SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

TRIAL/IAS PART 32
NASSAU COUNTY

BEVERLY A. TERRILLION, as Administratrix of the Estate of GREGORY F. TERRILLION, BEVERLY A. TERRILLION, Individually, and JACLYN TERRILLION,

Plaintiffs,

- against -

Index No.: 22734/10
Motion Seq. No.: 01
Motion Date: 08/31/11

LOVELAND PRODUCTS, INC., BASF CORPORATION, ARYSTA LIFESCIENCE, AMERICAN CYANAMID CO., CLARKE MOSQUITO CONTROL PRODUCTS, INC., BAYER CROPSCIENCE, LP, FAIRFIELD AMERICAN CORP., AOSI CO., RIGO CO., VELSICOL CHEMICAL CORPORATION, VELSICOL CHEMICAL LLC, DREXEL CHEMICAL COMPANY and MORTON GROVE PHARMACEUTICALS,

Defendants.

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibits and Memorandum of Law	1
Affirmation in Opposition and Exhibits	2
Memorandum of Law in Reply	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendants Loveland Products, Inc., BASF Corporation, Arysta LifeScience North America, LLC, Clarke Mosquito Control Products, Inc., Bayer CropScience, LP (named herein as "Bayer Environmental Science a/k/a Bayer CropScience, LP"), Velsicol Chemical LLC (f/k/a

Velsicol Chemical Corporation), and Drexel Chemical Company (hereinafter the "moving defendants") move, pursuant to CPLR § 3211(a)(5) and (a)(7), for an order dismissing the Verified Compliant. Plaintiffs oppose the motion.

In this action, plaintiffs seek to recover damages arising from decedent Gregory F. Terrillion's wrongful death allegedly caused by his continuous exposure to a variety of toxic chemicals during the course of his employment as a mosquito control laborer/mosquito control supervisor with the Nassau County Department of Public Works between, in or about 1988 and 2007. As a result of his exposure, decedent became seriously ill, physically disabled and eventually rendered terminally ill and ultimately died on December 1, 2008.

In their Verified Complaint, plaintiffs allege ten causes of action including to wit:

1) strict liability/unsafe product design;

2) strict liability/manufacturing defect;

3) strict liability/failure to warn;

4) negligence;

5) breach of express warranty;

6) breach of implied warranty;

7) fraudulent concealment;

8) wrongful death;

9) loss of consortium/wife and daughter;

10) psychological and emotional injury to daughter as result of decedent's death.

Moving defendants seek dismissal of the Verified Complaint pursuant to CPLR §

3211(a)(5) and (a)(7). In support of their CPLR §3211(a)(7) motion, moving defendants allege that the Verified Complaint is fatally flawed because it fails to identify the specific products to which decedent was exposed, the manufacturer of each of the products and attendant details as to decedent's exposure, all of which make it impossible, as a practical matter, for moving defendants to respond properly to the Verified Complaint and assess potential affirmative defenses. They further maintain that the Verified Complaint fails to provide moving defendants with notice *vis-a-vis* the transactions or occurrences at issue as required pursuant to CPLR § 3013.

Moving defendants contend that the first, second, fourth, fifth, sixth and seventh causes of action sounding respectively in design defect, manufacturing defect, negligent design and manufacture; breach of express warranty; breach of implied warranty of merchantability, *i.e.*, fitness for their intended purpose and fraudulent concealment of the defective nature of the products at issue are deficient.

In addition to plaintiffs' failure to specify which of the defendants' products are at issue, moving defendants contend that the Verified Complaint fails to identify the specific conduct on the part of each moving defendant that allegedly caused the claimed injuries. With respect to the fraudulent concealment claim, moving defendants maintain that plaintiffs have failed to meet the heightened pleading standard set forth in CPLR § 3016(b).

Under the circumstances extant, the Court finds no basis to dismiss the Verified Complaint at this pre-discovery stage based on the deficiencies alleged.

On a motion to dismiss pursuant to CPLR § 3211(a)(7), the Court's function is to determine whether the plaintiffs' actual allegations fit within any cognizable legal theory (*see*

Nonnon v. City of New York, 9 N.Y.3d 825, 842 N.Y.S.2d 756 (2007)), without regard to whether these allegations can ultimately be established. *See Colasacco v. Robert E. Lawrence Real Estate*, 68 A.D.3d 706, 890 N.Y.S.2d 114 (2d Dept. 2009). The Court must afford the pleading a liberal construction and give plaintiffs the benefit of every possible legal inference. *See Halliwell v. Gordon*, 61 A.D.3d 932, 878 N.Y.S.2d 137 (2d Dept. 2009). On such a motion, however, the Court will not accept as true bare legal conclusions and factual claims which are flatly contradicted by the evidence. *See Palazzolo v. Herrick, Feinstein, LLP*, 298 A.D.2d 372, 751 N.Y.S.2d 401 (2d Dept. 2002).

A motion to dismiss pursuant to CPLR § 3211(a)(7) will be denied " 'unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it.' " *Sokol v. Leader*, 74 A.D.3d 1180, 904 N.Y.S.2d 153 (2d Dept. 2010) *quoting Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 401 N.Y.S.2d 182 (1977).

