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S.C. JOHNSON & SON, INC.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KATHERINE SHIMANOVSKY, individually and on behalf of all others similarly situated,

Plaintiff,

-against-

S.C. JOHNSON & SON, INC.,

Defendant.

Index No. 1:20-CV-03588-RA
Hon. Ronnie Abrams

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT S.C. JOHNSON & SON, INC.'S MOTION TO DISMISS

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Defendant S.C. Johnson & Son, Inc. ("SC Johnson") respectfully submits this memorandum of law in support of its motion to dismiss Plaintiff Katherine Shimanovsky's ("Plaintiff") complaint (the "Complaint") pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

PRELIMINARY STATEMENT

Plaintiff's threadbare Complaint lacks basic facts necessary to state a false advertising claim under New York law. While Plaintiff asserts she was injured by the "non-toxic formula" labels on a Windex cleaning product, she does not specify what Windex product she purchased or why the product she purchased as formulated is toxic. Plaintiff merely alleges the non-toxic labels are false and misleading because an unspecified Windex product contains ingredients that she believes may be potentially harmful. She does not, however, assert that the allegedly toxic compounds are present in a Windex product she purchased or that the compounds are at harmful concentrations. In fact, she claims that the presence of vinegar – a substance commonly found in food – renders a Windex product toxic. These allegations – and the lack thereof – underscore why she must state how the *formula* of the Windex product she purchased as a whole is toxic.

Plaintiff's allegations based on the existence of allegedly harmful ingredients at unspecified concentrations are insufficient to state a claim, and the Court should dismiss her claims for five main reasons.

First, Plaintiff lacks standing to assert her claims because she does not allege any concrete, particularized injury linked to the allegedly deceptive labels. Indeed, Plaintiff fails to allege *any* harm from using any Windex product. She cannot allege any economic harm where she does not specify what product she purchased or whether it contained the allegedly "harmful" ingredients. She does not have standing to pursue claims concerning products she did not

purchase. And she cannot pursue claims for injunctive relief based on speculation that she would purchase a Windex product in the future *if* SC Johnson reformulated the products.

Second, Plaintiff vaguely states that the Windex Products' non-toxic labels are false and misleading without identifying what product she bought or why each Windex Product as formulated is toxic. This unsupported conclusion is inadequate to state a claim for fraud under the requirements of Federal Rule of Civil Procedure Rule 9.

Third, Plaintiff's New York GBL §§ 349 and 350 claims fail because she does not plead any specific harm apart from "deception." Plaintiff merely contends that she would not have purchased the Windex Product(s) or she would have paid less for them if she had known that they contained the allegedly "harmful" ingredients. She generally concludes that she paid a "premium price" for the Windex Product(s), but fails to provide any details regarding what the premium is or the price of comparable non-premium products.

Fourth, Plaintiff did not purchase any Windex Product from SC Johnson, and, as such, her claims for negligent misrepresentation and breach of express and implied warranty fail. Additionally, the challenged non-toxic labels describe the Windex Products' formulas and do not constitute a written warranty as defined by the Magnuson-Moss Warranty Act ("MMWA").

Finally, Plaintiff's claim for unjust enrichment fails because it is duplicative of her other claims. It is well-settled that unjust enrichment claims cannot proceed where the claims at issue are subject to a contract. Because Plaintiff pleads the existence of a contract—through an express warranty claim—her unjust enrichment claim necessarily fails.

FACTUAL BACKGROUND

SC Johnson develops and sells four separate glass cleaners with non-toxic formula labels, Windex Original, Windex Vinegar, Windex Crystal Rain Ammonia-Free, and Windex Multi-

Surface (the "Windex Products"). (Request for Judicial Notice In Support of S.C. Johnson & Son, Inc.'s Motion to Dismiss the Complaint ("RJN"), Exs. A-D.) Although the Windex Products bear the same "non-toxic" labelling, they have distinct formulas and contain different ingredients. (*Id*.)

