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

DEFENDANTS WAL-MART STORES, INC., AMAZON.COM, INC., DRUGSTORE.COM, INC., CVS PHARMACY INC., GNC CORPORATION, WALGREEN CO. AND QUICK TRIM, LLC'S MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS THE AMENDED CLASS ACTION COMPLAINT

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INTRODUCTION

Defendants Wal-Mart Stores, Inc., Amazon.com, Inc., drugstore.com, Inc., CVS Pharmacy Inc., GNC Corporation, Walgreen Co. (collectively, "Retail Defendants"), and Quick Trim, LLC (collectively, with Retail Defendants, "Defendants") respectfully submit this memorandum in support of their 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. The Amended Complaint should be dismissed on several grounds.

First, the Amended Complaint fails to allege any cognizable injury or harm as a result of plaintiffs' alleged purchase of various QuickTrim™ products (collectively, "QuickTrim"). This requires dismissal of the Amended Complaint in its entirety. The Amended Complaint is devoid of allegations that QuickTrim failed to perform as warranted for any of the plaintiffs or that the they did not receive the benefit of the bargain from purchasing and using QuickTrim. Instead, plaintiffs simply allege that they would not have purchased the QuickTrim products had they known they "were not safe and effective treatments for weight loss" and that "the representations concerning the purported benefits of the products were unsubstantiated." Plaintiffs' allegations, however, are insufficient to state a cognizable injury resulting from Defendants' alleged conduct. Since the absence of injury is fatal to all of plaintiffs' claims, the Court should dismiss the Amended Complaint in its entirety pursuant to Federal Rule 12(b)(6).

Second, plaintiffs' claims under various states' consumer protection laws – Counts II, III, IV, VIII, XII, XVI, XVII and XXI of the Amended Complaint (the "Fraud Counts") – fail to satisfy the pleading requirements of Federal Rule 9(b). As a result of plaintiffs' failure to plead any of the Fraud Counts with requisite particularity, the Court should dismiss these counts as to Defendants. Pursuant to well-settled case law, where plaintiffs allege fraud against multiple defendants,

plaintiffs must plead with particularity. Specifically, plaintiffs are required to separately set for the acts complained of by each defendant. Here, the Amended Complaint repeatedly clumps together all of the "Defendants" and fails to identify which of the "Defendants" made each alleged statement or omission, or committed the wrongful acts forming the basis of plaintiffs' claims. Indeed, the Amended Complaint does not identify a single fraudulent statement uttered by any of the Defendants. Accordingly, the Court should dismiss the Fraud Counts directed at Defendants pursuant to Federal Rules 9(b) and 12(b)(6).

Third, plaintiffs' claims under common law for breach of warranty and breach of the implied covenant of good faith and fair dealing – Counts XI, XV, XXIV and XV of the Amended Complaint (the "Common Law Warranty Counts") – fail to state a claim against Defendants. These claims fail as a matter of law because, based on the allegations of the Amended Complaint, they are necessarily preempted by the Uniform Commercial Code ("U.C.C."). Further, plaintiffs do not allege any facts in support of any claim outside the scope of the U.C.C. that would plausibly suggest entitlement to such relief. Accordingly, the Court should dismiss the Common Law Warranty Counts pursuant to Federal Rule 12(b)(6).

Fourth, Count VII of the Amended Complaint seeks to state a claim against Defendants for "Unjust Enrichment" under California law (the "Unjust Enrichment Count"). This claim must fail as a matter of law because California does not recognize an independent cause of action for unjust enrichment. Accordingly, the Court should dismiss Count VII of the Amended Complaint pursuant to Federal Rule 12(b)(6).

Fifth, plaintiffs' claims under the Fraud Counts, various state statutes for violation of express warranties – Counts I, V, IX, XIII, XIX, XXII and XXVII of the Amended Complaint (the "Express Warranty Counts") – and Count XVI, alleging violation of New York General Business

Law § 349 (the "NY Consumer Protection Count"), fail to state a claim against the Retail Defendants. As a matter of law, the Retail Defendants cannot be liable for the Fraud Counts, Express Warranty Counts or the New York Consumer Protection Count as a result of alleged actions of the distributor, or any other party, merely by virtue of each Retailer Defendant's resale of a product. Moreover, there are no allegations – nor can there be – that the Retail Defendants took any steps to affirmatively participate in, control or adopt any of the distributor's statements. As a result, the Court should dismiss the Fraud Counts, Express Warranty Counts and New York Consumer Protection Count directed at the Retail Defendants pursuant to Federal Rule 12(b)(6).

Finally, the Amended Complaint fails to allege facts supporting plaintiffs' claims arising under state law against each of the Retail Defendants. Plaintiffs' state law claims necessarily arise out of each individual plaintiff's purchase of QuickTrim in a respective state. Each plaintiff alleges, however, that he or she purchased QuickTrim only from certain retailers in certain states. While claims against each Retail Defendant may arise under the law of the state of a particular plaintiff's purchase, there are no factual allegations to support holding each Retail Defendant liable for all alleged violations of state law where the Amended Complaint contains no allegations that any of the plaintiffs purchased QuickTrim from a Retail Defendant in a respective state. Accordingly, as identified more specifically herein, the Court should dismiss the counts against each of the Retail Defendants under various states statutes and common law where plaintiffs have not alleged they purchased the QuickTrim products pursuant to Federal Rule 12(b)(6).

