IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

ANDEIA COWAN, LUIS SHEPHERD, HOLLY VIOLA, ALEXSANDRA CERDA, CYNTHIA HOGAN, DEBBIE VONGPHACHANH, TEBYTHA CHAN, LAVADA FALLON, and ELIZABETH FREEDMAN, on behalf of themselves and all others similarly situated, Plaintiffs, v. WINDMILL HEALTH PRODUCTS, LLC, QUICKTRIM, LLC, KIMBERLY KARDASHIAN, KHLOE KARDASHIAN-ODOM, KOURTNEY KARDASHIAN, CHRISTOPHER TISI, CVS PHARMACY, INC., WAL-MART STORES, INC., GNC CORP., WALGREEN CO., AMAZON.COM, INC., and DRUGSTORE.COM, INC., Defendants.	Civil Action No. 1:12-CV-1541-VM ECF Case

CHRISTOPHER TISI'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION TO DISMISS THE AMENDED CLASS ACTION COMPLAINT

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INTRODUCTION

Defendant Christopher Tisi respectfully submits this memorandum in support of his motion to dismiss plaintiffs' Amended Class Action Complaint ("Amended Complaint") pursuant to Federal Rule of Civil Procedure ("Federal Rule") 12(b)(6) for failure to state a claim upon which relief may be granted. As an initial matter, Mr. Tisi respectfully joins in Points I through IV of the motion to dismiss filed on this date by defendants Wal-Mart Stores, Inc., Amazon.com, Inc., drugstore.com, Inc., CVS Pharmacy, Inc., GNC Corporation, Quick Trim, LLC and Walgreen Co., which also apply to plaintiffs' claims against Mr. Tisi.

As to all Counts directed against Mr. Tisi, the Amended Complaint is utterly devoid of allegations providing grounds for holding Mr. Tisi personally liable for the actions of Quick Trim, LLC, a dissolved Florida limited liability company ("LLC"). The Amended Complaint's sole factual allegation directed at Mr. Tisi is that he was the "creator, owner, principal investor, CEO and sole member of Quick Trim, LLC." Rather than providing any factual detail in support of its claims, plaintiffs attempt to impose personal liability upon Mr. Tisi based solely on the following two legal conclusions:

> (1) "[QuickTrim LLC] was dominated and controlled by Mr. Tisi to such an extent that the entity had no independent existence and was in fact the alter ego of Mr. Tisi, which was used to accomplish the fraudulent purposes described" in the Amended Complaint; and
>
> (2) "All conduct done in the name of 'QuickTrim LLC' that post-dates the dissolution of that entity was done by Mr. Tisi personally."

(Amend. Compl. ¶¶ 88-89).

Plaintiffs' conclusory allegations – wholly unsupported by any facts – are not entitled to the presumption of truth on a motion to dismiss pursuant to Federal Rule 8(a). Disregarding these allegations, as the Court must, the Amended Complaint sets forth no facts that plausibly suggest the plaintiffs are entitled to relief against Mr. Tisi in his personal capacity. In short, plaintiffs' have not

even suggested what Mr. Tisi has done wrong to warrant the drastic result of imposing personal liability on him for the actions of Quick Trim, LLC.

Even if the plaintiffs had a basis for holding Mr. Tisi personally liable, plaintiffs' claims against Mr. Tisi for breach of warranty under the Magnuson-Moss Warranty Act ("MMWA") and for breach of warranty and contract under various state laws (collectively, the "Warranty Counts") still fail as a matter of law. First, each and every one of the Warranty Counts fails because Mr. Tisi is not a "seller" as that term is defined in the Uniform Commercial Code ("U.C.C."). Mr. Tisi did not "sell" or "contract to sell" any of the QuickTrim™ products ("QuickTrim") and, as a result, he cannot be liable to plaintiffs for breach of express or implied warranties. Second, even if Mr. Tisi were deemed a "seller" under the U.C.C. (which he is not), plaintiffs' claims for breach of implied warranty under California, Florida, Illinois and New York law fail for the independent reason that Mr. Tisi was not in privity with any of the named plaintiffs. Finally, since plaintiffs do not state a viable state law warranty, it is well settled that the Court must dismiss plaintiffs' claim alleging breach of the MMWA.

