C. The Master Complaint Adequately Asserts a Claim for Subrogation Liability Determination

TPP Plaintiffs properly assert a claim for a determination of their subrogation rights in Count XXII of the Master Complaint arising under both conventional subrogation and the doctrine of equitable subrogation. Defendants improperly seek dismissal of this claim asserting the spurious argument that the Master Complaint does not allege that TPP Plaintiffs' insureds have made a claim or been paid money by Guidant. Defs' Brief at 15. Defendants also misstate the law of subrogation in both Pennsylvania and Minnesota in their attempts to mischaracterize the substance of TPP Plaintiffs' allegations, *i.e.*, that they have a vested right of subrogation, which is properly pled in the Master Complaint. *Id.* at 15-17. Moreover, Defendants seek to further cloud the issue by categorizing TPP Plaintiffs' subrogation claim as a disguised discovery request. *Id.* at 13-14. Contrary to Defendants' assertions, TPP Plaintiffs do not "think they have a subrogation claim against Guidant." They, in fact, do have a vested right to assert this claim under both Pennsylvania and Minnesota law.

1. TPP Plaintiffs alleged conventional and equitable subrogation

TPP Plaintiffs have properly and adequately alleged their claims for both equitable and conventional subrogation stating:

- "Plaintiffs and the TPP Class provided these and other benefits to their insureds and plan members not as volunteers but pursuant to their obligations under contractual agreements specifying the respective rights and obligations of the Plaintiffs and the Class and their members or insureds. These agreements specifically grant Plaintiffs and the Class broad subrogation and reimbursement rights." Master Complaint at ¶ 415.

- "Plaintiffs and the TPP Class provided benefits to their plan members and insureds and possess subrogation and reimbursement rights per either contractual provisions granting each of them such or equitable subrogation under the substantive law of the jurisdictions in which they are located and in which defendants sold their products." Master Complaint at ¶ 416.

- "Plaintiffs and the TPP Class have contractual and equitable rights of subrogation and reimbursement against Defendants to recover damages to the extent of health benefits paid or provided on behalf of members, employees and insureds implanted with the Devices." Master Complaint at ¶ 417.

The Master Complaint clearly and unambiguously provides a short and plain statement of both equitable and conventional subrogation claims alleged by TPP Plaintiffs demonstrating an entitlement to relief. The two named TPP Plaintiffs each have provisions in their respective plans describing conventional subrogation rights.[12] The terms of the particular plans differ slightly, but each provides the identical remedy of subrogation.

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12 The City of Bethlehem plan provides, in pertinent part, as follows:

> To the extent permitted by law, a Member who receives benefits related to injuries caused by an act or omission of a third party shall be required to reimburse the Employer for the cost of such Benefits when the Member receives any amount recovered by suit, settlement, or otherwise for his/her injury from any person or organization. The Member shall not be required to pay the Employer more than any amount recovered from the third party.
>
> In lieu of payment above, and to the extent permitted by law, the Employer may choose to be subrogated to the Member's rights to receive compensation including, but not limited to, the right to bring suit in the Member's name. Such subrogation shall be limited to the extent of benefits received under the Group Plan.

The UFCW plan provides, in pertinent part, as follows:

> The Fund has the right of subrogation or full reimbursement for all costs and benefits paid or incurred, or which will be incurred in the future, when any claim for benefits is filed on your behalf . . . where the event(s) that caused the claim may be payable by, and other party, including but not limited to Worker's Compensation, an insurance policy, another benefit plan, or any party that may be responsible for the event(s) related to the claim.

2. TPP Plaintiffs have vested subrogation rights under Pennsylvania law

Defendants argue that under Pennsylvania law, TPP Plaintiffs are "entitled to subrogation, if at all, only where an insured or plan member has already been fully compensated for his or her alleged 'injury'" and that contractual subrogation in Pennsylvania is limited by the made whole doctrine. Defs' Brief at 16-17. Defendants misstate and mischaracterize Pennsylvania law and TPP Plaintiffs' vested rights under it.

Pennsylvania law does not impose a distinction between equitable subrogation and contractual subrogation.[13] The doctrine of equitable subrogation is recognized in Pennsylvania and is defined as "the substitution of one [entity] in the place of another with reference to a lawful claim, demand, or right, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies or securities." *Public Service Mut. Ins. Co. v. Kidder-Friedman*, 743 A.2d 485, 488 (Pa. Super. Ct. 1999) (quoting *Molitoris v. Woods*, 618 A.2d 985, 989 (Pa. Super. Ct. 1992)). This doctrine is "a means of placing the ultimate burden of a debt upon the one who in good conscience ought to pay it, and is generally applicable when one pays out of his own funds a debt or obligation that is primarily payable from the funds of another." *High-Tech-Enter., Inc. v. Gen. Accident Ins. Co.*, 635 A.2d 639, 642 (Pa. Super. Ct. 1993). *Also Topelski v. Universal South Side Autos, Inc.*, 180 A.2d 414, 421 (Pa. 1962).

