Fulton County Superior Court
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Cathelene Robinson, Clerk

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

WENDY NORMAN and JANET NORMAN, Plaintiffs	*	CIVIL ACTION 2017CV298536
vs.	*	JUDGE MCBURNEY
XYTEX CORPORATION, XYTEX CRYO INTERNATIONAL LTD, MARY HARTLEY, J. TODD SPRADLIN, and DOES 1-25, Defendants	*	

ORDER ON DEFENDANTS' MOTION TO DISMISS

Plaintiffs are the parents of A.A.[1] A.A. was conceived in 2001 when sperm purchased from Defendant Xytex Corporation[2] and procured from donor BGM 9623 was introduced into Plaintiff Wendy Norman by intrauterine insemination. This procedure resulted A.A.'s birth on 12 June 2002. Upon learning the identity of BGM 9623 in March 2017,[3] Plaintiffs discovered he was a college dropout with a felony conviction and diagnosed schizophrenia. This reality contrasted starkly with the information Xytex had provided when Plaintiffs made their purchase: BGM 9623 was described as a healthy male with an IQ of 160, a bachelor's degree, a master's degree, a Ph.D. in neuroscience engineering on the way, and no criminal history. As a result of this unwelcome discovery Plaintiffs brought suit against Xytex alleging fraud, negligent misrepresentation, strict liability in products liability,

[1] All "facts" recited herein are drawn from Plaintiffs' complaint, unless otherwise noted. Reliance on Plaintiffs' allegations for purposes of deciding Defendants' motion to dismiss is proper: "In making this analysis, we view all of the plaintiff's well-pleaded material allegations as true, and view all denials by the defendant as false, noting that we are under no obligation to adopt a party's legal conclusions based on these facts." *Love v. Morehouse College, Inc.*, 287 Ga. App. 743, 743-44 (2007) (citations omitted).

[2] Xytex Corporation is a subsidiary of Defendant Xytex Cryo International LTD. Xytex Cryo International provided sperm through Xytex Corporation. Mary Hartley is an employee of Xytex Corporation. J. Todd Spradlin is apparently a physician and the Medical Director for Xytex. The two Xytex entities, Hartley, and Spradlin have jointly moved to dismiss the complaint in this case and are referred to in this Order collectively as "Xytex".

[3] Xytex inadvertently released the identity of BGM 9623 in June 2014. In March 2017, A.A. discovered BGM 9623's identity through an internet search and informed Plaintiffs of the discovery.

negligence in products liability, breach of express warranty, breach of implied warranty, battery, negligence, unfair business practices, false advertising, promissory estoppel, unjust enrichment and seeking to compel disclosure of BGM 9623's complete history on file with Xytex. Defendants timely answered and moved to dismiss. That motion -- and Plaintiffs' response -- are considered below.

Wrongful Birth

Xytex's primary basis for dismissal is that Plaintiffs' suit -- all thirteen counts -- is derivative of a single underlying tort claim that has no legal basis in Georgia: wrongful birth. That is, Xytex argues that Plaintiffs' various claims are simply variations on the single theme that, if Plaintiffs had only known the true characteristics of BGM 9623, A.A. would not have been born. Plaintiffs disagree: they assert that, had they known the true nature of BGM 9623 *when they should have* -- that is, at the time Xytex rendered its services -- A.A. would not have been *conceived*.[4] Plaintiffs are thus arguing that it is a wrongful *conception* they are challenging, not a wrongful birth.

As this Court has previously noted, the science that brought us the wonders (and attendant moral and legal challenges) of artificial insemination, *in vitro* fertilization, and embryo transplantation has developed much faster than the laws we rely on to regulate such procedures (and the business models that have sprung up around them). The issues raised by this litigation are complicated and careful use of terminology is essential. Under current Georgia law, an action for "wrongful conception" -- which is *literally* what

[4] "Had Plaintiffs known the true facts, Plaintiffs would not have purchased the sperm from Donor #9623 from Defendants…." (Complaint ¶ 44). "By causing a pregnancy that would have been *unwanted* if Xytex had properly vetted this sperm donor and disclosed his checkered past, Defendants directly caused the harm." (Plaintiffs' brief at 9, emphasis added). "If Xytex had disclosed the relevant information about this donor *before* conception, a pregnancy with that biological father would have been just as unwanted as a pregnancy suffered by a person who had chosen to undergo sterilization….." (Plaintiffs' brief at 11-12, emphasis in original).

