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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SOCORRO MARRUJO, et al.,
Plaintiffs,
v.
COLOPLAST CORP., a corporation; and
DOES 1-30, inclusive,
Defendants.

Case No.: 3:19-cv-01588-AJB-NLS
**ORDER GRANTING DEFENDANT’S
MOTION TO DISMISS WITH
LEAVE TO AMEND (Doc. No. 19)**

Before the Court is Defendant Coloplast Corporation’s (“Coloplast”) Motion to Dismiss. (Doc. No. 19.) Coloplast Corporation challenges the sufficiency of several causes of actions in Plaintiff Socorro Marrujo’s (“Mrs. Marrujo”) First Amended Complaint. (*Id.*) For the reasons stated herein, the Court **GRANTS** Coloplast’s motion.

I. BACKGROUND

Mrs. Marrujo brings this products liability action against Coloplast for alleged defects in its Pelvic Mesh Products (the “Products”). (Doc. No. 18 ¶ 1.) This action arises out of the manufacturing and distribution of the Products by Coloplast, the implantation of a Product inside Mrs. Marrujo, and the subsequent damages suffered by Mrs. Marrujo and her husband, Plaintiff Roberto Marrujo (hereinafter “Mr. Marrujo” and collectively with Mrs. Marrujo “Plaintiffs”). (*Id.*)

1 complaint. *See Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). “[A] court may dismiss
2 a complaint as a matter of law for (1) lack of cognizable legal theory or (2) insufficient
3 facts under a cognizable legal claim.” *SmileCare Dental Grp. v. Delta Dental Plan of Cal.*,
4 88 F.3d 780, 783 (9th Cir. 1996) (citation omitted). However, a complaint will survive a
5 motion to dismiss if it contains “enough facts to state a claim to relief that is plausible on
6 its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). In making this
7 determination, a court reviews the contents of the complaint, accepting all factual
8 allegations as true and drawing all reasonable inferences in favor of the nonmoving party.
9 *See Cedars-Sinai Med. Ctr. v. Nat’l League of Postmasters of U.S.*, 497 F.3d 972, 975
10 (9th Cir. 2007). Notwithstanding this deference, the reviewing court need not accept legal
11 conclusions as true. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). It is also improper for
12 a court to assume “the [plaintiff] can prove facts that [he or she] has not alleged.” *Assoc.*
13 *Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526
14 (1983). However, “[w]hen there are well-pleaded factual allegations, a court should assume
15 their veracity and then determine whether they plausibly give rise to an entitlement to
16 relief.” *Iqbal*, 556 U.S. at 664.

17 **B. Rule 9(b)**

18 Federal Rule of Civil Procedure 9(b) requires that the circumstances constituting a
19 claim for fraud be plead with particularity. Rule 9(b) applies not just where a complaint
20 specifically alleges fraud as an essential element of a claim, but also where the claim is
21 “grounded in fraud” or “[sounds] in fraud.” *Vess v. Ciba–Geigy Corp. U.S.A.*, 317 F.3d
22 1097, 1103–04 (9th Cir. 2003). A claim is said to be “grounded in fraud” or “sounds in
23 fraud” where a plaintiff alleges that defendant engaged in fraudulent conduct and relies on
24 solely on that conduct to prove a claim. *Id.* “In that event, . . . the pleading of that claim as
25 a whole must satisfy the particularity requirement of 9(b).” *Id.* However, where a plaintiff
26 alleges claims grounded in fraudulent and non-fraudulent conduct, only the allegations of
27 fraud are subject to heightened pleading requirements. *Id.* at 1104.

28 A pleading is sufficient under Rule 9(b) if it “[identifies] the circumstances

1 constituting fraud so that the defendant can prepare an adequate answer from the
2 allegations.” *Walling v. Beverly Enters.*, 476 F.2d 393, 397 (9th Cir. 1973). This requires
3 that a false statement must be alleged, and that “circumstances indicating falseness” must
4 be set forth. *In re GlenFed Sec. Litig.*, 42 F.3d 1541, 1548 (9th Cir. 1994). Thus, Rule 9(b)
5 requires a plaintiff to identify the “who, what, when, where and how of the misconduct
6 charged,” as well as “what is false or misleading about [the purportedly fraudulent
7 conduct], and why it is false.” *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 998
8 (9th Cir. 2010).