In order for an insurer to assert the right of subrogation, "the insurer must first have paid, or at least have offered to pay, to discharge the claim of the insured." *Dearry*

13 *See Mellon Bank, N.A. v. Nat'l Union Ins. Co. of Pittsburgh*, 768 A.2d 865, 871 (Pa. Super. Ct. 2001) ("subrogation is equitable in nature, regardless of any applicable contractual language"); *Cullen v. Pennsylvania Prop. & Cas. Ins. Guar. Ass'n*, 760 A.2d 1198, 1200 n.7 (Pa. Commw. Ct. 2000) (stating the principles behind equitable and contractual subrogation are the same).

v. Liberty Mut. Ins. Co., 1997 U.S. Dist. LEXIS 3091, *12 (E.D.Pa. 1997) (citing *Allstate Ins. Co. v. Clarke*, 527 A.2d 1021, 1023 (Pa. Super. Ct. 1987). In *Dearry*, the court held that upon payment of the loss, the insurer became vested with subrogation rights from the insured to pursue the amounts paid from the tortfeasor under the terms of the applicable insurance policy. *Dearry* at *13. The policy language referenced in *Dearry* is substantially similar to that of the plans provided by the two named TPP Plaintiffs in this action in that they all grant broad subrogation rights to the insurer upon payments made under the policy. *Id.* at *13-14 n.5.

TPP Plaintiffs have pled with specificity that their damages incurred include "all benefits paid for or provided to plan members and insureds, said damages being incurred as a result of the plan members or insureds being injured by or seeking treatment as a proximate result of utilization of the Device."[14] Master Complaint at ¶ 414. As such, TPP Plaintiffs' subrogation rights from their plan members or insureds to pursue Defendants for benefits paid have vested under the terms of their respective policies. Accordingly, TPP Plaintiffs clearly have the right to assert their claim for subrogation rights against Defendants.

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14 The named TPP Plaintiffs specifically allege that they have made payments as result of the Devices at issue in this litigation as follows:

- "UCFW Fund has paid all or part of the cost of its participants' purchases, and associated medical expenses, of the Guidant products at issue in this litigation, as defined herein, including the medical expenses for the subrogee, John Doe." Master Complaint at ¶ 27.
- "City of Bethlehem, Pennsylvania has incurred and will likely incur, pursuant to such contract, policy, or plan, full or partial costs for the Guidant products at issue in this litigation and related medical costs including implantation surgery, replacement cardiac devices, replacement surgery, medical monitoring, and/or other hospital costs. City of Bethlehem, Pennsylvania has been billed for and has paid charges for Guidant devices at issue in this litigation as described herein." Master Complaint at ¶ 28.

Defendants cite Pennsylvania cases that purportedly support their twisted interpretation that the "made whole" doctrine precludes TPP Plaintiffs' subrogation claims. Defs' Brief at 16-17. Unlike the instant case, however, these cases involve disputes regarding uninsured or underinsured motorist benefit claims, where the insurer seeks to assert subrogation rights against its insured. Accordingly, these cases are inapplicable and easily distinguishable from the facts and circumstances of the instant case.

Defendants cite *Nationwide Mutual Insurance Co. v. DiTomo*, 478 A.2d 1381 (Pa. Super. Ct. 1984) for the blanket proposition that "the 'made whole' doctrine . . . limits subrogation to cases where the insured has been made whole by payments from a tortfeasor." Defs' Brief at 15-16. Defendants, however, improperly attempt to broaden the applicability of this doctrine. *DiTomo* addresses subrogation strictly in the context of uninsured motorist coverage and is a study in procedural gaffs by both parties. In *DiTomo*, Nationwide paid uninsured motorist benefits to its insured who had previously settled with the primary tortfeasor for its full policy limits. *DiTomo*, 478 A.2d at 1382. This additional sum did not make the insured whole. *Id.* Nationwide then filed a subrogation action against its insured to recover the settlement proceeds received from the tortfeasor. *Id.* The trial court, while noting procedural mistakes by both parties, ruled that Nationwide could not subrogate against its own insured to recover uninsured motorist benefits until the insured was made whole. *Id.* Accordingly, the court refused to allow Nationwide to benefit from its procedural mistakes and subrogate against its own insured.

