UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

NICOLE BAKER,

Plaintiff,

v.

BAYER HEALTHCARE PHARMACEUTICALS, INC.,

Defendant.

NO. C13-0490 TEH

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS

This matter came before the Court on December 9, 2013, on Defendant Bayer Healthcare Pharmaceuticals, Inc.'s ("Defendant") motion to dismiss Plaintiff Nicole Baker's ("Plaintiff") Second Amended Complaint ("SAC"). After carefully considering the parties' written and oral arguments, and relevant law, the Court now GRANTS in part and DENIES in part Defendant's motion.

BACKGROUND

This suit is a product liability case stemming from Plaintiff's use of the intrauterine contraceptive device known as "Mirena." Mirena is made by Defendant, a Delaware corporation, which is in the business of designing, manufacturing, marketing, testing, and distributing prescription drugs and women's healthcare products, including Mirena. SAC ¶¶ 4, 10, Docket No. 21. Mirena is a T-shaped polyethylene frame with a steroid reservoir that releases 20 μg/day of levonorgestrel, a prescription medication used as a contraceptive; it is inserted into the uterus by a healthcare provider during an office visit. The federal Food and Drug Administration approved Defendant's New Drug Application for Mirena in December 2000. *Id*. ¶ 14-15.

Plaintiff, a California resident, alleges that Mirena's label does not accurately warn

and understates the risks of certain medical conditions or injuries associated with use of Mirena, including spontaneous migration of Mirena, perforation of the uterus, embedment, infections, cysts, ectopic and intrauterine pregnancy, adhesions, fetal injury and fetal death caused by Mirena. *Id*. ¶¶ 18-19. Plaintiff alleges that Defendant did not effectively test or analyze results of pre-market tests before putting Mirena on the market, but nonetheless promoted Mirena through social media and online marketing campaigns while understating the associated risks. *Id*. ¶¶ 20-21. Plaintiff further alleges that in March 2009, the Department of Health and Human Services' Division of Drug Marketing, Advertising, and Communications ("DDMAC") issued a warning regarding Defendant's advertising materials for Mirena, stating that they did not communicate any risk information and inadequately communicated Mirena's indications. *Id*. ¶¶ 22-23. Plaintiff also alleges that in December 2009, DDMAC contacted Defendant regarding its "Mirena Simple Styles Statements Program," which Plaintiff alleges were consumer-directed live presentations directed toward "busy moms" that utilized scripts that omitted information regarding the serious risks associated with using Mirena. *Id.* ¶¶ 24-27. Plaintiff alleges that Defendant concealed its knowledge of the defects in their products from the Plaintiff, her physicians, hospitals, pharmacists, the FDA and the public in general. *Id*. ¶ 28.

Plaintiff had her Mirena inserted on January 6, 2010 at Community Physicians Network for Women in Indianapolis, Indiana by her healthcare provider. Plaintiff alleges that she chose Mirena because it was promoted as a safe and effective method of birth control. *Id*. ¶ 29. On June 21, 2011, after suffering from extreme pelvic pain, Plaintiff was rushed to the emergency room ("ER") at Parkview Community Hospital in Riverside, California. She received treatment for abdominal pain. *Id*. ¶ 30. Over the next four months, Plaintiff repeatedly went to the ER. On June 28, 2011, Plaintiff went to the ER at Riverside Community Hospital in Riverside, California for sharp pains on her left side. An ultrasound showed a left ovarian cyst. Plaintiff was treated for her pain. *Id*. ¶ 31. On September 3, 2011, Plaintiff went to the ER at Parkview Community Hospital for severe abdominal pain, nausea and pain associated with an ovarian cyst. *Id*. ¶ 32. On October 10,

2011, Plaintiff was again rushed to the ER at Riverside Community Hospital for extreme pelvic pain, and noted that her pain level was a 7 out of 10. Plaintiff had a urinary tract infection, a fever and leukocytosis. *Id.* ¶ 33. Plaintiff's Mirena "was expelled" on October 20, 2011. After removal, Plaintiff continued to suffer from vaginal bleeding, pelvic pain, and pain when urinating. *Id.* ¶ 34. Prior to having Mirena, Plaintiff alleges that she did not suffer from these injuries. *Id*. In sum, Plaintiff maintains she has suffered severe injuries, including, but not limited to, abdominal pain, an ovarian cyst, infections, substantial mental and physical pain and suffering, and has incurred medical expenses for treatment and care, and will continue to incur expenses in the future. *Id*. ¶ 35.