Despite the existence of multiple products offered, Plaintiff does not assert which specific Windex Product(s) she purchased, but asserts "the Product" contains "potentially harmful and toxic compounds," including "2-Hexoxyethanol, Butoxyproponal, and acetic acid ('vinegar')." *See* Compl. ¶¶ 1, 19-20, 51 (alleging Plaintiff purchased "window cleaning solution described as a 'Non-Toxic Formula', under the Windex brand"). Plaintiff does not allege at what concentrations these ingredients are "potentially harmful and toxic" or that the ingredients are present in the Windex Products at harmful or toxic levels. The lack of such allegations is particularly problematic as vinegar, which Plaintiff characterizes as a "harmful and toxic compound," is a common ingredient in food.

The generality of the allegations creates additional problems as the Windex Products do not all contain every allegedly "harmful and toxic compound" Plaintiff identifies. (RJN, Exs A-D.) The three ingredients are only a part of Windex Vinegar's formula. (*Id*.) Windex Original does not contain Butoxyproponal or acetic acid. (RJN, Ex. A) Nor does Windex Ammonia-Free. (RJN, Ex. C.) Similarly, acetic acid is not found in Windex Multi-Surface. (RJN, Ex. D.)

Based on her generalized allegations, Plaintiff sued SC Johnson, claiming that the "non-toxic formula" label on an unspecified Windex Product is false and misleading because the Windex Products contain allegedly harmful ingredients. (Compl. ¶¶ 19, 34.) Plaintiff asserts seven causes of action for: (1) violation of the New York General Business Law ("GBL") §§ 349 and 350; (2) negligent misrepresentation; (3) breach of express warranty; (4) breach of implied

warranty of merchantability; (5) breach of MMWA, 15 U.S.C. §§ 2301, *et seq.*; (6) fraud; and (7) unjust enrichment. (Compl. ¶¶ 62-91.) She seeks injunctive relief and damages on behalf of a putative class of "all purchasers of the Product who reside in New York during the applicable statute of limitations." (*Id*. ¶ 54.)

LEGAL STANDARD

"The inquiry on a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) concerns whether the district court has the statutory or constitutional power to adjudicate the case." *See Buonasera v. Honest Co., Inc.*, No. 16 Civ. 1125 (VM), 2016 WL 5812589, at *2 (S.D.N.Y. 2016) (*citing Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000)). To establish Article III standing, Plaintiffs must allege: "(1) *injury-in-fact*, which is a 'concrete and particularized' harm to a 'legally protected interest'; (2) *causation* in the form of a 'fairly traceable' connection between the asserted injury-in-fact and the alleged actions of the defendant; and (3) *redressability* . . ." *See W.R. Huff Asset Mgmt. Co. v. Deloitte & Touche LLP*, 549 F.3d 100, 106-07 (2d Cir. 2008) (citation omitted, emphasis in original). "To survive a motion to dismiss under Rule 12(b)(6), a complaint must allege sufficient facts to state a claim to relief that is plausible on its face." *Bank v. Philips Elecs. N. Am. Corp.*, No. 14-cv-5312 (JG)(VMS), 2015 WL 1650926, at *1 (E.D.N.Y. 2015) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Although the Court must accept the facts pleaded in the complaint as true, a plaintiff must provide "more than labels and conclusions" and "a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

ARGUMENT

I. PLAINTIFF LACKS ARTICLE III STANDING

Plaintiff lacks standing to bring this action because she does not allege any injury fairly traceable to the allegedly false Windex Product labels. To establish Article III standing, a

plaintiff must plead and prove "injury in fact," causation, and redressability. "[I]njury in fact" requires damage to "a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent', not 'conjectural or hypothetical.'" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (internal citations omitted). "For an injury to be 'particularized,' it 'must affect the plaintiff in a personal and individual way.'" *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (citation omitted).

The Complaint fails to establish the requisite standing because Plaintiff (1) does not allege adequate injury from the product she purchased, (2) sues over products she never purchased, and (3) alleges far too speculative an injury to seek injunctive relief. Each shortcoming is described below.