Defendants erroneously rely on *Gallop v. Rose*, 616 A.2d 1027 (Pa. Super. Ct. 1992), for its overbroad claim that "the equitable right of subrogation attaches only upon the insurer's showing that the sum of the insured's recovery from the insurers and from the other persons legally responsible for the injury exceeds the insured's loss." Defs' Brief at 16. Defendants have conveniently omitted key language from the opinion in their disingenuous attempt to cite it for the purported proposition. Rather, and more significantly for purposes of this litigation, the *Gallop* court, citing *DiTomo*, explicitly states that

> [t]he equitable right to subrogation for payments made pursuant to ***uninsured motorist coverages*** attaches "to the insured's recovery from any person legally responsible for the insured's injury for which the insurer has made payment under ***uninsured*** motorist coverage *only* upon the insurer's showing that the . . . insured's recovery from the insurer and from persons legally responsible *exceeds* the insured's loss."

Gallop, 616 A.2d at 1030-1031 (bold emphasis added). Accordingly, under its terms, the *Gallop* opinion deals specifically with subrogation involving uninsured motorist coverages and therefore has no bearing here. The same is true of *DiTomo*.

Further undermining Defendants' misapplication of the "made whole" doctrine is its reliance on *Walls v. City of Pittsburgh,* 436 A.2d 698 (Pa. Super. Ct. 1981). *Walls* is similarly limited in application, bearing upon "only subrogation pertaining to Uninsured Motorist coverage." *DiTomo*, 478 A.2d at 1383.

3. TPP Plaintiffs' subrogation claims also survive under Minnesota law

Like Pennsylvania, Minnesota recognizes both conventional and equitable subrogation. *Commercial Union Ins. Co. v. Minn. School Bd. Ass'n*, 600 N.W.2d 475,

478 (Minn. Ct. App. 1999). Conventional subrogation is contractual in nature, "a product of an agreement between the insured and the insurer." *Medica, Inc. v. Atlantic Mut. Ins. Co.*, 566 N.W.2d 74, 77 (Minn. 1997). However, if the rights of the parties are not governed by the terms of the policy, the rules of equitable subrogation control. *Westendorf v. Stasson*, 330 N.W.2d 699, 703 (Minn. 1983). Equitable subrogation is a product of common law, the purpose of which is to "place[] the charge where it ought to rest, by compelling the payment of the debt by him who ought in equity to pay it." *Id.*

Defendants cite *Westendorf* for the sweeping proposition that subrogation "will be denied prior to [the insured's] full recovery." Defs' Brief at 15 n.5. Defendants' reliance on *Westendorf* is misplaced. The court in *Westendorf* held that an insurer may not enforce its subrogation rights against its insured's settlement prior to the insured's full recovery for damages. *Westendorf*, 330 N.W.2d at 701. *Westendorf* simply does not apply to the situation at hand where TPP Plaintiffs seek to assert their vested subrogation rights specifically and solely against Defendants "to recover damages to the extent of health benefits paid or provided on behalf of members, employees and insureds implanted with the Devices." Master Complaint at ¶ 417.

Based on the above analysis, it is clear that TPP Plaintiffs who reimbursed plan members for the purchase of or who purchased for their plan participants Defendants' defective devices have the vested right to assert their claim for subrogation liability determination under the laws of both Pennsylvania and Minnesota.

D. The Master Complaint Adequately Pleads Warranty Claims on Behalf of TPP Plaintiffs

1. TPP Plaintiffs state a viable claim for breach of the implied warranty of merchantability

Defendants ask the Court to dismiss TPP Plaintiffs' implied warranty claims, asserting that such claims are not cognizable under Pennsylvania law. Defs' Brief at 19-20. As described above, Defendants' choice of law argument is presumptuous; it is not necessarily true that Pennsylvania law applies to this motion. However, even assuming that Pennsylvania law applies, Defendants' request should be denied.

In seeking dismissal of Count XXIV of the Complaint, Defendants confuse an implied warranty claim in the context of personal injury with an implied warranty claim in the context of economic loss. The claim in Count XXIV is an economic loss one, brought by third party payers who "have incurred health care costs related to the Devices that have been paid by them." Master Complaint at ¶ 432. The cases cited by Defendants all relate to personal injury implied warranty claims and do not apply here.

Under Pennsylvania law, the implied warranty of merchantability arises under 13 Pa. Cons. Stat. § 2314 (2006). Under § 2314(a), "a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." Section 2314(b) lists requirements of merchantability, stating

> Goods to be merchantable must be at least such as:
> 1) pass without objection in the trade under the contract description;
> 2) in the case of fungible goods, are of fair average quality within the description;
> 3) are fit for the ordinary purposes for which such goods are used;

4) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved;
5) are adequately contained, packaged, and labeled as the agreement may require; and
6) conform to the promises or affirmations of fact made on the container or label if any.

When Defendants recalled the ICDs at issue in this case, they admitted that such goods were not merchantable as defined by the statute.