Plaintiffs are pursuing -- arises when a sterilization procedure goes wrong and a live birth unintentionally results.[5] *Fulton-DeKalb Hosp. Auth. v. Graves*, 252 Ga. 441, 442 (1984); *Wasdin v. Mager*, 274 Ga. App. 885, 887 (2005); 15A Ga. Jur. Personal Injury and Torts § 38:6. In other words, an aggrieved party brings a wrongful conception action when no conception was intended, sought, or desired and yet it nonetheless occurred. While wrongful conception actions, thusly defined, may be maintained in Georgia, this case does not present such a claim, as Plaintiffs sought and desired the conception that brought them A.A.[6]

An action for "wrongful birth" arises when parents make a claim that, had they been fully informed of the fetus's condition, the birth would not have occurred. *Atlanta Obstetrics & Gynecology Grp. v. Abelson*, 260 Ga. 711 (1990). Georgia law does not recognize wrongful birth claims.[7] *Id.; see also Etkind v. Suarez,* 271 Ga. 352, 352–53 (1999).

Plaintiffs insist their suit is not for wrongful birth but rather, as enumerated above, for fraud, products liability, misrepresentation, negligence, breach of warranty, etc. Superficially, Plaintiffs are correct, but simply calling one tort by another name does not transform that tort into the other. Others have tried this approach and properly failed. *See Gale v. Obstetrics & Gynecology of Atlanta, P.C.*, 213 Ga. App. 614, 615 (1994) ("Though couched in terms of breach of contract, breach of confidential relationship, and

[5] These actions are also known as "wrongful pregnancies."
[6] There is, at present, no recognized civil action in Georgia for the type of wrongful conception Plaintiffs complain of: negligence on the part of defendants that resulted in a desired conception with undesirable results. Georgia law recognizes only those claims in which the alleged negligence resulted in *un*desired conception.
[7] There is also a correlative "wrongful life" cause of action that is "brought on behalf of an impaired child and alleges basically that, but for the treatment or advice provided by the defendant to its parents, the child would never have been born." *Abelson*, 260 Ga. at 713. Few States allow such claims; Georgia does not. *Id.; but cf. Turpin v. Sortini*, 31 Cal. 3d 220 (1982).

negligence, the cause of action set forth in their complaint is, in reality, one for wrongful birth … and wrongful birth claims explicitly [are] not … recognized in Georgia."). The Court finds the same here: despite their various re-characterizations of Defendants' allegedly tortious acts, Plaintiffs are truly challenging the purported negligence that resulted in a wanted conception and birth with unwanted results. This claim most closely resembles a claim for wrongful birth -- and so is not allowed.[8] The reason for this is both simple and profound: courts are "unwilling to say that life, even life with severe impairments, may ever amount to a legal injury." *Abelson*, 260 Ga. at 715, quoting *Azzolino v. Dingfelder*, 315 N.C. 103, 111 (1985). Put differently, the question of "[w]hether it is better never to have been born at all than to have been born with even gross deficiencies is a mystery more properly to be left to the philosophers and the theologians." *Becker v. Schwartz*, 46 N.Y.2d 401, 411 (1978).

