No. SJC-13747
Appeals Court No. 2024-J-0724

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

COMMONWEALTH OF MASSACHUSETTS,

Plaintiff-Appellee,

v.

META PLATFORMS, INC. AND INSTAGRAM, LLC,

Defendants-Appellants.

On Direct Appellate Review from an Order of
the Superior Court for Suffolk County, No. 2384CV02397

REPLY BRIEF OF DEFENDANTS-APPELLANTS

PAUL W. SCHMIDT (BBO # 640488)
MARK W. MOSIER (*PHV* GRANTED)
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001-4956
(202) 662-6000
pschmidt@cov.com
mmosier@cov.com

FELICIA H. ELLSWORTH (BBO # 665232)
SIMON J. WILLIAMS (BBO # 713794)
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000
Felicia.Ellsworth@wilmerhale.com
Simon.Williams@wilmerhale.com

Attorneys for Defendants-Appellants
Meta Platforms, Inc. and Instagram, LLC

September 10, 2025

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INTRODUCTION

The Commonwealth contends that Section 230 of the Communications Decency Act provides immunity only from liability, not from suit. But the statute expressly provides that "[n]o cause of action may be brought and no liability may be imposed." 47 U.S.C. § 230(e)(3). The present execution doctrine thus applies and this Court has jurisdiction over Meta's appeal. The Court should reject the Commonwealth's effort to rewrite Section 230. Instead, this Court should join the courts recognizing that Section 230's plain text provides immunity from suit, exercise jurisdiction over this appeal, and dismiss the Commonwealth's Complaint. As Meta has shown, the Complaint violates Section 230 and the First Amendment and is inadequately pleaded as a matter of law.

The Commonwealth fails to engage with most of Meta's arguments. Instead, the Commonwealth urges this Court to follow a series of non-final, non-binding trial court orders. None of those decisions is persuasive, let alone binding. Far more persuasive are the many state and federal courts that have decided the issues consistent with Meta's position.

The Commonwealth purports to challenge certain "design elements" of Instagram, but it does not dispute that these "elements" are how Meta displays user-generated content on Instagram. Section 230 and the First Amendment bar the Commonwealth's claims because they challenge Meta's editorial choices about when, whether, and how to disseminate third-party content. The Commonwealth cannot avoid that result by arguing that it merely challenges Meta's "conduct," because the challenged "conduct" is protected publishing activity.

The Commonwealth's public nuisance and Chapter 93A claims also fail as a matter of law. The public nuisance claim has no basis in Massachusetts law, as the Commonwealth concedes. And the Commonwealth's interpretation of Chapter 93A is inconsistent with the statute's text and the Commonwealth's cited authority. The Court should dismiss the Complaint.

ARGUMENT

I. THIS APPEAL IS PROPERLY BEFORE THE COURT.

Under the present execution doctrine, this Court has jurisdiction over an appeal from "an order denying a motion to dismiss based on immunity from suit." *Kent* v. *Commonwealth*, 437 Mass. 312, 316 (2002). The Commonwealth contends this doctrine does not apply because Section 230 does not confer immunity from suit and this case does not involve a substantial public interest. Resp. 24-31. Neither argument has merit.

First, Section 230(e)(3) states that "*[n]o cause of action may be brought* and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. § 230(e)(3) (emphasis added). This statutory language confers immunity from suit because the phrase "no cause of action may be brought" addresses the "basis of controversy," *Shapiro* v. *McCarthy*, 279 Mass. 425, 430 (1932), not whether the controversy can be resolved by imposing liability. And the Commonwealth's contrary interpretation—which treats the phrase "no cause of action may be brought" as conferring only immunity from liability—would render the "no liability may be imposed" language superfluous. Br. 20-21.

The Commonwealth offers no response to this point. It does not explain how "cause of action" can mean "liability," or how a suit can be maintained if a "cause of action" cannot be brought. See Br. 20-21. Nor does the Commonwealth dispute that its interpretation would render the phrase "[n]o cause of action may be brought" surplusage in violation of basic principles of statutory interpretation. Resp. 28.

The Commonwealth instead argues that Section 230(e)(3) "contains surplusage either way" because immunity from suit necessarily immunizes from liability. *Id.* That is incorrect. The two phrases confer two distinct immunities. As this Court has recognized, an immunity from suit provides "protection from the burden of litigation," *Estate of Moulton* v. *Puopolo*, 467 Mass. 478, 485 (2014), whereas an immunity from liability protects against an adverse judgment. A defendant who invokes an immunity from suit may avoid both litigation and liability. But the converse is not true. For example, a defendant who does not raise an immunity from suit by filing a motion to dismiss could still invoke an immunity from liability later in the case. In any event, even if both interpretations resulted in surplusage, Meta's interpretation should be adopted because it is the only one that gives effect to the ordinary meaning of "no cause of action." Any surplusage in Meta's interpretation suggests only that Congress "employed a belt and suspenders approach in writing" Section 230 to ensure immunity for publishing activity. *Facebook, Inc.* v. *Duguid*, 592 U.S. 395, 407 n.7 (2021) (cleaned up).

The Commonwealth incorrectly contends that the "overwhelming majority" of courts have concluded that Section 230 does not confer immunity from suit. Resp. 28. At least six federal or state appellate courts have concluded that Section 230's "plain language confers immunity from suit." *Banaian* v. *Bascom*, 175 N.H. 151, 158 (2022); see also Br. 21-22 (collecting cases). The Commonwealth dismisses all but one as dicta. Resp. 29. But that is no basis to ignore them. Those decisions are persuasive because they look to Section 230's text and conclude that Section 230(e)(3)'s command that "[n]o cause of action may be brought" creates "a substantive right to be free of litigation, not just a right to be free of liability at the end of litigation." *In re Facebook, Inc.*, 625 S.W.3d 80, 87 (Tex. 2021).

Only one court has held that Section 230 does not provide immunity from suit. See *General Steel Domestic Sales, L.L.C.* v. *Chumley*, 840 F.3d 1178, 1181 (10th Cir. 2016). That decision contains minimal reasoning, brushing aside the "[n]o cause of action" language as "merely a preemption provision." *Id.* at 1182. But what is preempted is any state law authorizing a party to bring suit, thus conferring immunity from such suits. The Commonwealth inflates its count of courts supporting its position by citing decisions denying Meta leave to appeal denials of motions to dismiss. Resp. 28-29. But those courts did not decide that Section 230 does not confer immunity from suit; they simply declined to exercise their discretion to grant permission to appeal.[1]

The Commonwealth also overlooks decisions going the other way. In the Ninth Circuit, Meta filed an appeal as of right based on Section 230's immunity from suit, and the court denied without prejudice the plaintiffs' motion to dismiss for lack of jurisdiction. *People of the State of California, et al.* v. *Meta Platforms, Inc., et al.*, No. 24-7032, Dkt. 82.1 (9th Cir. Mar. 3, 2025).[2] In the Arkansas Court of Appeals, the state moved to dismiss Meta's appeal on the same ground, and the court "passed" on the motion until "the case is submitted." *Meta Platforms, Inc., et al.* v. *State of Arkansas*, No. CV-24-592, Formal Order (Ark. Ct. App. Oct. 9, 2024). That appeal thus remains pending.

Second, the Commonwealth contends that Meta has not satisfied the present

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[1] The Commonwealth includes Nevada in its lists of states that denied Meta's petitions for leave to appeal, but Meta's petition for writ of prohibition remains pending and the Nevada Supreme Court recently ordered the state to respond to Meta's petition. *Meta Platforms, Inc., et al.* v. *State of Nevada*, No. 89920, Order Granting En Banc Reconsideration (Nev. Aug. 18, 2025).

[2] The plaintiffs have reasserted that Section 230 provides only an immunity from liability in their merits brief and the issue is pending before the Ninth Circuit. See *People* v. *Meta Platforms, Inc.*, No. 24-7032, Dkt. 119 (9th Cir. June 23, 2025).

execution doctrine's requirements because it has not identified a "substantial public interest." Resp. 31. There is no such requirement, and this Court should reject the Commonwealth's attempt to manufacture it. The present execution doctrine applies where "protection from the burden of litigation and trial is precisely the right to which [the party] asserts an entitlement." *Puopolo*, 467 Mass. at 485. The Commonwealth's reliance on the federal collateral order doctrine (Resp. 31-32) misses the mark because that doctrine "varie[s]" from present execution. *Patel* v. *Martin*, 481 Mass. 29, 33 (2018).

In any event, Meta's assertion of immunity from suit implicates a "substantial public interest." Forcing interactive service providers to litigate claims based on Section 230-protected publishing conduct would undermine the very interests that Congress expressly sought to protect, including "preserv[ing] the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2).[3]

II. SECTION 230 BARS THE COMMONWEALTH'S CLAIMS.

The Commonwealth contends Section 230 does not bar its claims because they neither depend on specific user-generated content nor treat Meta as a publisher

[3] That discovery is ongoing is no reason to deny an appeal. Resp. 32. Due to the unique circumstances of this case, allowing discovery to proceed preserves coordination with the related MDL proceedings. Br. 23 n.6.

of that content. Resp. 33. The Commonwealth is incorrect on both points.

A. The Commonwealth Cannot Avoid Section 230 by Alleging That Users Are Harmed by Instagram's Design Features.

The Commonwealth contends Section 230 does not apply to its "unfairness" claims because those claims are based on Instagram's allegedly addictive "design features," not on harm from user-generated content. Resp. 34-36. But the Commonwealth does not—and cannot—dispute that the features at issue are publishing tools that Meta uses to present third-party content to users. The Superior Court acknowledged that the challenged features "are tied to the display of the platform's third-party content." RA1/488. And the Commonwealth concedes that its claims depend on allegations that users become "addict[ed]" when they view "custom-tailored content" and "return to the platform to view posts" from other users. Resp. 34, 37. Because the Commonwealth does not allege that Meta created the "custom-tailored content," its concession confirms that the second prong of this Court's Section 230 test—whether "the claim is based on information provided by another information content provider," *Massachusetts Port Authority* v. *Turo Inc.*, 487 Mass. 235, 240 (2021)—is satisfied.

The Commonwealth resists this conclusion by arguing Section 230 does not apply where "no user sees the same content as another." Resp. 34. But nothing in Section 230 supports that conclusion. By its plain terms, Section 230 applies when Meta disseminates "*any* information provided by another." 47 U.S.C. § 230(c)(1) (emphasis added). For that reason, courts have consistently held that Section 230 applies even when specific content is not challenged, and the federal court overseeing the multi-district litigation adjudicating similar claims from over 30 other state attorneys general has concluded that Section 230 *does* immunize Meta from allegations regarding features such as notifications, recommendation algorithms, and autoplay. See, e.g., *In re Social Media Adolescent Addiction/Pers. Inj. Prods. Liab. Litig.*, 702 F. Supp. 3d 809, 831 (N.D. Cal. 2023); see also Br. 27-28 (listing cases).

The Commonwealth contends that siding with Meta would adopt a "but for" test that other courts have rejected. Resp. 38 (quoting *Doe* v. *Internet Brands, Inc.*, 824 F.3d 846 (9th Cir. 2016)). Unlike in the cases the Commonwealth cites, however, third-party content is central to these claims. For example, the Commonwealth explicitly seeks to impose liability on Meta for failing to monitor and remove certain user content. See, e.g., RA1/24 ¶ 10 (challenging "harmful material for teens"); RA1/88 ¶ 274 (same).

Internet Brands illustrates this point. There, an assault victim alleged that a website operator had a duty to warn that third parties might assault her because the website operator had learned, from sources *outside* the website, that the third parties intended to assault women. 824 F.3d at 848-849, 853. The Ninth Circuit held that the claim could proceed because it did not depend on *any* online communications or third-party content. *Id*. at 852. Courts have consistently distinguished *Internet Brands* where, as here, liability would be predicated on "a general possibility of harm resulting from use of [an] app." *Estate of Bride* v. *Yolo Techs., Inc.*, 112 F.4th 1168, 1181 (9th Cir. 2024) (distinguishing *Internet Brands*).

Finally, the Commonwealth is incorrect in arguing Section 230 applies only "when the harm alleged could not be traced to the 'improper character' of the speech published." Resp. 39. That limitation is found nowhere in the statute, which instead immunizes Meta for publishing "any" third-party content. 47 U.S.C. § 230(c)(1). The Commonwealth asserts that no case has applied Section 230 where the third-party content was not allegedly harmful (or "improper"). But many courts have applied Section 230 to bar claims in precisely that circumstance. See, e.g., *Bride*, 112 F.4th at 1174 (Section 230 barred claim "based … solely on the anonymity" feature of a messaging app). This Court should hold the same.

B. The Commonwealth Does Not Meaningfully Dispute That Its Claims Would Treat Meta as a Publisher of Third-Party Content.

To defend the Superior Court's holding that the claims do not treat Meta as a publisher of third-party content, the Commonwealth merely restates the Superior Court's holding. Resp. 41-42. The Commonwealth also cites several non-binding decisions from trial courts in other jurisdictions reaching a similar conclusion, and asserting that courts "routinely reject … extravagant" claims of Section 230 immunity. *Id.* That is no defense for claims challenging third-party content, much less a reason to deny Meta the protections Congress expressly conferred on interactive service providers.

1. Section 230 Bars the "Design" Claims.

The Commonwealth does not contest that courts have consistently adopted "a capacious conception of what it means to treat a website operator as [a] publisher." Br. 29 (cleaned up). Nor does the Commonwealth refute the cases holding that Section 230 protects a website's overall "design" and "design features." Br. 29-35. Rather, the Commonwealth contends Counts One and Four do not implicate Section 230 because it challenges Meta's "conduct" as a "product designer." Resp. 41.

Courts have consistently rejected similar arguments because parties cannot "plead around" Section 230 to "advance the same basic argument that the statute plainly bars." *Kimzey* v. *Yelp! Inc.*, 836 F.3d 1263, 1266 (9th Cir. 2016). The Commonwealth's design claims would impose liability on Meta for curating, organizing, and disseminating third-party content on Instagram—*i.e.*, traditional publishing activities. See Br. 29-35. Courts have thus rejected similar attempts to circumvent Section 230 by recasting claims as challenging a website's "design" as "defective." See, e.g., *Bride*, 112 F.4th at 1182. Instead, Section 230 bars claims "which, though artfully pleaded to avoid direct reference, … implicate a defendant's role, broadly defined, in publishing" third-party content. *Cohen* v. *Facebook, Inc.*, 252 F. Supp. 3d 140, 156 (E.D.N.Y. 2017).

Lemmon v. *Snap, Inc.*, 995 F.3d 1085 (9th Cir. 2021), is no different. *Lemmon* involved a "speed filter" that allegedly encouraged users to drive too fast—regardless of them posting or viewing filtered content. *Id.* at 1087, 1093-1094. The design defect claim survived because it challenged the creation of an "incentive structure that enticed users to drive at unsafe speeds," rather than Snap's publishing activity. *Bride*, 112 F.4th at 1180 (interpreting *Lemmon*). Because Counts One and Four are not "fully independent of [Meta's] role in … publishing third-party content," Section 230 bars them. *Lemmon*, 995 F.3d at 1093.

2. Section 230 Bars the Deception-Based Claims.

The Commonwealth accuses Meta of "misconstru[ing]" its deception claims, Resp. 43, and asserts in a footnote that the many cases holding that Section 230 bars failure-to-warn claims are "distinguishable," Resp. 44 n.10.

The Commonwealth cannot disavow its Complaint. The Commonwealth alleges that Meta "failed to disclose … the addiction-inducing nature of its platform design features" and "the frequency of exposure to types of content deem[ed] harmful." RA1/91 ¶ 298; see also, e.g., RA1/83 ¶ 254; RA1/88 ¶ 274 (identifying harmful content); RA1/114-RA1/115 ¶ 394(c) (alleging Meta failed to warn about "young users view[ing] content … identified as harmful"). But Section 230 bars claims that impose a duty that derives from Meta's status or conduct as a publisher of third-party content. See *Bride*, 112 F.4th at 1176. A duty to warn about the content that Meta publishes or about the "features" Meta uses to publish it would necessarily impose a duty based on Meta's publishing activity. See, e.g., *id.* at 1180. Section 230 immunizes Meta from such liability.

Section 230 bars the deception-based claims even if they turn on Meta's representations regarding its services' safety. Resp. 43. Section 230 bars claims based on "general statement[s]" that Instagram is "a safe and secure environment for its users" because such statements are not a "specific promise, but a description of [Meta's] moderation policy." *Doe* v. *Grindr Inc.*, 128 F.4th 1148, 1154 (9th Cir. 2025).

III. THE FIRST AMENDMENT BARS THE COMMONWEALTH'S CLAIMS.

The Commonwealth's response confirms that its claims infringe on Meta's First Amendment rights and that this Court can address this question of law now, without the need for further fact development.

Unfairness. The Commonwealth offers no compelling response to *Moody* v. *NetChoice, LLC*, 603 U.S. 707 (2024). It contends that *Moody* has no bearing on its claims because its alleged harm "arises from the manner in which Meta's platform operates; not the expressive content users see." Resp. 46. This cannot be reconciled with *Moody*, which held that the First Amendment protects social media services' "choices about what third-party speech to display *and how to display it*." 603 U.S. at 716 (emphasis added). These choices—including "organizing and presenting" third-party content—are "expressive activity" protected by the First Amendment. *Id.* at 716-717, 731.

Moody was not merely about "social media platforms' content moderation and algorithm procedures." Resp. 46. Instead, the Supreme Court broadly addressed social media services' expressive freedoms. 603 U.S. at 719. *Moody* thus directly rejects the Commonwealth's attempt to restrict Meta's choices about "*how*" content is displayed on its services. Resp. 46.

Nor is there merit to the Commonwealth's attempt to distinguish Meta's algorithm from the one considered in *Moody*. Resp. 47 (citing 603 U.S. at 736 n.5). *Moody* expressly addressed *Meta's* algorithm and concluded that the First Amendment protects Meta's publication of a "personalized collection" of content. 603 U.S. at 734-735.

Misrepresentations. The Commonwealth contends it should be free to penalize Meta's opinion statements because Meta's arguments were "not developed below" and raise "factual issues." Resp. 49. But Meta made the same argument in its motion to dismiss that it makes on appeal: that "generalized statements" regarding "'safety' and 'well-being' are non-actionable statements of opinion." RA1/155. Contrary to the Commonwealth's assertions, Resp. 49, those general statements about "safety" cannot be compared to a case in which the speaker had "special knowledge of facts unknown to the recipient." *McEneaney* v. *Chestnut Hill*

Realty Corp., 38 Mass. App. Ct. 573, 574-575 (1995) (realtor misrepresented that a condominium "was quiet"). Instead, the proper analogues are cases squarely holding that statements about "safety" and "well-being" are non-actionable statements of opinion. Br. 47-48. The Commonwealth offers no response to these cases.

The Commonwealth also cannot recharacterize its claim as "simply ask[ing] that Meta be truthful and accurate in its voluntary statements about the platform." Resp. 48. In similar contexts, courts have recognized that there is no objective standard to apply because "a business cannot assess the likelihood that a child will be exposed to harmful or potentially harmful materials … without first determining what constitutes harmful or potentially harmful material," and "a business's opinion about" what is "harmful content" varies. *NetChoice, LLC* v. *Bonta*, 113 F.4th 1101, 1118, 1120 (9th Cir. 2024) (cleaned up). Stated differently, determining what is "truthful" and "accurate" in this context requires subjective determinations and thus implicates Meta's First Amendment rights.

Nor does the Commonwealth identify any "factual issues" that would preclude resolving Meta's First Amendment arguments now. Resp. 49. Although the Commonwealth cites allegedly misleading statements that it believes survive Meta's First Amendment arguments (Resp. 50), those statements center on Meta's views regarding "safety" and "well-being" or its statements to Congress protected under the Petition Clause. See RA1/62-63, 66-68 ¶¶ 156, 171-173, 176-177. Such statements do not preclude immediate resolution of Meta's First Amendment arguments.[4]

Omissions. As with its misrepresentation claim, the Commonwealth asserts that its deception claim "simply asks that Meta be truthful" in statements about Instagram and so is not a "failure to warn" claim. Resp. 48. Yet the Complaint specifically alleges Meta's purported "fail[ure] to disclose" "the manipulative, addiction-inducing nature of its platform design features." RA1/91 ¶ 298. While Meta welcomes the Commonwealth's representation that it would not impose certain warnings on Meta's services, Resp. 48, this Court should still clarify that any compelled warning is antithetical to the First Amendment, see *Bonta*, 113 F.4th at 1117.

The Commonwealth also argues that *Bonta* and other cases required warning of "specific expressive content." Resp. 48. But any warning the Commonwealth would attempt to craft here would require Meta to display messages about purported risks its services pose to young users and thus directly resemble the state law struck down in *Bonta*, which "require[ed] covered businesses to opine on potential harm to children." 113 F.4th at 1117.

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[4] *Noerr-Pennington* does not apply only in the antitrust context. Resp. 49-50 & n.16. This Court has acknowledged that "*Noerr-Pennington* has been extended … to protect petitioning activity challenged under other [F]ederal statutes." *Evans* v. *Lorillard Tobacco Co.*, 465 Mass. 411, 457 & n.21 (2013).

IV. THE COMMONWEALTH'S CLAIMS DO NOT WARRANT EXPANDING MASSACHUSETTS LAW.

A. The Commonwealth Acknowledges That It Seeks to Extend Public Nuisance Law, But Offers No Compelling Reason to Do So.

The Commonwealth concedes that its public nuisance theory is foreign to Massachusetts law. Resp. 56. And the Commonwealth does not contest that other courts have consistently refused to extend public nuisance liability to alleged product-related public health or safety harms. Br. 54. Nevertheless, the Commonwealth urges this Court to blaze a new trail and extend public nuisance claims to the Internet. Resp. 55-56. This Court should not do so.[5]

Public nuisance requires "an unreasonable interference with a right common to the general public." *Sullivan* v. *Chief Just. for Admin. & Mgmt. of the Trial Court*, 448 Mass. 15, 34 (2006). But the Commonwealth does not, and cannot, identify any such right. Br. 52-56. The Commonwealth gestures toward public "health [and] safety," but not all alleged interferences with public health involve public rights. See, e.g., *State* v. *Lead Indus. Ass'n, Inc.*, 951 A.2d 428, 436 (R.I. 2008) (recognizing that lead poisoning "constitutes a public health crisis" plaguing children but

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[5] The Commonwealth concedes—as it must—that public nuisance claims "'traditional[ly]' involved water or land," but strains to assert in a footnote that Instagram is "the new public 'land' frontier." That is a gross distortion. Instagram is a private digital application governed by corporate policies and private Terms of Service to which users voluntarily agree—a far cry from government-owned property held in trust for all people. See, e.g., *Prager Univ.* v. *Google LLC*, 951 F.3d 991, 999 (9th Cir. 2020) (holding that YouTube is not a "public forum").

declining to find public right). While an interference with the public health may constitute a public nuisance, that is in cases involving communicable diseases, which implicate the public's shared right to go about their affairs. See Restatement (Second) Torts § 821B cmt. g (1979) ("smallpox"); see also *Morin* v. *MGH Inst. of Health Pros.*, No. CIV. A. 02-4484-F, 2002 WL 31441509, at *1 n.1 (Mass. Super. Nov. 1, 2002) ("epidemic of disease").

The cases the Commonwealth cites are not to the contrary—indeed, they are inapposite because they all involved physical, tangible products, the distribution of which violated Massachusetts law. Resp. 56 (citing, e.g., *Evans* v. *Lorillard Tobacco Co.,* No. 04-2840A, 2007 WL 796175, at *18-19 (Mass. Super. Feb. 7, 2007) (cigarettes to minors); *City of Boston* v. *Smith & Wesson Corp.,* No. 199902590, 2000 WL 1473568, at *13-14 (Mass. Super. July 13, 2000) (gun distribution "undermin[ed] Massachusetts firearms law")).

The Commonwealth does not, and cannot, show that Instagram's distribution violates an analogous statute or public right. Meta's services are not products, nor is their use or distribution prohibited by Massachusetts law. And in any event, the Commonwealth fails to cite any authority extending public nuisance liability to intangible information, content, or ideas—indeed, such an extension would offend the First Amendment.[6]

B. The Chapter 93A Claims Fail as a Matter of Law.

To the extent the Commonwealth's claims under Chapter 93A survive both Section 230 and the First Amendment, they fail as a matter of law.

"Trade or Commerce." The Commonwealth cannot transform the transaction at issue—the free use of Instagram—into one that occurs in "trade or commerce," as Chapter 93A requires. This Court has made clear that "time, attention, and data" are not the types of consideration Massachusetts law recognizes as an exchange in "trade or commerce." See Resp. 56-58. Rather, Chapter 93A applies only to "interaction[s]" that are "'commercial' in nature." *Sullivan* v. *Five Acres Realty Tr.*, 487 Mass. 64, 69 (2021) (citing Mass. Gen. Laws Ch. 93A, § 2(a)).

The cases the Commonwealth cites (at 51-52) offer no support. For example, in *Rafferty* v. *Merck & Co., Inc.*, 479 Mass. 141 (2018), this Court affirmed dismissal of a Chapter 93A claim because the alleged misconduct did *not* occur in "trade or commerce." *Id.* at 162. And the cases the Commonwealth cites from other states

[6] The Commonwealth's assertion that "social media use" creates a "'special'" injury to certain groups is no reason to extend public nuisance liability. Resp. 56-57. Whether a "public nuisance has caused some special injury of a direct and substantial character other than that which the general public shares" is relevant to whether a *private* plaintiff may bring a public nuisance suit, not whether the Attorney General may bring suit. *Chief Justice*, 448 Mass. at 34-35.

interpret their own consumer protection statutes, not Chapter 93A's "trade or commerce" requirement. Resp. 51 (citing, e.g., *New Hampshire* v. *Meta* (addressing New Hampshire law)).

"Unfair" Conduct. Nor does the Commonwealth refute that Chapter 93A "prohibits unfair or deceptive acts or practices 'in the conduct of any trade or commerce.'" Br. 56 (quoting *Five Acres*, 487 Mass. at 69). The Commonwealth relies on a single case—*Commonwealth* v. *Purdue Pharma, L.P.*, No. 1884CV01808BLS2, 2019 WL 5495866 (Mass. Super. Sept. 17, 2019)—in support of its Chapter 93A unfairness claim. Resp. 53. *Purdue* is entirely inapposite. There, the claim challenged misleading marketing practices. 2019 WL 5495866, at *2. It did not concern the design or use of products, let alone provision of free services. See *id.* Indeed, the only Chapter 93A discussion focused on whether Purdue's conduct was "permitted" under the statute, which has no relevance here. *Id.* at *4.

Deceptive Conduct. The Commonwealth does not engage with this Court's precedents limiting Chapter 93A liability to commercial speech. See *Five Acres*, 487 Mass. at 69-70. Instead, it argues that Meta is "liable for its countless … misleading statements made in settings outside of Congress," including those made to "news media." Resp. 50. The Commonwealth does not dispute that Meta's statements to Congress are constitutionally shielded. See Resp. 49 & n.16; see also supra pp. 17-18. But Meta's opinions expressed in other fora are also constitutionally protected. See supra pp. 16-17. The Commonwealth's argument would impose liability on Meta for First Amendment-protected expression, even absent deliberate falsity.

CONCLUSION

This Court should reverse the Superior Court's decision and dismiss the Complaint with prejudice.

Respectfully submitted,

/s/ Felicia H. Ellsworth
FELICIA H. ELLSWORTH (BBO # 665232)
SIMON J. WILLIAMS (BBO # 713794)
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000
Felicia.Ellsworth@wilmerhale.com
Simon.Williams@wilmerhale.com

Attorneys for Defendants-Appellants Meta Platforms, Inc. and Instagram, LLC

PAUL W. SCHMIDT (BBO # 640488)
MARK W. MOSIER (*PHV GRANTED*)
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001-4956
(202) 662-6000
pschmidt@cov.com
mmosier@cov.com

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v.
SMITH & WESSON CORP. & others. [2]

No. 199902590.
|
July 13, 2000.

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION TO DISMISS

HINKLE.