Similarly, in Minnesota, implied warranty claims arise under Minn. Stat. § 336.2-314 (2005), which contains language identical to that of the Pennsylvania implied warranty statute cited *supra*. Minn. Stat. § 336.2-314; 13 Pa. Cons. Stat. § 2314. As courts have noted, "[u]nder Minnesota law goods or products to be merchantable must be such as are fit for the ordinary purposes for which such products are used..." *Minn. Mining and Mfg. Co. v. Nishika*, 885 S.W.2d 603, 637 (Tex. App. 1994) (applying Minnesota law), *question certified*, 955 S.W.2d 853 (Tex. 1996), *certified question answered*, 565 N.W.2d 16 (Minn. 1997), *modified*, 953 S.W.2d 733 (Tex. 1997). Further, under Minnesota law, when a plaintiff "sustains solely economic loss as a result of a breach of implied warranty of merchantability, the buyer is not precluded from recovering consequential damages for economic loss simply because the purchaser is not in privity of contract with the defendant seller." *Industrial Graphics, Inc. v. Asahi Corp.*, 485 F. Supp. 793, 804 (D. Minn. 1980). TPP Plaintiffs who reimbursed plan members for the purchase of or who purchased for their plan participants Defendants' defective devices thus may bring an implied warranty of merchantability claim in Minnesota.

2. TPP Plaintiffs State a Viable Claim for Breach of Express Warranty

At the time of drafting Count XXV of the Master Complaint, discovery was not far along, and the details of Defendants' warranty program were not well known. At this time we know:

- Defendants have an express warranty on the Model 1861 that they provide to patients with each device implanted.
- That warranty provides: "This limited warranty is available if the Guidant cardioverter defibrillator fails to function within normal tolerances due to defects in materials, workmanship, or design during the first 6 years (72 months) after date of implantation."
- Subsequent to the recall, Defendants commenced their "Supplemental Warranty" program, sending letters containing the following language to all patients:

> You and your physician may decide that due to this situation, additional follow up care is warranted. If you and your physician also decide that your device should be replaced based on your individual medical needs, we will provide a Guidant replacement device at no charge, provided your device has not reached elective replacement indicators (ERI)(i.e., the normal battery replacement indication). After insurance reimbursement, Guidant will provide up to $2,500 for out-of-pocket medical expenses associated with device replacement and/or unanticipated follow-up care (office or hospital setting).[15]

- The Supplemental Warranty program supersedes the original, express written warranty. Koning Deposition at 74-75.

At the time the Master Complaint was drafted, TPP Plaintiffs were not certain how to name the Supplemental Warranty. The answer is now clear: it is an express, written warranty. To the extent further amendment of the Master Complaint is required to clarify these facts, TPP Plaintiffs now so move.

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15 Plaintiffs contend that the $2,500 limitation in the Supplemental Warranty fails of its essential purpose and is unconscionable under UCC § 2-719. Master Complaint at ¶ 303.

Defendants cite *Hahn v. Richter*, 673 A.2d 888 (Pa. 1996) and *Colacicco v. Apotex, Inc.*, 432 F. Supp. 2d 514 (E.D. Pa. 2006) in suggesting TPP Plaintiffs' express warranty claims are barred under Pennsylvania law.[16] Yet *Hahn* makes no mention of warranty claims. *Hahn*, 673 A.2d at 889-91 (affirming lower court's jury instructions on negligent failure to provide adequate warnings). Further, *Colacicco's* comments on express warranty claims were mere dicta and are not binding here as the plaintiff in that case dropped the breach of express warranty claim before the court had opportunity to rule. *Colacicco*, 432 F. Supp. 2d at 548 n.31.[17] Lastly, as described above, both *Hahn* and *Colacicco* were personal injury claims, not economic loss claims. Since this is an economic loss claim, *Hahn* and *Colacicco* are inapposite.

Express warranty claims by third party beneficiaries may also be brought in Minnesota. Under Minnesota law, property damage and personal injuries are not prerequisites to recovery in an action for breach of express warranty and a seller may not exclude or limit the operation of the applicable Minnesota statute. *Minnesota Min. & Mfg. Co.*, 885 S.W.2d at 619. Further, third party beneficiaries may recover for breach of all warranties, express and implied, which the manufacturer extended to another. *SCM Corp.*, 702 F. Supp. at 1432-33.

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16 Defendants also cite *Colacicco* for the proposition that TPP Plaintiffs' warranty claims are preempted. Defs' Brief at 21. Of course, preemption is the subject of a separate motion, and TPP Plaintiffs' reply will not be repeated here. However, suffice for these purposes to note that *Colacicco* involved a prescription drug, not a medical device, and the rules on preemption for drugs and medical devices differ.