Plaintiffs rightly highlight the public policy issues raised by this litigation. Advances in science have -- as they always do -- outstripped advances in law and policy. Plaintiffs make a compelling argument that there should be a way for parties aggrieved as these parents are to pursue negligence claims against a service provider involved in *pre*-conception services. How can it be, Plaintiffs ask, that Xytex can face no liability for negligently peddling "tainted" sperm that has produced so much suffering? And indeed, when would-be parents are working with companies such as Xytex, the human life that makes the calculus in a wrongful birth case so complicated has not yet begun. Allowing a claim that, but for the alleged negligence of Xytex, A.A. would not have been *conceived*

[8] The Court disagrees with Plaintiffs that the fact they are suing the service provider who provided the genetic material rather than the service provider who provided the medical care materially differentiates their claim from previously rejected wrongful birth claims. The tort is defined not by the identity of the tortfeasor but by the nature of the duty, breach, and harm.

seems more appropriate if limited to damages that focus not on the value of the child's life but instead on the emotional and economic injuries suffered by the parents.[9] And, in this case, unlike previous Xytex litigation this Court has heard, Plaintiffs can point to actual, present struggles they and A.A. are enduring rather than the fear of potential future physical and/or psychiatric issues.[10]

This Court, however, has no authority to overrule or modify a decision of the Supreme Court of Georgia, as the decisions of that Court "shall bind all other courts as precedents." *Gale*, 213 Ga. App. at 615. The direction from the higher courts and the Legislature is clear -- perhaps a step behind today's science, but clear -- and until that law is changed, it dictates the outcome of this case. Defendants' motion to dismiss is **GRANTED** as to all counts except Count Ten (specific performance), which seeks information concerning BGM 9623 and is not a claim for wrongful birth camouflaged as some other tort.

Count Ten -- Specific Performance

In Count Ten, Plaintiffs demand specific performance, asserting that they have a contract with Defendants and that, as part of that contract, Defendants are obligated to provide certain information about BGM 9623. Defendants, in seeking dismissal of Count Ten, argue that Plaintiffs failed to plead facts sufficient to show a contract was formed. They argue in the alternative that if a contract was formed the condition precedent which would trigger their disclosure obligation had not occurred.

> A motion to dismiss for failure to state a claim upon which relief can be granted should not be sustained unless (1) the allegations of the complaint

[9] *See Etkind v. Suarez,* 271 Ga. 352, 359-60 (1999) (Benham, J., dissenting).
[10] A.A. has been diagnosed with Thalassemia Minor, a hereditary condition for which birth mother Wendy Norman does not carry the trait. A.A. has also allegedly displayed both suicidal and homicidal ideation, searching the internet for ways to kill himself and his brother. A.A. has been hospitalized multiple times for these issues. He is presently medicated with Lexapro, Kapvay, and Abilify.

> disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof; and (2) the movant establishes that the claimant could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought. If, within the framework of the complaint, evidence may be introduced which will sustain a grant of the relief sought by the claimant, the complaint is sufficient and a motion to dismiss should be denied. For the purposes of a motion for judgment on the pleadings, all well-pleaded material allegations of the opposing party's pleading are to be taken as true, and all allegations of the moving party which have been denied are taken as false.

Sherman v. Fulton Cty. Bd. of Assessors, 288 Ga. 88, 90 (2010) (punctuation and citations omitted). Plaintiffs have properly alleged the existence of a contract and a duty to perform such that, given the right evidence, the relief sought could be granted. Defendants' contentions about the existence of a contract and whether any condition precedent was satisfied come too soon and are more suited to a motion for summary judgment, after a factual record has been developed. At this early juncture, the Court finds that Plaintiffs' pleading is sufficient; Defendants' motion to dismiss Plaintiffs' claim for specific performance is **DENIED.**

Alternative Ground -- Statute of Limitations/Timing of Action[11]

Xytex contends that Plaintiffs' claims are barred by the various applicable statutes of limitations, given that A. A. was conceived in September or October 2001 -- and Plaintiffs' dealings with Xytex preceded that. Plaintiffs respond that they timely filed suit after discovering in March 2017 the true identity of BGM 9623. This argument presents two questions. First, has a cognizable claim for damages accrued yet and, second, if one has, did the statute begin to run when Xytex and Plaintiffs consummated their transaction or only when Plaintiffs became aware of the alleged torts (or when Plaintiffs could have

[11] Because this case presents novel (or at least complicated) issues and may be returned to this Court for further proceedings, the Court is addressing Defendants' other arguments for dismissal.

discovered the alleged torts -- *i.e.*, at the time of the inadvertent disclosure of BGM 9623's information in June 2014)?