Plaintiffs have already had two attempts to plead a viable claim against Mr. Tisi; however, the Amended Complaint failed to cure the fatal flaws of the plaintiffs' original Complaint. The reason for this is clear – no facts exist to justify holding Mr. Tisi personally liable to the plaintiffs for the damages alleged. For all of these reasons, in addition to those stated in Points I through IV of the motion to dismiss filed by defendants Wal-Mart Stores, Inc., Amazon.com, Inc., drugstore.com, Inc., CVS Pharmacy, Inc., GNC Corporation, Quick Trim, LLC and Walgreen Co., plaintiffs have failed to state a claim against Mr. Tisi and the Court should dismiss the claims against him pursuant to Federal Rule 12(b)(6) for failure to state a claim upon which relief may be granted.

STATEMENT OF FACTS

On or about March 1, 2012, plaintiffs instituted this action via Class Action Complaint ("Original Complaint"), on behalf of themselves and a putative class, under a variety of theories.[1] Plaintiffs have named in this action the distributor of various QuickTrim products, Windmill Health Products, LLC; various retailers; Quick Trim, LLC; the former managing member of Quick Trim, LLC, Christopher Tisi; and three members of the Kardashian family that served as spokespeople for QuickTrim. Recognizing that the Original Complaint contained certain procedural and pleading defects, plaintiffs (including four new plaintiffs) filed and served the Amended Complaint on or about May 8, 2012. In addition to those claims stated above, which, with the exception of the MMWA claim, have now been asserted based on various state statutes, the Amended Complaint contains additional causes of action under various state consumer protection and warranty statutes. (See Amend. Compl. at pp. i-iii).

Although the Amended Complaint measures 76 pages in length, plaintiffs claims rely completely on a single conclusory allegation. Namely, plaintiffs claim that a variety of alleged representations by "Defendants" regarding the safety and efficacy of QuickTrim are "false, misleading, and unsubstantiated." (See, e.g., Amend. Compl. ¶¶ 3-4). In support of this allegation, plaintiffs broadly state that "[t]here is no competent and reliable scientific evidence supporting any of these claims." (See id.).

[1] Plaintiffs' claims included violations of the Magnuson-Moss Warranty Act; breach of express warranty; breach of the implied warranty of merchantability; unjust enrichment; violations of the California Consumer Legal Remedies Act, Unfair Competition Law and False Advertising Law; violation of the Florida Deceptive and Unfair Trade Practices Act; and violation of the New York General Business Law.

The Amended Complaint contains only one factual allegation directed towards Mr. Tisi, which states in full:

> Christopher Tisi is the creator, owner, principal investor, CEO and sole member of QuickTrim, LLC. He also is or has been the principal of at least 27 different Florida-registered limited liability companies, all of which share a common business address with QuickTrim, LLC.

(Id. at ¶ 87). As noted in the Amended Complaint, Quick Trim, LLC voluntarily dissolved on December 27, 2011, with an effective date of dissolution on December 1, 2011. (Id. at ¶ 88). Based on these facts alone, the Amended Complaint concludes (1) that "prior to the dissolution of QuickTrim LLC, the entity was dominated and controlled by Mr. Tisi to such an extent that the entity had no independent existence and was in fact the alter ego of Mr. Tisi, which was used to accomplish the fraudulent purposes described" in the Amended Complaint; and (2) "[a]ll conduct done in the name of 'QuickTrim LLC' that post-dates the dissolution of that entity was done by Mr. Tisi personally." (Id. at ¶¶ 88-89).

LEGAL ARGUMENT

POINT I

THE STANDARD OF REVIEW FOR A MOTION TO DISMISS PURSUANT TO FEDERAL RULE 12(B)(6)

The United States Supreme Court recently expounded on the minimum pleading requirements under Federal Rule 8(a) necessary to survive a motion to dismiss. See Ashcroft v. Iqbal, 556 U.S. 662 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007). In these cases, the Supreme Court held that Federal Rule 8(a) "does not require detailed factual allegations, but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." Iqbal, 556 U.S. at 678 (citing Twombly, 550 U.S. at 555) (internal quotation marks omitted). "A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not

do." Id. (citation omitted). "Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement." Id.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Id. (citation and internal quotation marks omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. To apply this plausibility standard, courts are to undertake a two-prong analysis to determine the sufficiency of a complaint. Id. at 678-79. First, although a court must accept as true all of the factual allegations contained in a complaint, that principle does not apply to "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." Id. at 678. The court is to disregard any "naked," "conclusory" or "threadbare" statements as such statements are not entitled to an assumption of truth. Id. Rule 8 "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." Id. at 678-79.