17 As *dicta*, "the statement is not binding". *In re Nomination Paper of Nader*, 2006 Pa. LEXIS 1546, *28 (Pa. 2006) (citing *Commonwealth v. Singley*, 868 A.2d 403, 409 (Pa. 2005), which reiterates that "a statement in [a] prior opinion, which clearly was not decisional but merely dicta, 'is not binding upon us.'").

Finally, Defendants wrongly claim the express warranty was not part of the basis of the bargain between the parties. Defs' Brief at 21. Minnesota and Pennsylvania law have identical statutory language on the issue, providing: "Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description." Minn. Stat. § 336.2-313(a)(2); 13 Pa. Cons. Stat. § 2313(a)(2). The comments to both statutes discuss subsequent changes in the original express warranty: "If language is used after the closing of the deal (as when the buyer when taking delivery asks and receives an additional assurance), the warranty becomes a modification, and need not be supported by consideration if it is otherwise reasonable and in order (Section 2-209)." Minn. Stat. § 336.2-313(a)(2), *comment* 7; 13 Pa. Cons. Stat. § 2313(a)(2), *comment* 7. Defendants' contention controverts the claims in the Master Complaint. At least for present purposes, the original express warranty is alleged to have been part of the basis of the bargain between the parties. Yet even if it was not, under Pennsylvania law, the subsequent modification of the warranty – to which Defendants have admitted in deposition, as shown – requires no new consideration to be effective.

For the foregoing reasons, the court should find that warranty claims are available to TPP Plaintiffs, and that such actions are not foreclosed by the authorities cited by Defendants.

E. Defendants' Attacks on TPP Plaintiffs' Unjust Enrichment Claim Are Unfounded

A claim for unjust enrichment is established when a claimant demonstrates that another party knowingly received something of value to which he was not entitled, and

the circumstances are such that it would be unjust for that person to retain the benefit. *ServiceMaster of St. Cloud v. GAB Bus. Servs., Inc.*, 544 N.W.2d 302, 306 (Minn. 1996); *Allegheny Gen. Hosp.*, 228 F.3d at 447. All that Plaintiffs must allege is that: (1) a benefit is conferred; (2) the defendant appreciates and knowingly accepts the benefit; and (3) the defendant's retention of the benefit under the circumstances would be inequitable. *Colkitt v. Boghosian*, 10 Fed. Appx. 398, 400 (8th Cir. 2001) (unpublished opinion); *Action Constr. Co. v. State*, 383 N.W.2d 416, 417 (Minn. Ct. App. 1986); *Allegheny Gen. Hosp.*, 228 F.3d at 447. The "gist" of the action "is that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money." *Zirinsky v. Sheehan*, 413 F.2d 481, 489 (8th Cir. 1969) (quoting *Todd v. Bettingen*, 124 N.W. 443, 444-45 (Minn. 1910); *also Stendardo v. Federal Nat'l Mortgage Ass'n*, 991 F.2d 1089, 1099 (3d Cir. 1993).

TPP Plaintiffs clearly allege each element of unjust enrichment. In particular, TPP Plaintiffs contend that: (1) the third party payors conferred a benefit on Defendants by paying for the purchase of the defective devices manufactured and sold by Defendants on behalf of their insureds (*e.g.*, Master Complaint at ¶ 423); (2) Defendants knowingly took, appreciated, and accepted the benefits provided by the third party payors (*e.g.*, Master Complaint at ¶ 425); and (3) Defendants' acceptance and retention of these benefits would be inequitable (*e.g.*, Master Complaint at ¶¶ 424-427). Accordingly, Defendants' motion should be denied.

Nonetheless, Defendants move to dismiss TPP Plaintiffs' claim for unjust enrichment on two grounds, arguing: 1) neither named TPP Plaintiff makes any

allegation that it made any payment to, or conferred any benefit on, Defendants; and 2) neither makes any allegation that it relied on any representation made by Defendants. These arguments fail for several reasons.

1. TPP Plaintiffs have conferred a benefit on Defendants

Defendants' argument that neither Local 1776 nor Bethlehem "makes *any* allegation that it made payment to, or conferred any benefit on Guidant" blindly ignores the plain language of the Master Complaint. Defs' Brief at 18 (emphasis added). In reality, multiple paragraphs contain specific allegations regarding the benefits TPPs provided to Defendants by virtue of the payments they made to Defendants for the defective devices. *See, e.g.*, Master Complaint at ¶¶ 9, 29, 254, 420, 421, 423, 425, 426, 427 (each generally discussing the payments made by TPPs as a result of Defendants' defective devices).[18] Indeed, the benefits conferred on Defendants by TPPs for the defective devices likely amount to hundreds of millions of dollars, a sizeable benefit by all calculations. *See* Master Complaint at ¶ 9.