The answer to the first question appears to be "yes and no." For the most part, Plaintiffs focus on their apprehension that A.A. *may* someday become schizophrenic. This fear of a future diagnosis of schizophrenia is not sufficient to support an action for damages. *Boyd v. Orkin Exterminating Co.*, 191 Ga. App. 38, 40 (1989) (fear of contracting disease in future not compensable without showing of reasonable medical certainty that such consequence will occur), *overruled on other grounds, Hanna v. McWilliams*, 213 Ga. App. 648, 651 (1994); *Parker v. Wellman*, 230 F. App'x 878, 882 (11th Cir. 2007) (applying *Boyd*). This principle equally bars such inchoate claims for economic damages: "until actual economic losses [are] incurred with certainty, and not merely as a matter of speculation, [Plaintiffs'] claim [does] not accrue…." *Hardaway Co. v. Parsons, Brinckerhoff, Quade & Douglas, Inc.,* 267 Ga. 424, 426 (1997). Similarly, Plaintiffs' mental anguish over the *possibility* of future harm to A. A. does not create a present cause of action. *See Russaw v. Martin*, 221 Ga. App. 683, 684 (1996). All of this is consistent with the notion that a wrongdoer is "not responsible for a consequence which is merely possible, according to occasional experience, but only for a consequence which is probable, according to ordinary and usual experience." *Dry Storage Corp. v. Piscopo*, 249 Ga. App. 898, 900 (2001) (quotations and citation omitted). All claims premised on such speculative consequences are **DISMISSED** as unripe.[12]

[12] This includes, but is not limited to, Plaintiffs' claims predicated on presently inchoate injuries resulting from Defendants' alleged fraud, negligent misrepresentation (*City of Cairo v. Hightower Consulting Engineers, Inc.*, 278 Ga. App. 721, 727 (2006)), negligence, violations of the Fair Business Practices Act (*Regency Nissan, Inc. v. Taylor*, 194 Ga. App. 645, 649 (1990)), and false advertising.

Plaintiffs do, however, allege a presently injurious hereditary condition in that A.A. carries the trait for and condition of Thalassemia Minor. Additionally Plaintiffs claim that A.A. currently suffers from mental health issues including suicidal and homicidal ideation, as well as attention deficit hyperactivity disorder, all of which have required treatment and have occasioned pain and suffering and/or mental anguish for A.A. and the Plaintiffs. Given that Plaintiffs may be able to show that these current issues flow directly from Xytex's misrepresentation of BGM 9623's true identity and health, such claims survive a motion to dismiss.

Turning to the second question -- when did the statute begin to run? -- with these latter claims in mind, the Court finds that Plaintiffs' claims premised on injuries that have already accrued may not be time-barred.[13] Whether Plaintiffs acted timely in bringing this suit upon discovering Defendant's alleged malfeasance, *i.e.*, Xytex's failure to discern (and disclose) BGM 9623's true identity, is an unresolved factual issue. The dates of Plaintiffs' transactions with Xytex and A.A.'s conception are not relevant to this determination, as the "identity" of BGM 9623 remained hidden and confidential at both those times. Moreover, there is no evidence that *Plaintiffs* failed to exercise reasonable diligence by respecting that confidentiality (or that they could have pierced the veil of confidentiality if they had tried). Consequently, no cause of action could have accrued at those earlier dates.

> A cause of action will not accrue under the discovery rule until the plaintiff discovers or in the exercise of reasonable diligence should have discovered not only that he has been injured but also that his injury may have been caused by the defendant's conduct.