Plaintiff filed suit on February 4, 2012, invoking this Court's diversity jurisdiction pursuant to 28 U.S.C. § 1332. She asserts claims against Defendant for negligence, for strict liability for design defects, failure to warn, and manufacturing defects, as well as for breach of implied and express warranties. On March 12, 2013, the Court stayed the case pending a motion to transfer the case as potentially related to the Judicial Panel on Multidistrict Litigation ("JPML") Docket No. 2434, *In re: Mirena IUD Products Liability Litigation*. Docket No. 13. On August 7, 2013, the JPML vacated the conditional transfer of the case because the Panel found that Plaintiff alleged injuries broader than injury related to the risk of perforation and migration associated with Mirena, which was the scope of the MDL. Docket Nos. 14, 16. After the Court lifted the stay, Plaintiff filed the SAC and this motion to dismiss followed.

LEGAL STANDARD

Dismissal is appropriate under Rule 12(b)(6) of the Federal Rules of Civil Procedure[1] when a plaintiff's allegations fail "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A dismissal under Rule 12(b)(6) "can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a

[1] All references to "Rules" hereinafter refer to the Federal Rules of Civil Procedure.

cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

Under Federal Rule of Civil Procedure 8(a), a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face" with sufficient specificity to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545, 570 (2007) (citation and quotation marks omitted). "Rule 8 . . . does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). Plausibility does not equate to probability, but it requires "more than a sheer possibility that a defendant has acted unlawfully." *Id.* "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* In ruling on a motion to dismiss, a court must "accept all material allegations of fact as true and construe the complaint in a light most favorable to the non-moving party." *Vasquez v. Los Angeles Cnty.*, 487 F.3d 1246, 1249 (9th Cir. 2007). The Court, however, is not "bound to accept as true a legal conclusion couched as a factual allegation." *Iqbal*, 556 U.S. at 678 (internal quotation marks omitted). Dismissal of claims that fail to meet this standard should be with leave to amend unless it is clear that amendment could not possibly cure the deficiencies in the complaint. *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1296 (9th Cir. 1998).

DISCUSSION

Defendant moves for dismissal on all claims under Rule 12(b)(6). For the reasons discussed below, Defendant's motion is GRANTED in part and DENIED in part.

I. Negligence Claim

Under California law, to maintain a negligence action, Plaintiff must allege that Defendant owed a legal duty, breached that duty, and that the breach proximately caused

injury to the Plaintiff. *Garcia v. W & W Cmty. Dev., Inc.*, 186 Cal. App. 4th 1038, 1044 (2010). Defendant argues Plaintiff's negligence claim is insufficiently pleaded under Rule 8 because Plaintiff does not allege sufficient facts and relies on bare legal conclusions to assert her negligence claim.

The Court holds that Plaintiff has sufficiently alleged facts supporting a negligence claim. The Court notes at the outset that the SAC is far from a model of clarity in pleading. Nonetheless, the Court must construe the SAC in a light most favorable to the non-moving party and assume the truth of non-conclusory, material allegations of fact contained therein. Plaintiff alleges that Defendant had a duty to exercise reasonable care in the designing, researching, manufacturing, marketing, supplying, promoting, packaging, selling or distributing Mirena, which included a duty to assure that Mirena would not cause users to suffer unreasonable, dangerous side effects. SAC ¶ 37. Plaintiff alleges that Defendant breached that duty when it, among other things: failed to adequately warn the Plaintiff, other Mirena users, physicians and the FDA of serious side effects of Mirena, including but not limited to, migration, perforation, embedment, ectopic pregnancies, intrauterine pregnancies, infections, adhesions, cysts, fetal injury and death. *Id.* ¶ 37(g). Plaintiff alleges that Defendant concealed its knowledge of the defects of Mirena from Plaintiff and her physician, *id.* ¶ 28, and that Plaintiff chose Mirena because it was promoted as a safe and effective method of birth control. *Id.* ¶ 29. Plaintiff alleges that Defendant's breach caused her injuries because after Mirena was inserted by her healthcare provider, she subsequently suffered from a series of injuries including extreme pelvic and abdominal pain, an ovarian cyst, nausea, urinary tract infection, fever, leukocytosis, all of which culminated when "Plaintiff's Mirena was expelled," after which she suffered from vaginal bleeding, pelvic pain, and pain when urinating. *Id.* ¶ 34. Plaintiff alleges that prior to having Mirena, Plaintiff did not suffer from these injuries. *Id.* Thus, read in a favorable light, Plaintiff has alleged sufficient factual matter to state a claim for negligence that is plausible on its face.

Defendant states that the "only allegation that provides any specificity at all

includes a number of injuries that Plaintiff does not contend to have suffered from." Reply at 3-4, Docket No. 26 (citing SAC ¶ 38(g) and listing alleged injuries, but omitting "infections" and "cysts," which are the injuries for which Defendant allegedly failed to provide adequate warnings and from which Plaintiff allegedly suffered). During oral argument, the Court questioned Plaintiff's counsel regarding how a negligence action may be maintained based on a failure to warn about injuries Plaintiff did not allege she sustained. Plaintiff's counsel argued that had Plaintiff been aware of the other alleged risks of Mirena, including migration of Mirena, that warning, had it been given, would have been relevant to her decision-making process. As the parties did not specifically brief this narrow issue, and because "adequacy of a warning is a question of fact for the jury" in most cases, the Court cannot say at the motion to dismiss stage that Plaintiff's theory is implausible as a matter of law. *Jackson v. Deft, Inc.*, 223 Cal. App. 3d 1305, 1320 (1990).

Defendant also argues that it cannot be held liable for a failure to test Mirena because California law does not recognize an independent cause of action for failure to test. Defendant is correct. "Imposing liability for breach of a purported 'independent duty to conduct long-term testing' would be beyond the pale of any known California tort doctrine, because, *inter alia*, the causal link between Plaintiff's known harm, and the unknown outcome of the hypothetical testing is entirely speculative." *Phillippi v. Stryker Corp.*, No. 2:08-CV-02445-JAM, 2010 WL 2650596, at *2 (E.D. Cal. July 1, 2010) *aff'd*, 471 F. App'x 663 (9th Cir. 2012) (citing *Valentine v. Baxter Healthcare Corporation*, 68 Cal. App. 4th 1467, 1485-86 (1999)). However, Plaintiff argues that she is not asserting that Defendant had an independent duty to conduct long-term testing, but that the duty to test was one of the duties owed to Plaintiff as part of the obligation to protect the end-user from long term risks. This concession brings Plaintiff's duty to test allegation within the ambit of *Valentine*, which recognizes that testing and inspection duties may be tied to liability for manufacture, design, and failure to warn, even if they are not maintainable as an independent duty. 68 Cal. App. 4th at 1485.

Accordingly, because Plaintiff has sufficiently pleaded a negligence claim,

Defendant's motion to dismiss the First Cause of Action for Negligence is DENIED.

II. Strict Liability – Product Liability

California recognizes strict liability for three types of product defects – manufacturing defects, warning defects (inadequate warnings or failure to warn), and design defects. *Lucas v. City of Visalia*, 726 F. Supp. 2d 1149, 1154 (E.D. Cal. 2010) (citing *Anderson v. Owens-Corning Fiberglas Co.*, 53 Cal. 3d 987, 995 (1991)). Plaintiff alleges that Defendant is strictly liable under all three product defect theories.