A. Plaintiff Has Not Suffered an Injury Fairly Traceable to the Allegedly False "Non-Toxic" Labels.

Plaintiff does not allege any viable economic injury because she does not assert what Windex Product actually contains 2-Hexoxyethanol, Butoxypropanol, and acetic acid – the only three ingredients alleged to be "potentially harmful and toxic compounds" – or whether she purchased that Windex Product. (*See* Compl. ¶ 19-20.) SC Johnson develops and markets four separate Windex Products. (RJN, Exs. A-D.) Each Windex Product has a different formula and distinct ingredients. (*Id.*) Only Windex Vinegar contains all three allegedly "potentially harmful and toxic compounds" Plaintiff identifies in her Complaint, but Plaintiff does not assert she bought that product. *See* Compl. ¶ 1, 51 (alleging Plaintiff purchased "window cleaning solution described as a 'Non-Toxic Formula', under the Windex brand ('Product')"). Absent allegations specifying that she purchased a Windex Product containing the purportedly harmful ingredients, Plaintiff cannot assert an injury. Therefore, SC Johnson respectfully requests the Court dismiss the Complaint for lack of standing. *See In re KIND LLC "Healthy & All Natural" Litig.*, No. 15-

MC-2645 (WHP), 2016 WL 4991471, at *6 (S.D.N.Y. 2016) (no standing to challenge "non GMO" claim as deceptive given plaintiffs' "failure to specify which products included GMOs and whether they actually purchased those products") (*citing Gallagher v. Chipotle Mexican Grill, Inc.*, No. 15-cv-03952(HSG), 2016 WL 454083, at *2 (N.D. Cal. 2016) ("[p]laintiff has not adequately alleged any resulting economic injury [because] it is not clear that [p]laintiff purchased any products that, by her definition, are made with ingredients containing GMOs").

B. Plaintiff Lacks Standing to Sue Over Products She Never Purchased.

Plaintiff also cannot challenge the non-toxic labels on the Windex Products she did not buy because she did not suffer an injury by them. "[I]n a class action, the named plaintiffs must themselves have standing to sue; it is not sufficient to show that 'an injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.'" *Hart v. BHH, LLC*, No. 15CV4804, 2016 WL 2642228, at *2 (S.D.N.Y. 2016) (quoting *Lewis v. Casey*, 518 U.S. 343, 357 (1996)). Applying this black-letter law, the Second Circuit dismisses consumer claims concerning unpurchased products where the unpurchased products are not "nearly identical". *See DiMuro v. Clinique Labs.,* LLC, 572 F. App'x 27, 29 (2d Cir. 2014)(finding plaintiff lacked class standing as to products that she did not buy where the challenged products had different ingredients); *Hart*, 2016 WL 2642228, at *4 (dismissing claims concerning unpurchased products because "[t]he products are distinct and serve different purposes"); *Elkind v. Revlon Consumer Prod. Corp.*, No. 14-CV-2484 JS AKT, 2015 WL 2344134, at *4 (E.D.N.Y. 2015) ("Because they have not purchased the [product], [p]laintiffs have not been injured in the 'personal and individual way' required by Article III").

Because each Windex Product has a distinct formula, contains different ingredients, and cleans in unique ways, the Windex Products are not "nearly identical." Plaintiff does not allege all the Windex Products contain every allegedly "harmful and toxic compound" she identifies in

her Complaint. And she cannot. Two of the Windex Products, Windex Original and Windex Ammonia-Free do not contain Butoxyproponal or acetic acid. (RJN, Exs A-D.) They use different ingredients, which work in unique ways. Similarly, acetic acid is not found in Windex Multi-Surface. (RJN, Ex. D.) Only Windex Vinegar contains all three allegedly "harmful and toxic compounds" Plaintiff identifies in her Complaint. (*Id*.)

Dimuro is particularly instructive. There, the Second Circuit affirmed dismissal of plaintiffs' false advertising claims for products they did not purchase. *DiMuro*, 572 F. App'x at 29. Plaintiff alleged defendant's marketing of seven products sold in the same product line was false and misleading. *Id*. Plaintiff only purchased and used three of the seven products, however. *Id*. Each of the seven products contained different ingredients. *Id*. The court found the products were not "nearly identical" and affirmed dismissal of plaintiffs' claims as to products they did not purchase because unique evidence would be required to prove each advertising statement was false and misleading. *Id*.

SC Johnson submits that the Court should reach the same conclusion here. Each of the challenged products similarly contains different ingredients and unique evidence would be required to prove each Windex Product formula is toxic. Given the differences between the Windex Products, Plaintiff only has standing with respect to the Windex Product(s) that she actually purchased. As a result, because Plaintiff fails to allege what Windex Product(s) she purchased, she lacks standing to bring *any* claims. *See supra* Section I.A.; *see also Hart*, 2016 WL 2642228, at *4.

C. Plaintiff Lacks Standing to Seek Injunctive Relief Where She Does Not Have Concrete Plans to Purchase the Windex Product(s) in the Future.

Furthermore, Plaintiff lacks standing to seek injunctive relief because she does not definitively plan to purchase any Windex Product(s) in the future. A plaintiff seeking injunctive

relief must allege a "real or immediate threat" of future injury. *Nicosia v. Amazon, Inc.*, 834 F.3d 220, 229 (2d Cir. 2016) (internal quotation marks and citations omitted). "'Allegations of *possible* future injury" are not sufficient.'" *Am. Civil Liberties Union v. Clapper*, 785 F.3d 787, 800 (2d Cir. 2015) (quoting *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013)). In addition, "to seek injunctive relief on behalf of a class, the named plaintiffs must themselves have standing." *Albert v. Blue Diamond Growers*, 151 F. Supp. 3d 412, 418 (S.D.N.Y. 2015).

Plaintiff's tentative intention to purchase a Windex Product again is not a concrete plan. She asserts she would buy a Windex Product again *if* assured the product did not contain the ingredients she believes to be harmful. (Compl. ¶53.) This hypothetical plan is not an actual or imminent injury because Plaintiff will potentially buy a Windex Product only if SC Johnson reformulates them. Her alleged injury is contingent on events that may or may not occur, and is thus only a possible future injury.

Courts routinely reject hypothetical intentions to purchase a product to support injunctive relief claims. See *e.g. Buonasera*, 208 F. Supp. 3d at 564 (holding plaintiff does not demonstrate a likelihood of future injury when he alleges he would consider purchasing the product in the future if it was reformulated); *Izquierdo v. Mondelez Int'l, Inc.*, No. 16-CV-04697 (CM), 2016 WL 6459832, at *5 (S.D.N.Y. 2016)(finding plaintiff lacked standing to seek injunctive relief when he alleged he would not purchase the product again unless defendant changed the packaging); *Atik v. Welch Foods, Inc.*, No. 15-CV-5405(MKB)(VMS), 2016 WL 5678474, at *6 (E.D.N.Y. 2016) (finding allegations that plaintiffs would purchase challenged products again if the labels were "truthful and non-deceptive" insufficient to establish future injury).

In *Buonasera*, the court dismissed plaintiff's request for injunctive relief holding he did not demonstrate a likelihood of future injury. *Buonasera*, 208 F. Supp. 3d at 564. Plaintiff

alleged that if the defendant's "products were reformulated such that its representations were truthful, Plaintiff would consider purchasing [defendant's] products in the future." *Id*. The court found "this allegation is insufficient to allege future injury," and held plaintiff did not standing to seek injunctive relief. *Id*. at 565. Here, like in *Buonasera*, Plaintiff's potential plan to purchase the Windex Products only "if assured [the products] did not contain components which were inconsistent with the use of an unqualified non-toxic claim" is insufficient to allege future injury. (Compl. ¶ 53.)

Accordingly, SC Johnson respectfully requests the Court dismiss Plaintiff's request for injunctive relief with prejudice.