[13] Given the Court's finding that all counts save the count for specific performance are dismissed as proxies for a wrongful birth claim, there are no damage claims that survive. However, should an appellate ruling undo this conclusion, the Court is here making clear its additional finding that Plaintiffs' claims predicated on any pre-conception negligence (or other properly-pled torts) by Defendants were timely made.

Ambling Mgmt. Co. v. Purdy, 283 Ga. App. 21, 25 (2006). Given that Plaintiffs had no reason to doubt that they had anything other than the truth about their donor, and given that some of their claims may be subject to a two-year statute of limitations, the issue of when Plaintiffs' should have (or even could have) discovered Defendants' potential liability for the injuries remains to be determined. The motion to dismiss is **DENIED** as to those claims for which an injury has already accrued.

Alternative Ground -- Fraud Claim

Xytex urges that Plaintiffs' fraud count should also be dismissed for failure to plead either (a) Xytex's knowledge of the falsity of BGM 9623's biographical information or (b) any intention to induce Plaintiffs to rely on the information. This ground fails for two reasons. First, the remedy for such a motion is not to dismiss but to require a more definite statement. *Bush v. Bank of New York Mellon*, 313 Ga. App. 84, 89-90 (2011). Second, the Court finds that Plaintiffs have adequately pled their claim for fraud, when the complaint is considered in its entirety. Thus, should the fraud claim return after appellate review, it also survives Defendants' challenge as to the sufficiency of the pleading. Defendants' motion is **DENIED** on this ground.

Alternative Ground -- "Strict Liability" Products Liability

Xytex argues that Plaintiffs' products liability claim asserting strict liability fails because Xytex did not sell Plaintiffs a commodity, good, or product, but instead provided a medical service -- which means Xytex enjoys the protections of O.C.G.A. § 51-1-28, Georgia's "Blood Shield" statute. *See McAllister v. Am. Nat. Red Cross*, 240 Ga. 246, 248 (1977); *Jones v. Miles Labs., Inc.*, 705 F. Supp. 561, 562-63 (N.D. Ga. 1987). Whether semen and/or sperm should be covered under O.C.G.A. § 51-1-28 appears to be a question of first impression in Georgia. The statute provides that the:

> injection, transfusion, or other transfer of human whole blood, blood plasma, blood products, or blood derivatives and the transplanting or other transfer of any tissue, bones, or organs into or onto the human body shall not be considered a sale of any commodity, goods, property, or product subject to sale or barter but, instead, shall be considered as the rendition of medical services. No implied warranties of any kind or description shall be applicable thereto and no person, firm, or corporation participating in such services shall be liable for damages unless negligence is proven.

O.C.G.A. § 51-1-28(a). The statute on its face exempts blood and "blood products" from strict liability -- but not any other bodily fluids. Xytex seeks refuge in the statute's term "tissue," arguing that that term should be read to encompass semen. For authority for that rather elastic reading of the term "tissue," Xytex offers up only a Federal District Court decision from Pennsylvania that asserts *ipse dixit* that "[s]emen is not a blood derivative; it is considered a human tissue." *Donovan v. Idant Labs.*, 625 F.Supp.2d 256, 271 (E.D. Pa. 2009). Beyond that mere say-so, *Donovan* provides no statutory, medical, or biological underpinning to support Xytex's claim.

This Court respectfully disagrees with the opinion in *Donovan*. Tissue is generally defined as "an aggregate of cells usually of a particular kind together with their intercellular substance that form one of the structural materials of a plant or an animal." *Merriam-Webster On-line Dictionary.*[14] Tissue includes portions of the body such as skin, cartilage, and tendons -- masses of cells that, through their combination, form a more complex whole. Sperm, on the other hand, are *individual* cells that combine, if ever, with only one other cell: a human egg. And semen is medically defined as a "secretion," not a tissue.[15] Neither sperm nor semen is a "structural material" like skin and bone out of which a human is built and held together. The Court finds that Georgia's Blood Shield

[14] It is defined in Georgia's Uniform Anatomical Gift Act as "a portion of the human body other than an organ or an eye." O.C.G.A. § 44-5-141(30).
[15] http://www.online-medical-dictionary.org/definitions-s/semen.html

Statute offers no safe harbor to Xytex as an alternative basis to dismiss Plaintiffs' strict liability product liability claim.[16] Defendants' motion is **DENIED** on this ground.