***1** This is an action by the City of Boston and the Boston Public Health Commission against various firearms manufacturers, distributors, sellers and promoters, including firearms industry trade associations. [3] In a detailed six-count complaint, [4] Plaintiffs seek to recover damages allegedly sustained through conduct of Defendants. [5] Briefly stated, Plaintiffs allege that Defendants, through a strategy of willful blindness, exploit and rely upon for profit an illegal, secondary firearms market of juveniles, criminals and other unauthorized gun users in Boston. Plaintiffs allegedly bear immense costs arising from this market. Plaintiffs also allege that Defendants design guns without readily available safety devices and fail to warn of certain dangers.

The matter is before the court on the motion of the manufacturing defendants to dismiss the First Amended Complaint under Mass.R.Civ.P. 12(b)(6) for failure to state a claim. After a hearing, for the reasons discussed below, the motion to dismiss is *ALLOWED* in part and *DENIED* in part. [6]

BACKGROUND

The factual allegations contained in the First Amended Complaint, [7] as relevant to each of the theories of liability, are summarized as follows. [8] For clarity, additional factual allegations are set forth in the discussion section where pertinent.

Plaintiffs allege that Boston faces a high level of violent crime [9] involving guns manufactured by Defendants. [10] Easy movement of firearms from the legal marketplace to unauthorized and illegal users, [11] through an illegal, secondary firearms market, fuels the gun violence. [12]

Plaintiffs also allege that the flow of firearms into the illegal market and into the hands of unauthorized users in Boston has occurred in ways Defendants knew or should have known. Plaintiffs claim that Defendants could have taken action to control and prevent the illegal diversion. The methods of illegal diversion include, according to Plaintiffs: (1) straw purchases, which occurred under circumstances which indicated or should have indicated to the dealer that a straw purchase was being made; (2) multiple sales (where a purchaser buys more than one gun, at one time or over a short period, from a licensed dealer with the intent of conveying the gun to another person not qualified to purchase guns), occurring under circumstances which indicated or should have indicated to the seller that the gun was destined for the unlawful market; (3) sales to “kitchen table” dealers (federally licensed dealers who do not sell from a retail store) by Defendants, even though Defendants knew or should have known that many of those dealers fail to perform background checks or otherwise illegally divert guns to the illegal market; (4) theft of guns from firearm dealers who failed to provide adequate security for their premises, where Defendants failed to ensure that persons distributing their products have implemented adequate security measures; (5) obliteration of serial numbers from guns, where Defendants, though aware of this problem, took no initiative to make their serial numbers tamper-proof; (6) movement of firearms from states with weak gun control laws to areas (such as Boston) with stronger laws and (7) sales at gun shows, where background checks are usually not required. These guns are often used in more than one crime.

***2** Plaintiffs allege that Defendants' distribution system is reckless and has caused firearms to come into the hands of unauthorized persons, causing Plaintiffs direct harm. [13] Plaintiffs claim that Defendants knew that their guns were distributed into the illegal, secondary market and knew that this market supplied a substantial percentage of firearms used to inflict harm upon Plaintiffs. [14] According to Plaintiffs, Defendants could have helped to prevent firearms they manufacture, market, distribute and sell from flowing into the illegal market and into the hands of unauthorized persons. [15]

Plaintiffs also claim that Defendants' guns are unsafely designed in that Defendants fail to incorporate features which would inhibit unlawful access, transfer or theft by criminals, juveniles and other unauthorized users. The defective design results in thousands of unintentional deaths and non-fatal injuries per year, according to Plaintiffs. [16] Plaintiffs claim that failure to incorporate "personalized" gun technology (to prevent unauthorized or prohibited persons from obtaining access to and using guns) results in homicides and other crimes, some of which occur in Boston.

Plaintiffs claim that Defendants are in the best position to conduct research to correct the design of their guns. Plaintiffs allege that Defendants have been aware of the need for design features which would inhibit straw purchases, reuse of stolen weapons and accidental discharges by unauthorized users, but that Defendants have failed to research, develop and implement feasible, available technology.

According to Plaintiffs, it has been reasonably foreseeable that Defendants' guns would come into the hands of unauthorized users. [17] Plaintiffs claim that Defendants have been aware or should have been aware that, when unauthorized users gain access to Defendants' guns, shootings may result. Unintentional shootings, suicides and crimes committed by juveniles and other unauthorized users could be prevented if Defendants implemented safer gun designs, Plaintiffs allege. Such designs, according to Plaintiffs, include built-in locking systems, magazine-disconnect safeties and chamber-loaded indicators. Plaintiffs claim that Defendants knew that by failing to implement such safety designs, it was reasonably foreseeable that stolen guns could be employed by unauthorized or prohibited users in violent criminal acts. Plaintiffs claim that they have been repeatedly victimized by Defendants' "unreasonably dangerous products." [18]

According to Plaintiffs, when Defendants manufactured, distributed, promoted, and/or sold these guns, they knew or should have known of the unreasonable dangers of the guns; Defendants knew of and had available to them safety devices or other measures which would decrease the dangers; Defendants are in the best position to correct the unreasonably dangerous design of their products, but have failed to remedy the deficiency and Defendants purposefully and intentionally engaged in their activities knowing that their products could be made to prevent firing by unauthorized users and knowing that Plaintiffs would be injured and forced to bear substantial expenses. Plaintiffs further allege that Defendants have acted in concert with each other in their failure to develop and implement safety features and implement proper warnings.

***3** Plaintiffs claim that, to increase profits, Defendants have knowingly, purposefully, intentionally or negligently misled, deceived and confused Boston and its citizens regarding the safety of firearms. Defendants did this, Plaintiffs allege, by claiming falsely and deceptively through advertising that firearm ownership enhances security and that firearms are safe. Plaintiffs say that when Defendants made these claims, Defendants knew or should have known that studies and statistics show that presence of firearms in the home increases the risk of harm and that firearms without locking devices are unsafe. [19] Plaintiffs claim that, in Boston, numerous deaths and injuries have occurred when firearms were foreseeably used in unintentional shootings, suicides by teenagers, domestic disputes and other acts of violence.

Plaintiffs allege that Defendants' conduct undermines the Commonwealth's public policy regarding handguns. Plaintiffs further allege that Defendants' conduct has caused Plaintiffs harm, including substantial financial costs for prevention, amelioration and abatement of the ongoing public nuisance caused by Defendants; increased spending on law enforcement, emergency rescue services, increased security at public schools and public buildings, costs for coroner and funeral services for unknown victims, pensions, disability, and unemployment benefits, higher prison costs and youth intervention programs and lower tax revenues and lower property values.

DISCUSSION

The standard for evaluating the sufficiency of a complaint under Mass.R.Civ.P. 12(b)(6) is undisputed. The court must accept as true the allegations of the complaint, as well as any reasonable inferences to be drawn from them in the plaintiff's favor. *Eyal v.. Helen Broad Corp.,* 411 Mass. 426, 429 (1991). Plaintiffs "need only surmount a minimal hurdle to survive a motion to dismiss for failure to state a claim." *Bell v. Mazza,* 394 Mass. 176, 184 (1985). A "complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Nader v. Citron,* 372 Mass. 96, 98 (1977) (quoting *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957)). "[A] complaint is not subject to dismissal if it would support relief on any theory of law," *Whitinsville Plaza, Inc. v. Kotseas,* 378 Mass. 85, 89 (1979) (citations omitted; emphasis in original), "even though the particular relief [which the plaintiff] has demanded and the theory on which he seems to rely may not be appropriate." *Nader,* 372 Mass. at 104 (citations omitted). In addition, "[a] complaint should not be dismissed simply because it asserts a new or extreme theory of liability or improbable facts." *Jenkins v. Jenkins,* 15 Mass.App.Ct. 934, 934 (1983).

In this case, Defendants argue that the complaint should be dismissed because the claims are substantively deficient and the claims are barred by reason of six defenses, namely (1) Boston's harm is too remote to confer standing or establish proximate cause; (2) a municipality cannot obtain relief for the expenditure of funds to provide municipal services; (3) the economic loss rule bars recovery; (4) Plaintiffs improperly aggregate claims; (5) the Home Rule Amendment and the Firearms Act bar recovery and (6) the relief requested amounts to improper regulation of interstate commerce. Each issue will be addressed in turn.

I. The "Remoteness" Issue

***4** Defendants argue that Plaintiffs' claims are entirely derived from harm or threatened harm to others and, therefore, Plaintiffs cannot establish standing or show that Defendants' alleged actions proximately caused the harm claimed.[20]

Proof of a causal relationship between a defendant's action and a plaintiff's injury is essential in every tort "because the consequences of an act go endlessly forward in time and its causes stretch back to the dawn of human history," the concept of proximate causation was developed to limit the liability of a wrongdoer to only those harms with a reasonable connection to the wrongdoer's actions. *Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.,* 191 F.3d 229, 235 (2d Cir.1999), cert. denied, 120 S.Ct. 799 (2000) (hereafter "*Laborers Local* "). "[T]he notion of proximate cause reflects 'ideas of what justice demands, or of what is administratively possible and convenient.' " *Holmes v. Securities Investor Protection Corp.,* 503 U.S. 258, 268 (1992) (quoting W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 41, at 264 (5th ed.1984)).[21]

One way in which the concept of proximate cause operates is through the remoteness doctrine, which is sometimes called the direct injury test. *Holmes,* 503 U.S. at 268. This doctrine states that there must be "some direct relation between the injury asserted and the injurious conduct alleged."[22] *Id.* Thus, in general, "a plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts was generally said to stand at too remote a distance to recover." *Id.* at 268-69 (citing 1 J. Sutherland, Law of Damages 55-56 (1882)).

This doctrine has been applied in Massachusetts.[23] In the "classic"[24] case of *Anthony v. Slaid,* 11 Met. (52 Mass.) 290, 291 (1846), the plaintiff, for a fixed annual compensation, contracted to support the poor of a Massachusetts town. After incurring increased expense in caring for a pauper who was the victim of an assault and battery, the plaintiff sued the party responsible for the attack.[25] The Supreme Judicial Court held that the injury to the plaintiff, which derived entirely from the pauper's injuries, was too remote and indirect because the relation between the plaintiff and the pauper was based on a "special contract" rather than as a "natural and legal relation." *Id.*

The Supreme Judicial Court took occasion to explain *Anthony* in *Chelsea Moving & Trucking Co. v. Ross Towboat Co.,* 280 Mass. 282 (1932). In that case, the injured victim's employer sought to recover from the tortfeasor for the employer's loss, which resulted from the victim-employee's decreased work ability, which in turn had resulted from the tortfeasor's negligence. Holding that the injury to the employer was too remote, the Court emphasized that the relationship between the original victim and the plaintiff was based on contract. *Id.* at 287. In contrast, where the plaintiff's loss is the effect of a natural and legal relationship, such as a parent-child relationship, that loss is not too remote. *Id.* at 284; *Balian v. Ogassin,* 277 Mass. 525, 531 (1931) (father's damages-medical expenses incurred in treatment of injured son-not too remote that father could not recover from tortfeasor); *Dennis v. Clark,* 2 Cush. (56 Mass.) 347, 354-55 (1848) (same).

***5** Similarly, the Supreme Judicial Court held, the relationship between a master and an apprentice was so important and so like a parent-child relationship that the master could recover for injuries to the apprentice, whose services the master lost. *Chelsea Moving & Trucking Co.,* 280 Mass. at 284-85 (citing *Ames v. Union Ry. Co .,* 117

Mass. 541 (1875)). The reason for this distinction, the Court said, was that the injury to an employer "is not the natural and probable consequence of the ordinary tort." *Id.* at 287. Thus, the employer's injury was too remote because it was not foreseeable to the tortfeasor, who did not know of the contract. Had the tortfeasor known of the contract, a different result may have obtained:

> It is not alleged that there was any knowledge on the part of the defendant of the contract between [the employee] and the plaintiff or that the negligence of the defendant had any relation to such knowledge. There is no allegation of malice on the part of the defendant toward the plaintiff or toward anybody. There was no negligent interference with a contract. There is no allegation of deliberate design by the defendant to accomplish a definite end regardless of consequences to others. If elements of that nature were present a quite different question would be presented.

Id. at 286. See also *Robins Dry Dock & Repair Co. v. Flint,* 275 U.S. 303, 309 (1927) (tortfeasor not liable to another "merely because the injured person was under a contract with that other, unknown to the doer of the wrong").

From these cases, it is apparent that a plaintiff cannot recover from a defendant when the plaintiff's loss arises from harm the defendant caused to the injured party, absent some special relationship between the plaintiff and the injured party or, perhaps, an ordinary contract relationship of which the defendant knew. [26] There is no proximate cause under those circumstances because the plaintiff's harm is too "remote."

The cases the parties cite show that a plaintiff's harm arises from harm to a third party when it is "purely contingent on" or "wholly derivative of" harm to the third party. [27] *Laborers Local,* 191 F.3d at 236 & 237. *Holmes* itself was a case of "harm flowing merely from the misfortunes visited upon a third person by the defendant's acts." [28] *Holmes,* 503 U.S. at 268, 269-70.

In this case, the principal portion of the complaint alleging harm states:

> Defendants' conduct has caused [Plaintiffs] to incur public costs to respond to both intentional and accidental gunshot injuries. The harm to [Plaintiffs] includes substantial financial costs necessary for prevention, amelioration and abatement of the ongoing public nuisance caused by [D]efendants. Moreover, [Plaintiffs] ha[ve] suffered economic injury as a result of increased spending on, among other things, law enforcement, emergency rescue services, increased security at public schools and public buildings, costs for coroner and funeral services for unknown victims, pensions, disability benefits, unemployment benefits, higher prison costs, and youth intervention programs. Boston has further been damaged by lower tax revenues and lower property values.

***6** Compl. at par. 76. [29]

This alleged harm is in large part not "wholly derivative of" or "purely contingent on" harm to third parties. Unlike the harm alleged in the cases discussed above, which would not have existed without harm to a third party, harm to Plaintiffs may exist even if no third party is harmed. For example, Plaintiffs allege that Defendants' conduct places firearms in the hands of juveniles causing Plaintiffs to incur increased costs to provide more security at Boston public schools. Thus, wholly apart from any harm to the juvenile (who may even believe himself to be benefited by acquisition of a firearm), and regardless whether any firearm is actually discharged at a school, to ensure school safety Plaintiffs sustain injury to respond to Defendants' conduct. Even if no individual is harmed, Plaintiffs sustain many of the damages they allege due to the alleged conduct of Defendants fueling an illicit market (e.g., costs for law enforcement, increased security, prison expenses and youth intervention services). Similarly, diminished tax revenues and lower property values may harm Plaintiffs separately from any harm inflicted on individuals.[30] Plaintiff's' harm is in essence the type of harm typically suffered by municipalities due to public nuisances. Cf. *White v. Smith & Wesson,* 97 F.Sup.2d (ND.Ohio 2000), 2000 WL 664176 at *6. Indeed, much of the harm alleged is of a type that can only be suffered by these plaintiffs.

To be sure, Plaintiffs do allege injuries that arise from harm to others. Plaintiffs allege, for example, increased costs for emergency medical services, funerals, pensions, disability and unemployment benefits and lost productivity of citizens and employees harmed by guns. In addition, some of the injuries not necessarily derivative of harm to others may be exacerbated if individuals themselves are harmed. Two points need be made on this.

First, the remoteness doctrine, as it appears to exist in Massachusetts, contains an exception in cases of a special relationship between the plaintiff and the injured third party, such as a parent-child relationship or a close master-apprentice relationship *Chelsea Moving & Trucking Co.,* 280 Mass. at 284-85. An additional exception may arise where the plaintiff and the injured third party, while not in a special relationship, have a relationship of which the defendant knew, or in cases where the defendant acted with malice or with a "deliberate design ... to accomplish a definite end regardless of consequences to others." *Id.* at 286. As governmental bodies, Plaintiffs may have the type of special relationship that puts this case within the first exception to *Anthony* (if such an exception exists), and the complaint's allegations are sufficient to place the case within the second *Anthony* exception (if this exception exists).

The uncertainty about the state of the law expressed in the above paragraph raises the second point. It is settled law that a complaint should not be dismissed "simply because it asserts a new or extreme theory of liability or improbable facts." *Jenkins v. Jenkins,* 15 Mass.App.Ct. 934, 934 (1983). A motion to dismiss is not an appropriate vehicle for "resolv[ing] undecided points of substantive law[.]" *M. Aschheim Co. v. Turkanis,* 17 Mass.App.Ct. 968, 968 (1983).

***7** Nearly all the cases to which the parties refer which apply the remoteness doctrine are non-Massachusetts cases.[31] While the *Anthony* case appears to be the ultimate source of the remoteness doctrine, the contours of that doctrine are ill-defined in Massachusetts. Even if Plaintiffs' allegations present an extreme theory of liability, a motion to dismiss is not the proper vehicle to challenge the theory.[32] See *New Eng. Insulation Co. v. Gen. Dynamics Corp.,* 26 Mass.App.Ct. 28, 30 (1988).[33]

In sum, Plaintiffs' allegations are not, as a matter of law, barred by "remoteness."

II. The Free Public Services Issue

Defendants argue that the complaint should be dismissed because a municipality may not recover costs of providing public services. The principal Massachusetts case on which Defendants rely is *Town of Freetown v. New Bedford Wholesale Tire, Inc.,* 384 Mass. 60 (1981). The court does not read *Freetown* as broadly as do Defendants.[34]

In *Freetown,* the plaintiff town alleged that the defendants negligently dumped 750,000 used tires on town land. A fire broke out, and the town's fire department "incurred greater expense than usual and necessary" in extinguishing the fire. *Id.* at 61. The town sought to recover for the defendant's alleged negligence or misrepresentation. The Supreme Judicial Court held that the town could not recover because the costs of controlling that type of fire were to be borne by the town. The Court noted that the establishment and maintenance of a fire department is for the benefit of the public. Implicit in the Court's decision is the determination that the costs of this public benefit are to be carried by the public as a whole, absent a contrary statute.

In this respect, *Freetown* is consistent with the other cases to which Defendants refer In *City of Flagstaff v. Atchison, Topeka & Santa Fe Ry. Co.,* 719 F.2d 322, 323 (9th Cir.1983), the plaintiff city incurred great public expense after the defendant's train, containing liquefied petroleum gas, derailed. The Ninth Circuit (predicting Arizona law on an issue of First impression) held that the city could not recover its costs.

> [T]he cost of public services for protection from fire or safety hazards is to be borne by the public as a whole, not assessed against the tortfeasor whose negligence creates the need for the service. Where such services are provided by the government and the costs are spread by taxes, the

> tortfeasor does not expect a demand for reimbursement.

Id. (citation omitted). The court noted that while sometimes "new tort doctrines are required to cure an unjust allocation of risks and costs," such is not the situation "where a fair and sensible system for spreading the costs of an accident is already in place." *Id.* In addition, the court said, the state legislature had chosen to allocate to the government the costs in question, and the court doubted that judicial intervention was needed to call the attention of the state legislature to "the cost allocation presented by what we find to be the existing rule, for the state and its municipalities presently feel the pinch when they pay the bill." *Id.* at 324.

***8** Similarly, in *Township of Cherry Hill v. Conti Constr. Co.,* 218 N.J.Super. 348, 349, 527 A.2d 921 (N.J.Super.Ct.App.Div.1987), where the plaintiff town sought to recover expenses (largely police overtime) incurred when the defendant ruptured a natural gas main, recovery was barred. "Government has traditionally assumed the ultimate cost of providing basic emergency services that protect the community." *Id.* "[T]he policy decision is that it would be too burdensome to charge all who carelessly cause or fail to prevent fires with the injuries suffered by the expert retained with public funds to deal with those inevitable, although negligently created, occurrences." *Id.* (quoting *Krauth v. Israel Geller & Buckingham Homes, Inc.,* 31 N.J. 270, 274, 157 A.2d 129 (1960) (applying firefighter's rule, which shifts to taxpayers' financial responsibility for firefighter's or police officer's injury)). See also *District of Columbia v. Air Florida, Inc.,* 750 F.2d 1077, 1078, 1080 (D.C.Cir.1984) (District must bear costs arising from crash of airplane); *County of Lassen v. State,* 4 Cal.App.4th 1151, 1154, 1156, 6 Cal.Rptr.2d 359 (Cal.Ct.App.1992) (county must bear costs of defending inmate suit).

What each of these cases has in common is that the acts causing the damage were of the sort the municipality reasonably could expect might occur, and each of the results was a discrete emergency. Fires, fuel spills and ruptured gas mains are all frequent happenings which, while every effort is made to prevent them, can be expected to occur. Train derailments and airplane crashes are more unusual, but not so rare that a municipality can never expect to have to respond to such an emergency. The cases thus stand for the principle that such contingencies are part of the normal and expected costs of municipal existence, and absent legislation providing otherwise are costs to be allocated to the municipality's residents through taxes. In addition, in those cases there is no evidence that the specific defendants had engaged in a repeated course of conduct causing recurring costs to the municipality.

This case is different. Plaintiffs allege wrongful acts which are neither discrete nor of the sort a municipality can reasonably expect. Plaintiffs allege that Defendants maintained and exploited an illegal firearms market, knowing that the market would and did cause Plaintiffs harm. Defendants' argument based on *Freetown* thus fails because that case and other cases applying the same doctrine do not extend the rule as far as Defendants contend. Accord *City of Flagstaff,* 719 F.2d at 324 ("Recovery has also been allowed where the acts of a private party create a public nuisance which the government seeks to abate").

III. The Economic Loss Rule

Defendants argue that Plaintiffs' claims are barred by the economic loss rule, which prohibits recovery in negligence for purely economic loss. *Clark v. Rowe,* 428 Mass. 339, 342 [1998]. The rule provides that

> ***9** ... when a defendant interferes with a contract or economic opportunity due to negligence and causes no harm to either the plaintiff's person or property, the plaintiff may not recover for purely economic losses. *Garweth Corp. v. Boston Edison Co.,* 415 Mass. 303, 305 (1993).

Priority Finishing Corp. v. LAL Constr. Co., 40 Mass.App.Ct. 719, 719 n. 2 (1996).

Analytically, the economic loss rule occupies an uncertain legal position. Marking the boundary between tort and contract law, the rule may be seen as functionally part of the causation analysis and a limit on boundless recovery. See John M. Palmeri & Monty L. Barnett, The Continuing Vitality of the Economic Loss Rule, 31 Land & Water L.Rev. 757, 758-59 (1996). As such, it may be understood as part of the foreseeability element of proximate cause. *Id.* at 761-62. It may also be understood as going to whether there existed a duty to another person or class of persons. *Id.* at 765. A defendant's fault appears to have some role in the economic loss rule. *Id.* at 761-62.[35] Additionally, as discussed below, the rule serves to separate tort and contract claims by encouraging parties to allocate risk contractually. In Massachusetts, the economic loss rule has been applied in cases where actions by a defendant interfered with a plaintiff's contract[36] and in products strict liability cases.[37]

Both types of cases, of course, lie at the boundary of tort and contract law. The reason for the rule in products liability cases is that when a product causes only economic loss,[38] a commercial user of the product is best left to his contractual remedies. *Bay State Spray & Provincetown S.S., Inc. v. Caterpillar Tractor Co.,* 404 Mass. 103, 109-10 (1989). In the typical products liability case where the economic loss rule is applied, a product that the defendant manufactures proves defective, and the purchaser bears costs to repair the product, and usually suffers from loss of business as well. See, e.g., *id.* at 104. The economic loss rule is justified because a "commercial user can protect himself by seeking express contractual assurances concerning the product (and thereby perhaps paying more for the product) or by obtaining insurance against losses." *Id.* at 109-10. In contrast, a person physically injured by the product "had neither the bargaining power nor the opportunity to bargain" to protect himself. *Id.* at 110. See also Restatement (Third) of Torts: Products Liability § 21(1997).

In my view, the economic loss rule does not compel dismissal of this case for several reasons.

First, Plaintiffs' allegations here differ from those in cases where the economic loss rule was applied. Insofar as the complaint states allegations under products liability law, this case is dissimilar to the typical products suit discussed above. The reasons supporting application of the economic loss rule to strict products liability actions, essentially risk-allocation principles, do not apply to the allegations in this case with the same force as in the usual products liability action. See *Clark,* 428 Mass. at 342 (Refusing to apply the economic loss rule to legal malpractice, the Court stated, "When the economic loss rule has been applied, the parties usually were in a position to bargain freely concerning the allocation of risk, and, more importantly, there was no fiduciary relationship"). To the extent the complaint states allegations analogous to the other line of cases applying the rule (interference with a contract or economic opportunity), Plaintiffs allege that it was foreseeable that they would suffer harm. Also, Plaintiffs have an interest in the safety and welfare of the residents of Boston. Accord *Priority Finishing Corp.,* 40 Mass.App.Ct. at 721 (noting that bailee of damaged property not barred by economic loss rule from recovering for financial harm because "the plaintiff's pecuniary losses are derived from physical harm to property for which the plaintiff has a right to recover").

***10** Secondly, while the allegations of harm in this case include economic harm, they are not limited to that type of harm. See, e.g., Compl. at par. 76 (Plaintiffs incurred "public costs"); at par 83 (Plaintiffs incurred "enormous costs in support of the public welfare"); at pars. 107 & 120 (loss of productivity of individuals harmed).

Finally, as noted, the uniqueness of the allegations of this case counsels against dismissal at the pleading stage.[39]

IV. The Aggregation Issue

Defendants next argue that the complaint must be dismissed because it improperly aggregates claims that individually could not survive the pleading stage, that are too "amorphous" and that are "factually diverse independent claims." As to the argument that the complaint improperly combines separate claims that are individually deficient, I defer discussion to the substantive claims (see pages 30 to 41).

Defendants' second argument is that the complaint is vague because Plaintiffs have brought suit "on the basis of some amorphous injury to unspecified citizens linked in only general terms to some amorphous wrong by a group of defendants." I disagree. In my view, the complaint meets basic notice pleading requirements.

Defendants' third argument is that this action is an effort to aggregate factually and legally diverse individual claims as a strategic effort to bypass the difficulty of proving causation or the existence of a tort, and to overcome affirmative defenses. Defendants misconstrue Plaintiffs' allegations. As noted in the discussion of "remoteness," Plaintiffs do not seek to aggregate multiple claims of individuals and recover on their behalf. Rather, Plaintiffs, two government bodies who have advanced various theories of liability, claim that Defendants' conduct caused harm to them. The harm alleged, including costs for preventative measures, youth intervention programs, increased security at schools and other public buildings and emergency rescue services, is not the same as harm to individuals.

V. Home Rule Amendment and Preemption

In their analysis of the Home Rule Amendment to the Massachusetts Constitution, Defendants advance two distinct arguments. First, they argue that Plaintiffs lack authority to bring this action under the Home Rule Amendment, Mass. Const. Art. Amend. 2, § 6 ("HRA"). Secondly, they claim that this action is preempted by the Massachusetts Firearms Act, G.L. c. 140, §§ 121 et seq.

Turning first to the Home Rule Amendment, the Legislature provides municipalities with the express statutory right to sue and be sued. G.L. c. 40, § 2.[40] It is well established that cities and towns have authority to initiate suits to recover damages under tort and contract theories.[41] See, e.g., *Town of Middleborough v. Middleborough Gas & Elec. Dep't,* 422 Mass. 583, 585 (1996).

Defendants' Home Rule[42] argument is premised on a misinterpretation of Plaintiffs' claims. According to Defendants, Plaintiffs claim "statutory authority to regulate through litigation." Plaintiffs, however, do not seek to regulate but rather assert common law and statutorily based claims. The terms "ordinance" and "by-law" found in the Home Rule Amendment are not so broad as to encompass civil actions like this case. That the courts of the Commonwealth have recognized the existence of tort and contract actions by municipalities, before and after ratification of the Home Rule Amendment, belies such an expansive interpretation.[43]

***11** In their reply brief, Defendants seek to distinguish between a city acting in "corporate capacity" and one acting in its "government capacity." Thus, Defendants argue, the language in G.L. c. 40, § 2 (allowing a town-and, through § 1, a city-to sue "in its corporate capacity," does not allow a city to sue in its "governmental capacity."[44] This argument simply repeats the contention that Plaintiffs are seeking to regulate by lawsuit.