TPP Plaintiffs' position has been explicitly supported, and Defendants' arguments outright rejected, by several courts.[19] For instance, in *In re Lorazepam & Clorazepate*

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18 Defendants seek to limit the allegations to Count XXIII of the Master Complaint, but ¶419 under that Count specifically incorporates all previous factual allegations as though fully set forth therein.

19 The cases cited by Defendants are distinguishable. *In re Rezulin Products Liability Litigation*, 392 F. Supp. 2d 597 (S.D.N.Y. 2005) is inapplicable because it involves a claim for damages by a health benefit provider regarding an ineffective drug that it placed on its formulary for its members. *In re Rezulin*, 392 F. Supp. 2d at 599. The court found the unjust enrichment claim to be too attenuated because there were too many parties and intermediaries separating the plaintiff and defendant, and New Jersey unjust enrichment law requires "some direct relationship between the parties." *Id.* at 620. Here, these attenuations do not exist, particularly because the TPPs, and not a third party, conferred the benefit on Defendants by paying for the defective devices. Similarly, *Williams & Drake Co. v. American Tobacco Co.*, 1998 U.S. Dist. LEXIS 21917 (W.D. Pa. 1998) explains that the plaintiff health fund's claims against the tobacco industry for health care expenses attributable to smoking were too attenuated. Williams, 1998 U.S. Dist. LEXIS 21917 at *13-16. However, the plaintiff in *Williams & Drake Co.* sought payment for misrepresentations made regarding the dangers of smoking that ultimately resulted in increased medical expenses –

Antitrust Litigation, 295 F. Supp. 2d 30 (D.D.C. 2003), Mylan Labs, Inc. ("Mylan") argued that plaintiff, a third party payor, did not confer a benefit on Mylan because TPPs paid benefits to their insureds merely pursuant to a contractual relationship or other legal obligation. *See In re Lorazepam*, 295 F. Supp. 2d at 33, 51. The court rejected this argument, specifically reasoning that:

> ... Plaintiffs are not asserting unjust enrichment claims on the basis that they paid health care benefits to their insureds. On the contrary, Plaintiffs have asserted an action on their *own* behalf *and* on behalf of their self-funded customers.... As previously noted, "because their members' copayments were the same without regard to the drugs' cost following Mylan's price increase... Plaintiffs and not their members were forced to eat these price hikes."
> ...
>
> Further, the benefit Plaintiffs claim that Defendants received is easily cognizable. Plaintiffs BCBS Minnesota, BCBS Massachusetts, and Federated have pled that they absorbed millions of dollars in overcharges, which significantly increased Mylan's revenue and net earnings.... *see also State Farm Gen. Ins. Co. v. Stewart*, 288 Ill. App. 3d 678, 681 N.E.2d 625, 633, 224 Ill. Dec. 310 (Ill. App. Ct. 1997) ("A plaintiff alleging an unjust enrichment may be seeking to recover a benefit which he gave directly to the Defendant, or one which was transferred to the Defendant by a third party." (citation omitted)).
>
> Overall, all four Plaintiffs have adequately pled that they conferred a benefit of money on Defendants "under circumstances in which it would be unjust or inequitable for [Defendants] to retain the benefit."

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a chain that is much longer and more convoluted than that alleged by TPP Plaintiffs against Defendants. *Id.* at *5. Unlike *Williams & Drake Co.*, where the plaintiff "complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts," *id.* at *8, TPP Plaintiffs here complain of their own misfortunes visited upon themselves and their members by Defendants' acts.

Id. at 51. *See also In re Pa. Baycol Third-Party Payor Litig.*, 2005 Phila. Ct. Com. Pl. LEXIS 129, *20-21, 30 (Phila. Com. P. LEXIS 2005) (certifying a class of third party payors alleging unjust enrichment under Pennsylvania law for reimbursement of payments made on behalf of insured for purchases of Baycol, and/or for additional charges flowing from Baycol withdrawal symptoms). Here, just as in *In re Lorazepam & Clorazepate Antitrust Litig.*, TPP Plaintiffs paid significant costs out of their own pocket (in addition to the share paid by their members) as a result of Defendants' unlawful and immoral actions.[20] Among these costs are millions of dollars in payments and profits to Defendants which constitute a benefit that would be unjust for Defendants to retain. Accordingly, the suggestion that the TPP Plaintiffs have not alleged that they conferred a benefit on Defendants must fail.

2. Neither reliance nor a "sufficient nexus" are required elements of unjust enrichment

In their Motion to Dismiss, Defendants seek to create a reliance or "significant nexus" element of unjust enrichment that simply does not exist.[21] Defs' Brief at 17-18. This exact argument has been repeatedly rejected outright by several other courts,

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20 Defendants unconvincingly suggest that because TPP Plaintiffs' plan members may also receive some contractual benefit, benefits could not also have been given to Defendants. Defs' Brief at 18. The benefit Bethelehem provides to its insureds is totally irrelevant to the benefit Bethlehem conferred on Defendants when it paid for the defective heart devices on behalf of its insureds. Such an argument is illogical and contrary to reality and should be rejected.