Alternative Ground -- "Ordinary Negligence" Products Liability

Plaintiffs have adequately pled their claims of Defendants' potential negligence under products liability. There is no other alternative basis to grant a motion to dismiss these claims. Defendants' motion is **DENIED** on this ground.

Alternative Ground -- Breach of Express Warranty

In moving the Court to dismiss Plaintiffs' breach of express warranty claim, Xytex asks the Court to theorize what the evidence *may* show and then to act on this theory. In each case cited in Defendants' motion, the dispositive issue involved a party's knowledge of certain facts at the time the warranty was made. Evidence of such knowledge is not presently before the Court, although it may be developed during discovery and presented via motion for summary judgment. Because Plaintiffs may prove facts sufficient to present a claim for breach of warranty, it would be improper to dismiss their claim at this juncture. Defendants' motion is thus **DENIED** on this ground. *Sherman*, 288 Ga. at 90.

Alternative Ground -- Breach of Implied Warranty

O.C.G.A. § 11-2-316(5) shelters providers of medical services from breaches of an implied warranty in language that tracks the Blood Shield Statute. As discussed *supra* concerning the Blood Shield Statute and Defendants' motion to dismiss Plaintiffs' strict

[16] The Legislature has, by separate statute, protected physicians from strict liability in this arena: "Any physician or surgeon who obtains written authorization signed by both the husband and the wife authorizing him or her to perform or administer artificial insemination shall be relieved of civil liability to the husband and wife or to any child conceived by artificial insemination for the result or results of said artificial insemination, provided that the written authorization provided for in this Code section shall not relieve any physician or surgeon from any civil liability arising from his or her own negligent administration or performance of artificial insemination." O.C.G.A. § 43-34-37. This Code section says nothing about the commercial provider of the sperm or semen, nor does it apply to a physician like Defendant Spradlin who directs the commercial enterprise of Xytex but does not perform the artificial insemination.

liability product liability claim, semen and sperm are not tissue and so are not covered by these protections for medical service providers. Defendants' motion is therefore **DENIED** on this ground.

Alternative Ground -- Battery

Battery involves the unauthorized touching of another with the intent to harm, insult, or provoke the person touched. *Kohler v. Van Peteghem*, 330 Ga. App. 230, 234 (2014). There is no allegation that any Defendant ever touched or threatened to touch either Plaintiff in a harmful, insulting, or provoking manner. Xytex has set forth an alternative basis to dismiss Plaintiffs' battery claim and the Court **GRANTS** the motion.

Alternative Ground -- Negligence

Xytex urges that Plaintiffs' simple negligence claim should be dismissed because Plaintiffs' claims are actually for professional malpractice and Plaintiffs failed to file an expert affidavit as required by O.C.G.A. § 9-11-9.1(a). Plaintiffs respond that Xytex does not operate in one of the specified professions set forth in O.C.G.A. § 9-11-9.1(g) and therefore the claim is properly one for simple negligence. Xytex replies that, pursuant to *Baskette v. Atlanta Ctr. for Reprod. Med., LLC,* 285 Ga. App. 876 (2007), the provisions of O.C.G.A. § 9-11-9.1 should apply to them because the claims are against medical employees under the supervision of medical professionals at a medical center.