9 III. DISCUSSION

10 In its Motion to Dismiss, Coloplast seeks to dismiss Plaintiffs’: (1) second claim
11 based on strict products liability for a manufacturing defect; (2) fourth and fifth claims for
12 breach of express and implied warranty; and (3) seventh, eighth, and ninth claims grounded
13 in fraud. The Court will address each basis for dismissal below.

14 1. Second Claim for Strict Liability for a Manufacturing Defect

15 First, Coloplast argues Plaintiffs fail to meet the pleading standard for a
16 manufacturing defect cause of action because they offer only conclusory statements instead
17 of the underlying facts to state the claim. (Doc. No. 19 at 4.) Plaintiffs do not oppose
18 Coloplast’s motion on this claim. (Doc. No. 23 at 4.) Therefore, the Court **GRANTS**
19 Coloplast’s Motion to Dismiss this claim **WITHOUT LEAVE TO AMEND**.

20 2. Fourth and Fifth Claims for Breach of Express and Implied Warranty

21 Coloplast next argues that Plaintiffs’ fourth and fifth claims for breach of express
22 and implied warranty should be dismissed for failure to state a plausible claim for relief.
23 (Doc. No. 19 at 6.) Coloplast alleges that Plaintiffs’ claims for breach of express and
24 implied warranty violate the *Twombly/Iqbal* pleading standard and Plaintiffs’ First
25 Amended Complaint fails to allege privity between Coloplast and Plaintiffs. (*Id.* at 6, 9.)
26 Coloplast alleges that paragraphs 96, 97, and 99-101 of Plaintiffs’ First Amended
27 Complaint are recitations of legal conclusions and, without them, Plaintiffs have failed to
28 provide facts that state a plausible claim for breach of express and implied warranty. (*Id.*

1 at 6.) Coloplast emphasizes that the existence of an express and implied warranty is reached
2 after an analysis of the underlying facts constituting the elements, and that those facts are
3 absent in Plaintiffs' First Amended Complaint. (*Id.* at 7.) Additionally, Coloplast argues
4 that privity of contract is a required element for breach of express and implied warranty
5 and that privity does not exist between the patient and manufacturer in the implantable
6 medical product context. (*Id.* at 9-10.)

7 Plaintiffs argue that their First Amended Complaint, including paragraphs 95-100,
8 states specific allegations to meet the pleading standard for breach of express and implied
9 warranties. (Doc. No. 23 at 4.) Plaintiffs contend that they have made specific allegations
10 in their statement that, "Coloplast made 'express and implied warranties' to Plaintiffs and
11 their doctors that the products at issue were 'safe, effective, fit and proper for their intended
12 uses' [and] that those warranties were untrue." (*Id.*) Further, Plaintiffs argue that they have
13 plead sufficient facts because the First Amended Complaint states that Coloplast marketed
14 the Products "to medical professional and patients, such as Mrs. Marrujo, by making
15 statements and representations warranting the products as 'safe, effective, reliable medical
16 devices' and 'as safer and more effective as compared to available feasible alternative
17 treatments of pelvic organ prolapse and stress urinary incontinence.'" (*Id.*) Plaintiffs
18 contend that the existence of an express warranty does not have to be reached by an analysis
19 of the underlying facts, instead the discovery process is designed to "ferret out" the
20 underlying facts of an express warranty claim. (*Id.* at 5.) Further, Plaintiffs argue that,
21 because Mrs. Marrujo purchased the product and claims to have "reasonably relied" on the
22 implied warranty by Coloplast, the privity argument is unavailing. (*Id.* at 5-6.)