Defendants next argue that this action is preempted by the Massachusetts Firearms Act, G.L.c 140, § 121 et seq., and by state regulations regarding firearms, 940 Code Mass. Regs. §§ 16.00 et seq. (regulations promulgated under G.L. c. 93A). In support of this argument, Defendants recite the standard for determining whether a local ordinance or by-law is inconsistent with and thus preempted by a state statute. See *Boston Gas Co. v. City of Newton,* 425 Mass 697, 699 (1997).[45] They argue that the Firearms Act is so comprehensive that the court should infer a legislative intent to preempt the field.[46]

Defendants' argument fails because this is a tort and contract case, not a suit about a local by-law or ordinance. The issue before the court is not whether the statute and regulations preempt an ordinance or by-law, but whether the statute abrogates this state's common law of tort and contract and the relevant portions of the Uniform Commercial Code relating to warranties. "[A]n existing common law remedy is not to be taken away by statute unless by direct enactment or necessary implication." *Eyssi v. Lawrence,* 416 Mass. 194, 199-200 (1993) (quoting *Ferriter v. Daniel O'C'onnell's Sons,* 381 Mass. 507, 521 (1980)). See also *General Elec. Co. v. Department of Envtl. Protection,* 429 Mass. 798, 804-05 (1999). "Moreover, '[a] statute is not to be interpreted as effecting a material change in or repeal of the common law unless the intent to do so is clearly expressed.' " *Eyssi,* 416 Mass. at 200 (quoting *Riley v. Davison Constr. Co.,* 381 Mass. 432, 438 (1980) (alteration by *Riley* Court)); *Hopkins v. Medeiros,* 48 Mass.App.Ct. 600, 610 (2000). Defendants cite no authority, and the court has found none, stating that the Firearms Act or the regulations clearly express an intent to abrogate the common law, or that they do so by necessary implication.[47]

VI. The Commerce Clause Issue

Defendants next argue that this suit is barred by the Commerce Clause.[48] U.S. Const. Art I, § 8.[49] The affirmative grant to Congress of authority to regulate interstate commerce encompasses a "dormant" limitation on the authority of states to enact legislation affecting interstate commerce. *Healy v. Beer Inst.,* 491 U.S. 324, 326 n 1 (1989). In this respect, the Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State," *id.* at 336 (quoting *Edgar v. MITE Corp.,* 457 U.S. 624, 642-43 (1982)), and bars "a statute that directly controls commerce occurring wholly outside the boundaries of a State regardless of whether the statute's extraterritorial reach was intended by the legislature," *id.* (quoting *Brown-Forman, Distillers Corp. v. New York State Liquor Auth.,* 476 U.S. 573, 579 (1986)). "[T]he practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also ..., how the challenged statute may interact with the legitimate regulatory regimes of other States ...” *Id.* [50] The applicability of the Commerce Clause to causes of action under state tort and contract law is unsettled.

***12** The standard for analysis under the Commerce Clause has its focus on positive law-statutes or regulations. See *CTS Corp. v. Dynamics Corp. of America,* 481 U.S. 69, 87 (1987) (“The principal objects of dormant Commerce Clause scrutiny are statutes that discriminate against interstate commerce). [51] With one exception, none of the cases Defendants cite as conducting a Commerce Clause analysis involve application of a remedy by a court after finding defendants liable under state tort and contract law. See, e.g., *Healy,* 491 U.S. at 326 (Connecticut statute); *Brown-Forman Distillers Corp.,* 476 U.S. at 584 (New York statute), *Kassel v. Consolidated Freightways Corp. of Delaware,* 450 U.S. 662, 679 (1981) (Iowa statute); *Hughes v. Oklahoma,* 441 U.S. 322, 323 (1979) (Oklahoma statute); *Hunt v. Washington State Apple Adver. Comm'n.* 432 U.S. 333, 354 (1977) (Washington statute); *Dean Foods Co. v. Brancel,* 187 F.3d 609, 620 (7th Cir.1999) (Wisconsin regulations); *Knoll Pharm. Co. v. Sherman,* 57 F.Sup.2d 615, 623 (ND.Ill.1999) (Illinois statute).

Nonetheless, the Supreme Court did state, in *BMW of N. America, Inc. v. Gore,* 517 U.S. 559, 572 (1996), that Commerce Clause principles apply in some civil suits, although the Court recognized that state civil suits may proceed even though the result may be to effect a change in out-of-state practices. [52], [53] In *BMW of N. America,* the plaintiff alleged that failure to disclose that the new automobile he purchased in Alabama had been damaged and repainted constituted fraud under Alabama law. The repainting occurred in Georgia, and the nondisclosure was due to a nationwide BMW policy not to advise car dealers of repairs to new cars if the repair cost was no more than 3 percent of the suggested retail price. After trial, the jury awarded the plaintiff compensatory damages and $4 million in punitive damages. The plaintiff argued that the large punitive damage award was necessary to change BMW's policy nationwide.

The Supreme Court held that “a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States” *Id.* at 572 (footnote omitted). Economic penalties (in the form of legislatively authorized fines or judicially imposed punitive damages) “must be supported by the State's interest in protecting its own consumers and its own economy.” *Id.* Thus, Alabama could not “punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents,” and could not “impose sanctions on BMW in order to deter conduct that is lawful [54] in other jurisdictions.” *Id.* at 573. Applying notions of fairness, [55] the Court concluded that the punitive damages award was grossly excessive.

Thus, the Supreme Court never held that the plaintiff's suit in the *BMW* case was barred by the Commerce Clause. In fact, the Court appeared to take for granted that the suit was proper, as would legislation have been obtaining the same result:

> ***13** No one doubts that a State may protect its citizens by prohibiting deceptive trade practices and by requiring automobile distributors to disclose presale repairs that affect the value of a new car. But the States need not, and in fact do not, provide such protection in a uniform manner. Some States rely on the judicial process to formulate and enforce an appropriate disclosure requirement by applying principles of contract and tort law. Other States have enacted various forms of legislation ... The result is a patchwork of rules representing the diverse policy judgments of lawmakers in 50 States.
>
> That diversity demonstrates that reasonable people may disagree about the value of a full disclosure requirement.

Id. at 568-70 (footnotes omitted). What the Supreme Court held to be improper was, in part, seeking to change BMW's conduct in other states. *Id.* at 572. See also *id.* at 572 n. 18 (“The record discloses no basis for [the plaintiff's] contention that BMW could not comply with Alabama's law without changing its nationwide policy”).

Here, Plaintiffs allege violations of longstanding state law and seek remedies specific to these violations. Plaintiffs seek compensatory, not punitive, damages, which the Supreme Court never questioned in *BMW of N America.* [56] Certainly, some of the expansive injunctive relief Plaintiffs seek (e.g., to enjoin “manufacturing, distributing, or offering for sale firearms without appropriate safety devices and warnings, including devices designed to prevent unauthorized use”) can be read to seek directly to impact out-of-state conduct. However, as I have previously emphasized, all I now decide is a motion to dismiss for failure to state a claim. The scope and constitutionality of any remedy, should Plaintiffs succeed at trial, is appropriately left to the judge who will have the benefit of a full factual record. [57] The court then will also be able to determine whether the intent of any of the proposed remedies is to deter or punish for out-of-state conduct, or whether the intent is to protect residents of Boston. See *BMW of N. America,* 517 U.S. at 572-73.[58]

The contention that the allegations of the complaint violate the Commerce Clause is also weakened by the existence of the Firearms Act, G.L. c. 140, §§ 121 et seq., and the Attorney General's regulations, 940 Code Mass.Regs. §§ 1600 et seq. Defendants have not attempted to argue why maintaining this action violates the Commerce Clause while the Firearms Act and the regulations do not.

VII. The Substantive Claims

Finally, Defendants argue that each of the six counts in the complaint is legally deficient.

Public Nuisance

A public nuisance is an "unreasonable interference with a right common to the general public."[59] Restatement (Second) of Torts § 821B(1) (1979) (quoted in *Leary v. Boston,* 20 Mass.App.Ct. 605, 609 (1985)).

> Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:
>
> > ***14** (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
> >
> > (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or
> >
> > (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.
>
> Restatement (Second) of Torts § 821B(2). A public nuisance differs from a private nuisance: "It is a much broader term and encompasses much conduct other than the type that interferes with the use and enjoyment of private property" W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 90, at 643 (5th ed, 1984). Thus, in its broadest statement, the concept of a public nuisance "seems unconnected to place or property." *Leary,* 20 Mass.App.Ct. at 609.

Liability for a public nuisance may arise even though a person complies in good faith with laws and regulations. *Hub Theaters, Inc. v. Massachusetts Port Auth.,* 370 Mass. 153, 156 (1976); *Strachan v. Beacon Oil Co.,* 251 Mass. 479, 488 (1925).

Liability extends to all who join or participate in the creation or maintenance of a public nuisance. *Attorney Gen. V. Baldwin,* 361 Mass. 199, 208 n. 3 (1972).

Defendants argue that Plaintiffs' claim fails because it does not arise from activities on or related to property. However, as noted, a public nuisance is not necessarily one related to property. Defendants also argue that the claim fails because Plaintiffs cannot allege that the manufacturers owned or had control of the land or instrumentality that caused the harm, citing *Belanger v. Commonwealth,* 41 Mass.App.Ct. 668, 670 n. 3 (1996). *Belanger,* however, addressed private nuisance, which is, as noted, distinct from public nuisance.[60] Defendants also cite *Commonwealth v. Mead,* 153 Mass. 284, 286 (1891). In *Mead,* a criminal case, the nuisance alleged was the keeping of a tenement used for the sale of intoxicating liquors. As such, *Mead* was a case where the nuisance was one connected with property, but the case does not hold that the connection is required. See *id.* at 286.[61] Plaintiffs allege that Defendants created and supplied an illegal, secondary market in firearms. The "instrumentality" which Plaintiffs allege Defendants controlled is the creation and supply of this secondary market.[62]

Review of the complaint shows that Plaintiffs allege Defendants intentionally and negligently created and maintained an illegal, secondary firearms market. They further allege that this market unreasonably interfered with public rights by (1) significantly interfering with the public safety, health, or peace, (2) producing permanent or long-lasting harm and (3) undermining Massachusetts firearms law, making enforcement of those laws difficult or impossible. Compl. Pars. 79 & 81.[63] Thus, the complaint alleges sufficient facts to state a claim for public nuisance.[64] To be sure, the legal theory is unique in the Commonwealth but, as previously noted, that is not reason to dismiss at this stage of the proceedings.

Negligent Distribution and Marketing

***15** Defendants argue that Plaintiffs' claim for negligent distribution and marketing fails because, as a matter of law, Defendants did not owe Plaintiffs a duty to protect from the criminal acts of third parties.[65] Here, too, Defendants misconstrue the complaint. Plaintiffs do not allege that Defendants were negligent for failure to protect from harm but that Defendants engaged in conduct the foreseeable result of which was to cause harm to Plaintiffs.[66]

To recover for negligence, a plaintiff must show that the defendant owed the plaintiff a legal duty; the defendant breached that duty and that this breach actually and proximately caused injury *Davis v. Westwood Group,* 420 Mass. 739, 742-43 (1995). The existence of a duty is a question of law. *Id.* at 743; *Bergendahl v. Massachusetts Elec. Co.,* 45 Mass.App.Ct. 715, 722-23 (1998), rev, denied, 428 Mass 1111, cert. denied, 120 S.Ct. 326 (1999). "In determining whether the law ought to provide that a duty of care is owed by one person to another, we look to existing social values and customs, and to appropriate social policy. A basic principle of negligence law is that ordinarily everyone has a duty to refrain from affirmative acts that unreasonably expose others to a risk of harm." *Yakubowicz v. Paramount Pictures Corp .,* 404 Mass. 624, 629 (1989) (citation omitted).

Taking Plaintiffs' allegations as true, Defendants have engaged in affirmative acts (i.e., creating an illegal, secondary firearms market) by failing to exercise adequate control over the distribution of their firearms. Thus, it is affirmative conduct that is alleged-the creation of the illegal, secondary firearms market. The method by which Defendants created this market, it is alleged, is by designing or selling firearms without regard to the likelihood the firearms would be placed in the hands of juveniles, felons or others not permitted to use firearms in Boston. Further, according to the complaint, Defendants did this depending upon precisely that result, realizing that Plaintiffs would be harmed. Taken as true, these facts suffice to allege that Defendants' conduct unreasonably exposed Plaintiffs to a risk of harm.[67] Worded differently, the Plaintiffs were, from Defendants' perspective, foreseeable plaintiffs.[68] Thus, the court need not decide whether Defendants owed a duty greater than the basic duty.[69], [70]

Breach of Warranty-Defective Design

The complaint alleges that Defendants breached the implied warranties of merchantability and of fitness for a particular purpose, by way of defective design, by failing to incorporate certain devices.

In Massachusetts, a warranty that goods are merchantable is implied in every sale of goods.[71] G.L.c 106, § 2-314. Defendants assert two reasons why this count should be dismissed. They argue (1) knowing and deliberate misuse is a complete bar to recovery and (2) Plaintiffs are not in privity with Defendants.[72]

***16** Under the doctrine of unreasonable use, "a plaintiff's knowing and unreasonable use of a defective product is an affirmative defense to a defendant's breach of warranty." *Colter v. Barber Greene Co.,* 403 Mass. 50, 60 (1988) Apart from this affirmative defense, as an element of their claim Plaintiffs must prove that at the time of their injuries Defendants' products were being used "in a manner that the defendant seller, manufacturer, or distributor reasonably could have foreseen." *Allen v. Chance Mfg. Co.,* 398 Mass. 32, 34 & n. 1 (1986). See *Correia v. Firestone Tire & Rubber Co.,* 388 Mass. 342, 357 (1983). As to the latter, Plaintiffs have put forth sufficient allegations to survive this motion to dismiss. See Compl. at pars. 93 & 95.[73] As to the former, the affirmative defense, Defendants carry the burden of proof, and they have not shown that, on the facts alleged, Plaintiffs cannot prove any set of facts which would entitle them to relief.[74] See *Nader,* 372 Mass. at 98.

As to Defendants' privity argument, G.L.c 106, § 2-318 provides in relevant part:

> Lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer, seller, lessor or supplier of goods to recover damages for breach of warranty, express or implied, or for negligence, although the plaintiff did not purchase the goods from the defendant if the plaintiff was a person whom the manufacturer, seller, lessor or supplier might reasonably

> have expected to use, consume *or be affected by the goods.*

(Emphasis added.)

On its face, then, the relevant statute does not require privity between Plaintiffs and Defendants in this case, as Plaintiffs allege that Defendants could reasonably have expected (or actually knew) that Plaintiffs would be harmed by their goods. See *Jacobs v. Yamaha Motor Corp., USA.,* 420 Mass. 323, 328 (1995) (explicit language of G.L.c 106, § 2-318, invalidates claim that privity is required for plaintiff to sue motorcycle manufacturer). The decision in *Sebago, Inc.,* 18 F.Sup.2d at 99, is not to the contrary. *Sebago, Inc.,* predicting Massachusetts law, read *Jacobs* as being limited to "consumer goods," and ruled that privity is required when a contract-based warranty claim arises from a commercial transaction. *Id.* In this case, Defendants do not argue that the firearms were purchased through commercial transactions. See also *Thayer v. Pittsburgh Corning Corp.,* 45 Mass.App.Ct. 435, 440, rev. denied 428 Mass. 1109 (1998) (no privity required for worker injured by asbestos to sue asbestos manufacturer).

Breach of Warranty-Failure to Warn

Plaintiffs also allege that Defendants breached the implied warranties of merchantability and fitness for a particular purpose by failing to provide adequate warnings or instructions. Defendants argue that this count must be dismissed because Plaintiff's lack privity and because the dangers posed by firearms are "open and obvious." The court has already addressed the privity argument in the context of the count alleging defective design.

***17** A product's manufacturer has a duty to warn foreseeable users of latent dangers in the product's normal and intended use. *Vassallo v. Baxter Healthcare Corp.,* 428 Mass. 1, 23(1998); *Carey v. Lynn Ladder & Scaffolding Co.,* 427 Mass. 1003, 1003 (1998); *Bavuso v. Caterpillar Indus., Inc.,* 408 Mass. 694, 699 (1990). There is no duty to warn, however, where the danger is obvious or where the plaintiff appreciated the danger substantially to the same extent as a warning would have provided. *Carey,* 427 Mass. at 1004.

In this case, Plaintiffs allege that Defendants failed adequately to warn or instruct, e.g., as to risks that children could obtain access to the firearms, that a gun's chamber may contain a round of ammunition, as to proper storage of guns to prevent suicide, accidents, or theft, that guns can be fired with the ammunition magazine removed and without pulling the trigger, that the guns may not contain safety devices, that a gun in the home dramatically increases rather than decreases risk of injury to household members, that training is needed to handle guns safely and that improperly stored guns could be stolen. Compl. at par. 103. This failure to warn, Plaintiffs allege, was the proximate cause of Plaintiffs' injuries. *Id.* at par. 106.[75]

Defendants reference no case where on a motion to dismiss for failure to state a claim it was decided that, as a matter of law, the danger was obvious or that it was appreciated to the same extent as if a warning had been supplied. See *Carey,* 427 Mass. at 1003 (summary judgment); *Bavuso,* 408 Mass. at 694 (jury trial); *Bell v. Wysong & Miles Co.,* 26 Mass.App.Ct. 1011, 1012 (1988) (jury trial); *Killeen v. Harmon Grain Prods. Inc.,* 11 Mass.App.Ct. 20-21 (1980) (directed verdict for defendant); *Wasylow,* 975 F.Sup. at 378 (summary judgment); *Bolduc v. Colt's Mfg. Co.,* 968 F.Sup. 16, 17 (D.Mass.1997) (summary judgment).[76]

Defendants do not argue that they have no duty to warn of any of the dangers presented by firearms. The court does not have before it any evidence of the warnings that were provided, from which the court could determine whether, as a matter of law, adequate warnings were provided. Defendants are, in essence, asking this court to take judicial notice that the dangers posed by firearms discussed in paragraph 103 of the complaint are so obvious (or were actually appreciated) such that warnings or instructions were not required. This is contrary to Plaintiffs' allegations, and the court declines to do so.

Negligence

In this count of their complaint, Plaintiffs allege that Defendants negligently designed, marketed, distributed and sold their products. Compl. at par. 111. Inasmuch as this states a claim for negligent distribution and marketing, it is duplicative of Count II and is dismissed. However, this count states a claim not previously stated, for negligent design.

"A manufacturer is under a duty to design its product with reasonable care to eliminate avoidable dangers. The manufacturer must anticipate the environment in which the product will be used and design against reasonably foreseeable risks attending the product's use in that setting. The duty is placed on the manufacturer because it stands in a superior position to recognize and cure defects in its product's design." *Simmons v. Monarch Mach. Tool Co.,* 413 Mass. 205, 211(1992) (citations omitted).

***18** In this case, Plaintiffs have alleged that Defendants were negligent in their design of firearms by failing to include adequate safety devices and failing to include adequate warnings. Such a claim is distinct from the breach of warranty counts. *Uloth v. City Tank Corp.,* 376 Mass. 874, 875 (1978). See J.R. Nolan & L.J. Sartorio, Tort Law § 307 (2d ed. 1989 & 2000 Supp.). Because Defendants have only argued for dismissal of this count on grounds that it is duplicative, the court need not test the sufficiency of the allegations further.

In sum, the court dismisses Count V to the extent it alleges negligent distribution and marketing, but denies Defendants' motion as to the claim for negligent design.

Unjust Enrichment

In the final count of the complaint, Plaintiffs allege that Defendants have been unjustly enriched because they have "reaped substantial profits and gains" from their conduct, causing Plaintiffs' harm.

A claim that a party has been unjustly enriched seeks the equitable remedy of restitution. *Keller v. O'Brien,* 425 Mass. 774, 778 & n. 8. (1997). Restitution is appropriate when the circumstances of receipt or retention of a benefit "are such that, as between the two persons, it is unjust for [one] to retain it." *Keller,* 425 Mass. at 778 (quoting *National Shawmut Bank v Fidelity Mut. Life Ins. Co.,* 318 Mass. 142, 146 (1945)). "A person confers a benefit upon another if he in any way adds to the other's security or advantage." 9 Mass. Jurisprudence § 2:5 (1993) (citing Restatement of Restitution § 1, cmt b).

Here, Plaintiffs allege that they have conferred a benefit upon Defendants by paying for the costs of the harm caused by Defendants' conduct ("externalities"). See *White,* 97 F.Sup.2d at 2000 WL 664176, at *10. Plaintiffs further allege that Defendants undertook the alleged wrongful conduct for the purpose of increasing their profits. Thus, Plaintiffs state a claim for unjust enrichment.

CONCLUSION

The parties in this case have pressed upon the court public policy considerations which they believe the court should consider. Defendants, in urging the court to look behind the allegations in the complaint, which they describe as "politicized rhetoric and conclusory allegations," emphasize that they are not the ones "truly responsible" for the harm. Plaintiffs put forth examples of the devastating effects of gun violence. It is not this court's function, on a motion under Rule 12(b)(6), to decide whether public policy requires that the complaint proceed or that it be dismissed. Rather the court's inquiry is limited to deciding whether the complaint fails to state a claim upon which relief can be granted.

ORDER

For the foregoing reasons, Defendants' motion to dismiss is *ALLOWED* as to Count V to the extent that count alleges negligent distribution and marketing. Defendants' motion to dismiss is *DENIED* as to Count V to the extent it alleges negligent design. As to all other counts, the motion to dismiss is *DENIED.*

All Citations

Not Reported in N.E.2d, 12 Mass.L.Rptr. 225, 2000 WL 1473568

Footnotes

1 Boston Public Health Commission.

2 Beretta USA Corp., BL Jennings Inc., Browning Arms Co., Inc., Bryco Arms Corp., Charter Arms Corp., Colt's Manufacturing Co., Inc., Davis Industries Inc., Firearms Import & Export Corp., Glock Inc., Harrington &

Richardson Corp., Heritage Manufacturing, Inc., Hi-Point Firearms Corp., International Armaments Corp. dba Interarms, Inc., Kel-Tec CNC Industries, Inc., Import Sport, Inc. dba SGS Importers International, Inc., Lorcin Engineering Co., Inc., Marlin Firearms Co., OF Mossberg & Sons, Inc., Navegar, Inc. dba Intratec USA Corp., Phoenix Arms Inc., U.S. Repeating Arms Co., Inc., Remington Arms Corp., Savage Arms Inc., Sigarms, Inc., Sturm, Ruger & Co., Inc., Sundance Industries Corp., Taurus International Manufacturing, Inc., American Shooting Sports Council, Inc., National Shooting Sports Foundation, Inc., Sporting Arms & Ammunition Manufacturers Institute, Inc., Does 1-250. Does 1-50 are unknown business entities that manufacture firearms distributed, marketed, sold, and/or possessed within Boston. Does 51-100 are unknown business entities that are retailers of firearms found in Boston. Does 101-225 are unknown business entities that distribute and/or market firearms found within Boston. Does 226-250 are unknown business entities that are industry trade associations composed of firearms manufacturers, distributors, and retailers.

3 This action is one of a number of similar suits brought throughout the United States. See Note, Recovering the Costs of Public Nuisance Abatement: The Public and Private City Sue the Gun Industry, 113 Hav.L.Rev. 1521 (2000).

4 The six counts are: public nuisance (Count I); negligent distribution and marketing (Count II); breach of warranty through a design defect (Count III); breach of warranty through failure to warn (Count IV); negligence (Count V) and unjust enrichment (Count VI).

5 Defendants Beretta, Colt's and Phoenix Arms have filed a third-party complaint against China North Industries Corp./Norinco and Denel (Pty) Ltd.

6 Defendants removed this action to federal court. That court remanded the case. See *City of Boston v. Smith & Wesson Corp.,* 66 F.Sup.2d 246 (D.Mass.1999).

7 All references in this decision to the complaint are to the First Amended Complaint.

8 In this decision I place no reliance on the settlement agreement between Smith & Wesson and certain public entities, which was submitted to the court after the hearing on this motion.

9 Plaintiffs allege that these crimes from 1996 through 1998 include 30 homicides, 131 aggravated assaults, 37 armed robberies and 29 suicides.

10 Plaintiffs allege that over 1,400 guns were involved in the crimes cited in note 9. They also allege that from July 1, 1996 through July 31, 1998, 1,470 guns were seized by the Boston Police Department and that from January 1, 1993 through November 30, 1998, the firearms recovered were made by the individual defendants in the following numbers: Beretta USA (102), Browning Arms (35), Bryco Anus (138), Charter Arms (29), Colt's Mfg. (138), Davis Industries (100), Firearms Import & Export (48), Glock (89), Harrington & Richardson (100), Hi-Point (27), Interarms (6), Lorcin (121), Marlin (51), Mossberg (73), Navegar (27), Phoenix (90), Remington (39), Savage (45), Smith & Wesson (369), Sturm & Ruger (167), Sundance (15) and Taurus (56). Plaintiffs allege additionally that thousands of guns used in crime in Boston remain unrecovered.

11 While Plaintiffs frame many of their allegations in terms of acquisition and use of guns by juveniles and criminals, Plaintiffs refer to “all other classes prohibited from acquiring or possessing guns, such as illegal aliens, fugitives, drug addicts, persons committed to mental institutions, and persons under domestic violence restraining orders.” Pls.' Mem. at 5 n. 4 (citing 18 U.S.C. § 922; G.L. c. 140, § 129B).

12 Plaintiffs allege that surveys indicate that juveniles and convicted criminals can easily obtain firearms. Plaintiffs do not allege that the surveys were of Boston respondents. This survey evidence is, according to Plaintiffs, continued by a study by the Federal Bureau of Alcohol, Tobacco and Firearms (“ATF”), which found that in Boston over a one year period (Plaintiffs do not state which year) 11 percent of guns traced

to crime were seized from juveniles, while the figure for the previous year was 14 percent. The ATF also found (presumably based on national data) that more guns traced to crime are seized from persons in the age group of 18, 19, and 20 years than any other three-year age group. Also presumably based on national data, the ATF found that over 45 percent of seized weapons were possessed illegally by felons. Finally, as additional evidence of an ease of movement of firearms into an illegal market, Plaintiffs allege that there is a short time interval between retail sale and criminal use of a significant percentage of firearms. Between 40 and 44 percent of guns traced to crime seized in Boston had been sold at retail less than three years earlier, which Plaintiffs allege to be evidence of trafficking.

13 Plaintiffs allege 15 incidents of examples of Defendants' misconduct.

14 According to Plaintiffs, traces by the ATF of guns involved in crimes (where the ATF contacts the manufacturer, who provides the name of the distributor) provides Defendants with actual notice that the distribution system supplies guns to an unlawful market. The ATF data further indicates that a very high percentage of guns traced to crime have been “funneled through” a small set of federally licensed dealers. Plaintiffs cite statements allegedly made by Robert Hass, former Senior Vice President of Marketing and Sales for Smith & Wesson, and Robert Lockett, 1993 (firearms) Dealer of the Year, to the effect that the gun industry knows that their guns seep into an illegal market but takes no action to prevent this.

15 To restrict or impede the unlawful flow of firearms into Boston, Defendants could have (Plaintiffs allege) taken the following “reasonably available” steps:

(1) adequately investigate or screen distributors and dealers through which Defendants distribute and sell firearms;

(2) adequately monitor, supervise, regulate, and standardize distributors' and dealers' methods of distributing and selling firearms;

(3) conduct research (or heed existing research) to better monitor and control the flow of firearms to the illegal, secondary market, and implement preventative strategies;

(4) “establish a tighter and more direct distribution system in which Defendants remain in control of the distribution of their lethal products”;

(5) adequately train and encourage distributors and dealers to act lawfully and responsibly to ensure compliance with law:

(6) direct distributors and dealers to refuse to sell firearms when the distributor or dealer knows or should know that the firearm likely will not be used for lawful purposes;

(7) require distributors and dealers not to sell more than one handgun per month to any person not holding a federal firearms license, and to track sales to enforce this restriction:

(8) require distributors and dealers to sell only to retailers who stock guns for sale from retail stores, and not to sell guns over the Internet, at gun shows, or to “kitchen table” dealers;

(9) require distributors and dealers to certify compliance with all firearms laws and to provide documentation of sales employees' and sales agents' eligibility to sell guns;

(10) require distributors and dealers to carry a specified minimum amount of liability insurance coverage at all times;

(11) refrain (and require distributors and dealers to refrain) from rewarding sales persons or purchasers based on sale or purchase volume;

(12) require distributors and dealers to meet reasonable and specified security requirements to prevent theft;

(13) require distributors and dealers to maintain computerized inventory tracking programs containing information concerning the acquisition and disposition of every gun, and enforce this requirement;

(14) require distributors and dealers to maintain records of trace requests initiated by law enforcement agencies, and to report those requests to the firearm manufacturer;

(15) track and analyze trace requests from law enforcement agencies to determine where and when in the distribution chain the gun may have been diverted to crime, and take preventative measures to reduce diversions; and

(16) institute effective training, monitoring, and sanctions to enforce these requirements (including disciplining or terminating distributors and dealers Defendants know or should know distribute firearms to the illegal market or in an illegal or unsafe manner).