21 The one case Defendants cite is based on Delaware's unjust enrichment principles, which specifically require a relationship to exist. *See Pa. Employee Benefit Trust Fund v. Zeneca, Inc.*, 2005 U.S. Dist. LEXIS 27444, * 18 (D. Del. 2005) ("The elements of unjust enrichment are (1) an enrichment; (2) an impoverishment; (3) a relation between the enrichment and impoverishment; (4) the absence of justification; and (5) the absence of a remedy at law.") Minnesota law does not. Moreover, under the facts of this case, it is demonstrable that there is a traceable relationship between what TPP Plaintiffs paid and what Defendants have received, despite the lack of "privity," which unjust enrichment law does not require.

including the District of New Jersey in *In re K-Dur Antitrust Litigation*. There, the court explained that:

> Defendants' argument that Third-Party Payors do not have a right to sue for unjust enrichment because they had a legal obligation to reimburse their insureds' purchases of K-Dur is similarly unavailing. Defendants cite no applicable cases standing for the proposition that third-parties are precluded from seeking recovery from defendants that overcharge those whose costs third parties reimburse. The relevant inquiry is whether there is a sufficient nexus between the conferrer of the benefit and the recipient, not whether there is a legal obligation to pay on the part of a third-party payor.

In re K-Dur, 338 F. Supp. 2d at 546; *see also Muehlbauer v. GMC*, 431 F. Supp. 2d 847, 853-54 (N.D. Ill. 2006) (rejecting the defendant's direct privity argument and discussing *In re Cardizem*, 105 F. Supp. 2d at 671, noting that court's view that the "the central inquiry is whether the plaintiff's detriment is directly related to the defendant's benefit, and not whether the plaintiff directly conferred a benefit on the defendant," and that "the question of whether the relationship between detriment and benefit is sufficient is one of fact."); *In re K-Dur*, 338 F. Supp. 2d at 544 (reiterating that all benefits accrued by the defendants can be disgorged through unjust enrichment and that "the critical inquiry is whether the plaintiff's detriment and the defendant's benefit are related to, and flow from, the challenged conduct"); *In re Cardizem*, 105 F. Supp. 2d at 671 (generally discussing privity in unjust enrichment claims and noting that "[w]hether or not the benefit is directly conferred on the defendant is not the critical inquiry; rather, the plaintiff must show that his detriment and the defendant's benefit are related and flow from the challenged conduct."); *In re Pa. Baycol*, 2005 Phila. Ct. Com. Pl. LEXIS 129,

*15 (rejecting the defendants' privity argument with regard to TPP payments and noting that "no state has expressly extended this requirement to a breach of an implied warranty..."). Thus, TPP Plaintiffs' unjust enrichment claim does not "float in the air," but has been sufficiently alleged by virtue of TPP plaintiffs' payments to Defendants for defective devices purchased for their insureds. TPP Plaintiffs have also alleged that it would be unjust to allow Defendants to retain the enormous profits it made at their expense. Accordingly, Defendants' motion to dismiss should be denied.

F. TPP Plaintiffs' Misrepresentation by Omission Claim Should Not Be Dismissed

After a superficial analysis of a complex area of law, Defendants take the position that TPP Plaintiffs' claim of misrepresentation by omission (Count XXVI) should be dismissed because it owed no duty to TPPs. Yet the Master Complaint is based on the premise that Defendants have a duty to physicians and that they violated that duty by deceiving physicians, and, in turn, their patients and TPP Plaintiffs. The Master Complaint clearly alleges that Defendants breached their duty to disclose by not only failing to issue a warning to physicians whatsoever, but also by intentionally misrepresenting the defects and risks of their defibrillators. *E.g.*, Master Complaint at ¶ 439 ("Defendants took advantage of the limited opportunity beneficiaries of Plaintiffs and other Third Party Payors (and their physicians) had to discover Defendant's intentional concealment of the defects and risks in the Devices."); *id.* at ¶ 441 ("Defendants' intentional misrepresentations and omissions were made willfully, wantonly or recklessly to the beneficiaries of Plaintiffs and Third Party Payers (by among

other things through physicians) to induce purchase of the Devices over their competitors.").