23 **a. Breach of Express Warranty**

24 First, when taking all factual allegations as true, Plaintiffs have failed to allege
25 sufficient facts to state a plausible claim for relief in establishing the existence of an express
26 warranty. An express warranty is created by: "(a) [a]ny affirmation of fact or promise made
27 by the seller to the buyer which relates to the goods and becomes part of the basis of the
28 bargain creates an express warranty that the goods shall conform to the affirmation or

1 promise,” and “(b) [a]ny description of the goods which is made part of the basis of the
2 bargain creates an express warranty that the goods shall conform to the description.” Cal.
3 Com. Code § 2313. Here, the Court need not consider legal conclusions couched as facts,
4 and, in paragraphs 96 and 97, Plaintiffs present conclusions instead of facts to establish a
5 claim for express warranty. (Doc. No. 18 ¶¶ 96-97.) In order to establish an express
6 warranty Plaintiff must present enough facts to plausibly assert that Coloplast’s statements
7 formed “the basis of the bargain.” But, throughout paragraphs 96 and 97, Plaintiffs
8 summarily conclude that “Coloplast . . . expressly warranted” and “Plaintiffs and Plaintiffs’
9 physicians reasonably relied,” while failing to present facts that allege Mrs. Marrujo used
10 Coloplast’s statements to form the basis of her decision to use the Product or that she was
11 ever aware of the alleged express warranties. (Doc. No. 18 ¶¶ 96-97.) Under the
12 *Twombly/Iqbal* pleading standard, the complaint needs only enough facts to state a
13 plausible claim for relief and, here, aside from Plaintiffs’ legal conclusions, there is an
14 inherent lack of facts to allow the Court to plausibly conclude the existence of an express
15 warranty. (*Id.*)

16 Along the same rationale, Plaintiffs have failed to present facts to adequately plead
17 privity for a breach of express warranty claim. As a general rule, “privity of contract is a
18 required element of a breach of express warranty cause of action.” *Tapia v. Davol, Inc.*,
19 116 F. Supp. 3d 1149, 1160 (S.D. Cal. 2015) (citing *Burr v. Sherwin Williams Co.*, 42 Cal.
20 2d 682, 695 (1954)). There is a clear absence of facts to plausibly conclude that Mrs.
21 Marrujo entered into a contract with Coloplast, that she personally relied on Coloplast’s
22 specific representations in selecting the Product, and how Mrs. Marrujo’s subsequent
23 injuries were correlated to the warranties allegedly made. Therefore, the Court **GRANTS**
24 Coloplast’s Motion to Dismiss Plaintiffs’ breach of express warranty claim **WITH**
25 **LEAVE TO AMEND** to include specific factual allegations as to the elements of an
26 express warranty claim.

27 **b. Breach of Implied Warranty**

28 Second, the Court agrees with Coloplast in that Plaintiffs have failed to present

1 sufficient facts to state a plausible claim for relief for breach of implied warranty and failed
2 to allege privity between Coloplast and Plaintiffs. Plaintiffs’ legal conclusions that
3 Coloplast “impliedly warranted” that the “Products were of merchantable quality” are not
4 supported by specific factual allegations and, thus, do not meet the *Twombly/Iqbal* pleading
5 standard for establishing the elements of an implied warranty claim.¹ (Doc. No. 18 ¶¶ 99,
6 101.) Further, Plaintiffs’ First Amended Complaint inherently lacks factual allegations to
7 support that Mrs. Marrujo and Coloplast were in privity with one another and, how Mrs.
8 Marrujo read and relied upon warranties made by Coloplast, and not the judgement of her
9 physician. *See Blanco v. Baxter Healthcare Corp.*, 70 Cal. Rptr. 3d 566, 582 (Cal. Ct. App.
10 2008). The Court finds persuasive similarities in *Zetz v. Bos. Sci. Corp.*, 398 F. Supp. 3d
11 700 (E.D. Cal. 2019), where the court further solidified that in order to establish privity in
12 the implantable medical product context, the plaintiff must provide factual allegations that
13 they personally relied on the representations made by the manufacturer and not the
14 physician in selecting and using the product at issue. Indeed, in *Zetz*, the Court explained:

15 Plaintiffs’ allegations fail to identify any specific representations made by
16 Boston Scientific or any other specific facts that would suggest that Plaintiffs
17 personally relied on Boston Scientific’s representations when selecting and
18 using the Product. . . . Instead, Plaintiffs’ allegations only vaguely state that
19 Plaintiffs relied in some unspecified way on some unspecified representations
20 and unspecified ‘skill, judgment and implied warranty’ of Boston Scientific
21 when selecting and using the Product. . . . This is insufficient under Rule 8
22 and *Iqbal* to plead the requisite privity, especially since this is a medical
23 implant lawsuit where there is a strong presumption that Plaintiffs relied on
24 the skill and judgment of the physician, not the manufacturer, to select and
25 use the Product.

26 *See Zetz*, 398 F. Supp. 3d at 709.

27 ¹ For goods to be merchantable, it “must be at least such as: (a) [p]ass without objection in the trade under
28 the contract description; and (b) [i]n the case of fungible goods, are of fair average quality within the
description; and (c) [a]re fit for the ordinary purposes for which such goods are used; and (d) [r]un, within
the variations permitted by the agreement, of even kind, quality and quantity within each unit and among
all units involved; and (e) [a]re adequately contained, packaged, and labeled as the agreement may require;
and (f) [c]onform to the promises or affirmations of fact made on the container or label if any.” Cal.
Comm. Code § 2314.

1 Here, Plaintiffs' paragraph 100 is identical to the paragraph in *Zetz* that was ruled
2 insufficient to state a plausible claim for relief for breach of implied warranty. *Id.* at 712;
3 (Doc. No. 18 ¶ 100.) Therefore, the Court **GRANTS** Coloplast's Motion to Dismiss
4 Plaintiffs' breach of implied warranty claim **WITH LEAVE TO AMEND** to include
5 specific factual allegations as to the elements of an implied warranty.

6 **3. Seventh, Eighth, and Ninth Claims for Fraudulent Concealment, Fraud,**
7 **and Negligent Misrepresentation**

8 Next, Coloplast moves to dismiss Plaintiffs' claims grounded in fraud for failing to
9 meet the heightened pleading standard required by Rule 9(b). (Doc. No. 19 at 11.)
10 Coloplast claims that Plaintiffs have failed to plead with particularity their causes of action
11 for fraudulent concealment, fraud,² and negligent misrepresentation³ because they have
12 failed to allege specific factual allegations of the "who, what, when, where, and how of the
13 misconduct charged" and, instead, allege legal conclusions. (*Id.*) Coloplast argues that
14 Plaintiffs lump Coloplast and DOES 1-30 together and fail to identify the specific persons
15 who they attribute the representations and omissions to. (*Id.* at 12.) Further, Coloplast
16 argues that Plaintiffs have not satisfied an element of fraudulent concealment because they
17 fail to present facts that establish Coloplast had a duty to disclose to Mrs. Marrujo. (*Id.* at
18 13.) Coloplast contends that a duty to disclose only arises in a fiduciary or transactional
19 relationship with the plaintiff, and Plaintiffs have failed to present any facts that establish
20 this essential relationship. (*Id.* at 14.)

21 Plaintiffs argue that, throughout their First Amended Complaint, they have supplied
22 sufficient factual allegations to meet the heightened pleading standard for fraud. (Doc. No.

24 ² The elements of a cause of action for intentional misrepresentation are (1) a misrepresentation, (2) with
25 knowledge of its falsity, (3) with the intent to induce another's reliance on the misrepresentation, (4) actual
26 and justifiable reliance, and (5) resulting damage." *Daniels v. Select Portfolio Servicing, Inc.*, 246 Cal.
App. 4th 1150, 1166 (2016).

27 ³ The elements of negligent misrepresentation are: "(1) a misrepresentation of a past or existing material
28 fact, (2) without reasonable grounds for believing it to be true, (3) with intent to induce another's reliance
on the fact misrepresented, (4) ignorance of the truth and justifiable reliance thereon by the party whom
the misrepresentation was directed, and (5) damages." *Fox v. Pollack*, 181 Cal. App. 3d 954, 962 (1986).