There is not yet sufficient evidence of record to meaningfully asses Xytex's characterization of its practice. Defendant Spradlin is apparently a physician; under certain circumstances his presence and role might shield employees acting under his supervision. However, under the facts presently pled, the Court is not persuaded that claims for professional malpractice are being alleged. Should the record develop in a

manner that supports Defendants' position, Defendants may reassert this argument. Defendants' motion to dismiss is **DENIED** on this ground.[17]

Alternative Ground -- False Advertising

In Georgia, false advertising, as a civil action, can yield only injunctive relief to a plaintiff. O.C.G.A. § 10-1-423; *Clark v. Aaron's, Inc.*, 914 F. Supp. 2d 1301, 1307 (N.D.Ga. 2012). Plaintiffs, however, do not seek injunctive relief; they seek recompense for alleged injuries. Given that such relief is not available under the law, Defendants have met their burden of showing that Plaintiffs "could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought." *Northway v. Allen*, 291 Ga. 227, 229 (2012). Defendants' motion to dismiss Count Eleven (false advertising) is therefore **GRANTED** on this additional ground.

Alternative Ground -- Promissory Estoppel

> The essential elements of promissory estoppel are:
>
> > (1) the defendant made a promise or promises; (2) the defendant should have reasonably expected the plaintiff to rely on such promise; (3) the plaintiff relied on such promise to its detriment; and (4) an injustice can only be avoided by the enforcement of the promise, because as a result of the reliance, plaintiff changed its position to its detriment by surrendering, forgoing, or rendering a valuable right.

Hendon Properties, LLC v. Cinema Dev., LLC, 275 Ga. App. 434, 438–39 (2005) (punctuation and citation omitted). "Damages recoverable under promissory estoppel are those damages as are equitable and necessary to prevent injustice from occurring."

[17] In responding to this argument Plaintiffs sought to introduce hearsay statements allegedly from the Xytex website, and attached a copy of a document as an exhibit to their brief. The Court did not consider this information. The Court declined not only because of the patent hearsay nature of the items but also -- and more importantly -- because the Court is declining the perhaps unwitting invitation to convert this motion to dismiss into a motion for summary judgment. "Although a trial court has the option to consider evidence attached to a motion to dismiss and brief in support thereof, when [the court] does so it converts the motion to dismiss into a motion for summary judgment, governed by OCGA § 9–11–56." *Weathers v. Dieniahmar Music, LLC*, 337 Ga. App. 816, 825 (2016).

Rental Equip. Grp., LLC v. MACI, LLC, 263 Ga. App. 155, 159 (2003). At this stage of the case, the promise(s) Xytex made are amorphous. Should discovery occur, the contours and scope of any alleged promises can be better defined. While Defendants correctly argue that vague promises cannot be enforced,[18] that issue is better raised at the summary judgment stage of proceedings. Defendants' motion to dismiss this count is **DENIED**.

Alternative Ground -- Unjust Enrichment

At first blush it would appear a claim for unjust enrichment must fail. Plaintiffs sought to purchase sperm and semen from Xytex and Xytex sold such to Plaintiffs. Plaintiffs, however, complain that the product was not the quality represented and therefore Xytex has been unjustly enriched by way of Plaintiffs' unwitting overpayment. The record is not yet developed but there are credible scenarios in which Plaintiffs could show unjust enrichment (e.g., if the costs of sperm/semen varies depending on the credentials/qualities of the donor). Given these realistic possibilities, the Court **DENIES** Defendants' motion to dismiss the claim for unjust enrichment.

* * *

[18] "Promissory estoppel does not apply to vague promises and while the promise need not meet the formal requirements of a contract, it must, nonetheless, have been communicated with sufficient particularity to enforce the commitment." *Sparra v. Deutsche Bank Nat. Tr. Co.*, 336 Ga. App. 418, 421 (2016) (internal citation omitted).

Conclusion

Plaintiffs' complaint sets forth thirteen claims, twelve of which are rooted in the concept of wrongful birth, a claim not presently recognized under Georgia law. Defendants' motion to dismiss is therefore **GRANTED** as to all counts except Count Ten (specific performance). Additionally, several alternative bases for dismissal have been considered and ruled upon above.

SO ORDERED this 13th day of June 2018.

Judge Robert C. I. McBurney
Superior Court of Fulton County
Atlanta Judicial Circuit

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