II. ADDITIONALLY, EACH OF PLAINTIFF'S CLAIMS FAIL AS A MATTER OF LAW

A. Plaintiff Fails to Plead Fraud with Particularity.

Plaintiff vaguely concludes the Windex Products' non-toxic labels are fraudulent without identifying what product she bought or how the labels are false and misleading, and, as such, her claims should be dismissed. To state a claim for fraud under Federal Rule of Civil Procedure 9(b), a plaintiff must "(1) detail the statements (or omissions) that the plaintiff contends are fraudulent, (2) identify the speaker, (3) state where and when the statements (or omissions) were made, and (4) explain why the statements (or omissions) are fraudulent." *Eternity Glob. Master Fund Ltd. v. Morgan Guar. Trust Co. of N.Y.*, 375 F.3d 168, 187 (2d Cir. 2004) (internal quotation marks omitted).

Here, Plaintiff does not assert what specific Windex Product(s) she purchased or why any Windex Product as formulated is toxic. Plaintiff generally alleges she relied on "representations the Product was non-toxic" (Compl. ¶ 51), but she does not identify what Windex Product she purchased. *See id*. ¶ 1 (defining "Product" as "window cleaning solution described as a 'Non-

Toxic Formula', under the Windex Brand"). She even fails to allege that the picture included in the Complaint is of the product she actually purchased. As such, Plaintiff inadequately pleads what representations she relied on. *See Izquierdo*, 2016 WL 6459832 at *9 (dismissing claim when plaintiff fails to allege when, where, or for how much, he purchased the product).

Additionally, Plaintiff does not make any attempt to explain why each Windex Product as formulated is toxic. She alleges the unspecified Windex Product is toxic because it contains ingredients that "may be harmful." (Compl. ¶ 17.) Critically, Plaintiff fails to explain why the *formula* of the product she purchased is toxic. She includes no allegations assessing the toxicity of the Windex Products' individual formulas. Nor does she claim the allegedly harmful ingredients are present in any of the Windex Products at toxic concentrations. Plaintiff's allegation that a Windex Product is toxic because it contains vinegar demonstrates the importance of this omission. Vinegar is a common ingredient in food. By Plaintiff's logic, many foods are toxic because they contain vinegar. Moreover, only Windex Vinegar contains all three allegedly "harmful and toxic compounds" Plaintiff identifies in her Complaint. (RJN, Exs. A-D.) Plaintiff alleges no facts showing she bought a toxic product. Her vague, conclusory statements do not satisfy Rule 9(b)'s stringent pleading requirements. These pleading deficiencies are fatal to her fraud claims, and, as such, SC Johnson respectfully requests the Court dismiss her claims with prejudice. *See DiMuro*, 572 F. App'x at 30 (dismissing fraud claims when plaintiff did not allege facts explaining how each product did not work as advertised and why any specific advertising claim for each product is false).

B. Plaintiff's GBL Claims Fail Because Plaintiff Does Not Plead a Viable Injury.

Plaintiff's conclusory allegations that SC Johnson sells the Windex Products at a "premium price" are not enough to plead a viable injury under GBL §§ 349 and 350. To state a claim under GBL §§ 349 and 350, Plaintiff must allege either "pecuniary or 'actual' harm,"

separate and apart from any alleged "deception." *Small v. Lorillard Tobacco Co.*, 94 N.Y.2d 43, 56 (1999); *Goshen v. Mut. Life Ins. Co.*, 98 N.Y.2d 314, 324 n.1 (2002) ("The standard for recovery under General Business Law § 350, while specific to false advertising, is otherwise identical to section 349"). "[C]onsumers who buy a product that they would not have purchased, absent a manufacturer's deceptive commercial practices, have not suffered an injury cognizable under GBL § 349 [and 350]." *Rodriguez v. It's Just Lunch, Int'l*, No. 07CIV9227(SHS)(KNF), 2010 WL 685009, at *9 (S.D.N.Y. Feb. 23, 2010). Merely "recit[ing] the word 'premium' multiple times" in a complaint "does not make Plaintiff['s] injury any more cognizable." *Izquierdo*, 2016 WL 6459832 at *5 (dismissing GBL claim when plaintiffs alleged they paid a premium for the products but did not show that they paid a higher price for the product than they otherwise would have, absent deceptive acts).