A. Strict Liability – Defective Manufacturing Claim

Under the "manufacturing defect" theory, generally a "manufacturing or production defect is readily identifiable because a defective product is one that differs from the manufacturer's intended result or from other ostensibly identical units of the same product line." *Lucas*, 726 F. Supp. 2d at 1155 (citing *Barker v. Lull Engineering Co.*, 20 Cal. 3d 413, 429 (1978)). The "manufacturing defect" theory posits that "a suitable design is in place, but that the manufacturing process has in some way deviated from that design." *Id*. (citation omitted). To survive a challenge to a manufacturing defect claim under Rule 12(b)(6), a plaintiff must "*identify/explain how* the [product] either deviated from [defendant's] intended result/design or *how* the [product] deviated from other seemingly identical [product] models." *Id*. (emphasis in original) (citing *Barker*, 20 Cal. 3d at 429); *see also Trabakoolas v. Watts Water Technologies, Inc.*, No. 12-CV-01172-YGR, 2012 WL 2792441, at *4 (N.D. Cal. July 9, 2012) (dismissing manufacturing defect claim on motion to dismiss).

Plaintiff's claim for a strict product liability manufacturing defect fails because Plaintiff does not allege facts that identify or explain how Mirena either deviated from Defendant's intended result or design or how Mirena deviated from other seemingly identical Mirena models. *Lucas*, 726 F. Supp. 2d at 1155. Plaintiff argues that because she suffered from certain injuries which she alleges were caused by Mirena, in hindsight, Mirena then clearly deviated from the Defendant's intended result. However, the SAC

contains no allegations of *how* the deviation occurred or whether her Mirena was manufactured defectively. Plaintiff has thus provided only insufficient legal conclusions that Mirena had a manufacturing defect, which are insufficient to state a legally cognizable manufacturing defect claim. Defendant's motion to dismiss Plaintiff's Second Cause of Action with respect to the strict liability manufacturing defect claim is GRANTED WITH LEAVE TO AMEND.

B. Strict Liability – Failure to Warn Claim

The California Supreme Court has held that manufacturers of prescription drugs can be held strictly liable for failure to warn of knowable risks. *Brown v. Superior Court*, 44 Cal. 3d 1049, 1069 (1988). In California, a defendant manufacturer can be held strictly liable for failure to warn if the plaintiff proves the following: "(1) the defendant manufactured, distributed, or sold the product; (2) the product had potential risks that were known or knowable at the time of manufacture or distribution, or sale; (3) that the potential risks presented a substantial danger to users of the product; (4) that ordinary consumers would not have recognized the potential risks; (5) that the defendant failed to adequately warn of the potential risks; (6) that the plaintiff was harmed while using the product in a reasonably foreseeable way; (7) and that the lack of sufficient warnings was a substantial factor in causing the plaintiff's harm." *Tucker v. Wright Med. Tech., Inc.*, No. 11-CV-03086-YGR, 2013 WL 1149717, at *12 (N.D. Cal. Mar. 19, 2013) (citing *Rosa v. City of Seaside*, 675 F. Supp. 2d 1006, 1011 (N.D. Cal. 2009)), *aff'd sub nom., Rosa v. Taser Int'l, Inc.*, 684 F.3d 941 (9th Cir. 2012) & (citing Jud. Council of Cal. Civ. Jury Instructions No. 1205 [entitled "Strict Liability – Failure to Warn – Essential Factual Elements"]). With respect to a known or knowable risk, the plaintiff must prove that "the defendant did not adequately warn of a particular risk that was known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge available at the time of manufacture and distribution." *Rosa*, 675 F. Supp. 2d at 1012 (citing *Anderson*, 53 Cal. 3d at 1002).