A wrongful death action is brought on behalf of the decedent's distributees and not on behalf of decedent's estate. As such, the damages recovered are not in compensation for the injury sustained by decedent, but rather for the pecuniary injuries suffered by the distributees as a result of the decedent's death. *See Matter of Ramirez*, 14 Misc.3d 480, 826 N.Y.S.2d 553 (Surrogate's Court Bronx County 2006). The proceeds are paid directly to the distributees in the proportions directed by the Court, determined by their respective monetary injuries. *See Heslin v. County of Greene*, 14 N.Y.3d 67, 896 N.Y.S.2d 723 (2010). The person entitled to commence a wrongful death action is not the decedent's distributee, who is the beneficiary of the claim, but the decedent's personal representative. A personal representative is defined as a person who has received letters to administer the estate of the decedent. *See* NEW YORK ESTATE, POWERS AND

TRUST LAW § 1-2.13.

A wrongful death cause of action is created solely by statute and requires strict adherence to authorizing legislation. *See Langan v. St. Vincent's Hosp. of N.Y.*, 25 A.D.3d 90, 802 N.Y.S.2d 476 (2d Dept. 2005), *appeal dismissed* 6 N.Y.3d 890, 817 N.Y.S.2d 625 (2006). Pursuant to NEW YORK ESTATE, POWERS AND TRUST LAW § 5-4.1(1), a wrongful death action must be commenced within two years after the decedent's death. Since the decedent died on December 1, 2008, plaintiffs were required to commence the wrongful death claim by December 1, 2010. However, the Verified Complaint in this action was not filed until December 20, 2010. The wrongful death and derivative loss of consortium claims asserted in the eighth and ninth cause of action are, therefore, time barred and must be dismissed. *See Public Adm'r of Kings County v. Canada Dry Bottling Co., of N.Y.*, 16 A.D.3d 397, 790 N.Y.S.2d 711 (2d Dept. 2005). Under the facts at bar, no legal basis exists to extend the statute of limitations to save the claim. *See Baez v. New York City Health and Hospitals Corp.*, 80 N.Y.2d 571, 592 N.Y.S.2d 640 (1992).

Since plaintiffs' wrongful death claim is time barred, a derivative cause of action to recover for loss of consortium due to decedent's death cannot be sustained. *See Liff v. Schildkrout*, 49 N.Y.2d 622, 427 N.Y.S.2d 746 (1980). Moreover, there can be no recovery for loss of consortium in a wrongful death action. *See Monson v. Israeli*, 35 A.D.3d 680, 828 N.Y.S.2d 424 (2d Dept. 2006); *Dobin v. Town of Islip*, 11 A.D.3d 577, 783 N.Y.S.2d 64 (2d Dept. 2004).

In the tenth cause of action, plaintiffs allege that as a result of decedent's contact with and/or exposure to defendants' harmful and dangerous products, decedent suffered genetic injuries which were transmitted to his daughter, plaintiff Jaclyn Terrillion, who was born on

January 7, 1986, causing her to suffer severe and permanent unspecified emotional, physical and psychological injuries.

To the extent that the tenth cause of action may be read to allege a claim for genetic injury suffered by plaintiff Jaclyn Terrillion prior to her conception, the claim must be dismissed as New York does not recognize a cause of action for preconception torts. *See Upshur v. Staten Is. Med. Group*, 88 A.D.3d 785, 930 N.Y.S.2d 649 (2d Dept. 2011); *Ruffing v. Hoechst Celanese*, 1 A.D.3d 339, 766 N.Y.S.2d 439 (2d Dept. 2003), *appeal and leave to appeal dismissed* 2 N.Y.3d 820, 781 N.Y.S.2d 283 (2004). While plaintiffs contend that the instant case is similar to DES exposure cases in which the Court of Appeals held that children who suffered injuries as a result of their mother's ingestion of DES could recover against the manufacturer of the drug (*see Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 541 N.Y.S.2d 941 (1989)), plaintiffs have offered no authority or rationale to support such a theory.

Similarly, decedent's daughter's post-birth secondary exposure claim to defendants' chemicals/products which she alleges her father, Gregory F. Terrillion, transported on his clothing and/or his personal belongings or otherwise transmitted to her, as asserted in the tenth cause of action is deficient. *See Matter of New York City Asbestos Litig.*, 5 N.Y.3d 486, 806 N.Y.S.2d 146 (2005).

Manufacturers of defective products may be held strictly liable for injury caused by their products, meaning that they may be liable regardless of privity, foreseeability or reasonable care. *See Sprung v. MTR Ravensburg*, 99 N.Y.2d 468, 758 N.Y.S.2d 271 (2003); *Codling v. Paglia*, 32 N.Y.2d 330, 345 N.Y.S.2d 461 (1973). A product may be defective when it contains a manufacturing flaw, is defectively designed or is not accompanied by adequate warnings for the use of the product. *See Liriano v. Hobart Corp.*, 92 N.Y.2d 232, 677 N.Y.S.2d 764 (1998);

Robinson v. Reed-Prentice Div. of Package Mach. Co., 49 N.Y.2d 471, 426 N.Y.S.2d 717 (1980).