Despite *Izquierdo's* finding that reciting the mantra "price premium" is inadequate to support a claim, Plaintiff does nothing more here. Plaintiff alleges "the Product is sold at a premium price…compared to other similar products" and that had she "known the truth" she "would not have bought the Product or would have paid less for them." (Compl. ¶¶ 40-41). She does not assert the prices of any similar, allegedly cheaper competitor products.

In *Colella*, the court held that these conclusory allegations of a "price premium" did not allege a cognizable injury under §§ 349 and 350. *Colella v. Atkins Nutritionals, Inc.*, 348 F. Supp. 3d 120, 143 (E.D.N.Y. 2018). There, plaintiff alleged defendant "charge[d] a premium for its products and specifically markets them in a premium location of its retailers; thus, Plaintiff and members of the Class paid more than they normally would have for comparable products." *Id.* The Court held such a "conclusory" allegation was insufficient when plaintiff provided "no facts regarding what the premium was, what price he paid for the products, or the price of non-

premium products." *Id*. Like in *Coella*, Plaintiff concludes that Windex Products are sold "at a premium price" without providing the price of similar non-premium products. Her general allegations are not enough to establish a pecuniary harm separate from any alleged deception. Thus, her claims under GBL §§ 349 and 350 should be dismissed.

C. Plaintiff's Claim for Negligent Misrepresentation Fails Because She Does Not Have a Special Relationship with SC Johnson.

As a consumer, Plaintiff does not have a special relationship with SC Johnson, and therefore her negligent misrepresentation claim fails. To establish a claim for negligent misrepresentation, a plaintiff must allege a special relationship with the defendant "beyond an ordinary arm's length transaction." *Naughright v. Weiss*, 826 F. Supp. 2d 676, 688 (S.D.N.Y. 2011). Plaintiff alleges she purchased the Windex Product(s) "at store(s) including Home Depot." (Compl. ¶ 51.) Because Plaintiff does not assert she purchased the Windex Product(s) from SC Johnson, she fails to allege even an ordinary business relationship with SC Johnson, much less any "special relationship." As a result, the Court should dismiss Plaintiff's negligent misrepresentation claim with prejudice. *See Segedie v. Hain Celestial Grp., Inc.*, No. 14–CV–5029, 2015 WL 2168374 at *14 (S.D.N.Y. 2015) (dismissing negligent misrepresentation claim because there is no cognizable relationship between consumer and manufacturer of allegedly misleadingly labeled product).

D. Plaintiff Cannot State a Claim for Breach of Express Warranty or Implied Warranty of Merchantability Because She Is Not in Privity With SC Johnson.

Plaintiff's breach of express warranty and implied warranty of merchantability claims also fail because she did not purchase the Windex Product(s) from SC Johnson. A plaintiff must plead privity with the defendant to state a claim for breach of express warranty, "unless the plaintiff claims to have been personally injured." *Koenig v. Boulder Brands, Inc.*, No. 13-CV-

1186 (ER), 2014 WL 349706, at *13 (S.D.N.Y. 2014) (citation omitted) (dismissing breach of express warranty claims when plaintiffs merely allege they purchased defendant's products "'in the state of New York,' but do not specify where, or from whom"). A claim based upon a breach of an implied warranty also "requires a showing of privity between the manufacturer and the plaintiff." *Ebin v. Kangadis Food Inc.*, No. 13 CIV. 2311 JSR, 2013 WL 6504547, at *6 (S.D.N.Y. 2013).

Plaintiff alleges only economic injury resulting from SC Johnson's conduct. *See* Compl. ¶¶ 39-41 (alleging damage in the form of unspecified price premiums). Plaintiff does not, and cannot, however, assert privity between herself and SC Johnson. *See id* ¶ 51 (alleging Plaintiff purchased Windex cleaning solution "at store(s) including Home Depot"). Because Plaintiff has allegedly suffered only economic injuries and is not in privity with SC Johnson, SC Johnson respectfully requests the Court dismiss her breach of express warranty and implied warranty of merchantability claims. *See Ebin*, 2013 WL 6504547 at *6 (dismissing breach of express warranty and implied warranty of merchantability claims in food mislabeling case when plaintiffs do not allege they were in privity with defendant).