Defendants do indeed have an affirmative duty to inform, educate, and warn physicians of any problem or defect with the medical products they manufacture and which the physicians use or prescribe. *See, e.g., Mazur v. Merck & Co.*, 964 F.2d 1348, 1355 (3d Cir. 1992); *Sterling Drug, Inc. v. Cornish*, 370 F.2d 82, 85 (8th Cir. 1966). Thus, while a warning to the physician is deemed a warning to the patient, failure to warn the physician is likewise considered a failure to warn the patient. *See, e.g., Ehlis v. Shire Richwood, Inc.*, 367 F.3d 1013, 1016 (8th Cir. 2004); *Colacicco*, 432 F. Supp. 2d at 546 (finding that plaintiff properly plead that defendants failed to provide adequate warnings to his decedent's treating and/or prescribing physician and denying defendants' motion to dismiss on those grounds). Accordingly, the consequences of Defendants' violation of their duty to warn physicians do not end with physicians but extend to those actually harmed by the deception: patients and TPP Plaintiffs. It is clear that Defendants had a duty to keep physicians informed about these defects and that they did not do so; a failure to warn the physician is tantamount to a failure to warn the patient and TPP Plaintiffs.[22]

[22] Further, despite Defendants' simplistic assertions to the contrary, the LID can *only* act as a liability shield to manufacturers when adequate and timely warnings and information are given to medical providers. *Ehlis*, 367 F.3d at 1016; *Colacicco*, 432 F. Supp. 2d at 546-547. Thus, the doctrine "does not shield drug manufacturers from liability if the warnings they provided to physicians would not permit the physicians to adequately advise their patients." *Colacicco*, 432 F. Supp. 2d at 546. The issue of whether the information regarding the defibrillators' defects would have had an impact on the plaintiff's injuries is a question best left for the jury or for summary judgment. *See De Luryea v. Winthrop Labs.*, 697 F.2d 222, 225-26 (8th Cir. 1983) (finding issue of whether physician received adequate warnings "was properly submitted to the jury"); *Colacicco*, 432 F. Supp. 2d at 546-47; *Demmler v. SmithKline Beecham Corp.*, 448 Pa. Super. 425, 434 (Pa. Super. Ct. 1996) (affirming grant of summary judgment on the issue of inadequate warnings).

Further, courts have recognized that the question of whether a duty exists need not be answered where, as here, a party makes affirmative misrepresentations. *In re Lupron Mktg. and Sales Practices Litig.*, 295 F. Supp. 2d 148, 167-68 (D. Mass. 2003). *See also, e.g., Roeder v. Alpha Industries, Inc.*, 814 F.2d 22, 26 (1st Cir. 1987) ("When a corporation does make a disclosure – whether it be voluntary or required – there is a duty to make it complete and accurate."). In *In re Lupron*, the court found the defendants' actions in publishing false prices sufficient to allege mail and wire fraud, noting

> this is not a case of nondisclosure. Defendants did not stand mute. As alleged in the Amended Complaint, defendants trumpeted a lie by publishing the inflated AWPs, knowing (and intending) them to be used as instruments of fraud.... And because the alleged misrepresentations were knowing, deliberate, and made in furtherance of a scheme to defraud, they are sufficient to support the predicate acts...

Id. at 167-68. There, as here, plaintiffs deceived by the defendants' misrepresentations – patients and health benefit providers alike – were allowed to assert claims for damages regardless of the relationship between the parties and whether or not a duty was owed.

Ultimately, Defendants' argument is simply a recasting of their argument on TPP standing and the claim that TPPs cannot recover for the direct injuries they suffered as a result of Defendants' deceptive acts. But this standing argument has been rejected by the Minnesota Supreme Court and likewise should be rejected here. *See Group Health Plan, Inc.*, 621 N.W.2d at 8, 11; *State v. Philip Morris, Inc.*, 551 N.W.2d at 492, 495; *supra* section IV.A.

V. CONCLUSION

For all the foregoing reasons, Defendants' motion to dismiss should be denied.

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ZIMMERMAN REED, PLLP

s/ Charles S. Zimmerman
Charles S. Zimmerman, #120054
651 Nicollet Mall, Suite 501
Minneapolis, MN 55402
Telephone: (612) 341-0400
Facsimile: (612) 341-0844

Liaison Counsel and
Lead Counsel Committee

LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP

s/ Elizabeth J. Cabraser
Elizabeth J. Cabraser
Embarcadero Center West
30th Floor, 275 Battery St.
San Francisco, CA 94111-3339
Telephone: (415) 956-1000
Facsimile: (415) 956-1008

Lead Counsel Committee

NEBLETT, BEARD & ARSENAULT

s/ Richard J. Arsenault
Richard J. Arsenault
2220 Bonaventure Ct., P.O. Box 1190
Alexandria, LA 71301
Telephone: (318) 487-9874
Facsimile: (318) 561-2591

Lead Counsel Committee

LOCKS LAW FIRM PLLC

s/ Seth Lesser
Seth Lesser
110 East 55th St., 12th Floor
New York, NY 10022
Telephone: (212) 838-3333
Facsimile: (212) 838-3735

Lead Counsel Committee