A manufacturer of a prescription drug is obligated to warn physicians, not patients,

of potential side effects associated with its pharmaceutical products. *Motus v. Pfizer Inc.*, 358 F.3d 659, 661 (9th Cir. 2004) ("*Motus II*"); *Carlin v. Superior Court*, 13 Cal. 4th 1104, 1116 (1996). Known as the "learned intermediary" doctrine, the duty to warn the physician – rather than the patient – is discharged if a manufacturer provides an adequate warning to the physician, regardless of whether the warning reaches the patient. *Motus v. Pfizer Inc*., 196 F. Supp. 2d 984, 991 (C.D. Cal. 2001) *aff'd sub nom. Motus v. Pfizer Inc. (Roerig Div.)*, 358 F.3d 659 (9th Cir. 2004). "A plaintiff asserting causes of action for failure to warn must prove not only that no warning was provided or that the warning was inadequate, but also that the inadequacy or absence of a warning caused the plaintiff's injury." *See Wendell v. Johnson & Johnson*, No. C 09–04124 CW, 2012 WL 3042302, at *7 (N.D. Cal. July 25, 2012) (emphasis added) (internal citations omitted)); *Brown*, 44 Cal. 3d at 1062.

Defendant contends that it "is left to guess about what aspects of the FDA-approved Mirena warnings are allegedly inadequate and how Plaintiff believes the warnings should be different." Reply at 5. The Court disagrees.

Plaintiff has alleged that (1) Defendant manufactured, distributed, and sold Mirena; (2) Mirena poses potential risks to users such as developing infection, cysts, and physical pain and these risks were known or knowable at the time of manufacture or distribution, *see* SAC ¶22, 70-74 (alleging that the Department of Health and Human Services issued a warning in March 2009 regarding Defendant's advertising material noting that Defendant did not communicate any risk information); (3) the potential risks presented a substantial danger to users of Mirena; (4) ordinary consumers such as Plaintiff would not have recognized the potential risks; (5) the Defendant failed to adequately warn of the potential risks of developing infections and cysts, among other injuries; (6) Plaintiff was harmed while using the product in a reasonably foreseeable way; (7) and the lack of sufficient warnings was a substantial factor in causing Plaintiff's harm because Plaintiff alleges she would not have used Mirena had she received adequate warnings disclosing these risks, *see id.* ¶ 79. Plaintiff has thus alleged in the SAC sufficient facts to state a plausible claim for

strict liability failure to warn.

Neither party raised the learned intermediary defense in their papers with respect to strict liability failure to warn. Had Defendant invoked the learned intermediary defense at this procedural stage, the result would be no different. Defendant can discharge its duty to warn about Mirena if it provides an adequate warning to the physician. *Motus I*, 196 F. Supp. 2d at 991. Here, Plaintiff has also alleged that Defendant's warning to her physician was non-existent or inadequate and that the inadequacy of the warning or its absence caused Plaintiff's injury. *See* SAC ¶ 79 ("Plaintiff did not have the same knowledge as Defendant and no adequate warning was communicated to her or her physician(s). Had the Plaintiff received adequate warnings regarding Mirena, she would not have had the device implanted."). At the motion to dismiss stage, even had Defendant raised the learned intermediary defense, Plaintiff has alleged sufficient facts to withstand the motion to dismiss. *See Wendell v. Johnson & Johnson*, No. C 09-04124 CW, 2010 WL 271423, at *3 (N.D. Cal. Jan. 20, 2010) (Wilkin, J.) (denying drug manufacturer's motion to dismiss because at pleading stage manufacturer could not prove that the learned intermediary doctrine barred all plaintiff's claims where plaintiff alleged manufacturer did not adequately convey to physicians the known or knowable risks of the drug).

For the foregoing reasons, Defendant's motion to dismiss Plaintiff's Second Cause of Action with respect to the strict liability – failure to warn claim is DENIED.

C. Strict Liability – Design Defect Claim

A design defects exist where a product is built in accordance with its intended specifications, but the design itself is inherently defective. *Barker*, 20 Cal. 3d at 429. Controlling California authority unequivocally prohibits strict liability claims for design defect against manufacturers of prescription drugs. *See Brown*, 44 Cal. 3d at 1069 (holding that no manufacturer strict liability exists for design defect injuries caused by a prescription drug); *Tucker*, 2013 WL 1149717, at * 6 (collecting cases in accord and dismissing strict liability claim based on design defect as precluded by California law). Moreover, the California Court of Appeal has squarely held that a manufacturer of

intrauterine devices cannot be held strictly liable for design defect. *Plenger v. Alza Corp.*, 11 Cal. App. 4th 349, 360-61 (1992).

