SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARY V. ROSADO** **PART** **33M**

Justice

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TODD GREENBERG, Individually and as Personal Representative of the ESTATE OF ALICIA GREENBERG, Deceased,

Plaintiffs,

- v -

LOREAL USA, INC.,LOREAL USA PRODUCTS, INC.,SOFT SHEEN-CARSON, LLC

Defendants.

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INDEX NO. 159477/2025

MOTION DATE 09/18/2025

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 34, 35, 36

were read on this motion to/for DISMISS.

Upon the foregoing documents, and after a final submission date of November 5, 2025, Defendants L'Oréal USA, Inc., L'Oréal USA Products, Inc., and SoftSheen-Carson LLC's (collectively, "L'Oréal") motion to dismiss Plaintiff Todd Greenberg, Individually and as Personal Representative of the Estate of Alicia Greenberg ("Decedent") (collectively "Plaintiffs") Complaint is granted in part and denied in part.

I. Background

This action arises out of Decedent's alleged exposure to hair straightening products which allegedly caused her uterine cancer. From the 2000 through 2023, Plaintiffs allege Decedent used numerous hair relaxer products manufactured and sold by L'Oréal. In or around May of 2023, Decedent was diagnosed with uterine cancer, and on July 23, 2023 she died, allegedly due to metastatic cancer. Plaintiffs now sue L'Oréal under numerous theories of liability seeking to recover damages related to her uterine cancer diagnosis. L'Oréal responds with the instant pre-

answer motion to dismiss. Plaintiffs oppose and request leave to amend or supplement the Complaint should the Court find the Complaint deficient in any regard.[1]

II. Discussion

A. Preemption

L'Oréal's motion to dismiss based on express preemption is denied. Defendants argue Plaintiffs' claims are expressly preempted by the Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C. §301. Express preemption applies only where the plain language of a statute supersedes state law (*Doomes v Best Transit Corp.*, 17 NY3d 594, 601 [2011]). As held by the United States Supreme Court, there is a presumption against pre-emption, and pre-emption clauses are to be narrowly construed (*Cipollone v Liggett Group, Inc.* 505 U.S. 504, 505 [1992]; *see also Galper v JP Morgan Chase Bank, N.A.*, 802 F3d 437, 448 [2d Cir 2015]). The specific language which L'Oréal argues preempts many of Plaintiffs' causes of action is found in 21 U.S.C. § 379s(a).

That provision provides:

> "Except as provided in subsection (b), (d), or (e), no State or political subdivision of a State may establish or continue in effect any requirement for labeling or packaging of a cosmetic that is different from or in addition to, or that is otherwise not identical with, a requirement specifically applicable to a particular cosmetic or class of cosmetics under this chapter, the Poison Prevention Packaging Act of 1970 (15 U.S.C. 1471 et seq.), or the Fair Packaging and Labeling Act (15 U.S.C. 1451 et seq.)."

The exception to the preemption clause found at 21 U.S.C. § 379s(d) provides:

> "Nothing in this section shall be construed to modify or otherwise affect any action or the liability of any person under the product liability law of any State."

A holistic review of Plaintiffs' Complaint yields allegations that Defendants were negligent for failure to comply with the labelling requirements of 21 U.S.C. §§ 361, 362, and 21 C.F.R. §

[1] Plaintiffs did not formally cross-move for a motion to amend, therefore the Court need not entertain this relief (*see Fifth Partners LLC v Foley*, 227 AD3d 543 [1st Dept 2024]; *Onofre v 243 Riverside Drive Corp.*, 232 AD3d 443, 443-444 [1st Dept 2024]).

740.1(a). Accepting Plaintiffs' allegations as true, pursuant to § 361, titled "Adulterated cosmetics," Defendants' products should have been labelled and/or recalled as adulterated. That section specifically states a cosmetic is adulterated "[i]f it bears or contains any poisonous or deleterious substance which may render it injurious to users under the conditions of use prescribed in the labelling thereof, or under such conditions of use as are customary or usual…." (*see* 21 U.S.C. § 361[a]). Moreover, pursuant to 21 U.S.C. 362(a), a cosmetic is misbranded "[i]f its labelling is false or misleading in any particular (*sic*)." And pursuant to 21 C.F.R. § 740.1(a), "[t]he label of a cosmetic product shall bear a warning statement whenever necessary or appropriate to prevent a health hazard that may be associated with the product."