STATEMENT OF FACTS

On or about March 1, 2012, plaintiffs instituted this action via Class Action Complaint (the "Original Complaint"), on behalf of themselves and a putative class, under a variety of theories.[1] Plaintiffs have named as defendants in this action the distributor of QuickTrim, 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 who served as spokespeople for QuickTrim. Recognizing that the Original Complaint contained certain procedural and pleading defects identified by defendants, plaintiffs (including four new plaintiffs) filed and served the Amended Complaint on or about May 8, 2012.

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.).

Further, the Amended Complaint contains allegations regarding each plaintiff's purchase of QuickTrim. (Id. at ¶¶ 92-119). Specifically, Plaintiff Andeia Cowan, a New York resident, allegedly purchased QuickTrim online from Amazon.com, Inc. ("Amazon.com") and drugstore.com, Inc. ("drugstore.com"). (Id. at ¶¶ 6, 92.) Plaintiffs Luis Shepherd and Holly Viola, residents of Florida, allegedly purchased QuickTrim from retail stores in Florida, specifically CVS

[1] Plaintiffs' claims included violations of the Magnuson-Moss Warranty Act ("MMWA"); 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.

Pharmacy, Inc. ("CVS") and Wal-Mart Stores, Inc. ("Wal-Mart"), respectively. (Id. at ¶¶ 7-8, 95, 99.) Plaintiffs Alexsandra Cerda, LaVada Fallon and Elizabeth Freedman, residents of California, allegedly purchased QuickTrim from retail stores in California operated by GNC Corporation ("GNC"), Wal-Mart, and Walgreen Co. ("Walgreens"), respectively. (Id. at ¶¶ 9-11, 102, 115, 117.) Plaintiff Cynthia Hogan, an Illinois resident, allegedly purchased QuickTrim from a retail store operated by CVS in Illinois. (Id. at ¶¶ 12, 106.) Plaintiff Debbie Vongphachanh, a Colorado resident, allegedly purchased QuickTrim from retail stores operated by GNC and Wal-Mart in Colorado. (Id. at ¶¶ 12, 109.) Plaintiff Tebytha Chan, a Nevada resident, allegedly purchased QuickTrim from retail stores operated by GNC and Walgreens in Nevada. (Id. at ¶¶ 14, 112.)

With regard to damages, the Amended Complaint alleges that each plaintiff "would not have purchased QuickTrim if she [or he] had known that the product and its ingredients were not safe and effective treatments for weight loss, and that the representations concerning the purported benefits of the product were unsubstantiated." (Id. at ¶¶ 94, 97, 101, 104, 108, 111, 114, 116, 119). The Amended Complaint does not contain any further allegations as to how any plaintiff sustained damages or suffered actual injury as a result of his or her purchase and use of QuickTrim. Of particular relevance, no plaintiff alleges that, despite the alleged unsubstantiated representations, QuickTrim failed to perform as warranted or provide plaintiffs with the benefit of the bargain.

Based on defendants' alleged misrepresentations, the Amended Complaint sets forth the following claims for relief against all defendants:

(a) Violation of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, *et seq*. (Count I) (the "MMWA Count");

(b) Breach of Express Warranty under various states' laws, including the Express Warranty Counts;

(c) Breach of the Implied Warranty of Merchantability under the following states' laws, including California (Count VI), Colorado (Count X), Florida (Count XIV), Illinois (Count XVIII), Nevada (Count XXIII), and New York (Count XXVIII) (the "Implied Warranty Counts");

(d) Breach of Common Law Warranty or Implied Covenants under various states' laws, including the Common Law Warranty Counts;

(e) Breach of Contract under various states' laws, including Illinois (Count XX) and New York (Count XXIX) (the "Breach of Contract Counts");

(f) Violation of Consumer Protection Laws under various states' laws, including the Fraud Counts and New York Consumer Protection Count; and

(g) The Unjust Enrichment Count.