1 23 at 8.) Further, Plaintiffs provide specific facts in their Opposition that they claim meets
2 the “who, what, when, where, and how” standard. (*Id.* at 9-10.) Plaintiffs contend that a
3 duty to disclose did exist because a physician stands in the shoes of the plaintiff in the case
4 of implants and Coloplast had exclusive and superior knowledge of the defects and failed
5 to disclose. (*Id.* at 11.)

6 **a. Plaintiffs Fail to Comply With Rule 9(b)**

7 To plead with particularity under Rule 9(b), a party must plead the “who, what,
8 when, where, and how of the misconduct charged.” *Cooper v. Pickett*, 137 F.3d 616, 627
9 (9th Cir. 1997). In other words, “the pleader must state the time, place and specific content
10 of the false representations as well as the identities of the parties to the misrepresentation.”
11 *Alan Neuman Prods., Inc. v. Albright*, 862 F.2d 1388, 1392-93 (9th Cir. 1988). “Rule 9(b)
12 does not allow a complaint to merely lump multiple defendants together but require[s]
13 plaintiffs to differentiate their allegations when suing more than one defendant . . . and
14 inform each defendant separately of the allegations surrounding his alleged participation
15 in the fraud.” *Swartz v. KPMG LLP*, 476 F.3d 756, 764-65 (9th Cir. 2007).

16 Plaintiffs have failed to include facts in their First Amended Complaint that assert
17 the “who, when, where, and how” of the fraud, negligent misrepresentation, and fraudulent
18 concealment claims. Plaintiffs’ Opposition provides facts as to *how* the misrepresentations
19 were disseminated through “documents, patients brochures, and internet websites as well
20 as in-person at medical conferences, hospitals, and private offices” but these facts cannot
21 be found in the First Amended Complaint. (Doc. No. 23 at 10); *Schwenk v. Chula Vista*
22 *Police Dep’t*, No. 11-CV-2069-L JMA, 2012 WL 1354055, at *2 n.1 (S.D. Cal. Apr. 18,
23 2012) (holding that any factual allegations found in the opposition but not in the complaint
24 will not be considered) (citing *Farr v. United States*, 990 F.2d 451, 454 (9th Cir. 1993)).
25 Also, Plaintiffs do not provide any facts or allegations as to *when* any of the allegedly
26 fraudulent behavior took place in their First Amended Complaint. In Plaintiffs’ First
27 Amended Complaint, the “*who*” in paragraph 180, “Defendants, their sales wholesalers,
28 distributors representatives, detail persons and other authorized agents,” and the “*where*”

1 in paragraph 12, “a substantial part of the events and omissions giving rise to Plaintiffs’
2 causes of action occurred in San Diego County, California,” do not provide clarity as to
3 who perpetuated the different fraudulent claims, where they occurred, and, importantly,
4 how it relates to Mrs. Marrujo and her injuries. (Doc. No. 18 ¶¶ 180, 12.) Further, Plaintiffs
5 fail to differentiate between each party’s participation in the fraud by lumping together
6 Coloplast and DOES 1-30. (*Id.* ¶¶ 108-184.)

7 Therefore, although Plaintiffs allege compelling scenarios for fraudulent behavior,
8 for example, Coloplast touting their products as “FDA approved” instead of “cleared,” they
9 have included insufficient facts as to the “who, when, where, and how” of each fraudulent
10 activity to meet the heightened pleading standard under 9(b). (Doc. No. 18 ¶ 128.)

11 **b. Plaintiffs Fail to Plead the Elements of Fraudulent Concealment,**
12 **Fraud, and Negligent Misrepresentation**