L'Oréal's preemption argument is misguided in two respects. First, Plaintiffs do not seek relief under state law causes of action that would impose a different or additional labeling requirement pursuant to the FDCA. Rather, Plaintiffs are alleging state law causes of action based on purported violations of the FDCA's labeling requirement. Specifically, it is alleged that Defendants' products were marketed and sold as creating "stronger hair" even though there was scientific data showing certain ingredients in Defendants' products disrupt women's endocrine systems and cause cancer (NYSCEF Doc. 1 at ¶¶ 58-62). These ingredients are alleged to include, but are not limited to, phthalates, parabens, cyclosiloxanes, di-(2-ethlhexyl), octamethylcyclotetrasiloxane, lye, and formaldehyde (*Id.* at ¶¶ 35-54). Given the presumption against preemption and construing 21 U.S.C. § 379s(a) narrowly and in conjunction with other sections of the FDCA, the Court finds Plaintiffs' sixth through tenth causes of action and twelfth cause of action are not expressly preempted. Indeed, § 379s(a) does not expressly bar plaintiffs from using common law causes of action to seek damages based on a defendant's alleged failure to comply with the labeling requirements set forth in the FDCA.

Although L'Oréal relies on the Second Circuit's decision in *Critcher v. L'Oreal USA, Inc.*, 959 F.3d 31 (2d. Cir. 2020), the facts of that case are wholly distinguishable from the case at bar. Specifically, the putative class in *Critcher* sued because some purchased cosmetics could not be fully dispensed from cosmetics containers – causing purchased product to go to waste. The plaintiffs alleged they were "cheated" of the product they bought. They alleged there should have been a disclaimer that not all the cream bought was accessible to the consumer. *Critcher* was not a case involving alleged mislabeling based on the failure to warn about potentially cancer-causing ingredients. The Second Circuit specifically noted that the *Critcher* plaintiffs were not suing based on the effectiveness of the products, as Plaintiffs do here. Moreover, the *Critcher* plaintiffs conceded that L'Oréal complied with the FDCA's federal labeling requirements, while here Plaintiffs allege those requirements have been violated. Thus, the Second Circuit's decision in *Critcher* is neither persuasive nor controlling.

The second reason that L'Oréal's preemption argument is misplaced is because it fails to consider that Plaintiffs' causes of action may be categorized as product liability claims, or at the very least, are product liability adjacent, bringing them within the product liability exception contained in 21 U.S.C. § 379s(d). Indeed, it was for this reason that United States District Judge Mary M. Rowland, in ruling on defendants' joint motion to dismiss the plaintiffs' master complaint, found the numerous state law claims were not preempted (*see In re Hair Relaxer Marketing Sales Practices and Prods. Liab. Litig.*, 702 F.Supp.3d 692, 699-700 [ND Ill 2023]). Given the presumption against preemption, construing 21 U.S.C. § 379s(a) narrowly, and to ensure consistency in rulings, this Court adopts Judge Rowland's ruling in the ongoing multidistrict litigation. Therefore, the motion to dismiss based on an express preemption defense is denied.

B. Failure to State a Claim

i. Failure to Warn (Second and Third Causes of Action)

L'Oréal's motion to dismiss Plaintiffs' failure to warn causes of action is denied. L'Oréal argues the failure to warn claims fail because the Complaint does not identify the defect in L'Oréal's products, nor does it allege L'Oréal's knowledge of the defect. This argument is unavailing, as the Complaint lists the products used (*see* NYSCEF Doc. 1 at ¶¶ 14-15) and alleged the numerous dangerous ingredients used in L'Oréal's products of which L'Oréal had a duty to research, test, and warn (*Id.* at ¶¶ 35-54). Accepting the allegations as true, as this Court must on a pre-answer motion to dismiss, this is sufficient to state a failure to warn claim (*see, e.g. Liriano v Hobart Corp.*, 92 NY2d 232, 237 [1998] [manufacturers have "a duty to warn against latent dangers resulting from foreseeable uses of its product of which it knew or should have known."]). Although L'Oréal argues that there is insufficient scientific evidence to allege that it knew or should have known about the dangers of certain ingredients, that is an argument appropriate for a motion for summary judgment, after further discovery has taken place and with competing expert affidavits, as opposed to a pre-answer motion to dismiss.

ii. Design Defect (First and Fourth Causes of Action)