16 Plaintiffs allege that 23 percent of unintentional shooting deaths nationwide per year occur because the gun user is unaware that the gun is still loaded with ammunition. Plaintiffs allege that this is one reason that the firearm death rate for children aged 14 and under is 12 times higher in the United States than the combined rate in 25 other industrialized countries. According to Plaintiffs, about 35 percent of all unintended shooting deaths occur where the user of the gun is between ages 13 and 16, during which adolescents are attracted to accessible guns and discount the risks of handling a firearm. Plaintiffs claim that the risk that a potentially suicidal adolescent will kill himself doubles if a gun is kept in the home; a person aged 10 to 19 years commits suicide with a gun every six hours; guns are used in 65 percent of male teenager suicides and 47 percent of female teenager suicides, and firearm-related suicides account for about 81 percent of the increase in the rate of suicide among 15 to 19 year-olds from 1980 to 1992. In each allegation summarized in this footnote, Plaintiffs allege that some of the events described occurred in Boston.

17 Plaintiffs allege that there are guns in about half the homes in the United States.

18 Plaintiffs allege that each year a number of children in Boston are injured or killed because Defendants' firearms are sold without the means to prevent their use by unauthorized users, without adequate warnings and without adequate instruction regarding the importance of proper firearm storage.

19 According to Plaintiffs, the referenced studies indicate that one out of three handguns is kept loaded and unlocked in the home; guns kept in the home for self-protection are 22 times more likely to kill or injure someone known by the owners than an intruder; a gun is used for protection in fewer than two percent of home invasion crimes when someone is home and for every time a gun in the home was used in a legally justifiable shooting, there were four unintentional shootings. seven criminal assaults or homicides and 11 attempted or completed suicides. Compl. at par. 72.

20 Defendants discuss “remoteness” as if it were a free-standing doctrine. The case law, however, considers remoteness as an element of either standing or proximate cause. Defendants do not separate their standing and proximate cause arguments. For purposes of clarity, the court addresses Defendants' arguments in terms of proximate causation, but the analysis is equally applicable to standing principles.

21 The Second Circuit Court of Appeals described the notion of proximate cause as "an elusive concept." *Laborers Local,* 191 F.3d at 235. The United States Supreme Court noted that "the principle of proximate cause is hardly a rigorous analytic tool." *Blue Shield of Va. v. McCready,* 457 U.S. 465, 477 n. 13 (1982).

22 The Second Circuit stated in *Laborers Local* that, in addition to time remoteness doctrine, other elements of proximate cause are the requirements of proof that the defendant's acts were a substantial cause of the injury and that the plaintiff's injury was reasonably foreseeable. 191 F.3d at 235-36. Defendants' argument in this case rests solely on the remoteness inquiry.

23 The parties have referred the court to no Massachusetts case articulating this doctrine as clearly as the cases previously discussed in the text. *Anthony v. Slaid,* 11 Met. (52 Mass.) 290 (1846), appears (insofar as the cases the parties discuss) to be the source of the doctrine. This court assumes, for purposes of this motion, that the doctrine is still recognized in Massachusetts.

24 The case was characterized as "classic" in *Seafarers Welfare Plan v. Philip Morris,* 27 F.Sup.2d 623, 628 (D.Md.1998).

25 The party responsible was the attacker's husband. Anthony, II Met. (52 Mass.) at 290.

26 See *Associated Gen. Contractors of Cal., Inc. v. California Store Council of Carpenters,* 459 U.S. 519, 532 n. 25 (1983) (quoting 1 J. Sutherland, Law of Damages 55-56 (1882)) ("[w]here the plaintiff sustains injury from the defendant's conduct to a third person, it is too remote, *if the plaintiff sustains no other than a contract relation to such a third person, or is under contract obligation on his account ..."*) (emphasis added & deleted).

27 The Second Circuit held:

> [Plaintiffs'] damages are entirely derivative of the harm suffered by plan participants as a result of using tobacco products ... Being purely contingent on harm to third parties, these injuries are indirect.

Laborers Local, 191 F.3d at 239.

28 As Defendants note, numerous other cases bar recovery where the harm the plaintiffs allege is wholly derivative of harm to third persons. A large number of these cases involve suits by health benefit funds against tobacco manufacturers and their public relations, lobbying and research firms. In these cases, the harm to the funds (increased expenses) was found to be too remote, as it derived entirely from harm to third persons (the smokers). See, e.g ., *Texas Carpenters Health Benefit Fund v. Philip Morris, Inc.,* 199 F.3d 788, 788-99 (5th Cir.2000); *International Bhd of Teamsters, Local 734 Health & Welfare Trust Fund v. Philip Morris, Inc.,* 196 F.3d 818, 827 (7th Cir.1999); *Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc .,* 185 F.3d 957, 963-64 (9th Cir.1999), *cert. denied,* 120 S.Ct. 789 (2000); *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.,* 171 F.3d 912, 932-33 (3d Cir.1999), cert. denied, 120 S.Ct. 844 (2000); *Massachusetts Laborers' Health & Welfare Fund v. Philip Morris, Inc.,* 62 F.Sup.2d 236, 246 (D.Mass.1999); *Laborers' & Operating Eng'rs' Util. Agreement Health & Welfare Trust Fund v. Philip Morris, Inc.,* 42 F.Sup.2d 943, 948 (D.Ariz.1999); *Seafarers Welfare Plan v. Philip Morris,* 27 F.Sup.2d 623, 630 D.Md.1998). *Coyne v. American Tobacco Co.,* 183 F.3d 488, 494-95 (6th Cir.1999), is slightly different and imports the remoteness doctrine into the context of standing of taxpayers to sue. A number of these cases also suggest that the health benefit funds sustained no injury (not even a remote injury), as the costs were ultimately passed on to others with the funds being mere "financial intermediaries." *International Bhd. of Teamsters,* 196 F.3d at 823-25. See also *Seafarers Welfare Plan,* 27 F.Sup.2d at 627-28. Not all courts follow these cases. See *Service Employees Int'l Union Health & Welfare Fund v. Philip Morris, Inc.,* 83 F.Sup.2d 70, 86 (D.D.C.1999). Even within the circuits that decided the above-cited cases, lower courts have found factual distinctions that

allow similar claims to proceed beyond the motion to dismiss stage. See *National Asbestos Workers Medical Fund v. Philip Morris, Inc.,* 74 F.Sup.2d 221, 225-28 (E.D.N.Y.1999).

29 Additionally, and apart from the generalized allegations found throughout the complaint that Plaintiffs have suffered harm, Plaintiffs allege the following:

> As for Count I (public nuisance): Defendants "have caused damage to the public health, the public safety and general welfare of the Boston residents, and have thereby wrongfully caused the plaintiffs to incur enormous costs in support of the public health, safety and welfare. The presence of illegitimately possessed and used firearms in Boston proximately results in significant costs to plaintiffs to enforce the law, arm its police force and to treat the victims of firearms." Compl. at pars. 83 & 84.
>
> As for Count II (negligent distribution and marketing): Defendants' conduct has caused Plaintiffs "to expend substantially more resources than [they] otherwise would in the form of police services, fire services, emergency medical services, pension benefits, disability benefits, workers' compensation benefits, health care, expenses to provide additional security measures in public schools and other public facilities." *Id.* at par. 88.
>
> As for Count III (breach of warranty by defective design): "the plaintiffs have paid and will continue to pay increased sums of money for police services, law enforcement, fire and rescue services, indigent health care, emergency medical services and other emergency services, pension benefits, disability benefits, workers' compensation benefits, health care, prison costs, increased security and other services in the public schools and other necessary facilities and services due to the threat of or actual use of the defendants' firearms ... Furthermore, ... Boston has suffered from diminished tax revenues and property values." *Id.* at pars. 97 & 98.
>
> As for Count IV (breach of warranty by failure to warn): Plaintiffs repeat, in substance, the allegations of pars. 97 & 98, see *id.* at pars. 106 & 108, and allege that "Boston has suffered from the lost productivity of certain citizens and employees harmed as a result of the use of defendants' products and suffered a direct loss of revenue from lost tax revenues due to diminished property values in areas of Boston where defendants' products are used." *Id.* at par. 107.
>
> As for Count V (negligence): Plaintiffs repeat, in substance, the allegations of pars. 97 & 98. See *id.* at pars. 115 & 116.

As for Count VI (unjust enrichment): Plaintiffs repeat, in substance, the allegations of par. 97, see *id.* at par. 119, and allege that they have been harmed by "the loss of substantial tax revenues as a result of diminished property values, loss of businesses and lost productivity of those individuals harmed by guns, due to the presence and use of guns throughout Boston." *Id .* at par. 120.

30 In their reply brief, Defendants misconstrue the remoteness doctrine as that doctrine was applied in *Anthony* and in the other cases discussed in Defendants' original memorandum. In the reply brief, Defendants state that "if firearms never were misused by such third parties to inflict direct injury on other third parties, [Plaintiffs] would have no cause to incur any of the claimed expenses." Defs.' Reply Mem. at 4. The remoteness doctrine is concerned with harm that is solely derived from injury to another rather than harm that is caused by persons other than the defendant. Plaintiffs allege that it was Defendants' misconduct that caused Plaintiffs' harm. Defendants' briefs do not raise the argument that their liability is barred by the intervening criminal (or tortious) acts of third persons.

31 The most recent Massachusetts case cited was decided in 1934. See *Ross v. Wright,* 286 Mass. 269, 273 (1934).

32 In their memorandum, Defendants seek to persuade the court that, should the complaint stand, a veritable Pandora's box would be opened, because cities would be allowed to sue automobile manufacturers on the theory that vehicles are made so as to be able to violate speed laws and sue liquor manufacturers on the theory that Scotch bottles are capable of being opened and the contents consumed by underage drinkers. These examples misconstrue Plaintiffs' allegations. Plaintiffs allege that Defendants' misconduct (i.e., allegedly fueling and exploiting an illegal firearms market and allegedly manufacturing defective and unreasonably dangerous products) caused Plaintiffs to suffer the harm discussed in the text. An apt analogy, to use Defendants' illustration, would be allegations that the alcohol industry exploited and relied upon an illegal, secondary market of underage drinkers and sold defective products, causing harm. In other words, it is not the mere manufacture and sale of a lawful product of which Plaintiffs complain, but rather the tortious manufacture and sale.

33 Defendants also argue that "practical and equitable considerations" reinforce their position. Defs.' Mem. at II. It is true that, in the context of the proximate cause analysis under the federal Racketeer Inf1uenced and Corrupt Organizations (RICO) Act, the Supreme Court identified three relevant factors: (1) the difficulty of ascertaining the amount of damages attributable to the misconduct rather than to some other source; (2) the difficulty of apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to prevent multiple recoveries and (3) whether suits by directly injured victims would vindicate the general interest in deterring injurious conduct. *Holmes,* 503 U.S. at 269-70. The difficulty in ascertaining damages in this case is best assessed when the case has gone beyond the pleading stage. For purposes of the pending motion, the complaint contains sufficient allegations of harm to survive. While Defendants characterize their connection to the alleged wrongdoing as being shippers of products that made their way, "by a series of legal and illegal acts beyond the manufactures' control," to persons who misused them, Defs.' Mem. at 13, Plaintiffs allege that Defendants could have exercised control over the distribution of their product. E.g., Compl. at pars. 59-60.

34 In their original memorandum, Defendants state that the rule articulated in the *Freetown* case "is a corollary of the 'fireman's rule.' '% Def's.' Mem. at 15 n. 2. Subsequently, the Appeals Court stated that "the firefighter's rule has no continuing vitality in Massachusetts." *Hopkins v. Medeiros,* 48 Mass.App.Ct. 600, 608-09 (2000). In their supplemental memorandum, Defendants argue that the fact that the Commonwealth no longer follows the firefighter's rule "has no effect on the continued vitality of the municipal cost recovery doctrine, as applied by the Supreme Judicial Council [sic] in *Freetown.*" Defs.' Supp.Mem. (dated June 1, 2000), at final (unnumbered) page of argument section. The court does not rule on the relationship between the firefighter's rule and the *Freetown* doctrine.

35 The authors state:

> Two generalizations underlie the numerous exceptions [to the economic loss rule]. First, the common rationale for allowing recovery of purely economic losses is formability. Second, the degree to which a defendant knew or should have known the extent of the consequences of negligent conduct, including economic loss, plays a dispositive role in a court's holding, more knowledge means more culpability.
>
> One differentiating factor between those cases allowing recovery and those denying recovery is foreseeability; that is, recovery hinges on whether a defendant could foresee that time negligent conduct would cause harm to a specific person, known class of persons, or foreseeable persons under the circumstances.

Palmueri & Barret, *supra,* at 761-62, 765 (footnotes omitted).

36 See *FMR Corp. v. Boston Edison Co.,* 415 Mass. 393, 395 (1993) (plaintiffs claimed defendants' negligent conduct caused plaintiffs to sustain damages from loss of income and increased costs of doing business);

Garweth Corp., 415 Mass. at 305 (plaintiff claimed defendant's conduct caused plaintiff to sustain monetary losses in connection with contract); *Stop & Shop Cos. v. Fisher,* 387 Mass. 889, 893 (1983) (plaintiff claimed that defendant's negligence in striking bridge caused economic injury to plaintiffs). See also Restatement (Second) of Torts § 766C (1979).

37 See *Marcil v. John Deere Indus. Equip. Co.,* 9 Mass.App.Ct. 625, 630-31 (1980) (plaintiff claimed manufacturing defect in construction equipment caused plaintiff business losses). See also Restatement (Third) of Torts: Products Liability § 21 (1997).

38 "Economnic loss" in time products liability setting is "the cost of repairs and lost profits." *Bay State-Spray & Provincetown S.S., Inc. v. Caterpillar Tractor Co.,* 404 Mass. 103, 107 (1989). The Appeals Court defined "economic loss" as including "damages for inadequate value, costs of repair and replacement of the defective product or consequent loss of profits without any claim of personal injury or damage to other property ..." *Marcil,* 9 Mass.App.Ct. at 630 n. 3 (quoting *Alfred N. Koplin & Co. v. Chrysler Corp.,* 49 Ill.App.3d 194, 199 (1977)).

39 Defendants' argument that the economic loss rule requires dismissal of the claims for public nuisance and unjust enrichment is without merit, as the rule does not appear to apply to such claims. See *Garweth Corp.,* 415 Mass. at 306.

40 General Laws c. 40, § 2 provides:

> A town may in its corporate capacity sue and be sued by its name, and may appoint necessary agents therefor.

This reference only to "town" is complemented by G.L. c. 40, § 1, which makes clear that § 2 applies to cities as well. Section 1 states:

> Cities and towns shall be bodies corporate, and, except as otherwise expressly provided, shall have the powers, exercise the privileges and be subject to the duties and liabilities provided in the several acts establishing them and in time acts relating thereto. Except as expressly provided, cities shall have all the powers of towns and such additional powers as are granted to them by their charters or by general or special law, and all laws relative to towns shall apply to cities.

41 Of course, the Boston Public Health Commission is the second plaintiff. However, Defendants make no separate argument as to the commission's authority to be a plaintiff, and they treat both plaintiffs the same. In the complaint, Plaintiffs rely on G.L. c. 111, § 122 (and Append. 2-4 & 2-5), for the commission's authority to sue.

42 Article 89 of the Amendments to the Constitution of the Commonwealth was ratified in 1966, and is commonly known as the Home Rule Amendment. This replaced the existing Article 2. At present, Article 2 of the Amendments, section 6, reads in full:

> Any city or town may, by the adoption, amendment, or repeal of local ordinances or by-laws, exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court in conformity with powers reserved to the general court by section eight, and which is not denied, either expressly or by clear implication, to the city or town by its charter. This section shall apply to every city and town, whether or not it has adopted a charter pursuant to section three.

General Laws c. 43B, § 13 (part of the Home Rule Procedures Act), largely tracks the language of the Home Rule Amendment. Section 13 has as its subject ordinances or by-laws, and "legislative or executive actions."

43 In a footnote in their reply brief, Defendants argue that while G.L. c. 40, § 2 empowers municipalities to sue and be sued in their own names, the scope of that empowerment derives from some other authority, such as the Home Rule Amendment. This argument has no merit. As noted, cities and towns have long had the authority to initiate tort and contract actions. The court does not believe that c. 40, § 2 requires that there exist specific statutory or constitutional authorization as to every asserted tort or contract cause of action before a city or town may initiate a suit. Defendants cite no authority to support that position.

44 The sole Massachusetts authority on which Defendants rely to support this distinction is *Higginson v. Treasurer & Sch. House Comm'rs of Boston,* 212 Mass. 583 (1912). *Higginson* held that the legislature had authority to designate city parkland as the site for a school building. The Court stated that there existed two characters of city and towns, a governmental capacity and a capacity similar to a private corporation. *Id.* at 585. Defendants make this distinction, apparently, to suggest that G.L. c. 40, § 2 only allows municipalities to sue in their "corporate capacity" (i.e., acting in the nature of a private corporation), and not in their "governmental capacity." Regardless which capacity Plaintiffs are suing in, the cases discussed plainly allow contract and tort suits to be brought by municipalities. Defendants cite no Massachusetts case barring suit and relying on the distinction made in *Higginson* . In *Slama v. Attorney Gen.,* 384 Mass. 620, 623-24 (1981), the Court made a different distinction and suggested that "corporate capacity" meant a municipality acting as a distinct entity, and "representative capacity" meant a municipality acting as a representative of its citizens, the actual rightholders, for whom it would be difficult or impossible to assert claims.

45 To determine whether an ordinance or by-law is inconsistent with state law, the Court asks (1) whether there was an express legislative intent to forbid local activity on the same subject, (2) whether the local regulation would frustrate the purpose of a statute so as to warrant an inference that the Legislature intended to preempt the subject or (3) whether legislation on the subject is so comprehensive that legislative intent to preempt can be inferred, as any local enactment would frustrate the statute's purpose. *Boston Gas Co.,* 425 Mass. at 699.

46 Defendants make no separate argument in relation to the regulations in 940 Code Mass.Regs. §§ 16.00 et seq.

47 I do not intend anything in this decision to affirm the propriety of the injunctive relief Plaintiffs seek. Any such comment would be highly premature.

48 Defendants frame their argument in terms of the Commerce Clause. In one paragraph of their memorandum, Defendants discuss Due Process principles, in connection with *BMW of N. America, Inc. v. Gore,* 517 U.S. 559 (1996). Because the thrust of this portion of their memorandum clearly focuses on a Commerce Clause argument, the court declines to read this paragraph of defendants' memorandum as raising a Due Process argument any broader than the doctrine discussed in *BMW of N. America.*

49 Clause 3 of Art. I, § 8, grants Congress the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]"

50 The United States Supreme Court has summarized its two-tiered approach as follows:

> When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. When, however, a statute has only indirect effects on interstate commerce and

regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.

Healy, 491 U.S. at 337 n. 14 (quoting *Brown-Forman Distillers Corp.,* 476 U.S. at 579) (citations omitted).

51 See also *Dennis v. Higgins,* 498 U.S. 439, 447 (1991) (Commerce Clause is limitation on "the power of the States to enact laws imposing substantial burdens on [interstate] commerce") (quoting *South-Central Timber Dev., Inc. v. Wunnicke,* 467 U.S. 82, 87 (1984); alteration added).

52 The Court stated: "State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute." *BMW of N. America,* 517 U.S. at 572 n. 17. The Court cited *New York Times Co. v. Sullivan,* 376 U.S. 254, 265 (1964) (relating to defamation and First Amendment), and *San Diego Bldg. Trades Council v. Garmon,* 359 U.S. 236, 247 (1959) (relating to displacement of state jurisdiction under National Labor Relations Act).

53 The Court's statements in this regard may properly be characterized as dicta, since the Court assumed that the ultimate damage award of $2 million (after remittitur by the Alabama Supreme Court) was based only on conduct occurring in Alabama and held that even this award was grossly excessive. *BMW of N. America,* 517 U.S. at 574. Thus, the Commerce Clause discussion was not necessary to the Court's analysis. See *id.* at 604 (Scalia, J., dissenting); *id.* at 607 (Ginsburg, J., dissenting).

54 The Supreme Court did not consider whether a State may attempt to change a tortfeasor's unlawful conduct in another state. *BMW of N. America,* 517 U.S. at 573 n. 20.

55 While the Supreme Court discussed notions of fairness enshrined in "constitutional jurisprudence," the Court appeared to rely on Due Process. *BMW of N. America,* 517 U.S. at 574 n. 22.

56 See *BMW of N. America,* 517 U.S. at 576 ("But this observation [that infliction of economic injury may warrant a substantial penalty] does not convert all acts that cause economic harm into torts that are sufficiently reprehensible to justify a significant sanction in addition to compensatory damages").

57 Defendants point out that the alleged diversions into an illegal firearms market can occur anywhere in the country and thus an injunction could have the effect of forcing Defendants to change its practices nationwide. Again, an argument as to the scope of injunctive relief, should such an argument be necessary and should injunctive relief be deemed appropriate, is best addressed at a later stage of litigation. Also, as noted, the Supreme Court has left open the question whether a state may attempt to change a tortfeasor's unlawful conduct in another state. *BMW of N. America,* 517 U.S. at 573 n. 20.

58 Defendants state that, according to the complaint, most of the sales of firearms to distributors took place outside Massachusetts. This appears to speak to a personal jurisdiction argument, and Plaintiffs appear to have interpreted it as such. Nevertheless, Defendants in their reply brief emphatically deny that they dispute personal jurisdiction. Defs.' Reply Mem. at 32.

59 See also *Planned Parenthood League of Mass., Inc. v. Bell,* 424 Mass. 573, 578 n. 4, cert. denied, 522 U.S. 819 (1997) ("A nuisance is public when it interferes with the exercise of a public right by directly encroaching on public property or by causing a common injury") (quoting *Connerty v. Metropolitan Dist. Comm'n,* 398 Mass. 140, 148 (1986)) (emphasis added); Restatement (Second) of Torts § 821B, cmt. h ("a public nuisance does not necessarily involve interference with use and enjoyment of land ... When the particular harm consists of interference with the use and enjoyment of land, the public nuisance may also be a private nuisance ...").

60 "A private nuisance is actionable when a property owner creates, permits, or maintains a condition ... that causes a substantial and unreasonable interference with the use and enjoyment of the property of another." *Belanger,* 41 Mass.App.Ct. at 670 n. 3 (quoting *Asia v. Fitchburg,* 24 Mass.App.Ct. 13, 17 (1987)).

61 Along similar lines is *Massachusetts v. Pace,* 616 F.Sup. 815, 821 (D.Mass.1985), which Defendants also cite. In that case, the federal court held that the defendants did not participate to a substantial extent in the release of chemicals into the ground when the defendants only transported the chemicals to a chemical waste reclamation facility, which did release the chemicals into the ground. Thus, the nuisance in *Pace* was also of the type connected to property.

62 In their reply brief, Defendants argue that, in order to exercise control to abate the nuisance, they would have to "identify[ ] all criminals and disarm[ ] them-something neither defendants, nor [Boston] with all its statutory and law enforcement resources can do." This argument misses the point of Plaintiffs' allegations. To exercise control to abate the alleged nuisance, Defendants would have to cease maintaining the illegal, secondary market.

63 Plaintiffs have also alleged that they sustained special or peculiar harm.

64 In a footnote to their original memorandum, Defendants observe that Plaintiffs have not pled that Boston's Corporation Counsel has initiated this action. Defendants conclude this makes Boston not a proper party. Defs.' Mem. at 21 n. 5. Under Chapters of the City of Boston Code, the city's law department is placed under the charge of the Corporation Counsel. The ordinance states in pertinent part that the Corporation Counsel "shall, subject to the direction of the Mayor, institute any suit or proceeding in behalf of the City which line shall deem the interest of the City requires; shall by himself or by his assistants in the Law Department appear as Counsel in all suits, actions, or prosecutions which may involve the rights or interests of the City[.]" City of Boston Code, Ordinances, c. 5, § 5-8.1 (1985 & 1999 update). Defendants cite no cases or rule of civil procedure, and present no argument as to why the quoted language from the city ordinance requires that the city plead that it has satisfied the ordinance, and why failure to do so requires dismissal. Plaintiffs do not address this issue in their opposition memorandum, and Defendants do not raise it in their reply memorandum or their sur-reply memorandum. See Mass.R.Civ.P. 9(a). Defendants thus have not pressed this issue.

65 Defendants' argument is framed in terms of the first element of a negligence action, the existence of a duty of care. However, the penultimate paragraph of this portion of their memorandum speaks of misuse of a firearm as being a bar to recovery. Defs.' Mem. at 34. This confronts the proximate causation analysis, which is an issue distinct from whether there exists a duty of care. To the extent Defendants argue that liability is barred by the intervening acts of third persons, such an argument fails in Massachusetts if the third person's acts could have been foreseen, which is what Plaintiffs allege. See *Poskus v. Lombardo's of Randolf, Inc.,* 423 Mass. 637, 639-40 (1996); *Jesionek v. Massachusetts Port Auth.,* 376 Mass. 101, 105 (1978); *Gidwani v. Wasserman,* 373 Mass. 162, 166-67 (1977).

66 Plaintiffs allege that Defendants are jointly and severally liable. Compl. at par. 87. Defendants make no argument against joint and several liability.

67 The complaint alleges alternatively that Defendants were negligent in failing to inhibit the formation of the secondary market. Failing to prevent an event from happening, if one knows it will occur absent intervention and one desires it to occur, may be the functional equivalent of an affirmative act. However, the court need not decide this issue, as a complaint should not be dismissed "if it would support relief on any theory of law." *Whitinsville Plaza,* 378 Mass. at 89 (citations omitted; emphasis is in original).

68 Foreseeability is sometimes considered an element of the ascertainment of the existence of a duty of care. *Whittaker v. Saraceno,* 418 Mass. 196, 198-99 & n. 3 (1994).

69 The legislature and the Attorney General have, as noted, established statutory and regulatory rules to prevent the harm Plaintiffs allege. This may be evidence of "existing social values and customs, as well as [ ] appropriate social policy," Davis, 420 Mass. at 743, from which a different duty can be inferred. The court does not reach this issue. Cf. *Tobin v. Norwood Country Club, Inc.,* 422 Mass. 126, 133 (1996) ("Determinations of public policy, especially when a statute 'undoubtedly' identifies such a policy, are highly relevant to [the initial inquiry, whether the defendant owed a duty of care]"); *Michnik Zilbernman v. Gordon's Liquor, Inc.,* 390 Mass. 6, 11 (1983) ("Once a vendor places liquor in the hands of a minor, it may set in motion the very harm which the Legislature has attempted to prevent").

70 Plaintiffs also allege that Defendants were negligent in marketing their products by failing to educate consumers regarding the risks of firearms, representing that purchase of a firearm will enhance household security, representing that firearms are safe and representing that families could safely store firearms unlocked and accessible to minors or mentally impaired persons, causing additional harm to Plaintiffs. Compl. at par. 89. Defendants make no argument relative to these allegations, and the court does not address them.

71 Defendants do not argue that the implied warranty of fitness for a particular purpose does not apply. G.L. c. 106, § 2-3-15.

72 As these are the only grounds for dismissal of this count urged by Defendants, the court confines its discussion to these two issues. In their reply brief, Defendants for the first time appear to raise the argument that the guns were not "defective." See Defs.' Reply Mem. at 27. The argument, in its entirety, is as follows: "When a product is deliberately functioned [sic] to accomplish a known and intended result, the product is not defective and liability is not extended to the manufacturer." Defendants reference a footnote in their original memorandum. That footnote argues that misuse of a firearm constitutes a superseding cause, negating a finding of proximate causation. Defs.' Mem. at 27 n. 9. Thus, Defendants present no argument as to why the firearms were, as a matter of law, not "defective" under warranty law. The court notes that the complaint contains sufficient allegations that Defendants' products were defective. See, e.g., Compl. at par. 94. *See Commonwealth v. Johnson Insulation,* 425 Mass. 650, 660-61 (1997) (discussion of breach of implied warranty of merchantability).