13 Additionally, Plaintiffs have failed to plead with particularity facts that support the
14 elements of fraud and negligent misrepresentation. Specifically, Plaintiffs do not
15 adequately plead that (1) Coloplast acted with intent to induce reliance on the
16 misrepresentations, (2) justifiable reliance on Plaintiffs’ part, and (3) damages. In their
17 First Amended Complaint, Plaintiffs repeat statements in pages 29-47 to plead fraud claims
18 but assert legal conclusions in several paragraphs including but not limited to: 110-112;
19 114-115; 135; 138; 151; 157; 166; 169. (Doc. No. 18.) Plaintiffs fail to allege facts that
20 suggest Mrs. Marrujo was ever aware of or influenced by misrepresentations in Coloplast’s
21 documents, patient brochures, or websites. Nowhere in Plaintiffs’ First Amended
22 Complaint do they specify what product was implanted in Mrs. Marrujo and how
23 Coloplast’s alleged fraudulent behavior was related to the actual product that caused Mrs.
24 Marrujo’s injuries. Throughout Plaintiffs’ First Amended Complaint, they use the plural
25 form of “Products” to describe what was implanted in Mrs. Marrujo, “Mrs. Marrujo had
26 the Products inserted into her body,” but in Plaintiffs’ Opposition they clarify that, “one
27 such product, Coloplast’s Aris Urethral Vaginal Sling . . . was implanted in Mrs. Marrujo
28” (Doc. No. 18 ¶ 2; Doc. No. 23 at 1.) Thus, there is a significant lack of particularity

1 in what product is at issue and how Coloplast’s fraudulent behavior surrounding that
2 product is correlated to Mrs. Marrujo’s injuries.

3 Finally, the Court agrees with Coloplast that Plaintiffs have failed to allege facts that
4 establish a fiduciary or transactional relationship that would impose a duty to disclose on
5 Coloplast for fraudulent concealment.⁴ “There are four circumstances in which
6 nondisclosure or concealment may constitute actionable fraud: (1) when the defendant is
7 in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive
8 knowledge of material facts not known to the plaintiff; (3) when the defendant actively
9 conceals a material fact from the plaintiff; and (4) when the defendant makes partial
10 representations but also suppresses some material facts.” *See Deteresa v. Am. Broad. Cos.*,
11 121 F.3d 460, 467 (9th Cir. 1997) (citation omitted). “The first circumstance requires a
12 fiduciary relationship; each of the other three presupposes the existence of some other
13 relationship between the plaintiff and defendant in which a duty to disclose can arise.” *Id.*
14 “Such relationships are created by transaction between parties from which a duty to
15 disclose can arise.” *Id.* Examples of transactional relationships are “seller and buyer,
16 employer and prospective employee, doctor and patient, or parties entering into any kind
17 of contractual agreement” but, here Plaintiffs fail to provide facts that allege any of these
18 relationships. *Id.*

19 Therefore, the Court **GRANTS** Coloplast’s Motion to Dismiss Plaintiffs’ claims for
20 fraudulent concealment, fraud, and negligent misrepresentation **WITH LEAVE TO**
21 **AMEND** to include specific facts as to the “who, when, where, and how” of the fraud
22 claims and facts that support a duty to disclose for fraudulent concealment.

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25 ⁴ The elements of a cause of action for fraudulent concealment are: “(1) the defendant must have concealed
26 or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the
27 plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to
28 defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he
did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or
suppression of the fact, the plaintiff must have sustained damage.” *Mktg. W., Inc. v. Sanyo Fisher (USA)*
Corp., 6 Cal. App. 4th 326, 336-37 (1997).


V. CONCLUSION

For the reasons stated herein, the Court **GRANTS** Coloplast’s Motion to Dismiss. (Doc. No. 19.) The Court **DISMISSES WITHOUT LEAVE** to amend Plaintiffs’ second cause of action for manufacturing defect. The Court **DISMISSES WITH LEAVE TO AMEND** Plaintiffs’ fourth and fifth claims for breach of express and implied warranty to include specific factual allegations to plausibly assert the elements of each claim. The Court also **DISMISSES WITH LEAVE TO AMEND** Plaintiffs’ seventh, eighth, and ninth fraud-based claims to include facts that support the “who, when, where, and how” of the fraud allegations and to assert facts that establish a fiduciary or transactional relationship for a duty to disclose. *See Foman v. Davis*, 371 U.S. 178, 182 (1962) (stating that leave to amend should be freely given in the absence of an apparent reason such as, “undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendment previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.”).

Plaintiffs must file an Amended Complaint addressing the deficiencies noted herein by **July 27, 2020**.

IT IS SO ORDERED.

Dated: July 6, 2020


Hon. Anthony J. Battaglia
United States District Judge