LEGAL ARGUMENT

POINT I

PLAINTIFFS HAVE FAILED TO ALLEGE ANY COGNIZABLE INJURY

Plaintiffs do not allege any cognizable injury or harm as a result of their purchase and use of QuickTrim and, therefore, fail to state a claim under any Count of the Amended Complaint. Indeed, plaintiffs' failure to allege an "injury-in-fact" as a result of the defendant's wrongful conduct requires dismissal of every count in the Amended Complaint. The following controlling precedent supports this proposition as to the respective Counts in the Amended Complaint[2]:

- Counts I: Frye v. L'Oreal USA, Inc., 583 F. Supp. 2d 954, 957-59 (N.D. Ill. 2008) (finding plaintiff failed to plead any economic damage in alleging that she would not have purchased lipstick if she had been aware that defendant's product statements were "deceptive").
- Counts II, III and IV: Bower v. AT&T Mobility, LLC, 196 Cal. App. 4th 1545, 1555 (Cal. App. 2d Dist. 2011) (dismissing claims under Cal. Bus. & Prof'l Code §§ 17200, 17500 & Cal. Civ. Code § 1770 for failure to plead injury in fact such as a "tangible increased cost or burden" or that the product was "worth less than represented").
- Counts V and VI: Aaronson v. Vital Pharma., Inc., 09-CV-1333 W (CAB), 2010 WL 625337, *6 (S.D. Cal. Feb. 17, 2010) ("A party seeking recovery for breach [of express or implied warranty under Cal. Com. Code §§ 2313, 2314] must first plead facts which support

[2] In an effort to avoid bogging the Court down with unnecessary case citations, Defendants do not cite authority herein with respect to Counts VII, XI, XV, XXIV and XXV, which the Court should dismiss for the independent bases discussed further below. (See Points III and IV infra). As with the authority cited herein regarding plaintiffs' obligation to plead a cognizable injury or harm, each of these respective Counts likewise requires that plaintiffs allege an "injury-in-fact," which plaintiffs have failed to do in their Amended Complaint.

the basis for measuring damages, and then prove those damages at trial by any manner that is reasonable.").

- Count VIII: Purple Onion Foods, Inc. v. Blue Moose, Inc., 45 F. Supp. 2d 1255, 1262 (citing Hall v. Walter, 969 P.2d 224, 234-35 (Colo. 1998)) ("[T]he Colorado Consumer Protection Act ('CCPA') . . . requires actual injury before an individual may maintain a private cause of action.").
- Counts IX and X: Caldwell v. Kats, 38 Colo. App. 156, 159-60, 555 P.2d 190, 193 (1976) rev'd on other grounds, 193 Colo. 384, 567 P.2d 371 (1977) ("[T]o recover . . . for a breach of [express or implied] warranty, there must be proof that the breach of warranty was the actual cause of the damages suffered").
- Count XII: Gorran v. Atkins Nutritionals, Inc., 464 F. Supp. 2d 315, 329 (S.D.N.Y. 2006) (dismissing claim under Fla. Stat. § 501.201, *et seq.* based on plaintiff's failure to allege facts showing that defendants' acts caused a diminution in the value of the products that he purchased).
- Counts XIII and XIV: Smith v. Wm. Wrigley Jr. Co., 663 F. Supp. 2d 1336, 1341 (S.D. Fla. 2009) ("In order to state a claim for breach of warranty [under Fla. Stat. §§ 672.313, 672.314], the Plaintiff . . . must allege injuries sustained by the buyer as a result of the breach of warranty"); see also Dunham-Bush, Inc. v. Thermo-Air Serv., Inc., 351 So. 2d 351, 353 (Fla. Dist. Ct. App. 1977) (holding that, in order to state a claim for breach of Fla. Stat. §§ 672.313, 672.314, a plaintiff must plead "injuries sustained by the buyer as a result of the breach of warranty").
- Count XVI: See Frye, 583 F. Supp. 2d at 957-59.

- Count XVII: Price v. Philip Morris, Inc., 219 Ill. 2d 182, 275, 848 N.E.2d 1 (2005) (finding that the plaintiffs did not demonstrate the actual damages prong of an action under the Illinois Consumer Fraud Act or Illinois Deceptive Trade Practices Act because they could not show that they paid more for light cigarettes or they bought more light cigarettes because they were "light").
- Count XVIII: See Frye, 583 F. Supp. 2d at 957-59.
- Count XIX: Kim v. Mercedes-Benz, U.S.A., Inc., 353 Ill. App. 3d 444, 460 (2004) ("Damages are an element of a breach of warranty claim [under Ill. Stat. Ch. 810 §§ 5/2-313]. Without damages, there can be no recovery.").
- Count XX: Kushner v. Illinois State Toll Highway Auth., 575 F. Supp. 2d 919, 924 (N.D. Ill. 2008) (failure to allege cognizable "injury in fact" required dismissal of breach of contract claim under Illinois law).
- Count XXI: Sattari v. CitiMortgage, Case No.: 2:09-cv-00769-RLH-GWF, 2011 U.S. Dist. LEXIS 36748, **10-11 (D. Nev. Mar. 23, 2011) (holding that a victim of a deceptive trade practice is required to allege "damage to the plaintiff").
- Counts XXII and XXIII: Moretti v. Wyeth, Inc., 2:08-CV-00396-JCMGWF, 2009 WL 749532, *2 (D. Nev. Mar. 20, 2009) (plaintiff could not state viable claims for breach of express or implied warranty under Nevada law where she could not allege injury as a result of defendants' alleged breach of warranty).
- Count XXVI: Small v. Lorillard Tobacco Co. Inc., 94 N.Y.2d 43, 55 (1999) (holding that "consumers who buy a product that they would not have purchased, absent a manufacturer's deceptive commercial practices" have not suffered an injury under Gen. Bus. Law § 349).