73 While these paragraphs of the complaint allege that Defendants reasonably could have expected that Plaintiffs would have been injured by Defendants' defectively designed guns (and thus speaks to the foreseeability of harm rather than foreseeability of use), the facts alleged in the complaint, if proven, would show that Defendants reasonably could have foreseen the use to which their products were put. See, e.g., Compl. at pars. 53-55 (alleging, in substance, that Defendants reasonably should have known that their guns were being used by the secondary, illegal market to inflict harm by gun violence).

74 The court acknowledges that the breach of warranty by defective design claim seeks to apply warranty law in a way unlike past cases. The typical breach of warranty case involves allegations that the defendant's product, used in a reasonably foreseeable way, harmed the plaintiff-user. In such a situation, the defendants may assert the affirmative defense that the plaintiff acted unreasonably toward a product he knew to be defective and dangerous. Here, however, Plaintiffs were not the users, a difference which raises novel questions of law regarding the affirmative defense of unreasonable use. These questions are better addressed in the context of a factual record. Cf. *Bolduc v. Colt's Mfg. Co.* 968 F.Sup. 16, 18 (D.Mass.1997) (deciding, at summary judgment, that plaintiff's decedent's deliberate misuse of firearm barred recovery on negligent design claim).

75 Paragraph 106 of the complaint mentions by name only the implied warranty of merchantability. It does, however, reference G.L. c 106, § 2-315, the implied warranty for fitness for a particular purpose.

76 *Mavilia v. Stoeger Indus.,* 574 F.Sup. 107, 111 (D.Mass.1983), was a case involving a handgun decided on a motion to dismiss under Fed.R.Civ.P. 12(b)(6). That case does not appear to have involved allegations of

failure adequately to warn. Applying what it perceived to be Massachusetts law as it then existed, the federal district court decided that the .38 caliber Llama automatic pistol was not inherently defective and declined to certify the issue to the Supreme Judicial Court. *Id.* & n. 5. The allegations in *Mavilia* were different from Plaintiffs' allegations in this case.

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KeyCite Yellow Flag
Distinguished by Tavassoli v. Altria Group, Inc., D.Ariz., September 17, 2007

KeyCite Overruling Risk
Overruling Risk Iannacchino v. Ford Motor Co., Mass., June 13, 2008

22 Mass.L.Rptr. 91
Superior Court of Massachusetts,
Suffolk County.

Willie EVANS, as Executor [1]
v.
LORILLARD TOBACCO CO. & others. [2]

Civil Action No. 04–2840A.
|
Feb. 7, 2007.

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTIONS TO DISMISS

PAUL E. TROY, Justice.

1** The plaintiff, Willie Evans ("Plaintiff") commenced this action alleging that defendants Lorillard Tobacco Co. ("Lorillard"), Garber Bros., Inc. ("Garber"), George Melhado & Co. ("Melhado"), and Franklin Wholesalers, Inc. ("Franklin"), (collectively, "Defendants") caused the death of his mother, Marie R. Evans ("Evans"), through their design, marketing, distribution, and sale of Newport brand cigarettes. The action is before this court on the Defendants' motions to dismiss [3] the Plaintiff's complaint. For the following reasons, the Defendants' motions are ***DENIED in part and ***ALLOWED*** in part.

BACKGROUND

For purposes of a motion to dismiss under Rule 12(b)(6), the court must accept as true all of the factual allegations in the Plaintiff's complaint.

Newport cigarettes contain menthol which works "to facilitate the initiation of smoking and the development of a smoking habit in children." Complaint, ¶ 20. Lorillard is the designer, manufacturer, distributor, and seller of Newport cigarettes. During the time Evans purchased and smoked Newport cigarettes, defendants Garber, Melhado, and Franklin distributed Newport cigarettes in the areas where Evans lived and worked.

Growing in the Orchard Park housing project in Roxbury, Massachusetts, Evans attended Newport cigarette giveaway events in her neighborhood starting in approximately 1957 when she was about nine years old. At these giveaway events, Lorillard representatives gave her free samples of Newport cigarettes despite her age. When she was a young teenager, Evans began smoking the Newport cigarettes she received at the giveaway events not only because they were free, but also because she was influenced by Lorillard's marketing of Newport cigarettes. Lorillard advertised Newport cigarettes in *Jet* and *Ebony,* African–American magazines to which Evans had access. The advertisements showed attractive African–American men and women smoking Newport cigarettes and described the cigarettes as "fresher than any other menthol cigarette." *Id.* ¶ 18. Lorillard also used "various misleading euphemisms to conceal the true role of nicotine, such as 'satisfaction,' 'impact,' 'strength,' 'rich aroma,' and 'pleasure.' " *Id.* ¶ 23. Evans was addicted to Newport cigarettes for over forty years, smoking at least one and a half packs a day to as many as four packs a day.

Lorillard promised [4] the public that it would lead the effort to discover and disclose the truth about smoking and health, recognizing that such research and disclosures "were necessary for the protection of smokers of Lorillard-brand cigarettes, including ... Evans." *Id.* ¶ 52. Through industry research spanning decades, Lorillard has learned that the nicotine in cigarettes is addictive, and the Newport cigarettes cause such diseases as lung cancer and contain carcinogenic elements that increase the dangers of smoking. Rather than fulfill its promise to disclose this information to smokers such as Evans, however, Lorillard has concealed and suppressed the true facts about the health hazards of smoking Newport cigarettes, denied that nicotine is addictive, and, until recently, claimed that nicotine is important to cigarettes for taste.

***2** Therefore, Lorillard's knowledge of the material facts about smoking, health, and addiction was vastly superior to the knowledge of Evans and other members of the general public who purchased, used, and consumed Lorillard's cigarettes. Public access to these facts known by Lorillard has been exclusively within its control." *Id.* ¶ 43. Moreover, Lorillard has controlled the nicotine content in Newport cigarettes in order to create and sustain addiction in smokers such as Evans. In fact, in April 1994, Lorillard's then President and Chief Executive Officer, Andrew H. Tisch ("Tisch") testified under oath before the Congressional Subcommittee on Health and the Environment that nicotine is not addictive.

At the time Evans began smoking Newport cigarettes, Evans did not know that cigarette smoking causes illnesses such as cancer, she did not know that the nicotine in Newport cigarettes is addictive, and she did not know that Lorillard added menthol to Newport cigarettes in order to encourage the development of smoking habits in children. Evans had a heart attack in 1984 when she was approximately thirty-eight years old, at which time she learned that smoking causes diseases and that the addition of menthol made Newport cigarettes more dangerous to her health than cigarettes without the addition of menthol.

Evans made several futile attempts to quit smoking after her 1984 heart attack. By the time she was diagnosed with small call lung cancer in December 2001, the cancer had already spread to her brain, liver, and adrenal glands, and her doctor told her she had three to six months to live. Evans underwent four chemotherapy treatments that rendered her bedridden and unable to eat. Evans died on June 20, 2002.

As executor of Evans estate, the Plaintiff filed a complaint against the Defendants alleging fraud and misrepresentation (Count I, against Lorillard); voluntary undertaking of a duty (Count II, against Lorillard); breach of warranty (Count III, against the Defendants); public nuisance (Count IV, against Lorillard); battery (Count V, against Lorillard); violations of G.L. c. 93A, § 9 (Count VI, against the Defendants); negligence (Count VII, against the Defendants); and wrongful death (Count VIII, against the Defendants).

DISCUSSION

In deciding a motion brought pursuant to Rule 12(b)(6), the court must accept as true the complaint's well-pleaded factual allegations and any reasonable inferences in the plaintiff's favor that may be drawn from those allegations. *Fairneny v. Savogran Co.,* 422 Mass. 469, 470 (1996). A " 'complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " *Nader v. Citron,* 372 Mass. 96, 98 (1977), quoting *Conley v. Gibson,* 355 U.S. 41, 45–46 (1957). The court must give the complaint a generous reading and the plaintiff the benefit of the doubt. *New England Insulation Co. v. General Dynamics Corp.,* 26 Mass.App.Ct. 28, 29 (1988); *Kipp v. Kuelcer,* 7 Mass.App.Ct. 206, 210 (1979). A "rule 12(b)(6) motion is ordinarily not the proper vehicle for testing the factual sufficiency of a plaintiff's claims[;]" rather, a motion for summary judgment is more appropriate. *Reardon v. Commissioner of Corr.,* 20 Mass.App.Ct. 946, 947 (1985); *Wrightson v. Spaulding,* 20 Mass.App.Ct. 70, 72 (1985).

***3** The Defendants have moved to dismiss the Plaintiff's claims against them for failure to state a claim upon which relief can be granted because the Plaintiff cannot satisfy the essential elements of the claims and because, as to conduct that the Plaintiff alleges occurred after June 30, 1969, certain claims are preempted by the Federal Cigarette Labeling and Advertisement Act.

I. *Federal Cigarette Labeling and Advertisement Act*

The Defendants allege that insofar as the Plaintiff's complaint concerns the Defendants' alleged conduct occurring after June 30, 1969, it is preempted by the Federal Cigarette Labeling and Advertisement Act ("FCLAA"), set forth at 15 U.S.C. §§ 1331–1341. With the FCLAA, Congress "crafted a comprehensive federal scheme governing the advertising and promotion of cigarettes." *Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525, 541 (2001). Section 1334 of title 15 of the United States Code, titled "Preemption," "unequivocally precludes the requirement of any additional statements on cigarette packages provided in [15 U.S.C.] § 1333." *Id.* at 542, citing 15 U.S.C. § 1334(a). [5] The preemption provision further provides that "[n]o *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(b) (emphases added); see *Lorillard Tobacco Co.,* 533 U.S. at 542 ("Without question, the second clause is more expansive than the first; it employs far more sweeping language to describe the state action that is pre-empted."). The statute expressly states that the effective date of 15 U.S.C. § 1334 is July 1, 1969.

The Supreme Court in *Cipollone v. Liggett Group, Inc.* addressed the issue of whether this preemption provision "encompassed state common-law claims." 505 U.S. 504, 516 (1992). [6] Acknowledging the presumption against preemption, the Court held that common-law damages actions impose "requirements and prohibitions" because such actions "are premised on the existence of a legal duty," and that "the phrase 'state law' ... include[s] common law as well as statutes and regulations." *Id.* at 522. "Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are *not* pre-empted[,]" however, *id.* at 517 (emphasis added); therefore, the Court had to consider individually each of the plaintiff's "common-law claims to determine whether it [was] in fact preempted." *Id.* at 523.

"The central inquiry in each case is straightforward: ... whether the legal duty that is the predicate of the common-law damages action constitutes a requirement or prohibition based on smoking and health ... imposed under State law with respect to ... advertising or promotion, giving that clause a fair but narrow reading." *Id.* at 523–524 (second and third ellipses in original) (footnote omitted). Thus, "[t]he appropriate inquiry is not whether a claim challenges the 'propriety' of advertising and promotion, but whether the claim would require the imposition under state law of a requirement or prohibition based on smoking and health with respect to advertising or promotion." *Id.* at 525; see *Philip Morris Inc. v. Harshbarger,* 122 F.3d 58, 76–77 (1st Cir.1997) ("This observation indicates that the relevant inquiry focuses not upon any relation between advertising and the *motivation* behind a state law, but upon the law itself and any connection it might have with advertising activities." (emphasis in original)). This court will apply this analysis to those claims in the Plaintiff's complaint that the Defendants argue must be preempted. [7] It is undisputed that the FCLAA does not preempt any allegation concerning the Defendants' conduct occurring prior to June 30, 1969. As discussed with respect to the claims below, the FCLAA also does not preempt any other aspect of the Plaintiff's complaint. [8]

A. *Count I—Fraud and Misrepresentation*

***4** In Count I, the Plaintiff alleges that Lorillard willfully and recklessly failed to disclose to Evans the health hazards and addictive nature of smoking Newport cigarettes and that Lorillard "waged an aggressive campaign of disinformation about the health consequences of cigarette smoking." Complaint, ¶ 2. Among this disinformation, the Plaintiff points to Lorillard's advertisements in which it marketed Newport cigarettes as " 'fresher than any other menthol cigarette[,]' " *id.* ¶ 18, and Lorillard's use of "various misleading euphemisms to conceal the true role of nicotine, such as 'satisfaction,' impact,' strength,' 'rich aroma,' and 'pleasure.' " *Id.* ¶ 23.

In *Cipollone,* the Court considered the plaintiff's two fraudulent misrepresentation theories. 505 U.S. at 527–529. The first theory was essentially a failure to warn theory in which the plaintiff alleged that the defendants, "through their advertising, neutralized the effect of federally mandated warning labels ...." *id.* at 527, "and that they had possessed, but had 'ignored and failed to act upon' medical and scientific data indicating that 'cigarettes were hazardous to the health of consumers[.]' " *Id.* at 510 (first and second alteration added) (ellipses in original). [9] The FCLAA did preempt this claim because it was "predicated on a state-law prohibition against statements in advertising and promotional materials that tend to minimize the health hazards associated with smoking." *Id.* at 527.

Unlike in *Cipollone,* the Plaintiff's misrepresentation claim does not specifically make an allegation concerning Lorillard's conduct with respect to the federally required warning labels, although it does concern advertising and promotion. See *Johnson v. Brown & Williamson Tobacco Corp.,* 122 F.Supp.2d 194, 201 (D.Mass.2000) ("*Johnson I* ") (noting that "any communication by a cigarette manufacturer with the public constitutes 'advertising and promotion' under the [FCLAA]"). Despite the absence of language concerning warning labels, Lorillard argues that, by claiming that Lorillard failed to disclose to consumers the alleged health hazards associated with smoking, the Plaintiff is alleging that Lorillard has a legal duty to make such a disclosure. With this allegation, Lorillard further asserts, the Plaintiff is claiming that Lorillard's advertising should have included additional or more clearly stated warnings. Lorillard's attempt to turn this fraud and misrepresentation claim into a failure to warn claim fails.

As noted, the Plaintiff makes no mention of Lorillard's warnings. Rather, the Plaintiff alleges that Lorillard knew of certain facts and intentionally misrepresented and failed to disclose those facts to the public, including Evans, both directly and through its trade association, and that it "expressly [told] the public to place special trust and confidence in Lorillard's promise to discover and disclose all material facts about smoking, health and addiction." Complaint, ¶ 45; see *Johnson I,* 122 F.Supp.2d at 201. These allegations are distinguishable from the plaintiff's failure to warn claim in *Cipollone* which the FCLAA preempted. See 505 U .S. at 524, 528.

***5** The plaintiff's second fraudulent misrepresentation theory in *Cipollone* alleged "intentional fraud and misrepresentation both by 'false representation of a material fact [and by] conceal[ment of] a material fact.' " *Id.* at 528 (alterations in original). The Plaintiff's Count I is more like this second theory in *Cipollone* in that the Plaintiff alleges that Lorillard's use of "various misleading euphemisms to conceal the true role of nicotine, such as 'satisfaction,' impact, 'strength,' 'rich aroma,' and 'pleasure[,]' " Complaint, ¶ 23, and the description of Newport cigarettes as being "fresher than any other menthol cigarettes" constituted misrepresentation. *Id.* ¶ 23. The *Cipollone* Court held that the FCLAA did not preempt this theory "insofar as those claims rel[ied] on a state-law duty to disclose such facts through channels of communication *other than advertising or promotion.*" 505 U.S. at 528 (emphasis added).

The Plaintiff alleges that Lorillard made its comments regarding the freshness of Newport cigarettes in print advertisements. The Plaintiff's complaint does not specify the context in which Lorillard allegedly used euphemisms to conceal the true effect of nicotine. As noted above, however, "any communication by a cigarette manufacturer with the public constitutes 'advertising and promotion' under the" FCLAA. *Johnson I,* 122 F.Supp.2d at 201. Therefore, this court presumes that they constitute advertising and promotion. See *id.*

To the extent that these misrepresentation claims did "arise with respect to advertising and promotions (most notably claims based on allegedly false statements of material fact made in advertisements)[,]" *Cipollone,* 505 U.S. at 528, the FCLAA still does not preempt them because "[s]uch claims are predicated not on a duty 'based on smoking and health' but rather on a more general obligation—the duty not to deceive." *Id.* at 528–529. "[T]he phrase [in 15 U.S.C. § 1334(b)] 'based on smoking and health' fairly but narrowly construed does not encompass the more general duty not to make fraudulent statements." *Id.* at 529. The Court reasoned that, with the FCLAA, Congress did not intend "to insulate cigarette manufacturers from longstanding rules governing fraud .... [or] to proscribe the regulation of deceptive advertising." *Id.* Therefore, here, the FCLAA does not preempt the Plaintiff's allegations that Lorillard engaged in fraudulent misrepresentations in the context of its advertising and promotion. [10]

The FCLAA does not preempt Count I.

B. *Count II—Voluntary Undertaking of a Duty*

In Count II, the Plaintiff claims that Lorillard promised the public, including Evans, that it would research tobacco use and human health and that it would impart the results of that research to the public completely and accurately. In *Cipollone,* the plaintiff did not allege a "voluntary undertaking" claim; he did, however, allege breach of express warranty. *Id.* at 525. The Court's analysis of this claim is analogous to Count II. See *id.* at 525–526.

***6** When considering the plaintiff's breach of an express warranty claim in *Cipollone,* the Court held that liability for such a breach "derives from, and is measured by, the terms of that warranty. Accordingly, the 'requirement [s]' imposed by an express warranty claim are not 'imposed under state law,' but rather imposed *by the warrantor.*" *Id.* at 525 (alternation and emphasis in original). The Court concluded that "a common-law remedy for a contractual commitment *voluntarily undertaken* should not be regarded as a 'requirement ... *imposed under State law* ' within the meaning of" 15 U.S.C. § 1334(b). *Id.* at 526 (ellipses and second emphasis in original). Here, Count II is predicated on Lorillard's promise to research the effects of cigarette smoking on health and to impart those results to the public. State law did not impose this promise on Lorillard; Lorillard made this promise voluntarily. See *id.* The FCLAA therefore does not preempt Count II.

C. *Count III—Breach of Warranty*

In Count III, the Plaintiff alleges that the Defendants breached their warranty that the Newport cigarettes that they designed, manufactured, marketed, distributed, and sold were merchantable and fit for the ordinary purposes for which they were intended because they were carcinogenic, addictive, and contained dangerous levels of such substances as tar and nicotine. [11] See G.L. c. 106, § 2–314. As noted, the plaintiff's complaint in *Cipollone* alleged a claim of breach of *express* warranty. "While the general duty not to breach warranties arises under state law, the particular 'requirement ... based on smoking and health ... with respect to the advertising or promotion [of] cigarettes' in an express warranty claim arises from the *manufacturer's* statements in its advertisements." *Cipollone,* 505 U.S. at 526 (ellipses and alteration in original) (emphasis added).

Although the Plaintiff's claim is breach of an *implied* warranty rather than an express warranty, see Complaint, ¶ 59, the rationale against preemption is the same. The implied warranty of merchantability is arguably state-imposed given the provision in G.L. c. 106, § 2–314 that "a warranty that the goods shall be merchantable is implied in a contract for their sale.... Goods to be merchantable must at least be such as ... are fit for the ordinary purposes for which such goods are used...." G.L. c. 106, § 2–314(1), (2)(c). Any implied warranty "based on smoking and health ... with respect to the advertising and promotion of cigarettes[,]" however, 15 U.S.C. § 1334(b), "arises from [the Defendants'] statements [implied or otherwise] in [their] advertisements." *Cipollone,* 505 U.S. at 526. Therefore, the *Defendants* created the implied warranty that the Plaintiff alleges they breached, and their liability will "derive[ ] from, and [be] measured by, the terms of that warranty." *Cipollone,* 505 U.S. at 525.

***7** Moreover, Count III essentially alleges that the Defendants breached the implied warranty of merchantability because Newport cigarettes were defectively designed. See *Johnson I,* 122 F.Supp.2d at 202. The FCLAA "does not preempt 'state-law obligations to avoid marketing cigarettes with manufacturing defects or to use a demonstrably safer alternative design for cigarettes.' " *Id.* at 201–202, quoting *Cipollone,* 505 U.S. at 523. Consequently, insofar as the Plaintiff alleges breach of the implied warranty of merchantability by defective design, the FCLAA does not preempt Count III.

D. *Count V—Battery*

In Count V, the Plaintiff alleges that Lorillard committed a battery by distributing Newport cigarettes to Evans when she was a child through free giveaways and by intentionally concealing the hazardous and addictive effects of smoking Newport cigarettes so that she was unable to appreciate the danger. Although, arguably, the giveaways Lorillard conducted constitute promotional conduct within the scope of 15 U.S.C. § 1334(b), they presumably fall outside the effective date of the FCLAA, June 30, 1969, given that they continued "for several years" after 1957. Complaint, ¶ 16. The FCLAA does not preempt this pre–1969 conduct.

Even assuming that the conduct that the Plaintiff complains of in Count V occurred after June 30, 1969, and concerns advertising or promotion, [12] however, the FCLAA still does not preempt the claims. In conducting preemption analysis under 15 U.S.C. § 1334(b), "[t]he appropriate inquiry is not whether a claim challenges the 'propriety' of advertising and promotion, but whether the claim would require the imposition under state law of a requirement or prohibition based on smoking and health with respect to advertising and promotion." *Cipollone,* 505 U.S. at 525. The Plaintiff's Count V, read narrowly, appears to be predicated on a common-law prohibition of distributing cigarettes without disclosing to consumers the hazardous effects of smoking.

Cipollone, however, does not require such a narrow reading of Count V. In the context of the plaintiff's fraudulent misrepresentation claim, the Court held that, in enacting the FCLAA, Congress did not intend "to insulate cigarette manufacturers from longstanding rules governing fraud .... [or] to proscribe the regulation of deceptive advertising." *Id.* at 529. The Court reasoned that failure to analyze the plaintiff's fraud claim at this level of generality "would conflict both with the background presumption against pre-emption and with legislative history that plainly expresses an intent to preserve the 'police regulations' of the States." *Id.* at 529 n.27; see *id.* at 529 n.26 (noting that FCLAA does not affect such "police regulations" as " 'the taxation or the sale of cigarettes to minors, or the prohibition of smoking in public buildings ...' " (quoting S.Rep. No. 91–566, at 12 (1969)).

The Court distinguished the plaintiff's fraud claim from its failure to warn claim and construed the latter claim narrowly, holding that to construe it generally "would render the 1969 amendments [to the FCLAA] meaningless and would pay too little respect to Congress' substantial reworking of the [FCLAA]." *Id.* Moreover, "[u]nlike state-law obligations concerning the warnings necessary to render a product 'reasonably safe,' state-law proscriptions on intentional fraud rely only on a single, uniform standard: falsity." *Id.* at 529. Therefore, a claim of battery is more like a claim of fraud in that it relies on the uniform standard of an offensive, non-consented-to touching rather than obligations concerning the required warnings. See *id.*

***8** Accordingly, to the extent that Count V concerns conduct occurring after June 30, 1969, the FCLAA does not preempt Count V.

E. *Count VI—Violations of G.L. c. 93A, § 9*

In Count VI, the Plaintiff alleges that the Defendants violated G .L. c. 93A, § 9, by Lorillard's misrepresentations of material facts with respect to the addictive and hazardous nature of Newport cigarettes, by Lorillard's failure to disclose facts to Evans which might have influenced her not to purchase Newport cigarettes, and by the Defendants' breach of the implied warranty of merchantability through their manufacture, distribution, and sale of Newport cigarettes in a defective condition that was unreasonably dangerous to consumers, including Evans. The Defendants argue that the FCLAA preempts Count VI because it is a claim that the Defendants concealed information concerning the hazardous and addictive nature of Newport cigarettes. Such a claim, the Defendants assert, is the "converse" of a state law requiring such disclosure.

As with Count I, fraud and misrepresentation, this count is "predicated not on a duty 'based on smoking and health' but rather on a more general obligation—the duty not to deceive." *Cipollone,* 505 U.S. at 528–529. Additionally, as with Count III, because the alleged implied warranty was not state-imposed but was created by the Defendants, and to the extent it alleges a design defect, it is not within the scope of the FCLAA. Consequently, the FCLAA does not preempt Count VI.

F. *Count VII—Negligence*

In Count VII, the Plaintiff alleges that the Defendants owed Evans a duty to exercise reasonable care but that they breached that duty by failing to exercise reasonable care in their manufacture, marketing, distribution, and sale of Newport cigarettes, in Lorillard's distributing Newport cigarettes to children, including Evans, at giveaways, and by Lorillard's marketing Newport cigarettes to children, including Evans.[13] The Defendants argue that with this claim, the Plaintiff alleges that the Defendants undermined the awareness of the public, including Evans, through their advertising and through their concealment of information. Just as with Counts I and VI, however, this claim is "predicated not on a duty 'based on smoking and health' but rather on a more general obligation—the duty not to deceive." *Id.* Therefore, the FCLAA does not preempt Count VII.

II. ***Judicial Notice***[14]

The Defendants argue that the hazardous and addictive natures of cigarette smoking is common knowledge, therefore any reliance by Evans on the Defendants' representations, false or otherwise, was unreasonable as a matter of law. Based on this theory, the Defendants seek to dismiss Counts I, III, V, VI, VII, and VIII.[15] A court may take judicial notice of facts or law "only when they are indisputably true. Matters of common knowledge or observation within the community may be judicially noticed because they so qualify." *Nantucket v. Beinecke,* 379 Mass. 345, 352 (1979). " 'Facts which ordinarily are not known without the aid of expert testimony or other proof cannot be said to be matters of common knowledge.' " *Commonwealth v. Hartman,* 404 Mass. 306, 313 n.9 (1989), quoting *Mady v. Holy Trinity Roman Catholic Polish Church,* 223 Mass. 23, 26 (1916). Additionally, "[j]udicial notice is not to be extended to personal observations of the judge or juror ." *Nantucket,* 379 Mass. at 352.

***9** The Defendants rely on *Wolf v. Philip Morris, Inc.,* Civil No. 99–1260B (Norfolk Super. Ct. June 21, 2001) (Lauriat, J.), and *Massachusetts Laborers' Health & Welfare Fund v. Philip Morris, Inc.,* 62 F.Supp.2d 236 (D.Mass.1999), for their argument that given that the risks of smoking have been common knowledge for decades, the Plaintiff cannot allege that Evans' reliance on Lorillard's alleged misrepresentations was reasonable. In *Massachusetts Laborers' Health & Welfare Fund,* the plaintiff's complaint acknowledged that, "starting in the 1950s and continuing to the present, the results of research linking smoking to cancer, emphysema, and other health problems have been well publicized." 62 F.Supp.2d at 242. In response to this "research already available to the public that indicated smoking was dangerous[,]" *id.,* the defendants "engaged in a conspiracy to conceal the harmful effects of smoking on health." *Id.* at 239. Therefore, it was "a fundamental premise of the plaintiff's claims that smoking is hazardous to health and that the defendants were trying to obscure that truth. *It follows that those who warned of the health risks of smoking must have been speaking the truth.*" *Id .* at 243 (emphasis added).

In that case, the plaintiff's complaint also indicated that the plaintiff was "confronted with inconsistent or contradictory representations...." *Id.* at 242. In such a situation, the plaintiff could not "reasonably rely on one side of the controversy without attempting to resolve the inconsistency or contradiction." *Id.* at 242–243. The plaintiff's complaint offered "no basis for concluding that it was *reasonable* for the plaintiff to rely on the defendants' information as opposed to the contradictory information from other sources also in the public domain." *Id.* at 243 (emphasis in original). The absence of this allegation of reasonableness in the complaint caused the court to dismiss the plaintiff's claims of fraud, misrepresentation, and deceptive trade practices rather than take judicial notice of the hazards of smoking. *Id.*

Although the Plaintiff in this case has alleged that the Defendants have known about the hazards and addictiveness of cigarette smoking, he has not contended that Evans knew of this information, or that it was in the public domain. See Complaint, ¶ 43 (alleging public access to material facts about smoking, health, and addiction were "exclusively within [Lorillard's] control"). *Massachusetts Laborers' Health & Welfare Fund* therefore does not support the Defendants' request that this court take judicial notice.