Here, Plaintiff alleges that her Mirena administers a prescribed drug, levonorgestrel, and was installed by a healthcare provider at Community Physicians Network for Women in Indianapolis, Indiana. SAC ¶¶ 14-16, 29. Accordingly, the Court holds that Plaintiff's strict liability claim based on purported design defect in Mirena is precluded as a matter of California law. The Court therefore GRANTS WITHOUT LEAVE TO AMEND Defendant's motion to dismiss Plaintiff's strict liability – design defect claim.

III. Implied and Express Warranty Claims

A. Breach of Implied Warranty

Plaintiff alleges in her Third Cause of Action for breach of implied warranty that Defendant warranted Mirena to be of merchantable quality, safe and "fit for the ordinary purpose" of its use to Plaintiff, other Mirena users, physicians and healthcare providers. SAC ¶¶ 87-88. To maintain her claim, a plaintiff must allege (1) that she intended to use the product for a particular purpose; (2) that the defendant had reason to know of this purpose; (3) that the plaintiff relied on defendant's skill or judgment to provide a product suitable for this purpose; (4) that the defendant had reason to know that buyers relied on its skill or judgment; and (5) that the product was unfit for the purpose for which it was purchased and that it subsequently damaged the plaintiff. *Frisby-Cadillo v. Mylan, Inc.*, No. C 09-05816 SI, 2010 WL 1838729, at *3 (N.D. Cal. May 5, 2010) (citing *Keith v. Buchanan*, 173 Cal. App. 3d 13, 25 (1985)).

The Court finds that Plaintiff has adequately stated a claim for breach of an implied warranty. Plaintiff has alleged that she chose Mirena because it was promoted as a safe and effective method of birth control, SAC ¶ 91; Defendant had reason to know of this purpose because it promoted Mirena as a contraceptive, *id.* ¶¶ 87-88; Plaintiff relied on Defendant's skill and judgment as Defendant is in the business of designing, manufacturing, advertising and distributing prescription drugs and women's healthcare

products, *id.* ¶ 90; that Defendant knew or had reason to know that consumers so relied, *id.* ¶ 87; that Mirena was unfit for that purpose and Plaintiff subsequently suffered from infections, a cyst and abdominal pain as a result of Mirena, *id.* ¶¶ 93-95. These allegations, while brief, are sufficient to state a claim.

In addition to challenging the sufficiency of the pleadings, Defendant also argues that her breach of implied warranty claim fails because she was not in contractual privity with Defendant. *See Blanco v. Baxter Healthcare Corp.*, 158 Cal. App. 4th 1039, 1058-59 (2008). However, California recognizes an exception to the privity requirement in breach of warranty claims pertaining to food or drug products. *Wendell*, 2010 WL 271423, at *5 (citing *Gottsdanker v. Cutter Labs.*, 182 Cal. App. 2d 602 (1960)); *see also Arnold v. Dow Chem. Co.*, 91 Cal. App. 4th 698, 720 (2001) (citing *Gottsdanker* with approval). This exception allows an implied warranty to run from the manufacturer to the ultimate consumer. *Aaronson v. Vital Pharm., Inc.*, No. 09-CV-1333 W (CAB), 2010 WL 625337, at *5 (S.D. Cal. Feb. 17, 2010) (citing *Windham at Carmel Mtn. Ranch Assn. v. Superior Court*, 109 Cal. App. 4th 1162, 1168-70 (2003)).

Accordingly, that Plaintiff was not in privity with Defendant does not bar her implied breach of warranty claim as a matter of law given that claim is sufficiently pleaded. Defendant's motion to dismiss Plaintiff's Third Cause of Action is DENIED.