- Count XXVII: Weiner v. Snapple Beverage Corp., 07 CIV. 8742 DLC, 2011 WL 196930, **5-6 (S.D.N.Y. Jan. 21, 2011) (dismissing consumers' express warranty claims for failure to demonstrate actual injury by paying a "premium price" for a product based on alleged misrepresentations).
- Count XXVIII: Frank v. DaimlerChrysler Corp., 292 A.D.2d 118, 121 (N.Y. 1st Dept. 2002) (dismissing breach of implied warranty claims where plaintiffs did not "plead actual injuries or damages, resulting from defendants' conduct").
- Count XXIX: O.K. Petroleum Distribution Corp. v. Starnet Ins. Co., 09 CIV. 5094LMM, 2009 WL 2432725 at *2 (S.D.N.Y. Aug. 5, 2009) (plaintiff's failure to allege "injury-in-fact" required dismissal of common law breach of contract claims).

Frye v. L'Oreal USA, Inc. is particularly illustrative of the fatal shortcomings of plaintiffs' Amended Complaint. 583 F. Supp. 2d 954. In Frye, the plaintiff instituted a class action against defendant L'Oreal, a manufacturer of cosmetic products, alleging violations of the Illinois Consumer Fraud and Deceptive Practices Act; breach of implied warranty under 810 ILCS 5/2-314; breach of implied warranty under MMWA; strict liability; negligence per se; and unjust enrichment. Id. at 956. The plaintiff alleged that she "personally purchased and used" lipstick manufactured by L'Oreal, which allegedly contained dangerous levels of lead. Id. The gravamen of the plaintiff's complaint was that L'Oreal "marketed its products as safe for use, and that had she known that the products contained lead she would not have purchased them." Id. at 957.

L'Oreal sought to dismiss the complaint on the basis that the plaintiff had not alleged "actual damages" – i.e. that the plaintiff did not receive the "benefit-of-the-bargain." Id. The District Court agreed with L'Oreal, finding that the plaintiff's failure to allege actual damages required dismissal of her complaint in its entirety. Id. at 958-60. Of particular relevance here, the Court noted the

following with respect to the type of "out-of-pocket" loss representing cognizable damages in consumer fraud, negligence and/or warranty-based claims:

> In the instant case, plaintiff alleges that had the presence of lead been revealed, she would not have purchased the lipstick at issue. ***But she does not allege that she would not have purchased lipstick, that she would have purchased cheaper lipstick, or that the lipstick in question had a diminished value because of the lead***. Simply put, there is no allegation that the presence of lead in the lipstick had any observable economic consequences.

Id. at 958 (emphasis added). Accordingly, the plaintiff's failure to allege how the presence of lead in the lipstick manufactured by L'Oreal caused her *cognizable legal injury* required dismissal of her complaint in its entirety.

Here, just as in Frye, plaintiffs do not allege cognizable injury or harm arising out of their purchase of QuickTrim or "any observable economic consequences." See id. Therefore, plaintiffs fail to state a claim under any Count in the Amended Complaint. Plaintiffs have not alleged that, based on defendants' alleged misrepresentations,[3] they paid a "tangible increased cost" or that QuickTrim was "worth less than represented." See, e.g., Bower, 196 Cal. App. 4th at 1555; Gorran, 464 F. Supp. 2d at 329; Price, 219 Ill. 2d at 275; Weiner, 2011 WL 196930 at **5-6. Plaintiffs also do not allege that they would not have purchased any weight loss products, that they would have purchased a similar but cheaper product, or that QuickTrim had a diminished value because of the alleged misrepresentations. See Frye, 583 F. Supp. 2d at 958.

Moreover, the Amended Complaint does not even allege that QuickTrim did not perform as warranted for any of the plaintiffs. Instead, plaintiffs simply state that they would not have purchased QuickTrim products had they been aware defendants' alleged misrepresentations were

[3] Indeed, as set forth in greater detail below, plaintiffs have not alleged which representations they allegedly relied upon or which of the defendants allegedly made such representations. (See Point II infra).

"deceptive." Such allegations are clearly insufficient to state a cognizable "injury-in-fact" upon which relief may be granted. See id. at 957-60; Small, 94 N.Y. 2d at 55. Indeed, based on the allegations of the Amended Complaint, it is equally plausible that plaintiffs received the benefit-of-the-bargain and did, in fact, experience numerous benefits from consuming QuickTrim products. Accordingly, plaintiffs' failure to allege any cognizable injury or damages resulting from Defendants' alleged conduct requires that the Amended Complaint be dismissed pursuant to Federal Rule 12(b)(6).