Both negligence and strict liability standards require that a manufacturer or seller of a product, who knows or should know of non-obvious dangers inherent in the foreseeable uses of its products, adequately warn users of those dangers. *See Burke v. Dow Chemical Co.*, 797 F.Supp. 1128, 1133 (E.D.N.Y. 1992). Under the doctrine of strict products liability, the manufacturer of a product is under a nondelegable duty to produce a defect free product. Liability is imposed irrespective of fault. *See Perez v. Radar Realty*, 7 Misc.3d 1015(A), 801 N.Y.S.2d 241 (Sup. Ct. Bronx County 2005) *aff'd* 34 A.D.3d 305, 824 N.Y.S.2d 87 (1st Dept. 2006).

As noted in *Restrepo v. Rockland Corp.*, 38 A.D.3d 742, 832 N.Y.S.2d 272 (2d Dept. 2007), the FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT, 7 USC § 136 *et seq.* ("FIFRA"), preempts causes of action based on common law inadequate labeling or failure to warn. *See Warner v. American Fluoride Corp.*, 204 A.D.2d 1, 616 N.Y.S.2d 534 (2d Dept. 1994). FIFRA is a comprehensive regulatory scheme which authorizes the Environmental Protection Agency ("E.P.A.") to regulate most aspects of the development, manufacture, sale, labeling/packaging and use of pesticides and insecticides. All pesticides sold in the United States must be registered with the E.P.A. in compliance with FIFRA and its regulations. The preemptive scope of FIFRA does not extend, however, to state law claims predicated on other than inadequate labeling or packaging (failure to warn) causes of action, *i.e.*, those based upon, *inter alia*, express warranty, defective design or intentional concealment of potential health risks are not preempted. *See Younger v. Spartan Chem. Co.*, 252 A.D.2d 265, 686 N.Y.S.2d 152 (3d Dept. 1999).

The third cause of action in which plaintiffs allege, *inter alia*, that defendants failed to provide the public, including the decedent herein, with adequate and/or proper training/warnings regarding the handling/dispensing/use of hazardous chemicals including, but not limited to, Scourge, Anvil, Resmetrin, Melathion, Lindane, DDT and Chlordane is preempted by FIFRA and must be dismissed. Moreover, to the extent that plaintiffs' negligence, strict liability and breach of implied warranty claims require a showing that the defendants' labeling and packaging were a factor in causing the complained of injuries, such claims are expressly preempted by FIFRA. *See Warner v. American Fluoride Corp., supra* at 13.

Generally, causes of action based on negligence, breach of express warranty and implied warranty and strict products liability as set forth in the first, second, fourth, and fifth causes of action of plaintiffs' Verified Complaint, which are not premised on a failure to warn or inadequate labeling, survive preemption and will not be dismissed. *See Sabbatino v. Rosin & Sons Hardware & Paint*, 253 A.D.2d 417, 676 N.Y.S.2d 633 (2d Dept. 1998); *Lopez v. Hernandez*, 253 A.D.2d 414, 676 N.Y.S.2d 613 (2d Dept. 1998); *Wallace v. Parks Corp.*, 212 A.D.2d 132, 629 N.Y.S.2d 570 (4th Dept. 1995). Discovery will, however, be required to test the parameters of said causes of action. Since the scope of FIFRA's express preemption provision only extends to claims which are predicated on failure to warn or inadequate labeling, to the extent that plaintiffs' claims are not so predicated, such claims are actionable. *See Higgins v. Monsanto Co.*, 862 F Supp.751, 758 (N.D.N.Y. 1994).

With respect to the seventh cause of action, the Court notes that, where the gist of the alleged wrong is an injury resulting from negligence or strict products liability, if the allegations pled are true, the damages incurred are the product of defendants' negligence/design/manufacture and/or defective product and not of defendants' fraud. The fraud of defendants in representing that

their products were safe, fit and effective for the use for which they were intended do not result in the infliction of any additional damages beyond those to which plaintiffs would be entitled in the event they were to prevail on the negligence and strict products liability causes of action. The seventh cause of action for fraudulent concealment is, therefore, not viable. *See Ruffing v. Union Carbide Corp., supra* at 528.

Accordingly, moving defendants' motion, pursuant to CPLR § 3211(a)(5) and (a)(7), for an order dismissing the Verified Compliant is hereby **GRANTED to the extent that the third, seventh, eighth, ninth and tenth causes of action are dismissed**. The first, second, fourth, fifth and sixth causes of action continue.

It is further ordered that the parties shall appear for a Preliminary Conference on February 2, 2012, at 9:30 a.m., at the Preliminary Conference Desk in the lower level of 100 Supreme Court Drive, Mineola, New York, to schedule all discovery proceedings. A copy of this Order shall be served on all parties and on the DCM Case Coordinator. There will be no adjournments, except by formal application pursuant to 22 NYCRR § 125.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
December 19, 2011