This court is also not persuaded by *Wolf* to take judicial notice that the hazardous and addictive natures of cigarette smoking has been common knowledge at least since 1957. Like in *Massachusetts Laborers' Health & Welfare,* the plaintiff's complaint in *Wolf* "acknowledge[d] widespread reporting of the hazards of cigarette smoking beginning in the late 1950's." Civil No. 99–1260B, at 15. Unlike in *Massachusetts Laborers' Health & Welfare,* however, the court decided to take "judicial notice of the fact that the smoking of cigarettes poses serious health risks, including the risk of addiction, and that such risks have been generally known and recognized by the public as far back as the late 1930's...." *Id.* at 8. The court did not base this decision solely on the allegation in the plaintiff's complaint regarding the widespread reporting of the hazards of smoking. See *id.* at 15. Rather, the court also relied on "[well-]reasoned decisions ... [that] conclude[d], as a matter of law, that the dangers of smoking have long been common knowledge." *Id.* at 7, citing *Cipollone,* 505 U.S. at 513, *Allgood v. R.J. Reynolds Tobacco Co.,* 80 F.3d 168, 172 (5th Cir.1996), *Roysdon v. R.J. Reynolds Tobacco Co.,* 849 F.2d 230, 236 (6th Cir.1988), *Insolia v. Philip Morris, Inc.,* 53 F.Supp.2d 1032, 1037, 1040–1041 (W.D.Wis.1999), [16] *Paugh v. R.J. Reynolds Tobacco Co.,* 834 F.Supp. 228, 231 (N.D.Ohio 1993), *Ploch v. City of St. Louis,* 138 S.W.2d 1020, 1023 (Mo.1940), *State v. Olson,* 144 N.W. 661, 667 (N.D.1913).

***10** In *Johnson I,* similar to *Wolf,* the court held that it was "firmly convinced that the risks of smoking were quite clear to the population at large before 1969, ... [and that] the widespread publicity surrounding the 1964 report by the Surgeon General's advisory committee concerning the health risks of smoking was sufficient to charge all reasonable consumers with general knowledge of such health risks at least as of 1964." *Johnson I,* 122 F.Supp.2d at 204 (internal citations omitted), citing *Guilbeault v. R.J. Reynolds Tobacco Co.,* 84 F.Supp.2d 263, 273 (D. R.I.2000). The court took judicial notice in response to the plaintiff's allegation in his complaint that " '[a]t all times relevant to this matter, the ordinary consumer ... did not, in the exercise of ordinary diligence, know of the likelihood or the severity of the risks from using tobacco products....' " *Id.* (alteration and ellipses in original). The court concluded that the plaintiff's "claim that nearly all Americans were unaware of the health risks associated with smoking prior to 1969[was] simply without foundation ." *Id.*

This court does not accept, based on this court's (Lauriat, J.) holding in *Wolf* or the District Court's holding in *Johnson I,* that the health hazards and addictiveness of cigarette smoking have been common knowledge to Evans since a certain date. First, Evans began smoking Newport cigarettes sometime after 1957. This date is prior to the 1964 report of the Surgeon General's advisory committee stating that cigarette smoking is a health hazard, *Cipollone,* 505 U.S. at 513, and prior to the enactment of the 1965 version of the FCLAA mandating warnings on cigarette packages. *Id.* at 514. Second, the Plaintiff alleges that "[s]oon after ... Evans began smoking Newport cigarettes, she became addicted to smoking and struggled unsuccessfully to overcome a lifelong addiction to Newport cigarettes." Complaint, ¶ 21. Thus, by the time that these two events—the advisory committee's report and the requirement of warning labels on cigarette packages—occurred, Evans was already addicted. See, e.g., *Inzerilla v. The Am. Tobacco Co.,* Civil No. 11754/96, 2000 WL 34016364, *6 (N.Y.Sup.Ct. Oct. 27, 2000) (Berke, J.) (rejecting defendant's argument that "decedent knew or should have known of the carcinogenic risk of smoking from at least" the time when labels were required on cigarette packages "because it overlooks the element of addiction .... [meaning that] decedent allegedly learned of the carcinogenic properties of cigarettes at a time when addiction allegedly prevented her from acting upon that knowledge").

Moreover, even if this court were persuaded "to charge *all reasonable consumers* with general knowledge of such health risks" as of a certain date, see *Johnson I,* 122 F.Supp.2d at 204 (emphasis added), Evans was a child at the time she received Newport cigarettes at the giveaways and "a young teenager" when she began to smoke. See Complaint, ¶ 17. This court is not willing to hold that Evans is the "reasonable consumer" given the age at which she began to smoke, and given the explicit allegations in the Plaintiff's complaint that when Evans began smoking "and for years thereafter," Evans was unaware of the hazardous and addictive nature of cigarette smoking. *Id.* ¶ 19; see *id.* ¶¶ 27–28 (contending that Evans was influenced and confused by Lorillard's "campaign of misinformation" intended "to mislead the public about the health risks of smoking and to create controversy in the minds of smokers about the link between smoking and human disease"); see also *Fairneny,* 422 Mass. at 470 (requiring court to accept facts in complaint as true for purposes of motion to dismiss); *New England Insulation*

Co., 26 Mass.App.Ct. at 29 (holding that, on motion to dismiss, court must give complaint generous reading and give plaintiff benefit of doubt). Consequently, at this point in the litigation, this court will not take judicial notice of the fact that the hazards and addictiveness of cigarette smoking have been common knowledge to Evans, at least since she began smoking. [17]

III. ***The Plaintiff's Claims***

11** The Defendants also contend that the Plaintiff's complaint against them must be dismissed for failure to state a claim upon which relief can be granted because the Plaintiff cannot satisfy the essential elements of the claims. For the following reasons, the Defendants' motions to dismiss on these grounds are ***ALLOWED in part and ***DENIED*** in part.

A. *Count I—Fraud and Misrepresentation*

To state a claim for fraud and misrepresentation, the Plaintiff must establish " 'that [Lorillard] made a false representation of a material fact with knowledge of its falsity for the purpose of inducing the [P]laintiff to act thereon, and that the [P]laintiff relied upon the representation as true and acted upon it to his damage.' " *Danca v. Taunton Savs. Bank,* 385 Mass. 1, 8 (1982), quoting *Barrett Assocs. v. Aronson,* 346 Mass. 150, 152 (1963); *Stolzoff v. Waste Sys. Int'l,* 58 Mass.App.Ct. 747, 759 (2003). Failing to disclose a material fact is also actionable as a misrepresentation. See *Danca,* 385 Mass. at 8. Lorillard argues that the Plaintiff has not satisfied the particularity requirements of Mass. Rule Civ. P. 9(b), and that the Plaintiff has not stated a claim for relief because he cannot establish that Evans relied upon the alleged representation as true. See *Equipment & Sys. for Indus ., Inc. v. Northmeadows Constr. Co., Inc.,* 59 Mass.App.Ct. 931, 932 (2003) (holding that although " 'plaintiffs need only surmount a minimal hurdle to survive a motion to dismiss for failure to state a claim[,]'.... [R]ule 9(b) heightens the pleading requirements placed on plaintiffs who allege fraud and deceit").

As an initial matter, the Plaintiff alleged that Lorillard promised the public, including Evans, to discover and disclose "the truth about cigarettes" in order to induce the public to trust Lorillard. *Id.* ¶ 45. "A statement on which liability for fraud may be based must be one of fact; it may not be one of ... matters promissory in nature." *Stolzoff,* 58 Mass.App.Ct. at 759. Lorillard's promise is therefore not actionable as a misrepresentation, and Lorillard's motion to dismiss Count I is ***ALLOWED*** as to this allegation.

1. *Mass. R. Civ. P. 9(b)*

Rule 9(b) of the Massachusetts Rules of Civil Procedure provides that, "[i]n all averments of fraud, mistake, duress or undue influence, the circumstances constituting fraud, mistake, duress or undue influence shall be stated with particularity." In contrast, claims of "[m]alice, intent, knowledge, and other condition of mind of a person may be averred generally." Mass. R. Civ. P. 9(b). The allegations of fraud must be particular enough so "[t]here can be no question that the defendants were warned adequately concerning the particular statements which constituted the alleged fraud so that they could prepare their defense." *Friedman v. Jablonski,* 371 Mass. 482, 488–489 (1976). The Plaintiff must "allege who made the statements, their falsity[,] .... to whom the statements were made, the period during which they were made, that they were made to induce [Evans'] reliance, and that [Evans] did rely to [her] harm." *Id.* at 488.

***12** " '[A]lthough a bare statement that defendant's "fraudulent conduct harmed" plaintiff ..., standing alone, is insufficient, [r]ule 9(b) must be read with the [r]ule 8(a) mandate that the pleading contain a short and plain statement of the claim.' " *Lazzaro v. Holladay,* 15 Mass.App.Ct. 108, 110–111 (1983) (ellipses and second and third alterations in original), quoting James W. Smith & Hiller B. Zobel, Rules Practice, § 9.2 (1974). " 'Rule 9(b) does not require the claimant to set out in detail all of the facts upon which he bases his claim, nor does it require him to plead detailed evidentiary matter.' " *Id.,* quoting Smith & Zobel, supra. At the same time, however, "an oblique remark in the complaint suggest[ing]" the representation at issue was fraudulent does not satisfy Rule 9(b). *Charbonnier v. Amico,* 367 Mass. 146, 152 (1975).

The Plaintiff has alleged that at least since Evans first began smoking Newport cigarettes, Lorillard knowingly concealed information from the public, including Evans, in order to mislead and confuse the public about the hazardous nature of smoking Newport cigarettes. Complaint, ¶ 26. Although a failure to disclose can constitute a misrepresentation, the Plaintiff's allegation that Lorillard failed to make these disclosures "at the time [Evans] began smoking and for many years thereafter[,]" *id.,* is too vague to satisfy Rule 9(b)' s particularity requirement because it does not provide Lorillard with adequate warning concerning the omissions that constitute the alleged fraud so that it can prepare its defense. *Friedman,* 371 Mass. at 488. Lorillard's motion to dismiss Count I is therefore ***ALLOWED*** as to this allegation that Lorillard failed to make material disclosures to Evans during the time she was a Newport cigarette smoker.

The Plaintiff further alleges that, "[a]t all times relevant to this Complaint, Lorillard knowingly made material misrepresentations and/or omissions to the public, including ... Evans about the link between smoking and various human diseases, and, in particular, misrepresented that nicotine is addictive." Complaint, ¶ 22. "Rather than acknowledging what it has known for years—namely, that the primarily, if not sole, function of nicotine is to provide a pharmacological effect on the smoker that leads to addiction —Lorillard has instead used various misleading euphemisms to conceal the true role of nicotine, such as 'satisfaction,' 'impact,' 'strength,' 'rich aroma,' and 'pleasure.' " *Id.* ¶ 23. Moreover, "very recently, top Lorillard executives have claimed falsely that nicotine is important in cigarettes for taste." *Id.* These allegations, too, do not satisfy Mass. R. Civ. P. 9(b)' s particularity requirement. The phrase "[a]t all times relevant to this complaint," *id.* ¶ 22, is too vague as that time period spans from 1957, when Evans first began attending Lorillard's free giveaways, to 2002, when Evans died. The phrase "very recently" similarly fails to provide the requisite particularity. See *id.* ¶ 23. [18] Additionally, the Plaintiff's list of "euphemisms" that Lorillard allegedly used to mislead the public also fail to satisfy Mass. R. Civ. P. 9(b) because, again, the Plaintiff does not indicate "the period during which they were made...." *Friedman,* 371 Mass. at 488. Lorillard's motion to dismiss these allegations is therefore ***ALLOWED.***

***13** The Plaintiff has also alleged that Lorillard ran print advertisements of attractive people smoking Newport cigarettes along with the phrase " 'fresher than any other menthol cigarette.' " Complaint, ¶ 18. The Plaintiff further alleged that the combination of the advertisement and the statement therein left Evans "confused about the health risks of smoking and unconvinced that smoking caused human disease until her heart attack in 1984." *Id.* ¶ 28. [19] Therefore, as a result of Lorillard's misinformation and failure to disclose the hazardous nature of smoking Newport cigarettes, Evans smoked Newport cigarettes for forty years. Evans died of lung cancer in 2002. According to the allegations in the Plaintiff's complaint, these print advertisements ran "when [Evans] was a teenager." *Id.* ¶ 18.

Evans was a teenager between the years 1961 and 1967. [20] This allegation is particular enough for Lorillard to prepare a defense as it specifies the statement, the locations of the statement, and the time range during which the advertisements containing that statement appeared in the magazines. See *Friedman,* 371 Mass. at 488–489. Accordingly, Lorillard's motion to dismiss Count I as to this allegation is ***DENIED*** because the allegation satisfies the particularity requirement of Mass. R. Civ. P. 9(b).

Finally, the Plaintiff alleges that in 1994 Tisch testified before Congress that nicotine is not addictive. This allegation similarly satisfies Mass. R. Civ. P. 9(b) as it sets forth who made the false statement intended to mislead the public, including Evans, and when the statement was made. Lorillard's motion to dismiss Count I is therefore ***DENIED*** as to this allegation.

2. *Reasonable Reliance*

As noted above, one of the required elements of a claim for fraud and misrepresentation is that the plaintiff "reasonably relied" on the defendant's misrepresentations. See *Robertson v. Gaston Snow & Ely Bartlett,* 404 Mass. 515, 523 (1989). Given this court's conclusions, above, this argument is only relevant with respect to Evans' reliance on Tisch's 1994 comments before Congress, Complaint, ¶ 3, and Evans' reliance on Lorillard's magazine advertisements showing attractive African–American men and women smoking Newport cigarettes and the phrase "fresher than any other menthol cigarette .' " *Id.* ¶ 18. "The question whether a party's reliance on a promise by another is reasonable is often a question of fact, but in an appropriate case can present an issue of law. This is especially so when the parties involved are of relatively equal knowledge and sophistication." *Cataldo Ambulance Serv., Inc. v. Chelsea,* 426 Mass. 383, 387 (1998); see *Moran v. Gala,* 66 Mass.App.Ct. 135, 141 (2006).

The Plaintiff explicitly alleged in his complaint that "Lorillard's knowledge of the material facts about smoking, health and addiction was vastly superior to the knowledge of ... Evans and other members of the general public who purchased, used and consumed Lorillard's cigarettes. Public access to these facts known by Lorillard has been exclusively within its control." Complaint, ¶ 43. [21] For purposes of a motion to dismiss pursuant to Mass. R. Civ. P. 12(b)(6), this court takes this allegation as true. *Fairneny,* 422 Mass. at 470. Therefore, as it is not "beyond doubt that the [P]laintiff can prove ... [a] set of facts in support of his claim which would entitle him to relief[,]' " Lorillard's motion to dismiss Count I for failure to state a claim of reasonable reliance is ***DENIED.*** *Nader,* 372 Mass. at 98, quoting *Conley,* 355 U.S. at 45–46.

B. *Count II—Voluntary Undertaking of a Duty*

***14** In Count II, the Plaintiff claims that Lorillard voluntarily undertook the duty of researching tobacco use and human health and of accurately and fully disclosing the results of its research to the smokers of Lorillard-brand cigarettes, including Evans. By failing to exercise reasonable care in performing that duty, the Plaintiff further alleges, Evans suffered physical harm beyond that which she would have experienced if Lorillard had not voluntarily undertaken this duty. Lorillard seeks to dismiss this claim because the Plaintiff cannot establish the essential elements of the claim.

" 'If a person voluntarily assumes a duty or undertakes to render services to another that should have been seen necessary for her protection, that person may be liable for harm caused because of the negligent performance of his undertaking.' " *Davis v. Westwood Group,* 420 Mass. 739, 746 (1995), quoting *Thorson v. Mandell,* 402 Mass. 744, 748 (1988). The mere fact that Lorillard voluntarily undertook the service of researching tobacco use and human health "is not sufficient to impose a duty. It must also be shown that either (a) the failure to exercise due care increased the risk of harm, or (b) the harm is suffered because of [Evans'] reliance on the undertaking." *Mullins v. Pine Manor Coll.,* 389 Mass. 47, 53–54 (1983); see Restatement (Second) of Torts § 323 (1965). [22] Where the voluntary undertaking is gratuitous, however, the only duty owed is "the duty to refrain from gross negligence." *Kolofsky v. Heath,* 370 Mass. 856, 856 (1976), citing *Wheatley v. Peirce,* 354 Mass. 573, 576 (1968).

> " 'Gross negligence is substantially and appreciably higher in magnitude than ordinary negligence. It is materially more want of care than constitutes simple inadvertence. It is an act or omission respecting legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care.... It is a heedless and palpable violation of legal duty respecting the rights of others.... Ordinary and gross negligence differ in degree of inattention, while both differ in kind from wilful and intentional conduct which is or ought to be known to have a tendency to injure.' "
> *Christopher v. Father's Huddle Café, Inc.,* 57 Mass.App.Ct. 217, 230–231 (2003), quoting *Altman v. Aronson,* 231 Mass. 588, 591–592 (1919).

There is no need to determine whether the Plaintiff has stated a claim of gross negligence. The duties that Lorillard allegedly undertook were

> "to accept an interest in the public's health as a basic and paramount responsibility; to cooperate closely with those who safeguard the public health; to aid and assist the research effort into all aspects of tobacco use and human health; to continue to research and otherwise undertake all possible efforts to learn all the facts and to discover the truth about smoking and health; and finally, to disclose to the American public ... complete and accurate information about the effects of cigarette smoking on human health."

***15** Complaint, ¶ 51. The Plaintiff's complaint further asserts that Lorillard undertook this duty "to render such services [to research and disclose] recognizing that they were necessary for the protection of smokers of Lorillard-brand cigarettes, including ... Evans." Complaint, ¶ 52. Taking the allegations set forth in the complaint as true, *Fairneny,* 422 Mass. at 470, the duty Lorillard voluntarily undertook was not gratuitous but for the protection of smokers of Newport cigarettes, including Evans. See *Davis,* 420 Mass. at 746.

The Plaintiff has set forth sufficient facts in his complaint to state a claim that Lorillard failed to disclose the results of its research and that, as a result of this failure to disclose, Evans did not understand that cigarettes were hazardous and addictive and that the menthol in Newport cigarettes made them more hazardous than non-mentholated cigarettes. Therefore, Lorillard's motion to dismiss Count II is ***DENIED.*** [23]

C. *Count III—Breach of Warranty*

In Count III, the Plaintiff alleges that the Defendants breached their implied warranty of merchantability. Pursuant to G.L. c. 106, § 2–314, "a warranty that the goods shall be merchantable is implied in a contract for the sale if the seller is a merchant with respect to goods of that kind." G.L. c. 106, § 2–314(1). For goods to be "merchantable" within the meaning of the statute, they must be "fit for the ordinary purposes for which such goods are used...." *Id.* § 2–314(2)(c).

Massachusetts equates "a breach of the implied warranty of merchantability that goods be 'fit for the ordinary purposes for which such goods are used,' G.L. c. 106, § 2–314(2)(c), with the sale of an 'unreasonably dangerous' product" as set forth in Restatement (Second) of Torts § 402A(1). [24] *Commonwealth v. Johnson Insulation,* 425 Mass. 650, 660 (1997) (internal citations in original); see *Haglund v. Philip Morris Inc.,* 446 Mass. 741, 746 (2006) ("Warranty liability is ... 'congruent in nearly all respects with the principles expressed in Restatement (Second) of Torts § 402A (1965).'"). "A product may be unreasonably dangerous because of a defect in design.... Alternatively, a product may be considered to be unreasonably dangerous because of the absence of an adequate warning, sufficient to alert those who may be sensitive to the product and to allow users to balance the risk of harm against the product's social utility." *Johnson Insulation,* 425 Mass. at 661; see *Haglund,* 446 Mass. at 747 ("Warranty liability may be premised either on the failure to warn ... or ... on defective design.").

The Plaintiff alleges that the Defendants breached the implied warranty of merchantability both by a design defect and an inadequate warning. First, the Plaintiff asserts that Newport cigarettes were defective and unreasonably dangerous to consumers such as Evans as a result of the dangerous levels of tar, nicotine, and other substances they contained. Had the Defendants adopted a reasonable alternative design, the Plaintiff further alleges, they could have avoided or, at the least, reduced the foreseeable risks the Newport cigarettes posed. Second, the Plaintiff contends that the Defendants breached this warranty by failing to give consumers an adequate warning, prior to June 30, 1969, of the health hazards and addictive properties of Newport cigarettes. The Defendants argue that, given the fact that the risks of smoking have been well-known since the time Evans began smoking, there is no duty to warn.

1. *Design Defect*

***16** The "essence" of a design defect theory "is that all products of a particular type are defective when they leave the manufacturer." *Smith v. Ariens Co.,* 375 Mass. 620, 626 (1978). Warranty liability as a result of a design defect therefore "focuses on the product's features, not the seller's conduct." *Haglund,* 446 Mass. at 747. Thus, "[t]o show that a defect is attributable to a manufacturer in a design defect action, therefore, the plaintiff must show that the defect existed at the time the product left the manufacturer." *Smith,* 375 Mass. at 626; see *Back v. Wickes Corp.,* 375 Mass. 633, 642 (1978) (stating that factors to be considered in evaluating adequacy of product's design include " 'the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design' "). Liability results if the " 'conscious design choices fail to anticipate the reasonably foreseeable risks of 'ordinary' use." *Haglund,* 446 Mass. at 747–748, quoting *Back,* 375 Mass. at 642. The Defendants argue that the Plaintiff cannot state a design defect claim because the Plaintiff cannot establish that the Newport cigarettes Evans smoked were unreasonably dangerous, that there was a unique defect in the Newport cigarettes Evans smoked, and that there is a technically feasible alternative design.

Under the heading "Sale of Defective and Unreasonably Dangerous Products" in the complaint, the Plaintiff expressly states that the Newport cigarettes that the Defendants sold or distributed contained "disease-causing ingredients and nicotine in addictive amounts...." Complaint, ¶ 35. Moreover, the Plaintiff alleges that "Newport cigarettes are an inherently, abnormally and unreasonably dangerous product.... Defendants knew or should have known of the dangers inherent in the use of Newport cigarettes, and that ... Evans would be harmed by the foreseeable and intended use of these cigarettes." *Id.* ¶ 37. Newport cigarettes were unreasonably dangerous "because such cigarettes were carcinogenic, addictive, and contained dangerous levels of tar, nicotine and other substances." *Id.* ¶ 60.

In *Kyte v. Philip Morris Inc.,* the plaintiff's claim that defendant breached the implied warranty of merchantability was "not based on the proposition that all cigarettes are inherently defective, but rather on a claim that, because of their defective design, ... [the defendant's] cigarettes were inherently carcinogenic and addictive." 408 Mass. 162, 171 (1990). The fact that the plaintiff's complaint failed to "spell out what the design defect was that made [the defendant's] ... cigarettes carcinogenic and addictive" was not fatal to the plaintiff's claim, and the court denied the defendant's motion for summary judgment. *Id.;* see also *Johnson I,* 122 F.Supp.2d at 205 ("Although the overall 'thrust' of [plaintiff's] negligent design claim may be characterized as alleging that cigarettes as a whole are dangerous, it clearly pleads that [defendant's] tobacco was 'bad'.... [Thus, plaintiff] has ... sufficiently pled design defects specific to [defendant's] cigarettes as opposed to cigarettes in general."). [25] Here, too, the Plaintiff's claim of breach of implied warranty of merchantability does not rely solely on the defects inherent in all cigarettes; rather, the Plaintiff claims that the dangerous levels of tar, nicotine, and other substances in Newport cigarettes constitute a design defect. This allegation is more detailed and "spell[ed] out" than the plaintiff's claim in *Kyte* on which the court declined to grant the defendant's motion for summary judgment. See 408 Mass. at 171; see also *Johnson I,* 122 F.Supp.2d at 205 (relying on *Kyte's* reasoning).

17** Additionally, "a plaintiff alleging negligent design must show the existence of a safer alternative design that can be implemented without undue cost." *Johnson I,* 122 F.Supp.2d at 206, citing *Colter v. Barber–Greene Co.,* 403 Mass. 50, 57 (1988). Although the plaintiff in *Johnson I* did not "specify any such alternative designs," the plaintiff "implie[d] that there was a safer alternative design available to [the defendant]" by listing in his complaint the several design defects in the defendant's cigarettes. *Id.* Similarly, the Plaintiff in this case has not specifically alleged safer alternative designs the Defendants could have implemented, but he implies that a safer alternative "presumably would have reduced tar and other carcinogens...." *Id.;* see *Fairneny,* 422 Mass. at 470 (holding that, on motion to dismiss, court must accept ast true complaint's well-pleaded factual allegations and any reasonable inferences in plaintiff's favor that may be drawn therefrom"). Accordingly, the Defendants' motions to dismiss Count III are ***DENIED insofar as Count III alleges that Newport cigarettes are defectively designed because of the high levels of tar, nicotine, and other substances that render them carcinogenic and addictive.

The Plaintiff's complaint also alleges that Lorillard "added menthol to its Newport cigarettes to facilitate the initiation of smoking and the development of a smoking habit in children[,]" and that Evans was "unaware until after her heart attack in 1984, that the addition of menthol made Newport cigarettes more dangerous to her health than non-mentholated cigarettes." Complaint, ¶ 20. The court in *Johnson v. Brown & Williamson Tobacco Corp.* ("*Johnson II* ") held that the plaintiff's argument that the defect was the presence of menthol failed "because the addition of menthol is the purpose and intention of menthol cigarettes, not a defect. [The defendant's] cigarettes are advertised as containing menthol and consumers buy them with full knowledge of that fact." 345 F.Supp.2d 16, 21 (D.Mass.2004); see Restatement (Second) of Torts § 402A, cmt. g.[26] The Defendants urge this court to adopt this holding and dismiss the Plaintiff's allegation.

This court declines to follow the First Circuit's holding in *Johnson II.* 345 F.Supp.2d at 21. That court rendered its decision after discovery, and with the benefit of a full summary judgment record that included expert opinions. See *id.* But see *Johnson I,* 122 F.Supp.2d at 205 (denying defendant's motion to dismiss plaintiff's design defect claim). Moreover, as discussed above, this court has declined to take judicial notice as to the hazardousness and addictiveness of cigarettes. Thus, at this point in the litigation, before there has been discovery and the retention of expert testimony, this court denies the Defendants' motions to foreclose the Plaintiff from proceeding on this claim. The Defendants' motions to dismiss Count III are therefore ***DENIED.***

2. *Failure to Warn*

***18** Section 2(c) of the Restatement (Third) of Torts: Products Liability § 2(c) (1998)

> "reaffirms the principle expressed in Restatement (Second) of Torts, ... at § 402A comment j, by stating that a product 'is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings ... and the omission of the instructions or warnings renders the product not unreasonably safe.' "

Vassallo v. Baxter Healthcare Corp., 428 Mass. 1, 21 (1998) (second ellipses in original). The Plaintiff limits his failure to warn claim to the period prior to June 30, 1969, see 15 U.S.C. 1334(b), alleging that the Defendants "failed to give users and consumers of Newport cigarettes ... an adequate warning of the health hazards and addictive properties of Newport cigarettes, all of which were known or should have been known to Defendants." Complaint, ¶ 61. The Plaintiff has stated a claim for relief in Count III as to this issue, therefore the Defendants' motions to dismiss Count III insofar as it alleges a breach of warranty as a result of a failure to warn prior to June 30, 1969, are ***DENIED.***

D. *Count IV—Public Nuisance*

In Count IV, the Plaintiff alleges that the Newport cigarette giveaways that Lorillard conducted around the area where Evans grew up constituted a significant interference with the public health and safety in violation of G.L. c. 270, § 6, and were therefore a public nuisance. Lorillard seeks to dismiss this claim arguing that the Plaintiff has no private right of action under G.L. c. 270, § 6, and that the Plaintiff has not established that Lorillard interfered with a legally recognizable public right.

" 'A nuisance is public when it interferes with the exercise of a public right by directly encroaching on public property or by causing common injury.' " *Town of Hull v. Massachusetts Port Auth.,* 441 Mass. 508, 517 (2004), quoting *Connerty v. Metropolitan Dist. Comm'n,* 398 Mass. 140, 148 (1986), abrogated on other grounds by *Jean W. v. Commonwealth,* 414 Mass. 496 (1993). "To maintain a public nuisance action, a plaintiff must show that the public nuisance has caused some special injury of a direct and substantial character *other than that which the general public shares.*" *Connerty,* 398 Mass. at 148 (emphasis added), citing *Stop & Shop Cos. v. Fisher,* 387 Mass. 889, 894, 899 (1983). If the plaintiff does allege particularized harm, the plaintiff himself can "recover for injuries caused by a public nuisance...." *Id.* "Without such a particularized injury, however, the remedy for public nuisance must be sought by public authorities." *Id.*

The Plaintiff has demonstrated that Lorillard's conduct interfered with a public right, specifically G.L. c. 270, § 6,[27] which prohibits the distribution of cigarettes to any person under the age of eighteen. In *Planned Parenthood League of Mass. v. Bell,* the court held that the plaintiff "sufficiently state[d] a case in public nuisance" because it alleged that the defendant had interfered with the rights of its patients to obtain an abortion, a right " 'recognized as a substantive right under both the Federal and State Constitutions.' " 424 Mass. 573, 578 (1997), quoting *Planned Parenthood League of Mass., Inc. v. Operation Rescue,* 406 Mass. 701, 707 (1990). At this point in the litigation, the Plaintiff has therefore satisfied this burden.

***19** The Plaintiff has also sufficiently alleged particularized harm. In *Connerty,* the court found that the plaintiff "alleged facts sufficient to indicate he ... suffered harm more particularized than the harm suffered by the community at large." *Id.* Specifically, as a licensed clam digger, he "suffered harm to his livelihood ... [as] he was deprived of income by the [defendant's] pollution of the waters...." *Id.* at 148–149. In contrast, "the ordinary citizen was merely deprived of a cleaner harbor for a period of time." *Id.* at 149. Here, the Plaintiff has also alleged facts sufficient to state a claim that Evans suffered particularized harm. While the harm to the public was the distribution of Newport cigarettes to minors, Evans developed injuries to her health and eventually died of cancer. Thus, the Plaintiff has satisfied this burden as well.

Consequently, Lorillard's motion to dismiss Count IV is ***DENIED.***

E. *Count V—Battery*

In Count V, the Plaintiff claims that Lorillard's conduct constitutes a battery. Lorillard seeks to dismiss this count, arguing that Massachusetts law does not permit a battery claim based on lack of consent, and that the Count V lacks the specificity required for a claim based upon an allegation of concealment. " 'An actor is subject to another for battery if [a] he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and [b] a harmful contact with the person of the other directly or indirectly results....' " *Waters v. Blackshear,* 412 Mass. 589, 590 (1992) (alterations in original), quoting Restatement (Second) of Torts § 13 (1965). Thus, to state a claim for civil battery, the Plaintiff must allege that Lorillard's intentional act resulted in either direct or indirect contact with Evans that was either harmful or offensive.

Contact is harmful " 'regardless of consent. But an offensive ... [contact] is so only because of lack of consent.' " *Commonwealth v. Cohen,* 55 Mass.App.Ct. 358, 359 (2002), quoting *Commonwealth v. Burke,* 390 Mass. 480, 483 (1983) ("[I]t is the nonconsensual imposition upon one's person that makes a touching offensive and it is the offensiveness that makes the touching a battery."); see also *Commonwealth v. Parker,* 25 Mass.App.Ct. 727, 731 n.8 (1988) ("Physically harmful touching is a battery, and consent is immaterial. However, a nonharmful touching is a battery only if there is no consent."). The contact at issue in this case is Evans' smoking Newport cigarettes. Given her health problems arising from her addiction to Newport cigarettes, the contact was physically harmful. Evans' consent is therefore irrelevant.

Harmful or offensive contact is " 'intended if the act is done for the purpose of accomplishing the result or with knowledge that to a substantial certainty such a result will ensue....' " *Waters,* 412 Mass. at 590, quoting Harper F. James, Jr., & O.S. Gray, Torts § 3.3, at 272–273 (2d ed.1986). The Plaintiff has alleged that Lorillard added menthol to cigarettes in order to develop smoking habits in children. Complaint, ¶ 20. Lorillard therefore knew that adding menthol to cigarettes made the cigarettes more addictive.

***20** The "contact" that results from the act " 'may be direct, as by striking another, or it may be indirect, as by setting in motion some force or instrumentality with the intent to cause injury.' " *Cohen,* 55 Mass.App.Ct. at 359, quoting *Commonwealth v. Dixon,* 34 Mass.App.Ct. 653, 654 (1993). Lorillard's act that resulted in Evans' sustaining physical harm was its addition of menthol to Newport cigarettes. By adding menthol to Newport cigarettes, Lorillard set in motion an instrumentality—Newport cigarettes, containing an ingredient that allegedly rendered them more addictive than non-mentholated cigarettes—with the intent to cause injury.

The Superior Court case, *Burke v. Chatbar, Inc.,* Civil No. 03–00423, 2004 WL 3218001 (Barnstable Super. Ct. Nov. 18, 2004) (Connon, J.), is instructive as to this claim. In *Burke,* the plaintiff sued the defendant employer and two co-workers for, in part, battery as a result of one of the defendant co-worker's actions. *Id.* at *1. Specifically, the plaintiff alleged that the defendant committed a battery by intentionally serving the plaintiff a sandwich containing a fried dish towel. *Id.* As a result of ingesting this "sandwich," the plaintiff went to the hospital where he was treated for nausea. *Id.* The court found that these facts were sufficient to deny the defendant's motion for summary judgment on that claim. *Id.* at *6. *Burke* serves as persuasive authority for the argument that a plaintiff has alleged a battery where the plaintiff has ingested something the defendant has given her when the defendant knows the item is physically harmful and the plaintiff does not know that the item is physically harmful.

The Plaintiff has accordingly stated a cause of action of civil battery, and Lorillard's motion to dismiss Count V is ***DENIED.***

F. *Count VI—Violations of G.L. c. 93A, § 9*

In Count VI, the Plaintiff alleges that the Defendants violated G .L. c. 93A, § 9, by Lorillard's misrepresentations of material facts with respect to the addictive and hazardous nature of Newport cigarettes, by Lorillard's failure to disclose facts to Evans which might have influenced her not to purchase Newport cigarettes, and by the Defendants' breach of the implied warranty of merchantability through their manufacture, distribution, and sale of Newport cigarettes in a defective condition that was unreasonably dangerous to consumers, including Evans. The Defendants first argue that this claim must be dismissed for the same reasons it argued that Counts I and III must be dismissed. While this court agrees that Count VI is based on conduct alleged in Counts I and III, this court found that both of those counts are viable. Therefore, the Defendants' motions to dismiss Count VI on those grounds are ***DENIED.***

The Defendants also argue that Count VI must be dismissed to the extent it alleges conduct that occurred prior to the effective date of G.L. c. 93A. "The effective date of G.L. c. 93A, § 2, inserted by St.1967, c. 813, § 1 (approved December 26, 1967), is March 26, 1968; and the effective date of G.L. c. 93A, § 9, inserted by St.1969, c. 960 (approved August 13, 1969), is November 13, 1969." *Lewis v. Ariens Co.,* 434 Mass. 643, 645 n.3 (2001). Therefore, the Defendants argue, any conduct that the Plaintiff alleges occurred prior to November 13, 1969, is not actionable under G.L. c. 93A.

***21** " '[A]ll statutes are prospective in their operation, unless an intention that they shall be retrospective appears by necessary implication from their words, context or objects when considered in the light of the subject matter, the pre-existing state of the law and the effect upon existent rights, remedies and obligations[.]' " *Goodwin Bros. Leasing, Inc. v. Nousis,* 373 Mass. 169, 173 (1977) (first alteration in original) quoting *Hanscom v. Malden & Melrose Gas Light Co.,* 220 Mass. 1, 3 (1914). Thus, " '[w]here it appears that the Legislature intended an act to be retroactive, this intent should be given effect in so far as the Massachusetts and Federal Constitutions permit.' " *Pielech v. Massasoit Greyhound, Inc.,* 441 Mass. 188, 192 (2004), quoting *St. Germaine v. Pendergast,* 416 Mass. 698, 702 (1993). "Where, however, the statute regulates practice, procedure or evidence, as distinguished from substantive rights, it will commonly be applied to actions already pending." *Id.,* citing *American Locomotive Co. v. Hamblen,* 217 Mass. 513, 515 (1914). It is undisputed that G.L. c. 93A concerns substantive rather than procedural rights and that the Legislature did not intend G.L. c. 93A to be retroactive.

As "the legislative intent is unequivocally clear ..., [G.L. c. 93A] ... operates prospectively, not retroactively." *Sentry Fed. Sav. Bank v. Co–Operative Central Bank,* 406 Mass. 412, 414 (1990). Accordingly, the Defendants' motions to dismiss Count VI are ***ALLOWED*** to the extent that Count VI concerns conduct that occurred prior to November 13, 1969. [28]

G. *Count VII—Negligence*

In Count VII, the Plaintiff alleges that the Defendants owed Evans a duty to exercise reasonable care but that they breached that duty by failing to warn and to make complete and accurate representations to the public, including

Evans, of the addictive and hazardous nature of Newport cigarettes, and by failing to exercise reasonable care in their manufacture, marketing, distribution, and sale of Newport cigarettes; in Lorillard's distributing Newport cigarettes to children, including Evans, at giveaways; and in Lorillard's marketing Newport cigarettes to children, including Evans. The Defendants argue that, insofar as Count VII is a claim for negligent design defect and negligent failure to warn, it should be dismissed for the same reasons as Count III; insofar as Count VII is a claim for negligent misrepresentation, the Plaintiff cannot establish Evans' reasonable reliance; insofar as Count VII is a claim for negligent entrustment, the Plaintiff cannot establish that Evans was ignorant of the dangers of smoking, and the Plaintiff has no private right of action under G.L. c. 270, § 6; and, insofar as Count VII is a claim for negligent marketing, it fails for the same reasons as Count V and negligent entrustment as it is duplicative of those claims.

1. *Negligent Failure to Warn and Negligent Design Defect*

***22** "[N]egligent failure to warn and failure to warn under breach of warranty are to be judged by the same standard: the reasonableness of the defendant's actions in the circumstances." *Hoffman v. Houghton Chem. Corp.,* 434 Mass. 624, 637 (2001). Moreover, "[it] is possible ... to bring a defective design claim predicated on a theory of negligence." *Haglund,* 446 Mass. at 747 n.9, citing *Uloth v. City Tank Corp.,* 376 Mass. 874 (1978). Furthermore, " '[a] defendant in a products liability case in this Commonwealth may be found to have breached its warranty of merchantability without having been negligent, but the reverse is not true.' " *Id.,* quoting *Colter,* 403 Mass. at 61. Thus, "[a] defendant cannot be found to have been negligent without having breached the warranty of merchantability." *Id.,* quoting *Colter,* 403 Mass. at 61.

Above, in its conclusion concerning Count III, the Plaintiff's breach of warranty claim, this court held that the Plaintiff can proceed on his design defect claim and on his failure to warn claim. Accordingly, insofar as Count VII duplicates the allegations in Count III, the Defendants' motions to dismiss Count VII are ***DENIED.***

2. *Negligent Misrepresentation*

"A claim for negligent misrepresentation is ordinarily one for a jury, unless the undisputed facts are so clear as to permit only one conclusion." *Nota Constr. Corp. v. Keyes Assoc., Inc.,* 45 Mass.App.Ct. 15, 20 (1998); see Restatement (Second) of Torts § 552(1), cmt. e (1977). "Negligent misrepresentation differs from an action for fraud because 'liability for misrepresentation does not require a showing that the defendant even knew that the statements made were false or that the defendant actually intended to deceive the plaintiff.' " *Marram v. Kobrick Offshore Fund, Ltd.,* 442 Mass. 43, 59 n.25 (2004), quoting *Kitner v. CTW Transp ., Inc.,* 53 Mass.App.Ct. 741, 749 (2002); see *Nota Constr. Co.,* 45 Mass.App.Ct. at 20 (listing reasonable reliance among elements of negligent misrepresentation). The Plaintiff has limited this claim of negligent misrepresentation to Lorillard only, see Complaint, ¶ 84(c), therefore the Defendants' motions to dismiss Count VII are ***ALLOWED*** insofar as it alleges that defendants Garber, Melhado, and Franklin made negligent misrepresentations.

In Count VII, the Plaintiff has alleged that "Lorillard failed to exercise reasonable care in making representations and providing complete and accurate information to the public, including ... Evans, about smoking, health and addiction...." *Id.* As discussed above, the Plaintiff has also alternatively alleged that Lorillard knew that its representations to the public, including Evans, regarding the harmfulness and addictiveness of cigarettes were false and that it intended to deceive its customers. See Mass. R. Civ. P. 8(e)(2) (permitting party to "set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses"). [29] In the absence of any indication to the contrary, this court presumes that the Plaintiff's claim of negligent misrepresentation refers to the same alleged statements on which the Plaintiff's Count I relies. See Complaint, ¶ 82 ("Plaintiff restates and incorporates herein [Count VII] the foregoing paragraphs 1–80 of his Complaint."). Consequently, for the same reasons set forth above with respect to the Plaintiff's Count I allegations, Lorillard's motion to dismiss Count VII is ***ALLOWED*** in part and ***DENIED*** in part.

3. *Negligent Entrustment*

23** "[I]n particular circumstances, a supplier may be liable for harm caused after the supplier has knowingly placed property in the hands of an incompetent person." *Kyte,* 408 Mass. at 169. A manufacturer, however, cannot be held "liable in negligence simply because some third party unlawfully placed that product in the hands of a minor and, as a result, the minor or some other person was harmed." *Id.* In his opposition to the Defendants' motions to dismiss, the Plaintiff explains that the challenged action that gives rise to this claim of negligent entrustment is Lorillard's giveaways of Newport cigarettes to minors, including Evans; the Plaintiff's complaint does not allege that the other Defendants had any involvement in these giveaways. Therefore, insofar as Count VII alleges negligent entrustment against defendants Garber, Melhado, and Franklin, those defendants' motions to dismiss Count VII are ***ALLOWED.

The Plaintiff alleges, therefore, that it is Lorillard itself that "knowingly placed property in the hands of an incompetent person." *Id.* The court in *Kyte* likens the placing of cigarettes in the hands of a minor to the sale of alcoholic beverages to a minor. *Id.,* citing *Michnik–Zilberman v. Gordon's Liquor, Inc.,* 390 Mass. 6, 10–11 (1983). In *Michnik–Zilberman,* the plaintiff alleged that the defendant liquor store sold liquor to a seventeen-year-old customer who, while driving after imbibing the liquor, struck and killed the plaintiff's husband. 390 Mass. at 7–8. "It is the rule of this Commonwealth that negligence on the part of a seller or supplier of alcoholic beverages may be shown by a sale or the furnishing of those beverages to a minor, as well as to an inebriated person, as each is proscribed by statute." *Id.* at 10, citing G.L. c. 138, §§ 34, 69. It is the sale of the alcoholic beverages to a minor that is the "evidence of negligence even if the minor is not intoxicated at the time of the transaction. It is the sale or furnishing alcohol itself which is critical." *Id.* (footnote omitted).

As noted above, "[w]hoever sells a cigarette, chewing tobacco, snuff or any tobacco in any of its forms to any person under the age of eighteen or, not being his parent of guardian, *gives* a cigarette, chewing tobacco, snuff or tobacco in any of its forms to any person under the age of eighteen" is in violation of G.L. c. 270, § 6, and subject to a fine. G.L. c. 270, § 6 (emphasis added). A free giveaway of cigarettes to persons under the age of eighteen therefore violates G.L. c. 270, § 6. See *id.* The court in *Kyte* held that the plaintiffs failed "to produce record support ... as to whether ... [defendant cigarette manufacturer] supplied cigarettes to minors through Store 24. [The defendant] produced record support for the proposition that it did not." *Kyte,* 408 Mass. at 170. For that reason, the court held that, as a matter of law, the plaintiffs could not prove their claim of negligent entrustment. *Id.* The court was therefore willing to recognize a cause of action of negligent entrustment based on the sale of cigarettes to minors.

24** Here, conversely, the Plaintiff has set forth facts in his complaint alleging that Lorillard gave Newport cigarettes to minors. Thus, insofar as Count VII alleges that Lorillard's free giveaways of Newport cigarettes constitutes negligent entrustment, the Defendants' motions to dismiss are ***DENIED.

4. *Negligent Marketing*

As with negligent entrustment, the Plaintiff limits this claim to Lorillard alone, specifically to Lorillard's marketing Newport cigarettes to target minors at the giveaways. The Plaintiff does not allege that defendants Garber, Melhado, and Franklin engaged in marketing, negligent or otherwise. Therefore, insofar as the Plaintiff claims Garber, Melhado, and Franklin are liable for negligent marketing, those three defendants' motions to dismiss Count VII are ***ALLOWED.***

In *Kyte,* as the plaintiffs did not argue that the defendant cigarette manufacturer was liable under a theory of negligent marketing, the court did "not consider how far, if at all, marketing that intentionally or negligently induced an incompetent to use a product could be the basis of a manufacturer's liability." *Id.* The court cited to *Killeen v. Harmon Grain Prods., Inc.,* 11 Mass.App.Ct. 20, 28 (1980), for the proposition "that a manufacturer's liability [for negligent marketing] might be based on the marketing of a product in a manner calculated to induce direct purchases by children whose use would involve an unreasonable risk of injury." *Kyte,* 408 Mass. at 170 & n.8.

In *Killeen,* the court noted that, "[p]resumably, the [defendant] manufacturer [did] not know of a sale to any particular customer[,] .... [and] [t]here was no evidence that [the products] ... were advertised, to children or otherwise." 11 Mass.App.Ct. at 28. Conversely, here, the Plaintiff has alleged that Lorillard marketed Newport cigarettes "in a manner calculated to induce direct purchases by children" by failing "to exercise reasonable care in marketing Newport cigarettes, including at Newport giveaways, by intentionally and/or negligently inducing minors, including ... Evans, to smoke samples of Newport cigarettes." Complaint, ¶ 84(e). Moreover,

> "[a] ... basis for a finding of negligence against a manufacturer would involve the manufacturer's marketing its product, through advertising, packaging, or distribution, in a manner calculated to induce direct

> purchases by children or others whose use of the product would involve an unreasonable risk of injury. Without such a basis a finding of liability would imply that the manufacturer is subject to a legal duty to guard, by warnings or otherwise, against his products' falling into the hands of children, *a duty which might reasonably be required with respect to a product that is particularly attractive to children and inherently hazardous* ... but which ... is not required with respect to such everyday objects as pins, needles, scissors, knives, toothpicks, or objects made of glass."

***25** *Killeen,* 11 Mass.App.Ct. at 28 (emphasis added).

Consequently, the Plaintiff has set forth a claim for negligent marketing of Newport cigarettes, and the Defendants' motions to dismiss Count VII on this basis are ***DENIED.***

H. *Count VIII—Wrongful Death*

Finally, in Count VIII, the Plaintiff contends that the Defendants' wrongful conduct caused Evans' death. The wrongful conduct the Plaintiff alleges includes the manufacture, distribution, and selling of Newport cigarettes with carcinogenic and other harmful substances and with an addictive amount of nicotine when reasonable alternative designs were feasible; the manufacture, distribution, and selling of a product in an unreasonably dangerous condition; the failure to warn Evans, prior to 1969, of the hazardous and addictive nature of smoking Newport cigarettes; Lorillard's distribution of Newport cigarettes through giveaways at which children, including Evans, received free samples; and Lorillard's intentional, willful, and/or reckless failure to disclose to Evans that Newport cigarettes were carcinogenic, addictive, and hazardous to human health and contained harmful substances. The Defendants allege that Count VIII is dependant on the viability of the Plaintiff's other claims, therefore this claim must be dismissed as well.

"General Laws c. 229, § 2, governs actions for recovery of damages arising from wrongful death." *Marco v. Green,* 415 Mass. 732, 735 (1993). Section 2 "establishes procedures for the recovery of damages the substantive right to which is anchored in the common law." *Id.,* citing *Gaudette v. Webb,* 362 Mass. 60, 71 (1972); see *Hallett v. Town of Wrentham,* 398 Mass. 550, 555 (1986) ("The wrongful death statute provides for a single action brought by the decedent's executor or administrator. The executor or administrator presents all claims by the designated beneficiaries for damages flowing from the wrongful death."). A party is liable under G.L. c. 229, § 2, if he "by his negligence causes the death of a person, or ... by willful, wanton or reckless act causes the death of a person under such circumstances that the deceased could have recovered damages for personal injuries if his death had not resulted, or ... is responsible for a breach of warranty arising under Article 2 of chapter one hundred and six which results in injury to a person that causes death...." G.L. c. 229, § 2.

As noted, the Plaintiff alleges that the Defendants are liable for the wrongful death of Evans based on their negligence and their breach of warranty. These allegations concern the same issues set forth in the Plaintiff's claims of negligence (Count VII) and breach of the implied warranty of merchantability (Count III). Insofar as Count VIII arises out of the same conduct complained of in Counts III and VII, the Defendants' motions to dismiss Count VIII are ***DENIED.***

The Plaintiff also alleges that the Defendants are liable for the wrongful death of Evans based on their willful, wanton, and/or reckless conduct. " 'Wilful, wanton, or reckless' conduct is '*intentional* conduct, by way either of commission or of omission where there is a duty to act, which conduct involves a high degree of likelihood that substantial harm will result to another.' " *Manning v. Nobile,* 411 Mass. 382, 387 (1991) (footnote omitted) (emphasis added), quoting *Commonwealth v. Catalina,* 407 Mass. 779, 789 (1990). The Plaintiff has alleged that, "[a]t all relevant times, [D]efendants knew or should have known that smoking Newport cigarettes is hazardous to human health, causes human diseases and his addictive.... Defendants knew or should have known of the dangers inherent in the use of Newport cigarettes, and that ... Evans would be harmed by the foreseeable and intended use of these cigarettes." Complaint, ¶¶ 36–37. Further, the Plaintiff has alleged that the Defendants willfully and knowingly violated G.L. c. 93A through their conduct. Accordingly, insofar as Count VIII alleges that the Defendants are liable for the wrongful death of Evans in violation of G.L. c. 229, § 2, as a result of their willful, wanton, and/or reckless conduct, the Defendants' motions to dismiss are ***DENIED.***

ORDER

26** For the foregoing reasons, the Defendants' motions to dismiss the Plaintiff's complaint are ***DENIED in full as to Counts II, III, IV, V, and VIII; the Defendants' motions to dismiss the Plaintiff's complaint are ***ALLOWED*** in part and ***DENIED*** in part as to Counts I, VI, and VII.

All Citations

Not Reported in N.E.2d, 22 Mass.L.Rptr. 91, 2007 WL 796175, 62 UCC Rep.Serv.2d 661

Footnotes

1 Of the Estate of Marie R. Evans

2 Garber Bros., Inc., George Melhado & Co., and Franklin Wholesalers, Inc.

3 Lorillard filed an extensive motion to dismiss; Franklin filed a separate motion to dismiss and also joined in the other Defendants' motions to dismiss; and Garber and Melhado filed a joint motion to dismiss indicating that they joined in Franklin's and Lorillard's motions to dismiss.

4 Lorillard made this promise through its trade association, the Tobacco Industry Research Committee.

5 The only statement relating to smoking and health that is "required on any cigarette package" is "the statement required by section 1333 of this title...." 15 U.S.C. § 1334(a). Section 1333 of title 15 of the United States Code requires that cigarette packages bear one of the following labels:

> "SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy.
>
> SURGEON GENERAL'S WARNING: Quitting Smoking Now Greatly Reduces Serious Risks to Your Health.
>
> SURGEON GENERAL'S WARNING: Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth, And Low Birth Weight.
>
> SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide."

Id. § 1333(a)(1), (2), (3).

6 Although no Massachusetts state court has analyzed *Cipollone* in the context of an action against tobacco manufacturers, the Supreme Judicial Court analogized to the *Cipollone* Court's examination of the FCLAA in its own discussion of the preemptive effect of the Federal Insecticide, Fungicide, and Rodenticide Act in *Hochberg v. Zoecon Corp.,* 421 Mass. 456, 459–461 (1995).

7 Lorillard makes this argument specifically as to Counts I, II, V, VI, and VII; Franklin, which also joins in the other Defendants' motions to dismiss, makes this argument as to Count III specifically.

8 For purposes of the following analysis only, this court assumes that the Plaintiff's allegations are otherwise valid and state a claim for relief.

9 The plaintiff's separate failure to warn claim, to which the Court likened this fraudulent misrepresentation theory, alleged that the defendants 'failed to provide 'adequate warnings of the health consequences of

cigarette smoking.' " *Id.* at 524. The Court held that the FCLAA did preempt the failure to warn claim to the extent that it "require[d] a showing that [defendants'] post–1969 advertising or promotions should have included additional, or more clearly stated, warnings...." *Id.*

10 Even if the alleged misrepresentations do not constitute advertising and promotion, the FCLAA does not preempt them. See *Cipollone,* 505 U.S. at 528–529.

11 In Count III, the Plaintiff also alleges that the Defendants breached this warranty prior to 1969 by failing to warn of the health hazards and addictive nature of Newport cigarettes. Given that the effective date of the FCLAA was June 30, 1969, there is no need to conduct a preemption analysis of these claims that occurred before that date.

12 To the extent that Count V concerns conduct that does not concern advertising or promotion, there is no preemption as 15 U.S.C. § 1334(b) is not triggered.

13 In Count VII, the Plaintiff also alleges that the Defendants breached their duty in their failure to warn and to make complete and accurate representations to the public, including Evans, of the addictive and hazardous nature of Newport cigarettes. The Plaintiff, however, expressly contends that this failure to warn occurred prior to 1969, thereby precluding the FCLAA from preempting this claim.

14 Just as with its FCLAA analysis, above, for purposes of this analysis only, this court presumes that the Plaintiff's claims are valid and state a claim upon which relief can be granted.

15 The Plaintiff's complaint is premised on the notion that Lorillard's addition of menthol in its Newport cigarettes rendered those cigarettes more hazardous to Evans' health and more addictive than non-mentholated cigarettes. See Complaint, ¶ 20. In particular, the Plaintiff also alleges that Lorillard marketed Newport cigarettes as " 'fresher than any other menthol cigarette[,]" Complaint, ¶ 18, that Lorillard "added menthol to its Newport cigarettes to facilitate the initiation of smoking and the development of a smoking habit in children[,] .... [and that] the addition of menthol made Newport cigarettes more dangerous to her health than non-mentholated cigarettes." *Id.* ¶ 20. Therefore, although the Defendants have not made this argument, an additional inquiry is whether this court should take judicial notice of the hazards and addictiveness of smoking *mentholated* cigarettes in particular, and not simply smoking cigarettes in general as the Defendants have asserted.

In *Johnson I,* in which the court considered the defendant's motion to dismiss, the plaintiff alleged that the decedent died as a direct result of smoking Kool brand cigarettes. 122 F.Supp.2d at 198. In a separate decision, the court later considered the defendant's summary judgment motion and noted that, in support of his "argument that Kool cigarettes have been defectively designed, [the plaintiff] offer[ed] the deposition testimony and affidavit of a [doctor] .... [who] allege[d] that the menthol in Kool brand cigarettes (and presumptively all menthol cigarettes) acts as an anesthetic and cough suppressant causing smoke to be held longer in the lungs. That results, he explain[ed], in the smoker receiving more nicotine." *Johnson v. Brown & Williamson Tobacco Corp.,* 345 F.Supp.2d 16, 19 (D.Mass.2004) ("*Johnson II* ").

This court is not prepared to take judicial notice of the fact that mentholated cigarettes are more hazardous and addictive than non-mentholated cigarettes at this point in the litigation. There is no allegation that this fact is common knowledge, especially given the court's holding in *Johnson II,* 345 F.Supp.2d at 19, that suggests that this fact cannot be known without the aid of expert testimony. See *Hartman,* 404 Mass. at 313 n.9 (precluding judicial notice where facts cannot be known without expert testimony or other proof). Accordingly, at this point in the litigation, this court will not take judicial notice of the fact that mentholated cigarettes are more hazardous and addictive than non-mentholated cigarettes.

16 Affirmed in part and reversed, on other grounds, in part by 216 F.3d 596 (7th Cir.2000).

17 Additionally, the Supreme Judicial Court recently reiterated that it has "previously taken judicial notice of a report by the Surgeon General of the United States released in May, 2004, that 'presents persuasive evidence that smoking [cigarettes] harms nearly every organ of the human body, causes many diseases and reduces the health of smokers in general.' " *Haglund v. Philip Morris, Inc.,* 446 Mass. 741, 750 (2006) (alteration in original), quoting *Aspinall v. Philip Morris Co.,* 442 Mass. 381, 388 n.16 (2004); see *American Lithuanian Naturalization Club, Athol, Mass., Inc. v. Board of Health of Athol,* 446 Mass. 310, 317–318 (2006) (relying on judicial notice taken in *Aspinall* for conclusions regarding "substantial health dangers caused by tobacco smoke to smokers and nonsmokers alike"). Evans died in 2002, thus this court's taking judicial notice of the 2004 Surgeon General report would be of no effect.

18 To the extent that this sentence refers to Tisch's 1994 comment before Congress, it survives Lorillard's motion to dismiss because, as discussed further below, the Plaintiff's allegation of fraud and misrepresentation based on Tisch's statement satisfies Mass. R. Civ. P. 9(b)/

19 For purposes of this Rule 9(b) discussion only, this court will assume that these facts constitute reasonable reliance. This element is discussed further, below, in the context of Lorillard's challenge of that element.

20 According to the Plaintiff's complaint, Evans died on June 20, 2002, at the age of fifty-four. Therefore, Evans was likely born in 1948 and was a teenager, age thirteen through age nineteen, from 1961 to 1967.

21 The Plaintiff contends that at the time Tisch allegedly made his statement before Congress, he was Lorillard's President and Chief Financial Officer. The court infers from this allegation that Tisch made this statement within the scope of his employment. See *Fairneny,* 422 Mass. at 470 (accepting as true all reasonable inferences arising from plaintiff's complaint).

22 Proposed Final Draft 1 of Restatement (Third) of Torts: Liability for Physical Harm § 42 (2005) provides

> "An actor who undertakes to render services to another that the actor knows or should know reduce the risk of physical harm to the other has a duty of reasonable care to the other in conducting the undertaking if:
>
> (a) the failure to exercise such care increases the risk of harm beyond that which existed without the undertaking, or
>
> (b) the person to whom the services are rendered or another relies on the actor's exercising reasonable care in the undertaking."

Massachusetts has not expressly adopted this provision.

23 In a footnote, Lorillard argues that, because the Plaintiff bases Count II on statements "made in the course of the public dialogue on smoking and health, it fails for the independent reason that it is barred by the First Amendment." Lorillard Motion to Dismiss, at 35 n.10. This public dialogue "centered on 'evaluations and judgments' of scientific evidence." *Id.,* citing United States Department of Health, Education, and Welfare, United States Surgeon General's Advisory Committee, *Smoking and Health,* Forward (1964). At this stage of the litigation, this argument fails. Even if Lorillard's having undertaken this duty in the context of this "public dialogue" triggers First Amendment protection, this court is not prepared to take judicial notice of the fact that this "public dialogue" existed.

24 Restatement (Second) of Torts § 402A(1) provides,

"One who sells any product in a defective condition unreasonably dangerous to the user of consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold."

25 These holdings requiring that the plaintiff make more than a general allegation that all cigarettes are inherently defective are consistent with Restatement (Second) of Torts § 402A, cmt. i, which provides, "Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous.

26 Comment g states that a product is defective where it is "in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him." Restatement (Second) of Torts § 402A, cmt. g.

27 Section 6 of G.L. c. 270 provides,

> "Whoever sells a cigarette, chewing tobacco, snuff or any tobacco in any of its forms to any person under the age of eighteen or, not being his parent or guardian, gives a cigarette, chewing tobacco, snuff or tobacco in any of its forms to any person under the age of eighteen shall be punished by a fine of not less than one hundred dollars for the first offense, not less than two hundred dollars for a second offense and not less than three hundred dollars for any third or subsequent offense."

Contrary to Lorillard's argument, Count IV does not assert a private right of action under G.L. c. 270, § 6. The Plaintiff included that statute in his complaint in order to specify the public right with which Lorillard's conduct interfered.

28 The Plaintiff relies on *Commonwealth v. DeCotis,* 366 Mass. 234 (1974), for the argument that the determination as to whether G.L. c. 93A should be applied prospectively "must be made on a case-by-case basis and that retroactive application of Chapter 93A is appropriate when the conduct of which the plaintiff complains was already unlawful prior to the statute's enactment." Plaintiff's Consolidated Opposition to Defendants' Motions to Dismiss the Complaint, at 50 n.21. This court disagrees with the Plaintiff's reading of *DeCotis.*

In *DeCotis,* the court held that the defendants were not required to make payments to those individuals whose injuries occurred prior to the effective date of G.L. c. 93A, and that the defendants were entitled to a modification of the final decree to that effect. *DeCotis,* 366 Mass. at 244 n.8. The defendants, however, were only entitled to a modification as to those individuals who were injured prior to the effective date of G.L. c. 93A and who "did not have a right (*apart from G.L. c. 93A*) to" payment by the defendants. *Id.* (emphasis added). The individuals who were not entitled to payment from the defendants were therefore those whose injuries occurred prior to the effective date of G.L. c. 93A *and* whose only right to payment arose from G .L. c. 93A. *Id.* In order to ascertain which individuals were not entitled to payments, "a determination as to each such [individual's] rights [would] be required before the motion to modify [could] be acted on." *Id.*

29 This court acknowledges that it is logical that a claim for negligent misrepresentation must be dismissed where the defendant's misrepresentation was not negligent but was rather knowing and intentionally made

to induce reliance. In Count VII, however, the Plaintiff has alleged that "Lorillard failed to exercise reasonable care [,]" Complaint, ¶ 84(c), and Mass. R. Civ. P. 8(e)(2) permits the Plaintiff to make alternative claims.

End of Document

FORMAL ORDER

STATE OF ARKANSAS,)
)
COURT OF APPEALS)

BE IT REMEMBERED, THAT A SESSION OF THE COURT OF APPEALS BEGUN AND HELD IN THE CITY OF LITTLE ROCK, ON OCTOBER 9, 2024, AMONGST OTHERS WERE THE FOLLOWING PROCEEDINGS, TO-WIT:

COURT OF APPEALS CASE NO. CV-24-592

META PLATFORMS, INC.; FACEBOOK HOLDINGS, LLC; FACEBOOK OPERATIONS, LLC; META PAYMENTS, INC.; FACEBOOK TECHNOLOGIES, LLC; INSTGRAM, LLC; AND SICULUS, INC. APPELLANTS

V. APPEAL FROM POLK COUNTY CIRCUIT COURT - 57CV-23-47

STATE OF ARKANSAS EX REL. TIM GRIFFIN, ATTORNEY GENERAL APPELLEE

APPELLEE'S MOTION TO DISMISS APPEAL IS PASSED UNTIL THE CASE IS SUBMITTED.

IN TESTIMONY, THAT THE ABOVE IS A TRUE COPY OF THE ORDER OF SAID COURT OF APPEALS, RENDERED IN THE CASE HEREIN STATED, I, KYLE E. BURTON, CLERK OF SAID COURT OF APPEALS, HEREUNTO SET MY HAND AND AFFIX THE SEAL OF SAID COURT OF APPEALS, AT MY OFFICE IN THE CITY OF LITTLE ROCK, THIS 9TH DAY OF OCTOBER, 2024.

CLERK

ORIGINAL TO CLERK

CC: MICHAEL M. FORD, SENIOR ASSISTANT ATTORNEY GENERAL
CHUCK HARDER, ASSISTANT ATTORNEY GENERAL
BRITTANY N. EDWARDS, ASSISTANT ATTORNEY GENERAL
MATTHEW D. SWINDLE
BRIAN D. REDDICK AND HEATHER G. ZACHARY
MARSHALL S. NEY, KATHERINE C. CAMPBELL
MARTIN A. KASTEN
HONORABLE JAMES A. RINER, JUDGE

IN THE SUPREME COURT OF THE STATE OF NEVADA

META PLATFORMS, INC. F/K/A FACEBOOK, INC.,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE JOANNA KISHNER, DISTRICT JUDGE,
Respondents,
and
THE STATE OF NEVADA,
Real Party in Interest.

No. 89920

FILED

AUG 18 2025

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY [signature]
DEPUTY CLERK

ORDER GRANTING EN BANC RECONSIDERATION AND DIRECTING AN ANSWER AND REPLY TO THE PETITION FOR WRIT OF MANDAMUS AND PROHIBITION

Having considered the petition for en banc reconsideration in this matter, as well as the response, we have determined that reconsideration is warranted. *See* NRAP 40A(a). Accordingly, the petition for en banc reconsideration is granted.

Further, we conclude that an answer would assist the court in resolving the issues presented in the petition for writ of mandamus and prohibition filed on January 8, 2025. Therefore, the real parties in interest, on behalf of respondents, shall have 28 days from the date of this order within which to file and serve an answer, including authorities, along with any necessary appendix, against issuance of the requested writ. Petitioner shall have 14 days from service of the answer to file and serve a reply. The

25-36058

answer and the reply shall comply with NRAP 21(d) (setting forth requirements for, among other things, the form and length of an answer and reply filed in an original writ proceeding).

It is so ORDERED.

_______________, C.J.
Herndon

_______________, J.
Pickering

_______________, J.
Parraguirre

_______________, J.
Bell

_______________, J.
Stiglich

_______________, J.
Cadish

_______________, J.
Lee

cc: Hon. Joanna Kishner, District Judge
Womble Bond Dickinson (US) LLP/Las Vegas
Peterson Baker, PLLC
Attorney General/Carson City
Nachawati Law Group
Claggett & Sykes Law Firm
Morris Sullivan Lemkul/Las Vegas
Kemp Jones, LLP
Eighth District Court Clerk

15 Mass.L.Rptr. 417
Superior Court of Massachusetts.

Karen MORIN, Plaintiff,
v.
MGH INSTITUTE OF HEALTH PROFESSIONS
and Partners Healthcare System, Inc., Defendants.

No. CIV. A. 02-4484-F.
|
Nov. 1, 2002.

Opinion

MARIA LOPEZ, Justice.

> ***1** *"The right of self-determination and individual autonomy has its roots deep in our history. The only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right."* *Brophy v. New England Sinai Hosp., Inc.,* 398 Mass. 417, 430 (1986) citing John Stuart Mill on Liberty, in 43 Great Books of the Western World 271 (R. Hutchins ed.1952) (citations omitted).

BACKGROUND

This is a case of first impression under G.L. c. 76 § 15C.[1] This statute requires students in a health science program who come in contact with patients to be immunized against various communicable diseases. The court is asked to construe the language of the statute that exempts students from this requirement on the basis of religious beliefs.[2]

FACTS

Plaintiff, a speech pathology graduate student at the MGH Institute of Health Professions (the defendant), seeks a preliminary injunction against the defendant prohibiting it from administratively dismissing her because she has refused to be immunized on religious grounds. On either August 1, 2002, or August 13, 2002 plaintiff notified the defendant that because of her religious beliefs, she would not submit to being immunized.[3] The Director of the Institute responded by letter dated August 29, 2002, claiming that immunization was an essential part of matriculation, failure to be immunized would result in the defendant's inability to provide the requisite clinical experience, and therefore an incomplete degree. Plaintiff informed the defendant that her TB test would be provided to the school, but the other required immunizations would not be had.[4] Plaintiff also offered her willingness to submit to monthly blood tests in order to test for certain diseases. It is only the injection of foreign substances that poses a religious belief problem for the plaintiff. It is evident from her affidavit that her belief does not conflict with taking blood out of her body. Plaintiff's affidavit states the following:

> My family and I belong to an informal group of persons who believe that one's body can take care of itself. We hold a religious belief that there is a unifying force in nature, rather than a supreme being, and that as human beings we are intimately connected to that force. We adhere to the conviction that our bodies are party of nature and that we should not put foreign substances into them. We believe this is especially true of immunizations because many of them are actually putting a foreign virus into us. We believe that we should be true to nature and let nature take care of us as it will. I was raised with this religious belief and my entire family subscribes to it. I have never received immunizations in order to attend school.
>
> ***2** The only issue before the court is whether the plaintiff has sustained her burden with regard to the preliminary injunction.

LEGAL DISCUSSION

The legal standard for obtaining a preliminary injunction involves a combination of the moving party's claim of injury and chance of success on the merits. *Packaging Indus. Group, Inc. v. Cheney,* 380 Mass. 609, 617 (1980). "If the judge is convinced that failure to issue the injunction would subject the moving party to a substantial risk of irreparable harm, the judge must then balance this risk against any similar risk of irreparable harm which granting the injunction would create for the opposing party." *Id* . Only where the balance between these risks cuts in favor of the moving party may a preliminary injunction properly issue. *Id.*

Irreparable harm

The court begins first with the irreparable harm issue. The plaintiff's strongest, yet unpersuasive argument is that she is unable to freely exercise her religious beliefs. The United States Supreme Court has held that, "the loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427 U.S. 347, 373 (1976); *Farina v. The Bd. of Educ. of the City of New York,* 116 F.Supp.2d 503, 507 (S.D.N.Y.2000). In order to qualify for First Amendment protection under the free exercise clause, plaintiff must first show that the activity complained of is motivated and rooted in a legitimate and sincerely held religious belief. See *Wisconsin v. Yoder,* 406 U.S. 205, 215-229 (1972). The plaintiff claims that her refusal to be immunized is based on her religious belief that there is a unifying force in nature, rather than a supreme being, and that the introduction of foreign substances into the human body is contrary to that belief. Morin Aff. ¶ 1. The plaintiff has the burden of showing a sincerely held religious belief. Plaintiff has failed to meet her burden. The only evidence provided by the plaintiff supporting her religious belief is that she has never been vaccinated. Plaintiff claims that she was raised believing this. The lack of information about her religion, established or not, calls into question if this belief is truly religious or secular. The opposition to vaccines is not a religious issue per se. Because of the lack of evidence evincing a sincerely held religious belief, plaintiff cannot rely on the First Amendment to ground her irreparable harm argument. See *Farina v. The Bd. of Educ. of the City of New York,* 116 F.Supp.2d 503.

The plaintiff additionally argues that she will suffer irreparable harm if the injunction is not granted because she will not be able to continue her studies in speech pathology, and she will suffer financially as a result of her federal loans and her one year lease in Boston. These arguments do not bolster plaintiff's claim for irreparable harm. As the defendant points out, after the case is fully adjudicated, and if plaintiff prevails, she will be able to return to her studies and any monetary losses may be recovered as damages. According to *Packaging Industries,* "in the context of a preliminary injunction, the only rights which may be irreparably lost are those not capable of vindication by a final judgment." *Packaging Industries Group, Inc. v. Cheney,* 380 Mass. at 617 n. 11.

Balancing the Harms

***3** Plaintiff also fails to persuade the court of the second element required for a preliminary injunction, balancing the plaintiff's harm against the harm which would result to the defendant if the injunction were granted. The defendant claims that not only will it be harmed, but also plaintiff's failure to vaccinate will cause a serious harm to the public at large.

The court is primarily concerned with the harm to the public. The defendant has shown, by way of affidavits, that infectious diseases are alive and well in our society. The Measles, Mumps, Rubella vaccination (MMR) prevents the transmission of measles, mumps and rubella. These diseases are all airborne infectious diseases. The defendant cites that in 1991 the Center for Disease Control (CDC) identified a resurgence of measles resulting from unvaccinated adults in colleges and in the workplace. In 1990-1991, 668 measles cases arose among adult health care workers. In 1999, 271 cases of rubella arose, 86% of which affected adults. "In an appropriate case, the risk of harm to the public interest also may be considered" when deciding whether to grant or deny a preliminary injunction. *Town of Brookline v. Goldstein,* 388 Mass. 443, 447 (1983); see also *Bettigole v. Assessors of Springfield,* 343 Mass. 223, 234, 237 (1961). For example, in *Goldstein,* a member of the public who engaged in a series of harassment tactics against town officials and employees was enjoined from doing so in the future, contrary to his First Amendment assertion. See *Town of Brookline v. Goldstein,* 388 Mass. at 449. The court concluded "we reject the contention that conduct alleged here cannot be restricted consistent with the First Amendment rights to petition the government for a redress of grievances and to free speech." *Id.* at 450. "Those rights do not disable the government from taking reasonable steps to ensure that such rights are not exercised in a manner which infringes on the legitimate rights of other citizens." *Id.* at 449.

The plaintiff provided no evidence contradicting the persuasive statistics offered by the defendant. The plaintiff does not deny that her lack of vaccination is a public health and safety issue. In fact, the court interprets plaintiff's affidavit as recognizing that a public health and safety issue exists. Plaintiff boldly states, "I am willing to accept any risk that I might contract a contagious disease from a client." Morin Aff. ¶ 1. Furthermore, plaintiff's willingness to submit to monthly blood tests shows an awareness of the danger of infectious diseases. While the plaintiff may be willing to take the risk, the risk of endangering people is far too great to tip the scales in favor of granting this injunction.

Defendant also argues that there are practical consequences to granting the injunction: namely, its loss of accreditation by the Council of Academic Accreditation (CAA) of the American Speech-Language-Hearing Association (ASHA). It argues that persons enrolled in this course of study must be provided with clinical training at a minimum of three sites. These sites could quite possibly include a hospital-based setting or a school setting. Failure to provide this clinical training could result in a revocation of accreditation. That an institute could lose its accreditation and become defunct because of its failure to follow policies and procedures set forth by its directors constitutes irreparable harm not capable of vindication by final judgment. It is clear that both the defendant and the public would be harmed by the granting of this injunction.

Likelihood of Success on the Merits

***4** Finally, the court must look at the likelihood of success on the merits. "What matters as to each party is not the raw amount of irreparable harm the party might conceivably suffer, but rather the risk of such harm in light of the party's chance of success on the merits." *Packaging Industries Group, Inc. v. Cheney,* 380 Mass. 609 at 617. The issue of exemption to immunizations has never been litigated pursuant to G.L. c. 76 § 15C. There are only a few cases that give the court guidance, however, they are not determinative. Plaintiff claims that she has a strong likelihood of success on the merits. She asserts this claim based on the exemption language of the statute, as follows,

> In the absence of an emergency or epidemic of disease declared by the department of public health, no student who states in writing that such immunization would conflict with his religious beliefs shall be required to present such medical certificate in order to be admitted to such institution.

G.L. c. 76 § 15C.

The statutory language explicitly carves out an exception for people whose religious beliefs preclude them from being immunized. The plaintiff argues that the defendant, by not accepting the letter stating her religious beliefs, is violating the exemption created in the statute. The overarching purpose of the statute, however, is to prevent the widespread transmission of deadly diseases. To determine likelihood of success on the merits, it is not clear that the exemption can be read to supercede the important interest of containing diseases and ensuring that the residents of the Commonwealth are cared for in a safe manner. Read in conjunction with other cases, it is not clear that the interpretation would lead to a victory or even a likelihood of success on the merits.

The statutory language provides that the exemption is available to those with religious beliefs. It is not apparent that the plaintiff has "religious" beliefs. The court asked counsel at the hearing for the preliminary injunction what religion did this claim arise from. Counsel for plaintiff responded that plaintiff belongs to an informal group of individuals who believes that nature and the body are essentially one. In that response alone, the court is not convinced that the belief held by the plaintiff is a religious one. While plaintiff only needs to provide written affirmation of these religious beliefs, again, it is not clear that her beliefs arise from a religion. Plaintiff has not provided the court with other religious rituals she engages in. She has not explained what other beliefs she holds with regard to this religion. Given that the nature of her belief is not clear, it cannot be said that she has a likelihood of success on the merits.

Relying on *Farina,* this court cannot say that plaintiff is likely to succeed on the merits because the merits require that in order to be eligible for the statutory exemption, plaintiff must have a religious belief. See *Farina v. The Bd. of Educ. of the City of New York,* 116 F.Supp.2d at 512. In *Farina,* the court was convinced that the family genuinely opposed vaccines for their children, but, the court decided that those convictions were not religious. *Id.* at 508. In the current case, the plaintiff points to no religious issue, other than stating that one's body can take care of itself. She cites no other tenet that her religion abides by, she simply contends that immunizations are not permitted. Plaintiffs reliance on the language of the statute alone is insufficient to prove a likelihood of success on the merits adequate to grant a preliminary injunction which carries a strong possibility of harmful effects to defendant.

***5** The plaintiff cites *Dalli v. Bd. of Educ.,* 358 Mass. 753 (1971) as support for granting the injunction. In *Dalli,* the court addressed the statutory issue of compulsory vaccinations in school children through a declaratory judgment. *Dalli* is inapposite to the case at hand. In *Dalli,* the court held that the statutory exemption language "recognized church or religious demonination" encouraged preferred treatment and therefore was unconstitutional. *Id.* at 759. Whether or not the exemption in G.L. c. 76 § 15C applies to the plaintiff does not turn on a recognized or organized religion, it simply requires written verification of the religious belief. If the belief is held to be secular, as it is in this case, then the exemption does not apply.

Unlike this court, the court in *Dalli* decided that providing a religious exemption to elementary students was not a public safety issue. The *Dalli* court based its decision on "ample support" in the record. *Id.* at 760. This court has no such facts to assist it. To the contrary, this court has been inundated with overwhelming evidence supporting the proposition that infectious diseases are dangerous and that immunization plays an integral role in the prevention of the spread of communicable diseases.

Therefore, balancing the harms in light of the likelihood of success on the merits, the court finds that plaintiff has not sustained her burden for the court to grant a preliminary injunction.

ORDER

For the foregoing reasons, plaintiff's motion for preliminary injunction is ***DENIED.***

All Citations

Not Reported in N.E.2d, 15 Mass.L.Rptr. 417, 2002 WL 31441509

Footnotes

1 No full-time student under thirty years of age or any full-time or part-time undergraduate or graduate students in a health science who is in contact with patients shall, except as hereinafter provided, be registered at an institution of higher education except upon presentation of a medical certificate that such student has been immunized against measles, mumps, rubella, tetanus and diphtheria; provided, however, that a student may be registered at such institution upon certification made, in writing, by a physician who has personally examined such student and in whose opinion the physical condition of such student is such that his health would be endangered by any such immunization; and provided, further, that students who have attended an elementary or secondary school in the commonwealth may submit a copy of their school immunization record, indicating receipt of the above required immunizations, in lieu of such certificate; and provided, further, that unimmunized students may be registered on the condition that the required immunizations be obtained within ten days of registration.

In the absence of an emergency or epidemic of disease declared by the department of public health, no student who states in writing that such immunization would conflict with his religious beliefs shall be required to present such medical certificate in order to be admitted to such institution.

2 The statute provides for various ways of satisfying or obtaining exemption from this requirement which are inapplicable here.

3 The date of plaintiff's disclosure to the defendant is unclear. The plaintiff submitted an informal, unsigned letter dated August 1, and a signed, formal letter addressed to Carolyn Locke, Director of the MGH Institute on August 13. It appears that defendant only received the one dated August 13, however that is not specifically addressed in the papers.

4 A TB test does not require an injection of the virus into the body, for that reason, it was acceptable under her belief structure.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAR 3 2025

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

PEOPLE OF THE STATE OF CALIFORNIA; et al., Plaintiffs - Appellees, and STATE OF NORTH DAKOTA, and STATE OF GEORGIA, Plaintiffs, v. META PLATFORMS, INC.; et al., Defendants - Appellants.	No. 24-7032 D.C. Nos. 4:23-cv-05448-YGR 4:22-md-03047-YGR Northern District of California, Oakland ORDER
PERSONAL INJURY PLAINTIFFS; et al., Plaintiffs - Appellees, v. META PLATFORMS, INC.; et al., Defendants - Appellants, and SNAP INC.; et al., Defendants.	No. 24-7037 D.C. No. 4:22-md-03047-YGR Northern District of California, Oakland

STATE OF COLORADO, Plaintiff - Appellant, and PEOPLE OF THE STATE OF CALIFORNIA; et al., Plaintiffs, v. META PLATFORMS, INC.; et al., Defendants - Appellees.	No. 24-7265 D.C. No. 4:23-cv-05448-YGR Northern District of California, Oakland
MULTISTATE ATTORNEY GENERAL PLAINTIFFS, Plaintiff - Appellant, and PERSONAL INJURY PLAINTIFFS; et al., Plaintiffs, v. META PLATFORMS, INC.; et al., Defendants - Appellees,	No. 24-7300 D.C. No. 4:22-md-03047-YGR Northern District of California, Oakland

PERSONAL INJURY PLAINTIFFS and LOCAL GOVERNMENT AND SCHOOL DISTRICT PLAINTIFFS, Plaintiffs - Appellants, and MULTISTATE ATTORNEY GENERAL PLAINTIFFS and FLORIDA OFFICE OF THE ATTORNEY GENERAL, Plaintiffs, v. FACEBOOK HOLDINGS, LLC; et al., Defendants - Appellees.	No. 24-7304 D.C. No. 4:22-md-03047-YGR Northern District of California, Oakland
PERSONAL INJURY PLAINTIFFS; et al., Plaintiffs - Appellees, v. BYTEDANCE LTD.; et al., Defendants - Appellants, and META PLATFORMS, INC.; et al., Defendants.	No. 24-7312 D.C. No. 4:22-md-03047-YGR Northern District of California, Oakland

Before: CANBY, M. SMITH, and FORREST, Circuit Judges.

The motion (Docket Entry No. 77) to voluntarily dismiss appeal No. 24-7032 as to appellee the State of Michigan is granted.

The motions (Docket Entry Nos. 36, 42, 71, 72) to dismiss these appeals for lack of jurisdiction are denied without prejudice to renewing the arguments in the briefs. *See Nat'l Indus. v. Republic Nat'l Life Ins. Co.*, 677 F.2d 1258, 1262 (9th Cir. 1982) (merits panel may consider appellate jurisdiction despite earlier denial of motion to dismiss).

The consolidated first briefs on cross-appeal, for appellants in appeal Nos. 24-7032, 24-7037, and 24-7312, are due March 31, 2025. The consolidated second briefs on cross-appeal, for appellants in appeal Nos. 24-7265, 24-7300, and 24-7304, are due April 30, 2025. The consolidated third briefs on cross-appeal are due May 30, 2025. The optional consolidated cross-appeal reply briefs are due within 21 days after service of the consolidated third briefs on cross-appeal.

CERTIFICATE OF COMPLIANCE

I hereby certify that, to the best of my knowledge, this brief complies with the Massachusetts Rules of Appellate Procedure pertaining to the filing of briefs, including Rules 11, 16, 20, and 21. The brief is in Times New Roman 14-point font, contains 4,497 words, and was prepared using Microsoft Word for Office 365, version 2408. I have relied on the word count feature of this word processing system in preparing this certificate.

/s/ Felicia H. Ellsworth
FELICIA H. ELLSWORTH (BBO # 665232)
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000
Felicia.Ellsworth@wilmerhale.com

September 10, 2025

CERTIFICATE OF SERVICE

I, Felicia H. Ellsworth, hereby certify, under the penalties of perjury, that on September 10, 2025, I caused a true and accurate copy of this brief to be filed and served via the Massachusetts Odyssey File & Serve site, and, with consent of counsel, I also served copies on the following counsel by electronic mail:

Megan Barriger
Sara E. Cable
Christina Chan
Peter N. Downing
Kaitlyn Karpenko
David C. Kravitz
Douglas S. Martland
Jared Rinehimer

Office of the Attorney General
One Ashburton Place
Boston, MA 02108
(617) 727-2200

Megan.Barriger@mass.gov
Sara.Cable@mass.gov
Christina.Chan@mass.gov
Peter.Downing@mass.gov
Kaitlyn.Karpenko@mass.gov
David.Kravitz@mass.gov
Douglas.Martland@mass.gov
Jared.Rinehimer@mass.gov

/s/ Felicia H. Ellsworth
FELICIA H. ELLSWORTH (BBO # 665232)
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000
Felicia.Ellsworth@wilmerhale.com