POINT II

PLAINTIFFS HAVE FAILED TO PLEAD THE FRAUD COUNTS WITH REQUISITE SPECIFICITY

The Fraud Counts[4] contained in plaintiffs' Amended Complaint are all subject to the heightened pleading standard of Federal Rule 9(b).[5] See, e.g., Diacakis v. Comcast Corp., C 11-3002 SBA, 2012 U.S. Dist. LEXIS 2329, ** 12-15 (N.D. Cal. Jan. 9, 2012) (holding that claims under Cal. Civ. Code §§ 1750, *et seq.*, and Cal. Bus. & Prof. Code §§ 17500, *et seq.* are subject to Federal Rule 9(b)) (Counts II and IV); Keegan v. Am. Honda Motor Co., Inc., CV 10-09508 MMM AJWX, 2012 U.S. Dist. LEXIS 3007, ** 14-15 (C.D. Cal. Jan. 6, 2012) (holding that claims under Cal. Bus. & Prof. Code §§ 17200, *et seq.* are subject to Federal Rule 9(b)) (Count III); Duran v. Clover Club Foods Co., 616 F. Supp. 790, 793 (D. Colo. 1985) (holding that Colorado Consumer

[4] As noted above, the Fraud Counts include Counts II, III, IV, VIII, XII, XVI, XVII and XXI of the Amended Complaint.

[5] To the extent that any of the above-statutes require heightened pleading only for claims "sounding in fraud," plaintiffs allegations clearly "sound in fraud." See, e.g., Nakajima All Co., Ltd. v. SL Ventures Corp., 00 C 6594, 2001 U.S. Dist. LEXIS 7535, ** 16-17 (N.D. Ill. May 31, 2001) (holding that Illinois Uniform Deceptive Trade Practices Act is subject to Federal Rule 9(b)'s heightened pleading requirement where claims based upon "misrepresentations" to customers).

Protection Act claims are subject to Federal Rule 9(b)) (Count VIII); Sunoptic Techs., LLC v. Integra Luxtec, Inc., 3:08-CV-878-J-16JRK, 2009 U.S. Dist. LEXIS 23836, * 5 (M.D. Fla. Mar. 18, 2009) (holding that claims under Fla. Stat. § 501.201, *et seq.* are subject to Federal Rule 9(b)) (Count XII); Davis v. G.N. Mortg. Corp., 396 F.3d 869, 883 (7th Cir. 2005) (holding that Illinois Consumer Fraud Act claims are subject to Federal Rule 9(b)) (Count XVI); Nakajima All Co., 2001 U.S. Dist. LEXIS 7535 at ** 16-17 (holding that Illinois Uniform Deceptive Trade Practices Act claims which "sound in fraud" are subject to Federal Rule 9(b)) (Count XVII); Patterson v. Grimm, 2:10-CV-1292 JCM (RJJ), 2010 U.S. Dist. LEXIS 120901, **10-11 (D. Nev. Nov. 1, 2010) (holding that Nevada Deceptive Trade Practices Act claims are subject to Federal Rule 9(b)) (Count XXI).

Federal Rule 9(b) requires, in relevant part, that plaintiffs alleging fraud "must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. Proc. 9(b). To satisfy the heightened pleading standard, plaintiffs' Amended Complaint 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

Sofi Classic S.A. DE C.V. v. Hurowitz, 444 F. Supp. 2d 231, 248 (S.D.N.Y. 2006) (quoting Harsco Corp. v. Segui, 9 F.3d 337, 347 (2d Cir. 1996)) (dismissing claims sounding in fraud for failure to plead with particularity under Rule 9(b)); see also Bui v. Indus. Enters. of Am., Inc., 594 F. Supp. 2d 364, 371-72 (S.D.N.Y. 2009) (same); Brownstone Inv. Group, LLC v. Levey, 468 F. Supp. 2d 654, 659-60 (S.D.N.Y. 2007) (same); Flores v. Osaka Health Spa, Inc., 474 F. Supp. 2d 523, 528 (S.D.N.Y. 2007) (same).

Further, "[t]he overwhelming weight of authority in this Circuit interprets Rule 9(b) to require delineation of the role of each defendant in multi-defendant fraud cases." Yung v. Integrated Transp. Network Group, No. 00 Civ. 3965 (DAB)(HBP), 2001 U.S. Dist. LEXIS 24715,

*57 (S.D.N.Y. Sept. 4, 2001). As a result, "[w]here fraud is alleged against multiple defendants, a plaintiff must plead with particularity by setting forth separately the acts complained of by each defendant." Sofi Classic, 444 F. Supp. at 248 (quoting Ellison v. Am. Image Motor Co., 36 F. Supp. 2d 628, 641-42 (S.D.N.Y. 1999)). "The requirements of Rule 9(b) are 'not satisfied by a complaint in which defendants are clumped together in vague allegations.'" Polar Int'l Brokerage Corp. v. Reeve, 108 F. Supp. 2d 225, 237 (S.D.N.Y. 2000) (quoting Ellison, 36 F. Supp. 2d at 640); see also Apex Mar. Co. v. OHM Enters., No. 10 Civ. 8119 (SAS), 2011 U.S. Dist. LEXIS 35707, *13 (S.D.N.Y. Mar. 30, 2011) (dismissing Complaint under Rule 9(b) for "clumping" all defendants together, including allegations such as "Defendants issued a 'Stop Payment'" and that "Defendants intended all along . . .").