Second, the Court must consider the remaining factual allegations in the complaint "to determine if they plausibly suggest an entitlement to relief" sufficient to survive a motion to dismiss. Id. at 681. "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Id. at 679. "[W]here the well-pleaded facts do not permit the court to infer more than mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" Id.

POINT II

MR. TISI IS NOT A PROPER PARTY UNDER FLORIDA LIMITED LIABILITY COMPANY LAW

Mr. Tisi's purported liability to plaintiffs appears solely based upon his status as "creator, owner, principal investor, CEO and sole member" of Quick Trim, LLC, a dissolved Florida LLC. (See Amend. Compl. ¶ 87). Pursuant to Florida law, however, "[a] member of a limited liability company is not a proper party to proceedings by or against a limited liability company, except when the object is to enforce a member's right against, or liability to, the limited liability company." See Fla. Stat. § 608.462 (2012).[2] Moreover, the Florida legislature has determined that

> [i]n any case in which a party seeks to hold the members of a limited liability company personally responsible for the liabilities or alleged improper actions of the limited liability company, the court shall apply the case law which interprets the conditions and circumstances under which the corporate veil of a corporation may be pierced under the law of this state.

Id. § 608.701. Piercing the corporate veil requires that the plaintiff allege and prove the following two elements: (1) "the [LLC] is in actuality the alter ego of the [member]"; and (2) "it was organized or after organization was employed by the [members] for fraudulent or misleading purposes." See N. Am. Clearing, Inc. v. Brokerage Computer Sys., Inc., 666 F. Supp. 2d 1299, 1306 (M.D. Fla. 2009); see also Dania Jai-Alai Palace, Inc. v. Sykes, 450 So.2d 1114, 1121 (Fla. 1984) (claims for piercing the corporate veil must fail "[i]n the absence of pleading and proof that the corporation was organized for an illegal purpose or that its members fraudulently used the corporation as a means of evading liability with respect to a transaction that was, in truth, personal and not corporate") (citation omitted); Hilton Oil Transp. v. Oil Transp. Co., S.A., 659 So. 2d 1141, 1152 (Fla. Dist. Ct. App. 1995) ("the corporate veil will not be pierced absent a showing of

[2] The fact that Quick Trim, LLC voluntarily dissolved does not alter the analysis contained in Point II of this Memorandum. See Fla. Stat. § 608.4431(2)(b).

improper conduct . . . the corporate veil will not be penetrated either at law or in equity unless it is shown that the corporation was organized or employed to mislead creditors or to work a fraud upon them").

Here, the Complaint is utterly devoid of any allegations that would support holding Mr. Tisi vicariously liable for Quick Trim, LLC's purported actions on a veil piercing/alter ego theory. The Amended Complaint contains only one conclusory allegation in support of Mr. Tisi's alleged personal liability – that "[p]rior to the dissolution of QuickTrim LLC, the entity was dominated and controlled by Mr. Tisi to such an extent that the entity had no independent existence and was in fact the alter ego of Mr. Tisi, which was used to accomplish the fraudulent purposes described." (Amend. Compl. ¶¶ 88-89). This allegation, standing alone, cannot form the basis for a viable veil piercing/alter ego claim against Mr. Tisi, which requires the plaintiffs to set forth sufficient factual detail *at the pleading stage*. See Centrifugal Air Pumps Australia v. TCS Obsolete, LLC, 610-CV-820-ORL-31DAB, 2010 WL 3584948 at *2 (M.D. Fla. Sept. 9, 2010) (plaintiff's failure to plead facts in support of its conclusory veil piercing allegations required dismissal of individual LLC members from action).

Under Florida law, the failure to support conclusory allegations of veil piercing/alter ego liability with "sufficient factual detail"[3] mandates dismissal of a claim seeking to hold a member individually liable for an LLC's actions. See id.; Lovette v. Happy Hooker II, Case No. 2:04-cv-522-FtM-29SPC, 2006 U.S. Dist. LEXIS 1451, **16-17 (M.D. Fla., Jan. 11, 2006) (allegations that

[3] A plaintiff may satisfy its burden of pleading "sufficient factual detail" by setting forth factual allegations that, among other things, an individual member or shareholder failed to "observe corporate formalities . . . commingl[ed] funds of the corporation with funds of other corporations and with [personal] funds . . . us[ed] the assets of the corporation for his own personal use . . . fail[ed] to adequately capitalize the corporation, [and/or] us[ed] the corporate form to avoid liability." See Raber v. Osprey Alaska, Inc., 187 F.R.D. 675, 679 (M.D. Fla. 1999).

defendant was "sole member" of LLC insufficient to pierce the corporate veil). The plaintiffs have already had two attempts to plead sufficient facts, but have failed to do so. Indeed, if plaintiffs' wholly irrelevant allegation that Mr. Tisi "is or has been the principal of at least 27 different Florida-registered limited liability companies, all of which share a business address with QuickTrim, LLC" is any indication of the plaintiffs' ability to allege "sufficient factual detail" of improper conduct, it is difficult to see how further amendment will result in a plausible claim against Mr. Tisi in his personal capacity. See, e.g., Iqbal, 556 U.S. at 679. Accordingly, Florida law mandates the dismissal of the Amended Complaint in its entirety against Mr. Tisi.

Indeed, Courts in this Circuit have routinely dismissed actions at the pleading stage where a complaint "is devoid of *any* specific facts or circumstances supporting" liability of an individual on a veil piercing theory. See De Jesus v. Sears, Roebuck & Co., 87 F.3d 65, 70 (2d Cir. 1996); see also Lewis v. Abbott Labs., No. 08 Civ. 7480, 2009 WL 2231701, *7 (S.D.N.Y. July 24, 2009) (dismissing claim where "plaintiff has failed to allege facts to support piercing the corporate veil"); Kalin v. Xanboo, Inc., No. 04 Civ. 5931, 2009 WL 928279, *11 (S.D.N.Y. Mar. 30, 2009) (granting motion to dismiss where "Plaintiffs[‘] allegations are insufficient to carry the ‘heavy burden' placed on a party who seeks to pierce the corporate veil"); Lovely Peoples Fashion, Inc. v. Magna Fabrics, Inc., 95 CIV. 8450 AGS, 1996 WL 732634, *5 (S.D.N.Y. Dec. 19, 1996) (granting motion to dismiss against individual shareholders for failure to "state some basis in fact for piercing the corporate veil" where complaint's sole allegation was that shareholders "control and operate the [corporation] as their alter egos for the benefit of themselves and their families").

Plaintiffs' allegation that "[a]ll conduct done in the name of ‘QuickTrim LLC' that post-dates the dissolution of that entity was done by Mr. Tisi personally" does not alter this conclusion. This statement is merely a legal conclusion – wholly unsupported by any facts – and is not entitled

to the presumption of truth on a motion to dismiss pursuant to Federal Rule 8(a). See Iqbal, 556 U.S. at 678. Disregarding this allegation, as the Court must, the Amended Complaint sets forth no facts that "plausibly suggest an entitlement to relief" against Mr. Tisi for any purported actions of Quick Trim, LLC post-dissolution. Id. at 681. Based on the Amended Complaint's sole factual allegation against Mr. Tisi – that he was the "creator, owner, principal investor, CEO and sole member of Quick Trim LLC" – it is impossible to infer "more than a mere possibility of misconduct" required to satisfy the pleading standards of Federal Rule 8(a). Id. at 679. Simply stated, the Amended Complaint is utterly devoid of any facts suggesting what Mr. Tisi has done wrong to warrant the drastic result of imposing personal liability on him for the actions of a company, which plaintiffs conclude from a legal perspective "is" somehow a personal embodiment of Mr. Tisi post-dissolution.

Accordingly, plaintiffs' failure to adequately allege that Quick Trim, LLC's corporate veil should be pierced, and that Mr. Tisi should be held individually liable for Quick Trim, LLC's purported actions, requires that the Court dismiss the Amended Complaint in its entirety as to Mr. Tisi pursuant to Federal Rule 12(b)(6) for failure to state a claim upon which relief may be granted.

POINT III

MR. TISI IS NOT LIABLE UNDER THE MMWA OR THE UNIFORM COMMERCIAL CODE

A. Plaintiffs Failure To Allege A Viable State Law Claim For Breach Of Warranty Against Mr. Tisi Requires Dismissal Of Count I Of The Amended Complaint For Breach Of The MMWA

Count I of the Amended Complaint states that, "[i]n connection with the sale of the QuickTrim products, Defendants issued written warranties as defined in 15 U.S.C. § 2301(b) [of the MMWA], by making the Express Warranties [as defined in paragraph 3 of the Complaint]." (See Amend. Compl. ¶ 137). The Amended Complaint then states that the "QuickTrim products do not

conform to the Express Warranties because each of the Express Warranties is false, misleading, and unsubstantiated, and there []is no competent and reliable scientific evidence supporting any of those statements." (Id. at ¶ 138). Whether or not this is true, plaintiffs' cannot state a claim against Mr. Tisi for breach of express warranty under the MMWA *unless* they sufficiently allege a viable state law claim for breach of express and/or implied warranty. See Cali v. Chrysler Group LLC, 10 Civ. 7606 JSR, 2011 WL 383952, *4 (S.D.N.Y. Jan. 18, 2011) aff'd sub nom. 426 F. Appx. 38 (2d Cir. 2011) ("[C]laims under the Magnuson-Moss Act stand or fall with the express and implied warranty claims under state law."); Meserole v. Sony Corp. of Am., Inc., 08 CV. 8987 (RPP), 2009 WL 1403933 (S.D.N.Y. May 19, 2009) ("because Plaintiffs have not alleged a state law violation of either an express or implied warranty, their claim under the MMWA is dismissed"); see also Solomon v. Canon USA, 31 Misc. 3d 30, 33 (N.Y. App. Div. 1st Dep't 2010) (holding that a sustainable state law warranty claim is necessary to state a viable MMWA claim). Regardless of whether Mr. Tisi appears to facially satisfy the requirements for the MMWA for purposes of liability, a MMWA claim cannot stand absent a viable parallel state law warranty claim.

As discussed below, plaintiffs have not alleged *any* valid state law claims for breach of express or implied warranties against Mr. Tisi. As a result, Count I of the Amended Complaint for breach of the MMWA fails as a matter of law, and must be dismissed pursuant to Federal Rule 12(b)(6) for failure to state a claim upon which relief may be granted. See Cali, 2011 WL 383952, at *4 (dismissing MMWA claim for failure to state a claim under Rule 12(b)(6) where plaintiff could not state a valid state law breach of warranty claim).

B. Plaintiffs' Claims For Breach Of Express And Implied Warranties Against Mr. Tisi Must Fail As A Matter Of Law As Mr. Tisi Is Not A Seller Under The Uniform Commercial Code

Plaintiffs' claims for breach of warranty and contract under state law (Counts V, VI (California), IX, X, XI (Colorado), XIII, XIV, XV (Florida), XVIII, XIX, XX (Illinois), XXII, XXIII, XXIV, XXV (Nevada), XXVII, XXVIII, and XXIX (New York)) (collectively, the "State Warranty Counts") are governed by the U.C.C.[4] Under the U.C.C., an individual may only be liable for breach of express and implied warranties if he is a "seller." Section 2-103 of the U.C.C. defines "seller" as "a person who sells or contracts to sell goods." U.C.C. § 2-103(1)(d). Section 2-313 (Express Warranty) states that "the *seller*" can create express warranties by affirmation, promise, description, or sample. Id. § 2-313 ("Any affirmation of fact or promise made by the *seller* to the buyer which relates to the goods and becomes part of the basis for the bargain becomes part of the express warranty that the goods shall conform to the affirmation or promise.") (emphasis added). Section 2-314 (Implied Warranty) provides that "[u]nless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the *seller* is a merchant with respect to goods of that kind." Id. § 2-314 (emphasis added).

Since there is no allegation in the Amended Complaint that Mr. Tisi sold or contracted to sell the QuickTrim products – nor could there be such an allegation – it follows that Mr. Tisi cannot be liable for breach of express or implied warranty as a matter of law. See Rosen v. Hyundai Group, 829 F. Supp. 41, 49-50 (E.D.N.Y. 1993) (only "sellers" are liable for breach of warranty

[4] For the purposes of this memorandum, we note that the relevant provisions in the U.C.C. of each of the respective states identified in the Warranty Counts contain identical provisions to those stated in the model U.C.C. See, e.g., Cal. Com. Code §§ 2103, 2313, 2314 (2012); Colo. Rev. Stat. Ann. §§ 4-2-103, 4-2-313, 4-2-314 (2012); Fla. Stat. Ann. §§ 672.103, 672.313, 672.314 (2012); Ill. Stat. Ch. 810 §§ 5/2-103, 5/2-313, 5/2-314 (2012); Nev. Rev. Stat. Ann. §§ 104.2103, 104.2313, 104.2314 (2012); N.Y. U.C.C. Law §§ 2-103, 2-313, 2-314 (McKinney 2012). Accordingly, this memorandum refers to the model provisions of the U.C.C. throughout.

under the U.C.C.); see also Prima Int'l Trading v. Wyant, 6:07-CV-338-REW, 2009 WL 722609, *6 (E.D. Ky. Mar. 17, 2009) (finding that a broker, who never had title to the goods sold, was not a "seller" under § 2-103 of the U.C.C. and therefore could not be liable for breach of express warranty); Oscar Mayer Corp. v. Mincing Trading Corp., 744 F. Supp. 79, 83 (D.N.J. 1990) (rejecting notion that a "broker" qualifies as a "seller" for warranty purposes under the U.C.C.). Accordingly, since Mr. Tisi was not a "seller" as that term is defined under the U.C.C., all of the plaintiffs' State Warranty Counts fail as a matter of law, and must be dismissed pursuant to Federal Rule 12(b)(6) for failure to state a claim upon which relief may be granted.

C. Even If Mr. Tisi Were A "Seller," Plaintiffs' Claims For Breach Of Implied Warranty Under California, Florida, Illinois And New York Law Fail As A Matter Of Law Because Mr. Tisi Is Not In Privity With Any Of The Plaintiffs

Even assuming that Mr. Tisi was a "seller" under the U.C.C., plaintiffs' claims for breach of implied warranty under the laws of California (Count VI), Florida (Count XIV), Illinois (Count XVIII) and New York (Count XXVIII) fail for the independent reason that Mr. Tisi was not in privity with any of the named plaintiffs. Each of these states requires that a consumer and a "seller" be in privity in order to state a cause of action for breach of implied warranty seeking recovery of economic losses. See, e.g., Cali, 2011 WL 383952, at *3 ("New York law requires privity for implied warranty claims"); Mesa v. BMW of N. Am., LLC, 904 So. 2d 450, 458 (Fla. Dist. Ct. App. 2005) ("Under Florida law, a plaintiff cannot recover economic losses for breach of implied warranty in the absence of privity"); Caterpillar, Inc. v. Usinor Industeel, 393 F. Supp. 2d 659, 678 (N.D. Ill. 2005) ("[P]rivity of contract is a prerequisite to recover economic damages for breach of implied warranty under Illinois law."); U.S. Roofing, Inc. v. Credit Alliance Corp., 228 Cal. App. 3d 1431, 1441 (Ct. App. 1991) ("Vertical privity is a prerequisite in California for recovery on a theory of breach of the implied warranties of fitness and merchantability.").

Since the Amended Complaint contains no allegations that Mr. Tisi was in privity with any of the named plaintiffs – nor could it – Counts VI, XIV, XVIII and XXVIII must be dismissed against Mr. Tisi as a matter of law and pursuant to Federal Rule 12(b)(6) for failure to state a claim upon which relief may be granted.

CONCLUSION

For all of the foregoing reasons, defendant Christopher Tisi respectfully requests that the Court grant his motion to dismiss the plaintiffs' Amended Complaint pursuant to Federal Rule 12(b)(6) for failure to state a claim upon which relief may be granted.

Dated: New York, New York
June 4, 2012

Respectfully submitted,

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