E. Plaintiff Fails to Allege a Claim Under the Magnuson Moss Warranty Act Because There is No Warranty Within the Meaning of the Act.

The challenged "non-toxic" labels describes the Windex Products' formulas and do not constitute a written warranty as defined by the MMWA. The MMWA applies to "any written affirmation of fact or written promise" that "affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time." 15 U.S.C. § 2301(6)(A). The "non-toxic formula" labels describe the characteristics of the Windex Products. They are not a "written affirmation" that the Windex Product will be "defect free or will met a specified level of performance over a specified period of time." *See*

Bowling v. Johnson & Johnson, 65 F. Supp. 3d 371, 378–79 (S.D.N.Y. 2014)(dismissing MMWA claim and finding representations that mouthwash would "restore enamel" were product descriptions, not a promise of performance over time, despite the presence of a "best buy" date on the bottle); *In re Frito-Lay N. Am., Inc. All Nat. Litig.*, No. 12-MD-2413, 2013 WL 4647512, at *17, *27 (E.D.N.Y. 2013) (dismissing MMWA claim and finding that an "All Natural" product label "does not constitute a written warranty as defined by the MMWA.")

Even if the Court were to construe Windex Products' non-toxic labels as an affirmation or promise, Plaintiff's claim still fails because the labels do not specify a time period associated with any level of performance. "[C]ourts have found promises are written warranties under the MMWA only if the promise clearly states the specific time period over which the promised performance is to occur." *In re Scotts EZ Seed Litig.*, 2013 WL 2303727, at *4 (S.D.N.Y. 2013). *See also Hairston*, 2012 WL 1893818, at * 6 ("even if the [all natural] statements could somehow be construed as promises or guarantees, they clearly do not 'specify a level of performance over a specified period of time' and, thus, Plaintiff cannot state a claim under the MMWA"). The non-toxic labels describe the Windex Products' formulas and do not promise any level of performance over a specified period of time. Thus, SC Johnson respectfully requests the Court dismiss Plaintiff's claim with prejudice.

F. Plaintiff's Unjust Enrichment Claim Fails Because It Is Duplicative of the GBL and Breach of Warranty Claims.

Plaintiff's unjust enrichment claim is factually identical to her other claims and should be dismissed. By asserting breach of warranty claims, Plaintiff concedes the existence of a contract and cannot recover for unjust enrichment. *See Statler v. Dell, Inc.*, 775 F. Supp. 2d 474, 485 (E.D.N.Y. 2011) ("claim of unjust enrichment is … 'an obligation the law creates in the absence of any agreement.'"). Thus, "[w]here a valid contract governs the subject matter in a lawsuit, a

plaintiff may not recover in quasi-contract, and it is appropriate to dismiss a claim for unjust enrichment." *Id*. at 485.

Moreover, Plaintiff cannot maintain a duplicative unjust enrichment claim based on the same alleged "deceptive and misleading non-toxic claims" that Plaintiff alleges form the basis of an express warranty. (*See* Compl. ¶¶ 32, 78-79.) An unjust enrichment claim fails where it "simply duplicates, or replaces, a conventional contract or tort claim." *Corsello v. Verizon N.Y., Inc.*, 18 N.Y.3d 777, 790 (2012); *see also Koenig*, 2014 WL 349706, at *13 (dismissing unjust enrichment claim as duplicative of GBL § 349 and breach of express warranty claims, because "an unjust enrichment claim cannot survive where it simply duplicates, or replaces, a conventional contract or tort claim") (quotation omitted). Plaintiff's unjust enrichment claim is factually identical to her GBL and breach of warranty claims. Accordingly, Plaintiff's entirely duplicative unjust enrichment claim should be dismissed. *Ebin*, 2013 WL 6504547, at *7.

CONCLUSION

For the reasons set forth above, SC Johnson respectfully requests that the Court dismiss the Complaint in its entirety with prejudice.

Dated: Los Angeles, California
September 8, 2020

Respectfully submitted,

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