Here, the Amended Complaint fails to satisfy the heightened pleading standard of Federal Rule 9(b) as to the Defendants with regard to any of the Fraud Counts. The Amended Complaint does not identify *any* fraudulent statements uttered by *any* of the Defendants, nor does it "set[] forth separately the acts complained of by each defendant." See Sofi Classic, 444 F. Supp. 2d at 248. Rather than specify which defendant made each alleged statement or omission as required by Federal Rule 9(b), the Complaint simply attributes all of the statements – whatever they may have been – to all of the "Defendants." (See, e.g., Amend. Compl. ¶ 33 ("Defendants' marketing and promotion . . .") (emphasis added); id. at ¶ 128 ("Defendants' labeling, marketing and promotion . . .") (emphasis added); id. at ¶ 146 ("Defendants' misrepresentations . . .") (emphasis added); id at ¶¶ 152-154 ("Defendants' conduct . . .") (emphasis added); id. at ¶¶ 159-161, 188-192, 229-231, 263-264, 268-272, 299-302). Plaintiffs' attempt to "clump[]" all "Defendants" together is insufficient to satisfy the heightened pleading requirements of Federal Rule 9(b). See, e.g., Apex, 2011 U.S. Dist.

LEXIS 35707, at *13. This is clearly insufficient and the Court should dismiss these counts of the Amended Complaint pursant to Federal Rules 9(b) and 12(b)(6).

POINT III

THE COMMON LAW WARRANTY COUNTS ARE PREEMPTED BY THE UNIFORM COMMERCIAL CODE

The Common Law Warranty Counts[6] assert claims against Defendants for common law breach of warranty and breach of the implied covenant of good faith and fair dealing under the laws of Colorado, Florida, and Nevada, respectively. These claims, however, fail as a matter of law because they are necessarily preempted by the U.C.C. based on the factual allegations of the Amended Complaint.

Article 2 of the U.C.C. applies to "transactions in goods." U.C.C. § 2-102.[7] Further, "goods" is defined in the U.C.C., in relevant part, as "all things that are movable at the time of identification to a contract for sale." U.C.C. § 2-103(k). The Comments regarding the "Construction" of the U.C.C. further provide in relevant part:

> The Uniform Commercial Code was drafted against the backdrop of existing bodies of law, including the common law and equity, and relies on those bodies of law to supplement it provisions in many important ways. At the same time, ***the Uniform Commercial Code is the primary source of commercial law rules in areas that it governs***, and its rules represent choices made by its drafters and the enacting legislatures about the appropriate policies to be furthered in the transactions it covers. . . . ***[T]he Uniform Commercial Code preempts principles of common law and equity that are inconsistent with either its provisions or its purposes and policies***.

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[6] As noted above, the Common Law Warranty Counts include Counts XI, XV, XXIV and XXV of the Amended Complaint.

[7] For the purposes of the discussion in Point III of this memorandum, we note that the provisions in the U.C.C. relevant to the Common Law Warranty Counts contain identical provisions to those stated in the model U.C.C. See, e.g., Colo. Rev. Stat. Ann. §§ 4-1-1103, 4-1-1304, 4-2-102, 4-2-103, 4-2-313, 4-2-314, 4-2-714 (2012); Fla. Stat. Ann. §§ 671.103, 671.304, 672.102, 672.103, 672.313, 672.314, 672.714 (2012); Nev. Rev. Stat. Ann. §§ 104.1103, 104.1304, 104.2102, 104.2103, 104.2313, 104.2314, 104.2714 (2012). Accordingly, this memorandum refers to the model provisions of the U.C.C. throughout.

U.C.C. § 1-103 cmt. 2 (emphasis added).

Plaintiffs' claims in the Amended Complaint pertain solely to "transactions in goods." Namely, plaintiff "purchasers" allege a variety of claims related to their purchase of QuickTrim, a "good" under the U.C.C. (See, e.g., Amend. Compl. ¶¶ 5, 92, 95, 99, 102, 106, 109, 112, 115, 117, 120). As such, plaintiffs' claims are governed by the U.C.C. Moreover, since the U.C.C. provides plaintiffs with causes of action for breach of warranty and breach of contract, the U.C.C. remedy provisions are exclusive and preempt duplicative or inconsistent causes of action under common law. See U.C.C. §§ 2-313, 2-314, 2-714; see, e.g., Tufano Motorcar, Inc. v. Equip. & Res. Int'l, Ltd., CV 91-0446810S, 1992 Conn. Super. LEXIS 2777, * 5 (Super. Ct. Sept. 18, 1992) ("[W]here the UCC applies to a transaction, common law claims, such as for breach of contract, are preempted."); Hapka v. Paquin Farms, 458 N.W.2d 683, 688 (Minn.1990) (holding that Article 2 of the U.C.C. preempts common law claims). Similarly, the U.C.C. provides that "[e]very contract or duty within [the U.C.C.] imposes an obligation of good faith in its performance and enforcement," preempting any common law claim based on the implied covenant for good faith and fair dealing. U.C.C. § 1-304; see also Tufano, 1992 WL 257785; Hapka, 458 N.W.2d at 688.