L'Oréal's motion to dismiss Plaintiffs' design defect claim is denied. As long held by the Court of Appeals, a design defect claim arises when a product is "unreasonably dangerous for its intended use" or "whose utility does not outweigh the danger inherent in its introduction into the stream of commerce." (*Voss v. Black & Decker Mfg. Co.*, 59 NY2d 102, 107 [1983]). Plaintiffs explicitly allege that products designed and sold by L'Oréal were unreasonably dangerous because they contained toxic ingredients which increase the risk of uterine cancer. A feasible design can be inferred from the allegations – namely a design that did not include the allegedly toxic and

cancer-causing ingredients. Moreover, Plaintiffs allege Defendants' knowledge that certain ingredients included in their products could cause cancer, and Plaintiffs specifically identify L'Oréal products that were allegedly designed defectively (NYSCEF Doc. 1 at ¶¶ 58-62) Accepting the allegations as true, on a pre-answer motion to dismiss this is sufficient to state a design defect claim. Whether the evidence ultimately leads to a valid design defect claim is an issue to be determined at trial or on summary judgment.

iii. Negligence and Gross Negligence (Fifth Cause of Action)

L'Oréal's motion to dismiss Plaintiffs' negligence and gross negligence claims is denied. Given the CPLR's lenient pleading standard, coupled with Plaintiffs' detailed allegations in the Complaint, Plaintiffs sufficiently alleged a negligence claim. Plaintiffs also alleged a gross negligence claim, which requires allegations that a defendant's conduct "evinces a reckless disregard for the rights of others or 'smacks' of intentional wrongdoing." (*Colnaghi, U.S.A., Ltd. v. Jewelers Protection Servs., Ltd.,* 81 N.Y.2d 821, 823–24, [1993]). Accepting the allegations as true, marketing and selling products as safe or promoting strong hair while utilizing ingredients that dangerously increased the risk of uterine cancer and failing to warn about the dangers of those ingredients despite alleged knowledge of those dangers is sufficient, for purposes of a pre-answer motion to dismiss, to allege gross negligence.

iv. Negligence *Per Se* (Twelfth Cause of Action)

L'Oréal's motion to dismiss Plaintiffs' claim alleging negligence *per se* is denied. New York law holds defendants liable for negligence *per se* as to violations of the FDCA (*see Winans v Ornua Foods North America Inc.*, 731 F.Supp.3d 422, 431 [EDNY 2024]). Plaintiffs' alleged violations of the FDCA based on misbranding and false or misleading labeling has long been held by the Second Circuit to give rise to a negligence *per se* claim (*see Ezagui v Dow Chemical Corp.*,

598 F2d 727, 733 [2d Cir. 1979]; *see also Sita v Danek Medical, Inc.*, 43 F.Supp.2d 245, 262 [EDNY 1999]).

v. Negligent Misrepresentation, Fraud, Fraudulent Concealment (Sixth through Eighth Causes of Action)

L'Oréal's motion to dismiss Plaintiffs' claims alleging negligent misrepresentation, fraud, and fraudulent concealment is denied. To state a negligent misrepresentation claim, a plaintiff must allege that the defendant was "under a duty to the plaintiff to exercise reasonable care in giving the information, and plaintiff's reliance on the information must be foreseeable." (*Heard v City of New York*, 82 NY2d 66 [1993]). Accepting the allegations as true, Plaintiffs adequately alleged negligent misrepresentation by stating L'Oréal knew or should have known its products were unsafe yet failed to disclose the dangers to Decedent, who relied on Defendants' omissions when she decided to purchase their products (*see also Standish-Parkin v Lorillard Tobacco Co.*, 12 AD3d 301, 302-303 [1st Dept 2004]).

The same analysis holds true for Plaintiffs' fraud and fraudulent concealment claims (*see also Rose v American Tobacco Co.*, 3 Misc.3d 1103[A] at 2 [Sup. Ct. NY Co. 2004]). Contrary to L'Oréal's assertion, CPLR 3016(b)'s heightened pleading standard is not meant to prevent an otherwise valid cause of action in situations where it may be 'impossible to detail the circumstances constituting a fraud'" (*Pludeman v Northern Leasing Systems, Inc.* 10 NY3d 486, 491 [2008] citing *Lanzi v Brooks*, 43 NY2d 778, 780 [1977]). Given Plaintiffs' allegations and the current procedural juncture, the Court denies L'Oréal's motion to dismiss Plaintiffs' causes of action alleging negligent misrepresentation, fraud and fraudulent concealment.

vi. Breach of Express and Implied Warranties (Ninth and Tenth Causes of Action)

L'Oréal's motion to dismiss Plaintiffs' claims alleging breach of express and implied warranties is denied. Pursuant to New York Uniform Commercial Code §2-313(1)(a) "any

affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise." Likewise, §2-313(1)(b) states that "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." Here, Plaintiffs allege Decedent relied on warranties that Defendants' products were "safe, healthy, protective, and/or natural." (NYSCEF Doc. 1 at ¶¶ 213-18). As this is a pre-answer motion to dismiss, further discovery is needed to ascertain whether an express warranty existed and whether Decedent relied on the warranty.