2. Breach of Express Warranty

Under California law, "[i]n order to plead a cause of action for breach of express warranty, one must allege the exact terms of the warranty, plaintiff's reasonable reliance thereon, and a breach of that warranty which proximately causes plaintiff injury." *Frisby-Cadillo*, 2010 WL 1838729, at *4 (citing *Williams v. Beechnut Nutrition Corp.*, 185 Cal. App. 3d 135, 142 (1986)). In *Frisby-Cadillo*, the court recognized that a plaintiff need not quote the exact terms of the warranty when the plaintiff alleged that defendant "utilized the advertising media to urge the use and application of [the subject product] and expressly warranted to the general public including plaintiff herein, that said product was effective, proper and safe for its intended use." *Id.* (quotation marks omitted). Indeed, "[p]roduct

advertisements, brochures, or packaging can serve to create part of an express warranty." *Rosales v. FitFlop USA, LLC*, 882 F. Supp. 2d 1168, 1178 (S.D. Cal. 2012)) (citing Cal. Com. Code § 2313(1)(b) (2002)). While a plaintiff need not have relied on the individual advertisements, plaintiff must have actually been exposed to the advertising. *See In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Products Liab. Litig.*, 754 F. Supp. 2d 1145, 1183 (C.D. Cal. 2010).

Contrary to Defendant's argument, Plaintiff has pleaded a breach of express warranty claim. First, Plaintiff has sufficiently pleaded that Mirena's advertising failed to adequately warn about the potential health risks of Mirena and that Defendant promoted Mirena as safe for use. SAC ¶¶ 18-19, 21, 97. Plaintiff's allegations in the SAC allow for an inference to be drawn that Plaintiff knew about Defendant's claims that Mirena was safe and effective for use by the public at large. *Id.* ¶ 97. Second, Plaintiff alleges that she reasonably relied on these warranties in choosing Mirena, thus obviating the requirement to show privity in a breach of express warranty claim. *Id.* ¶¶ 98-99. *See Fieldstone Co. v. Briggs Plumbing Products, Inc.*, 54 Cal. App. 4th 357, 369 n. 10 (1997), *superseded by statute on other grounds as stated in Greystone Homes, Inc. v. Midtec, Inc.*, 168 Cal. App. 4th 1194, 1213 (2008) (an exception to the general rule that privity of contract is a required element of an express breach of warranty cause of action exists where a plaintiff's decision to purchase the product was made in reliance on the manufacturers' written representations in labels or advertising materials). Third, Plaintiff alleged that a breach of the express warranty proximately caused her injuries when she suffered from infections, an ovarian cyst, and abdominal pain caused by Mirena. SAC ¶¶ 101. Plaintiff has thus stated a claim for breach of express warranty. Identification of the specific statements used by Plaintiff in her purchasing decision are certainly an appropriate avenue for discovery, but at this procedural stage Plaintiff has adequately pleaded facts to establish an express warranty that was reasonably relied upon. Thus, Defendant's motion to dismiss Plaintiff's Fourth Cause of Action for breach of express warranty is DENIED.

CONCLUSION

For the foregoing reasons, the Court:

1) DENIES Defendant's motion to dismiss Plaintiff's First Cause of Action for negligence;

2) GRANTS WITH LEAVE TO AMEND Defendant's motion to dismiss Plaintiff's Second Cause of Action with respect to the strict liability – manufacturing defect claim;

3) DENIES Defendant's motion to dismiss Plaintiff's Second Cause of Action with respect to the strict liability – failure to warn claim;

4) GRANTS WITHOUT LEAVE TO AMEND Defendant's motion to dismiss Plaintiff's Second Cause of Action with respect to strict liability – design defect claim;

5) DENIES Defendant's motion to dismiss Plaintiff's Third Cause of Action for breach of implied warranty; and

3) DENIES Defendant's motion to dismiss Plaintiff's Fourth Cause of Action for breach of express warranty.

Should Plaintiff amend the complaint, any amended pleading shall be filed no later than **January 9, 2014**.

IT IS SO ORDERED.

Dated: 12/19/13

THELTON E. HENDERSON, JUDGE
UNITED STATES DISTRICT COURT