To the extent the common law causes of action asserted in the Amended Complaint are available to plaintiffs, those claims exist only in circumstances where the U.C.C. explicitly provides that it does not apply, such as with respect to real property or service contracts. See, e.g., Fumarelli v. Marsam Devel., Inc., 92 N.Y.2d 298 (1998) (discussing common law warranty claim in the context of the contract for sale of real property); Chutich v. Samuelson, 33 Colo. App. 195 (Ct. App. 1973) (discussing common law warranty claim in the context of a service contract). Plaintiffs do not allege any facts that would support a common law claim falling outside the scope of the U.C.C. or that would "plausibly suggest any entitlement to relief." Ashcroft v. Iqbal, 556 U.S. 662,

681 (2009). Accordingly, the Common Law Counts must be dismissed pursuant to Federal Rule 12(b)(6).

POINT IV

THERE IS NO CAUSE OF ACTION FOR UNJUST ENRICHMENT UNDER CALIFORNIA LAW

The Unjust Enrichment Count seeks to state a claim against Defendants for "Unjust Enrichment" under California law. (See Amend. Compl., Count IV). This claim fails as a matter of law because California does not recognize an independent cause of action for unjust enrichment. Walker v. USAA Cas. Ins. Co., 474 F. Supp. 2d 1168, 1174 (E.D. Cal. 2007) aff'd sub nom. Walker v. Geico Gen. Ins. Co., 558 F.3d 1025 (9th Cir. 2009) (citing Melchior v. New Line Prods., Inc., 106 Cal.App.4th 779, 794 (Ct. App. 2d Dist. 2003)) ("There is no cause of action in California for unjust enrichment."); see also Johns v. Bayer Corp., 09CV1935DMSJMA, 2010 WL 476688 at *6 (S.D. Cal. Feb. 9, 2010) (dismissing unjust enrichment claim because "it is not an independent cause of action"); Diacakis v. Comcast Corp., 2012 U.S. Dist. LEXIS 2329 at * 16 ("This Court has previously found that there is no independent claim for unjust enrichment."). Accordingly, the Unjust Enrichment Count must be dismissed pursuant to Federal Rule 12(b)(6).

POINT V

THE RETAIL DEFENDANTS CANNOT BE LIABLE ON THE FRAUD, EXPRESS WARRANTY AND NEW YORK CONSUMER PROTECTION ACT COUNTS AS A RESULT OF MERE RESALE OF QUICKTRIM AND PLAINTIFFS HAVE FAILED TO ALLEGE THAT THE RETAIL DEFENDANTS AFFIRMATIVELY PARTICIPATED IN, CONTROLLED OR ADOPTED ANY OF THE DISTRIBUTOR'S STATEMENTS

The Fraud, Express Warranty and New York Consumer Protection Act Counts[8] fail to state a claim against the Retail Defendants. Absent any allegation that the Retail Defendants took any steps to affirmatively participate in, control or adopt any of the distributor's statements, the Retail Defendants cannot be liable for violations of express warranties or consumer protection acts as a result of alleged statements of the distributor by virtue of each retailer's mere resale of a product. See, e.g., In re Hydroxycut Mktg. & Sales Pracs. Litig., 801 F. Supp. 2d 993, 1012-13 (S.D. Cal. 2011) (dismissing various state consumer protection laws and express warranty claims as a result of plaintiffs' failure to allege facts showing that retail defendants (1) participated in, controlled, or adopted as their own representations made by the manufacturer-distributor, or (2) made their own representations regarding the products that plaintiffs relied on in purchasing the products); In re Jamster, File No. 05cv0819 JM(CAB), 2009 U.S. Dist. LEXIS 43592, ** 24-27 (S.D. Cal. May 22, 2009) (holding that, to be held liable under consumer protection laws, plaintiffs must establish that the retailer defendants somehow participated in, controlled, or adopted the deceptive advertising); see also Emery v. Visa Int'l Serv. Ass'n, 95 Cal. App. 4th 952, 960 (2002) ("A defendant's liability must be based on his personal 'participation in the unlawful practices' and 'unbridled control' over the practices . . ."); 16 C.F.R. § 700.4 (2012) (MMWA Regulations) ("A supplier who does no more than distribute or sell a consumer product covered by a written warranty offered by another person

or business and which identifies that person or business as the warrantor is not liable for failure of the written warranty to comply with the Act or rules thereunder."); Laznovsky v. Hyundai Motor Am., Inc., 190 Misc. 2d 537, 540 (N.Y. Dist. Ct., Suffolk County 2002) ("A supplier who does no more than distribute or sell a consumer product covered by a written warranty offered by another person or business and which identifies that person or business as the warrantor is not liable for failure of the written warranty to comply with the [MMWA] or rules thereunder"); Lytle v. Roto Lincoln Mercury & Subaru, Inc., 167 Ill.App.3d 508, 514 (App. Ct. 2d Dist. 1988) (affirming summary judgment on warranty claims since plaintiff could not demonstrate that the retailer adopted the manufacturer's warrantees).

Further, there are no allegations (nor can there be) that the Retail Defendants took any steps to affirmatively participate in, control or adopt any of the distributor's statements. Laznovsky, 190 Misc. 2d at 540 ("Other actions and written and oral representations of such a supplier in connection with the offer or sale of a warranted product may obligate that supplier under the Act."); Motor Homes of Am., Inc. v. O'Donnell, 440 So. 2d 422, 427 (Fla. Dist. Ct. App. 1983) ("Delivering, presenting or explaining a manufacturer's warranty, without more, does not render a dealer a co-warrantor by adoption"). The Retail Defendants' alleged activities were limited to displaying and selling QuickTrim, utilizing "point-of-sale and point-of-purchase" materials provided by Windmill and Quick Trim LLC and reviewing advertisements that included retailers' names, logos and trademarks. (See Amend. Compl. ¶ 90; id. ¶ 91 (alleging that GNC participated in certain product launch activities)). None of these alleged activities, however, demonstrate that any Retail Defendant affirmatively participated in, controlled or adopted any of the distributor's statements.

[8] As noted above, these counts include Counts I, II, III, IV, VIII, IX, XII, XIII, XVI, XVII, XIX, XXI, XXII, XXVI and XXVII of the Amended Complaint.

Based on plaintiffs' own allegations, the Retail Defendants' role was limited to that of any ordinary retailer responsible for resale to end consumers. (See id.). As a result, the Court should dismiss the Fraud, Express Warranty Counts and New York Consumer Protection Act Counts as against the Retail Defendants pursuant to Federal Rule 12(b)(6).

POINT VI

THE COURT SHOULD DISMISS ALL COUNTS OF THE AMENDED COMPLAINT ALLEGING VIOLATIONS OF STATE LAW AS TO EACH OF THE RETAIL DEFENDANTS THAT DID NOT SELL QUICKTRIM PRODUCTS TO ANY OF THE PLAINTIFFS IN THE RESPECTIVE STATE

The Amended Complaint fails to allege facts supporting plaintiffs' assertion of claims arising under state law against each of the Retail Defendants. Each of the Retail Defendant's sales of QuickTrim to plaintiffs, respectively, are alleged to have occurred in the following states:

- Amazon.com – New York (Amend. Compl. ¶ 92);
- CVS – Florida and Illinois (id. at ¶¶ 95, 106);
- drugstore.com – New York (id. at ¶ 92);
- GNC– California and Colorado (id. at ¶¶ 102, 109);
- Walgreens – New York and California (id. at ¶¶ 112, 117); and
- Wal-Mart – Florida, Colorado and California (id. at ¶¶ 99, 109, 115).

The Amended Complaint does not indicate that any of the plaintiffs purchased QuickTrim from any of the Retail Defendants in any state other than those listed immediately above.

While claims against each Retail Defendant may arise under the law of the state of a particular plaintiff's purchase, there are no factual allegations to support holding each Retail Defendant liable for each alleged violation of state law where the Amended Complaint contains no allegations that any of the plaintiffs purchased QuickTrim from a Retail Defendant in a respective

state. The following counts allege state statutory and common law claims against each of the Retail Defendants in states in which none of the plaintiffs allegedly purchased QuickTrim from each of the respective Retail Defendants[9]:

- Amazon.com – Counts II through XXV;
- CVS Pharmacy – Counts II through XI and Counts XXI through XXIX;
- drugstore.com – Counts II through XXV;
- GNC– Counts XII through XXIX;
- Walgreens – Counts VIII through XXV; and
- Wal-Mart – Counts XVI through XXIX.

Accordingly, since the Amended Complaint does not set forth sufficient allegations as to each of the Retail Defendants for violations of the respective states' laws, the Court should dismiss the above-counts as to each Retail Defendant pursuant to Federal Rule 12(b)(6).

[9] Although the Retail Defendants do not address the MMWA Act Count in this point, to the extent plaintiffs' do not have any viable state law warranty claims for any of the reasons discussed throughout this Memorandum, the Court must dismiss the MMWA Act Count as well. See, e.g., 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 Fed. Appx. 38 (2d Cir. 2011) ("[C]laims under the Magnuson-Moss Act stand or fall with the express or implied warranty claims under state law."); 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).

CONCLUSION

For all of the foregoing reasons, defendants Wal-Mart Stores, Inc., Amazon.com, Inc., drugstore.com, Inc., CVS Pharmacy Inc., GNC Corporation, Walgreen Co. and Quick Trim, LLC respectfully request that the Court grant their motion to dismiss the Amended Complaint.

Dated: New York, New York
June 4, 2012

Respectfully submitted,

By: s/ Shawn L. Kelly
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