Moreover, there may be a breach of the implied warranty of merchantability if goods are unsafe "when used in the customary, usual and reasonably foreseeable manner" (*Denny v Ford Motor Co.*, 87 NY2d 248, 258-59 [1995]). Here, Plaintiffs allege that Decedent developed uterine cancer from using Defendants' hair relaxer products in their usual and customary manner. These allegations are sufficient (*see generally Colarossi v C.R. Bard, Inc.*, 113 AD3d 407, 408 [1st Dept 2014]). Thus, the motion to dismiss Plaintiffs' causes of action alleging a breach of express warranty and breach of implied warranty is denied.

vii. Unjust Enrichment (Thirteenth Cause of Action)

L'Oréal's motion to dismiss Plaintiffs' claim alleging unjust enrichment is granted. As reiterated by the Court of Appeals, an unjust enrichment claim is not available if it simply duplicates, or replaces, a conventional contract or tort claim (*Corsello v Verizon New York, Inc.*, 18 NY3d 777, 790 [2012]). Unjust enrichment is reserved for "unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff." (*Id.*). This is not one of those cases. Therefore, this portion of the motion to dismiss is granted.

viii. Negligent Failure to Recall (Eleventh Cause of Action)

L'Oréal's motion to dismiss Plaintiffs' claims alleging negligent failure to recall is granted. There is no independent cause of action for "negligent failure to recall" in New York, and in any event, the failure to recall is duplicative of the numerous other negligence-based causes of action–including failure to warn, ordinary negligence, gross negligence, and negligence *per se*. Therefore, this cause of action is dismissed.

ix. Punitive Damages (Fourteenth Cause of Action)

L'Oréal's motion to dismiss Plaintiffs' claims alleging punitive damages is granted in part and denied in part. To the extent L'Oréal argues punitive damages are not an independent cause of action this is correct, and the fifteenth cause of action is dismissed (*Jean v Chinitz*, 163 AD3d 497 [1st Dept 2018]). However, to the extent L'Oréal seeks to strike the demands for punitive damages throughout the Complaint, this portion of the motion is denied. At this pre-answer stage, without the benefit of any discovery, and accepting the allegations as true, the Court finds it premature to make any ruling dismissing the claim for punitive damages (*Wholey v Amgen, Inc.*, 165 AD3d 458, 459 [1st Dept 2018]; *Sclafani v Brother Jimmy's BBQ, Inc.*, 88 AD3d 515, 516 [1st Dept 2011]). Thus, L'Oréal's motion to dismiss Plaintiffs' fifteenth cause of action which purports to assert a claim for punitive damages is granted. However, L'Oréal's request that the demands for punitive damages found throughout the Complaint be stricken is denied.

x. Wrongful Death (Fifteenth Cause of Action)

L'Oréal's motion to dismiss Plaintiffs' wrongful death claim is denied. Although L'Oréal is correct that wrongful death is a derivative claim, there are sufficient underlying claims which survive this motion to dismiss, thus there is no basis to dismiss the wrongful death claim.

Accordingly, it is hereby,

ORDERED that L'Oréal's motion to dismiss motion to dismiss Plaintiffs' Complaint is granted in part and denied in part; and it is further

ORDERED that L'Oréal's motion to dismiss is granted to the extent that the thirteenth cause of action alleging unjust enrichment and eleventh cause of action alleging negligent failure to recall are hereby dismissed; and it is further

ORDERED that L'Oréal's motion to dismiss is granted to the extent that the fourteenth cause of action alleging punitive damages is dismissed. However, the motion is denied to the extent L'Oréal seeks dismissal of the demands for punitive damages throughout the Complaint; and it is further

ORDERED that the remainder of L'Oréal's motion to dismiss is denied; and it is further

ORDERED that within twenty days of entry, L'Oréal shall serve its Answer; and it is further

ORDERED that within ten days of entry, counsel for Plaintiffs shall serve a copy of this Decision and Order, with notice of entry, on all parties via NYSCEF.

This constitutes the Decision and Order of the Court.

12/15/2025
DATE

Mary V Rosado JSC
HON. MARY V. ROSADO, J.S.C.

CHECK ONE:		CASE DISPOSED		x	NON-FINAL DISPOSITION		
		GRANTED	DENIED	x	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE