UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
WHITE PLAINS COURTHOUSE

AJA ADEGHE, individually and on behalf of all others similarly situated, Plaintiff, v. THE PROCTER & GAMBLE COMPANY, Defendant.	Civil Case No. 7:22-cv-10025

DEFENDANT THE PROCTER & GAMBLE COMPANY'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS THE AMENDED COMPLAINT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

INTRODUCTION

Plaintiff Aja Adeghe filed this putative class action lawsuit alleging that The Procter & Gamble Company ("P&G") falsely advertises Tide by stating that a 2.72-liter container has enough detergent for "64 loads" of laundry. The label of Tide discloses that "64 loads" refers to "medium"-sized loads of laundry, and Plaintiff does not dispute that a container has enough detergent for 64 medium loads. Plaintiff nonetheless asserts that consumers are deceived because they expect "64 loads" to refer to *full* as opposed to *medium* loads—i.e., a full capacity load in a high-efficiency machine. Even after amending her Complaint, Plaintiff's allegations fall well short of supporting that theory.

First, Plaintiff's claims cannot be reconciled with the plain language of Tide's label. Plaintiff speculates that consumers believe that "64 loads" refers to full-sized loads of laundry, which corresponds to the amount of detergent measured at Bar 5 of the cap. Any person who reads the label would be readily dispelled of that belief. The label provides that a 2.72-liter container has approximately 64 medium loads "as measured just below Bar 1 on the cap," Am. Compl. ¶ 3, which is irreconcilable with Plaintiff's contention that consumers expect a container to have 64 full loads as measured at Bar 5 on the cap. To be sure, Plaintiff argues that consumers cannot be expected to read the entire label, but courts in this Circuit have uniformly held that the entire label should be considered in assessing whether the label is deceptive. *See, e.g.*, *Boswell v. Bimbo Bakeries USA, Inc.*, 570 F. Supp. 3d 89, 94, 96 (S.D.N.Y. 2021).

Second, even if Tide's label were silent about the meaning of "64 loads," Plaintiff alleges zero facts to support the contention that a reasonable consumer would expect Tide to contain enough detergent for 64 full capacity loads in a high-efficiency machine. To the contrary, the Amended Complaint pleads that only 14% of consumers prefer full loads, while 28% of consumers prefer medium loads. Am. Compl. ¶ 9. It is wholly implausible to suggest that consumers expect

full rather than medium loads, when Plaintiff's own allegations show that *more* consumers prefer the latter. At most, Plaintiff's allegations confirm that laundry load-sizes will vary significantly by consumer, which refutes any contention that there is a single reasonable consumer understanding of what "64 loads" means. For similar reasons, another federal court dismissed similar "laundry load" claims against another manufacturer, and this Court should reach the same conclusion here. *See Pridgen v. Church & Dwight Co.*, 2020 WL 2510517, at *4 (C.D. Cal. Mar. 2, 2020) (dismissing claims challenging "65 loads" on the label of OxiClean).

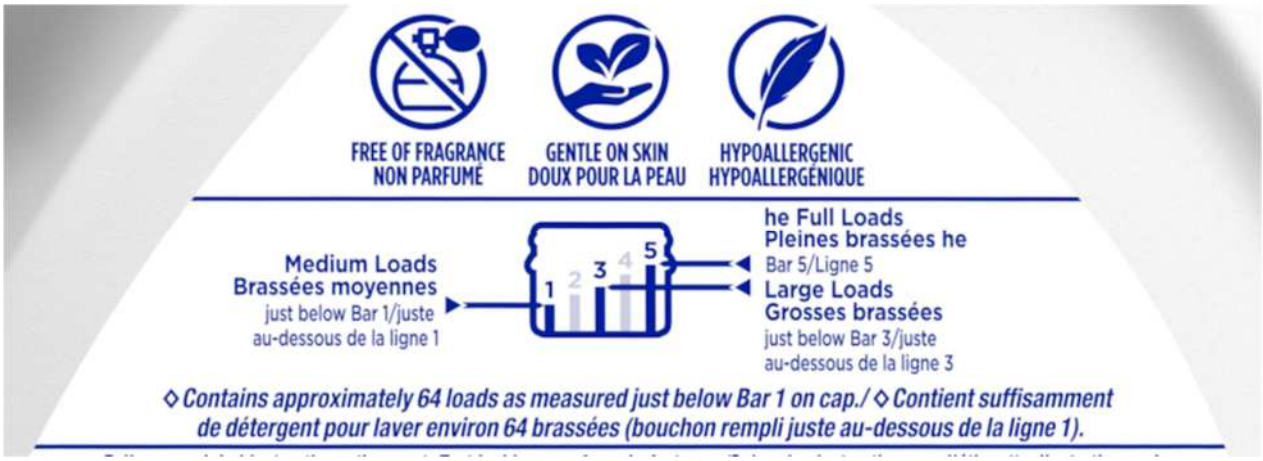
Even if Plaintiff had pleaded actual facts to support her claims, the Amended Complaint runs head-long into several additional pleading defects. Plaintiff's claims under New York's General Business Law ("GBL") fail because Plaintiff does not plead that she suffered an injury from Tide's use of the phrase "64 loads." The claims for violations of eight "State Consumer Fraud Acts" fail because Plaintiff makes no attempt to allege the elements of those claims or demonstrate that, as a New York resident, she has the right to sue under the laws of states other than New York. The warranty claims should be dismissed because Plaintiff did not provide timely pre-suit notice of the claims, purchase the Product directly from P&G, or satisfy several other prerequisites for warranty claims. And the facts alleged in the Amended Complaint also fall well short of sustaining Plaintiff's tag-along common law claim for unjust enrichment.

For these reasons, and the additional reasons set forth below, the Amended Complaint should be dismissed with prejudice.

BACKGROUND

P&G markets a wide range of laundry detergent products under the Tide brand. Am. Compl. ¶ 1. This case concerns Tide 2.72-liter liquid detergent, which states on the bottle that it contains enough detergent for "64 loads◊."

The diamond ("◊") directs consumers to the back of the label for further information. Am. Compl. ¶¶ 1–2. The back label, in turn, states that the 2.72-liter bottle "[c]ontains approximately 64 loads as measured just below Bar 1 on cap." *Id.* ¶ 3. The label also contains a measuring guide indicating that "just below Bar 1 on cap" corresponds to the amount of detergent needed for "Medium Loads" of laundry.[1] By contrast, "Large Loads" corresponds to the amount of detergent "just below Bar 3," while high-efficiency "Full Loads" corresponds to the amount of detergent at Bar 5 of the cap. *Id.*



[1] As P&G explains on Tide's website, the size of a typical laundry load will depend on a number of factors such as machine capacity. Nevertheless, a "Medium Load" generally corresponds to a half-full washer drum, which is approximately 6 pounds of laundry. *See* Tide, *The Ultimate Washing Machine Capacity and Load Size Guide*, available at https://tide.com/en-us/how-to-wash-clothes/washing-machine-101/how-to-use-a-washing-machine/load-size-by-drum-size (last visited April 5, 2023).

The Amended Complaint alleges that consumers understand what the terms "medium," "large," and "full"-sized loads of laundry mean, but that consumer preferences differ based on their individual needs, washing machines, or family size. For example, Plaintiff cites one study indicating that 21% of consumers prefer medium loads (Bar 1), 43% prefer large loads (Bar 3), and 21% prefer full or very large loads (Bar 5). Am. Compl. ¶ 8. Similarly, another study found that 28% of consumers prefer medium loads (Bar 1), 45% prefer large loads (Bar 3), and 14% prefer full or very large loads (Bar 5). *Id.* ¶ 9. Like many manufacturers, Tide states that "64 loads" corresponds to medium loads of laundry—i.e., the load size that Plaintiff contends 21% or 28% of consumers prefer. *Id.*[2]

In the Amended Complaint, Plaintiff does not dispute that a 2.72-liter container of Tide actually has enough detergent for 64 medium loads of laundry. Am. Compl. ¶¶ 4, 15, 16. Nor does Plaintiff dispute that the "medium" measurement on the Tide cap corresponds to a medium-sized load as consumers understand that term. Instead, Plaintiff alleges that she was misled because she believed that "64 loads" referred to "full" or "very large" loads of laundry, which is the amount of detergent measured by Bar 5 of the cap. *Id.* ¶ 30 (alleging that Plaintiff does laundry loads "best described as ***'full' or 'very large'***"); *see also id.* ¶ 5 (alleging that "[c]onsumers understand 'loads' on the context of laundry to refer to ***full units***"); *id.* ¶ 15 (alleging that "[t]he majority of Americans who do ***'full'*** loads of laundry will only get half as many, or 32 loads from

[2] Plaintiff's counsel has filed several identical class actions against other manufacturers of laundry detergent. As those cases make clear, it is common industry practice to base a laundry product's represented load count on a medium-sized load of laundry. *See, e.g.*, Dkt. 1, ¶ 3, *Foggs v. Radienz Living Chi., LLC*, 1:23-cv-01879 (N.D. Ill. Mar. 26, 2023) (alleging that "40 loads" representation on Ajax laundry detergent is misleading because product contains 40 "medium loads"); Dkt. 1, ¶ 3, *Crosby v. Church & Dwight Co, LLC*, No. 1:23-cv-01735 (N. D. Ill. Mar. 20, 2023) (alleging "116 loads" representation on Xtra laundry detergent is misleading because product contains 116 "medium loads").

the bottle when run at ***high efficiency***"); *id.* ¶ 16 (alleging that "typical Americans . . . do ***full loads***") (emphasis added in each).

Even taking all of Plaintiff's assorted statistics as true, what they show is that Plaintiff's assertions about consumer expectations are wrong. Although Plaintiff contends that consumers expect loads to refer to "full" or "very large" loads, her own allegations make clear that only a fraction of consumers—14% or 21%—do laundry loads that are characterized as "full." *Id.* ¶¶ 8, 10. Plaintiff nonetheless alleges that the label of Tide is misleading to consumers and, on that basis, brings class action claims for (1) violations of Sections 349 and 350 of the GBL, Am. Compl. ¶¶ 45–48; (2) violation of the unidentified "State Consumer Fraud Acts" of South Dakota, Wyoming, Idaho, Alaska, West Virginia, Arkansas, North Carolina, and Utah, *id.* ¶¶ 38, 49–51; (3) breaches of express warranty, implied warranty of merchantability/fitness for a particular purpose, and the Magnuson-Moss Warranty Act ("MMWA"), *id.* ¶¶ 52–65; and (4) unjust enrichment, *id.* ¶ 66. These claims are brought on behalf of "[a]ll persons" in New York, South Dakota, Wyoming, Idaho, Alaska, West Virginia, Arkansas, North Carolina, and Utah "who purchased the Product." *Id.* ¶ 26.

PROCEDURAL STANDARD

"To survive a motion to dismiss," a complaint must "state a claim to relief that is plausible on its face," *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 230 (2d Cir. 2016) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)), "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense," *Iqbal*, 556 U.S. at 679. "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (quoting *Twombly*, 550 at 557). Instead, "[f]actual allegations must be enough to raise a right to

relief above the speculative level." *Twombly*, 550 U.S. at 555. This standard is intended to expose pleading deficiencies "at the point of minimum expenditure of time and money by the parties and the court." *Id.* at 558 (quotation omitted).

ARGUMENT

I. Plaintiff's Claims Should Be Dismissed Because She Fails to Plausibly Allege a False or Misleading Statement.

All of Plaintiff's claims face a threshold problem: the Complaint fails to plausibly allege that the phrase "64 loads" on the label of Tide is false or misleading to consumers.

Under New York law, all of Plaintiff's claims require allegations that a defendant made a false, misleading, or inaccurate statement. *See Chen v. Dunkin' Brands, Inc.*, 954 F.3d 492, 500 (2d Cir. 2020) (GBL §§ 349 and 350 claims); *Lugones v. Pete & Gerry's Organic, LLC*, 440 F. Supp. 3d 226, 244 (S.D.N.Y. 2020) (warranty claim). A false or misleading statement is one that is "'likely to mislead a reasonable consumer acting reasonably under the circumstances.'" *Chen*, 954 F.3d at 500 (quoting *Fink v. Time Warner Cable*, 714 F.3d 739, 714 (2d Cir. 2013)). "It is well settled that a court may determine as a matter of law that an allegedly deceptive advertisement would not have misled a reasonable consumer." *Fink*, 714 F.3d at 741; *see also Housey v. Procter & Gamble Co.*, 2022 WL 17844403, at *2 (2d Cir. Dec. 22, 2022) (summary order) (plaintiff is "required to plead adequately" a false advertisement to survive a motion to dismiss); *Twohig v. Shop-Rite Supermarkets, Inc.*, 519 F. Supp. 3d 154, 160 (S.D.N.Y. 2021) (Seibel, J.) (courts may decide at the pleadings stage "whether a business practice or advertisement is misleading to a reasonable consumer") (citation omitted).

Here, the Amended Complaint contends that the phrase "64 loads" is false or misleading because a reasonable consumer would understand loads to mean "full" or "very large" loads of laundry. *E.g.*, Am. Compl. ¶ 30. The problem with that theory is two-fold: (1) no consumer could

possibly be misled because the label of Tide detergent plainly discloses that "loads" refers to medium and not full-sized loads, and (2) Plaintiff's own allegations confirm that the vast majority of consumers do *not* expect Tide to contain enough detergent for 64 full capacity loads in a high-efficiency machine. For either reason, the Amended Complaint should be dismissed.[3]

A. Plaintiff's claims are irreconcilable with disclosures on Tide's label.

Plaintiff acknowledges that the label of Tide detergent explains the meaning of the phrase "64 loads." Am. Compl. ¶¶ 3–4. As the label states, a bottle of Tide "[c]ontains approximately 64 loads as measured just below Bar 1 on cap," which is enough laundry for a "medium load" of laundry. *Id.*; *supra* at 3–4. Plaintiff does not dispute that a container has enough detergent for 64 medium-sized loads as consumers understand that term, nor does she contend that the term "medium" is otherwise misleading to consumers. Instead, Plaintiff asserts that "64 loads" is deceptive because consumers expect loads to refer to "full" or "very large" loads of laundry—i.e., the amount of detergent measured at Bar 5 of the cap. Because that expectation is irreconcilable with the label, Plaintiff's claims should be dismissed.

Courts in the Second Circuit have outlined the following approach to determine whether the full text of a label defeats a false advertising claim. "When the meaning of a challenged statement is clear, shoppers expect that the rest of the package will confirm that representation and are not reasonably expected to investigate further." *Nguyen v. Algenist LLC*, 2022 WL 17251733, at *7 (S.D.N.Y. Nov. 28, 2022). "But when a statement is ambiguous, 'every reasonable shopper knows the devil is in the details' and thus would seek clarification elsewhere on the package." *Id.*

[3] Numerous courts in this District have reached the same conclusion in cases brought by Plaintiff's counsel. As another judge noted, "counsel for Plaintiff has filed numerous class action complaints across the country" and "[i]n nearly all of these cases, the district court ultimately found that the plaintiffs had failed to state a viable claim for relief." *Cosgrove v. Oregon Chai, Inc.*, 520 F. Supp. 3d 562, 569 (S.D.N.Y. 2021).

(citation omitted). Thus, unless a challenged statement is "susceptible to only one interpretation," *id.*, courts must determine whether "the product labeling, taken as a whole, is deceptive," *Boswell*, 570 F. Supp. at 96. "If a plaintiff alleges that an element of a product's label is misleading, but another portion of the label would dispel the confusion," then "the clarification can defeat the claim." *Davis v. Hain Celestial Grp., Inc.*, 297 F. Supp. 3d 327, 334 (E.D.N.Y. 2018); *see also Bynum v. Fam. Dollar Stores, Inc.*, 592 F. Supp. 3d 304, 311 (S.D.N.Y. 2022) ("Because the term 'Smoked' on the packaging is ambiguous," ingredient list on label defeats the claim); *Engram v. GSK Consumer Healthcare Holdings (US), Inc.*, 2021 WL 4502439, at *3 (E.D.N.Y. Sept. 30, 2021) ("[W]hen the front of the package is better characterized as ambiguous than misleading, courts looking at the alleged misrepresentations in their full context [ ] are more likely to grant a motion to dismiss."); *see also Beers v. Mars Wrigley Confectionery US, LLC*, 2022 WL 493555, at *5 (S.D.N.Y. Feb. 17, 2022) (Seibel, J.) (rejecting argument that courts cannot consider whole label in determining whether label is misleading).

These well-settled principles require dismissal of the Complaint. Plaintiff cannot plausibly allege that the phrase "64 loads" is susceptible to only one meaning. On the contrary, Plaintiff's own allegations confirm that an average "load" of laundry varies significantly by consumer. *See, e.g.*, Am. Compl. ¶¶ 8–9. A reasonable consumer is therefore expected to read the entire label and understand that a 2.72-liter container does *not* have 64 "full" or "very large" sized loads as measured by Bar 5 of the cap.[4] Instead, the label of Tide states that a 2.72-liter container has

[4] Plaintiff alleges that the diamond directing consumers to the back of the label is "difficult to see" and she "did not notice" it. Am. Compl. ¶¶ 2, 31. That is irrelevant: disclaimers on the whole label should be considered in determining whether a label is deceptive, regardless of whether a plaintiff claims to have reviewed them. *See, e.g.*, *Richardson v. Edgewell Pers. Care, LLC*, 2023 WL 1109646, at *1, 6 (S.D.N.Y. Jan. 30, 2023) (disclaimer effective despite plaintiff's conclusory allegation that she "did not see and was not aware" of asterisk on front label).

"approximately 64 loads as measured just below Bar 1 on the cap," which corresponds to the amount of detergent needed for a medium-sized load of laundry. Am. Compl. ¶ 3; *see also supra* at 3–4. Thus, since the label would dispel any expectation that "64 loads" refers to "full" or "very large" sized loads, the Amended Complaint should be dismissed. *Boswell*, 570 F. Supp. 3d at 96 ("[R]easonable consumers would need additional information to understand the meaning of 'All Butter' and 'would know exactly where to look to investigate—the ingredient list.'"); *Engram*, 2021 WL 4502439, at *4–5 (dismissing claim that "8-Hour Moisture" on ChapStick misled consumers about length of protection because the back label stated "reapply at least every two hours"); *Richardson*, 2023 WL 1109646, at *6 (dismissing claim that "reef friendly" statement on front label of sunscreen was misleading where back label clarified the representation).

Another federal court reached the same conclusion on materially identical facts. *See Pridgen*, 2020 WL 2510517. In *Pridgen*, the plaintiff alleged that "65 loads" on the front label of OxiClean is false or misleading because a single "regular load" was not enough to remove "typical stains," even though the label disclosed that the product "[d]elivers 65 regular loads/uses when measuring to line 1 on scoop." *Id.* at *1. The court dismissed the claims because they "depend on an unreasonable reading of the product labeling and are inadequately pleaded." *Id.* at *4. The court explained that "a reasonable consumer would understand that the 3-lb. container advertises that it contains enough to run 65 'regular loads' of laundry, per the first column on the back label." *Id.* at *3. The same is true here: a reasonable consumer would understand that a 2.72-liter container of Tide has enough detergent to run 64 "medium" loads of laundry, per the explicit instructions on the back of the label.[5]

[5] During the parties' pre-motion conference, the Court suggested that *Pridgen* may be distinguishable because "it said one scoop for regular loads and there was enough if you used one scoop to get 65 loads." Tr. at 3. But in *Pridgen*, as here, the advertised load count corresponded

During the parties' pre-motion conference, the Court expressed concern that "medium" on the back of the label might actually refer to "small" loads because Bar 1 is the lowest measurement on the cap. Tr. at 9–10. P&G respectfully submits that the revisions in the Amended Complaint moot that concern: the Amended Complaint now makes clear that consumers understand what the terms "small," "medium," "large," and "full" mean. *See* Am. Compl. ¶¶ 8–9. And Plaintiff does not allege that a 2.72-liter container of Tide fails to produce 64 medium-sized loads of laundry, or that the "medium" designation on the label of Tide does not in fact correspond to a medium-sized load as consumers understand the term. Nor does Plaintiff allege facts suggesting that the phrase "medium" is otherwise deceptive to consumers. On the contrary, the Amended Complaint alleges that a large quantity of consumers—21% or 28%—actually *prefer* medium-sized loads, while an additional 14% tend to do smaller loads.

Rather than focusing on the term "medium," the Amended Complaint now advances the theory that consumers expect "loads" to refer to "full" or "very large" loads—i.e., the amount of detergent measured by Bar 5 of the cap. Because *that* theory is in direct conflict with the label, Plaintiff's claims should be dismissed.

B. Plaintiff fails to plausibly allege that consumers expect "loads" refers to "full" loads of laundry.

Even if Tide's label were wholly silent on the meaning of "64 loads," Plaintiff's claims face another defect: the Complaint contains no facts to support the idea that a consumer would understand "64 loads" to refer to full capacity loads in a high-efficiency machine. On the contrary,

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to "line 1" on the measuring cup. *Pridgen*, 2020 WL 2510517, at *1 (product "delivers 65 regular loads/uses when measuring to line 1 on scoop"). Plaintiff does not allege that there is any material difference between measuring to line 1 of an OxiClean scoop and measuring an amount just below Bar 1 of a Tide cap.

Plaintiff's own allegations indicate that only a small minority of consumers even prefer full-sized loads of laundry.

To survive a motion to dismiss in a false advertising case, "plaintiffs must do more than plausibly allege that a label might conceivably be misunderstood by some few consumers. Plaintiffs must plausibly allege that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled." *Jessani v. Monini N. Am., Inc.*, 744 F. App'x 18, 19 (2d Cir. 2018) (summary order) (citation and quotations omitted). To satisfy that standard, a plaintiff must offer more than "conclusory statements" suggesting that consumers interpret a challenged statement in a particular way. *Dashnau v. Unilever Mfg. (US), Inc.*, 529 F. Supp. 3d 235, 242 (S.D.N.Y. 2021); *Beers*, 2022 WL 493555, at *5 n.6 (J. Seibel) ("[A]bsent any allegations demonstrating how this survey was conducted or what questions were asked, the Court need not accept Plaintiff's conclusion that the survey is reflective or demonstrative of what reasonable consumers believe"); c*f. Iqbal*, 556 U.S. at 678 ("'naked assertion[s]' devoid of 'further factual enhancement'" carry no weight) (citation omitted).

The Amended Complaint founders on these principles. As discussed above, Plaintiff asserts that reasonable consumers are misled because they expect there to be 64 "full" or "very large" loads of laundry in a 2.72-liter container of Tide. *See* Am. Compl. ¶ 30. There are zero facts in the Amended Complaint to support that conclusion. On the contrary, Plaintiff cites studies indicating that very few consumers even do loads of laundry that could be characterized as "full" or "very large." For example, one study finds that only 14% of surveyed consumers prefer "very large" laundry loads, and another study determined that only 21% of North American households prefer "very large" laundry loads. *Id.* ¶¶ 8–9. By contrast, those same studies found that 21% and 28% of consumers prefer medium laundry loads. Accordingly, Plaintiff's own cited materials

suggest that *more* consumers prefer medium over full-sized loads, which is inconsistent with the assertion that a reasonable consumer expects "64 loads" to refer to full capacity loads in a high-efficiency machine. *Poindexter v. EMI Rec. Grp. Inc.*, 2012 WL 1027639, at *2 (S.D.N.Y. 2012) ("If a document relied on in the complaint contradicts allegations in the complaint, the document, not the allegations, control . . . .").

At most, Plaintiff's allegations confirm that an average "load" of laundry will vary significantly by consumer depending on their individual preferences. For example, Plaintiff refers to California data indicating that 14% of loads were very large, 45% of loads were large, 28% were medium, 11% were small, and 3% were very small. *Id.* ¶ 9. In light of these allegations, it is implausible for Plaintiff to contend that a reasonable consumer would have a single and common expectation of what a "load" refers to—let alone that reasonable consumers would expect there to be 64 full or very large loads in each container of Tide. Plaintiff's claims should therefore be dismissed because her own allegations refute her contention that "reasonable customers interpret [loads] to mean [full or very large loads]." *Wynn v. Topco Assocs., LLC*, 2021 WL 168541, at *3 (S.D.N.Y. Jan. 19, 2021); *see also Dwyer v. Allbirds, Inc.*, 598 F. Supp. 3d 137, 155 (S.D.N.Y. 2022) (Seibel, J.) ("That Plaintiff . . . believe[s] that Defendant should use a different method of measuring the Product's carbon footprint does not plausibly suggest that what Defendant in fact says is materially misleading.").

II. Plaintiff's GBL Claims Should Be Dismissed.

To assert a claim under New York's GBL for deceptive trade practices (GBL § 349) or false advertising (GBL § 350), Plaintiff must plead that P&G's actions (1) were consumer-oriented, (2) were materially misleading, and (3) caused her an injury. *See Chen*, 954 F.3d at 500; *Goshen v. Mut. Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 324 n.1 (2002). As explained above, the GBL

claims should be dismissed because Plaintiff fails to allege that the phrase "64 loads" on Tide's label is misleading to consumers.

Plaintiff's GBL claims should be dismissed for a second, independent reason: the Complaint fails to allege that Plaintiff suffered an "actual injury" from her purchase of Tide. The Complaint relies on two alleged theories of injury: (1) Plaintiff was injured by the full purchase price of Tide because she purportedly "would not have purchased the Product if the true facts had been known," Am. Compl. ¶¶ 35, 48; and (2) Plaintiff paid a "premium" for Tide because of P&G's "64 loads" statement, *id.* ¶¶ 17, 48. Neither theory is viable.

As to the first theory of injury, New York courts have rejected the idea that "consumers who buy a product that they would not have purchased, absent a manufacturer's deceptive commercial practices, have suffered an injury under General Business Law § 349." *Small v. Lorillard Tobacco Co.*, 94 N.Y.2d 43, 56, (1999). Accordingly, although Plaintiff seeks a full refund of the purchase price of Tide, *see* Am. Compl. ¶ 35, it is "well-settled" that a consumer "whose purchase was allegedly procured through deception" cannot recover "a refund of the price" under GBL §§ 349 and 350, *Dash v. Seagate Tech. (U.S.) Holdings, Inc.*, 27 F. Supp. 3d 357, 361–62 (E.D.N.Y. 2014). This is because "deceived consumers may nevertheless receive—and retain the benefits of—something of value, even if it is not precisely what they believed they were buying." *Id.*; *see also Rodriguez v. It's Just Lunch Int'l*, 2018 WL 3733944, at *5 (S.D.N.Y. Aug. 6, 2018) (in GBL and fraud case, "[a] full refund is not . . . a tenable model of damages under the benefit-of-the-bargain rule"); *Hu v. Herr Foods, Inc.*, 2017 WL 11551822, at *2 n.2 (E.D. Pa. Sept. 26, 2017) (a claim that consumers were "injured in the amount of the entire 'purchase price' fails as a matter of law" under GBL § 349).

As to the second theory of injury, "[p]laintiffs alleging a 'price premium' theory must do more than merely allege that they paid a premium price for their product." *Marshall v. Hyundai Motor Am.*, 334 F.R.D. 36, 59 (S.D.N.Y. 2019) (cleaned up). Instead, "a plaintiff must allege not only that defendants charged a price premium, but also that there is a 'connection between the misrepresentation'" and the alleged "price premium." *Duran v. Henkel of Am., Inc.*, 450 F. Supp. 3d 337, 350 (S.D.N.Y. 2020) (citation omitted); *see also Eidelman v. Sun Prods. Corp.*, 2022 WL 1929250, at *2 (2d Cir. June 6, 2022) ("The central question therefore is whether the higher price can be attributed, in whole or in part, to that advertising statement.").

Here, however, the Amended Complaint offers nothing more than the conclusory assertion that P&G could sell Tide "for a price premium compared to other similar products" by including the phrase "64 loads" on the label. Am. Compl. ¶ 17. There are no allegations, for example, describing the amount of the purported premium or explaining how the phrase "64 loads" allowed P&G to charge more than other comparable detergents. Plaintiff's GBL claims should therefore be dismissed because she does not allege that she "paid a *higher* price for [Tide] than [she] otherwise would have, absent deceptive acts." *Izquierdo v. Mondelez Int'l, Inc.*, 2016 WL 6459832, at *7 (S.D.N.Y. Oct. 26, 2016); *DaCorta v. AM Retail Grp., Inc.*, 2018 WL 557909, at *8 (S.D.N.Y. Jan. 23, 2018) ("Without allegations as to the value, *or the unique quality* for which the premium was paid, there can be no connection between the misrepresentation and the harm from the product."); *Rodriguez*, 2018 WL 3733944, at *5 (rejecting price premium theory where "even the most meticulous comparison of defendants' prices to those of their competitors . . . offer[ed] no way of linking the price difference, if any, to the allegedly unlawful or deceptive [advertising]") (quotation omitted)).

III. Plaintiff's "State Consumer Fraud Acts" Claims Should Be Dismissed.

Plaintiff purports to assert claims under the consumer protection statutes of eight states besides New York: South Dakota, Wyoming, Idaho, Alaska, West Virginia, Arkansas, North Carolina, and Utah. Am. Compl. ¶¶ 38, 49–51. This "claim" is defective for the reasons discussed above—i.e., Plaintiff fails to allege a material misrepresentation or a cognizable injury. The non-New York consumer protection claims should be dismissed for two additional reasons.

First, Plaintiff has not even attempted to allege how P&G supposedly violated the non-New York consumer protection statutes. Instead, Plaintiff simply lists the eight states whose consumer fraud statutes were supposedly violated, without alleging any particular facts that would support the varying elements of each law. The Second Circuit has rejected this type of "laundry list" pleading, holding that state consumer protection claims should be dismissed when "[t]he complaint does little more than list a couple dozen state statutes . . . without pleading any of their elements." *In re Aluminum Warehousing Antitrust Litig.*, 833 F.3d 151, 163 (2d Cir. 2016); *see also In re Trilegiant Corp., Inc.*, 11 F. Supp. 3d 82, at *124 (D. Conn. 2014) (dismissing state consumer protection claims where the complaint "merely lists several other states' consumer protection statutes without explaining how those statutes relate to the Defendants' alleged conduct in this case"); *cf. Iqbal*, 556 U.S. at 678 ("A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" (quoting *Twombly*, 550 U.S. at 555)).

Second, Plaintiff (a New York resident) lacks statutory standing to assert claims under the non-New York consumer protection laws. "For statutory standing, the question is whether the plaintiff has a cause of action under the statute."*Robainas v. Metro. Life Ins. Co.*, 2015 WL 5918200, at *5 (S.D.N.Y. Oct. 9, 2015) (quotation omitted); *see also Fed. Treasury Enter. Sojuzplodoimport v. SPI Spirits Ltd.*, 726 F.3d 62, 72 n.10 (2d Cir. 2013) ("[T]he 'statutory

standing' assessment concerns whether '*this* plaintiff has a cause of action under the statute.'" (citation omitted)). Here, however, the consumer protection statutes of each of the eight non-New York states listed in the Amended Complaint provide a cause of action only to residents, persons who are injured within the State, or persons who suffer injuries that are otherwise closely connected to the State. *See, e.g.*, *In re Aftermarket Auto. Lighting Prod. Antitrust Litig.*, 2009 WL 9502003, at *7–8 (C.D. Cal. July 6, 2009) (claims brought under state consumer protection laws of Alaska, Arkansas, and Utah should be dismissed where no plaintiffs resided or purchased products in those states); Idaho Code Ann. § 48-602(2) (defining "trade" and "commerce" to include the advertising and sale of goods "either to or from locations within the state of Idaho, or directly or indirectly affecting *the people of this state*" (emphasis added)); S.D. Codified Laws § 37-24-1 (similar).

Plaintiff thus fails to show that *she* has statutory standing under the non-New York consumer protection laws asserted in the Amended Complaint. Plaintiff is a citizen of New York and purchased the product in New York. Am. Compl. ¶¶ 25, 28. Because she cannot establish she suffered an injury outside of New York, she lacks a cause of action to pursue non-New York statutory claims. To hold otherwise "would allow Plaintiff to engage in lengthy and expensive discovery with respect to alleged violations of state laws when the Court cannot be certain that any individual suffered an injury under those laws." *In re HSBC Bank, USA, N.A., Debit Card Overdraft Fee Litig.*, 1 F. Supp. 3d 34, 49–50 (E.D.N.Y. 2014) (dismissing state-law claims asserted by plaintiff who was not a resident of those states).

IV. Plaintiff's Warranty Claims Should Be Dismissed.

Plaintiff asserts claims for breach of express warranty, breach of implied warranty, and violation of the MMWA. *See* Am. Compl. ¶¶ 52–65. For multiple reasons, each of these claims should be dismissed.

A. The express warranty claim suffers from several defects.

To state an express warranty claim, Plaintiff must allege that (1) P&G made a material statement amounting to a warranty; (2) Plaintiff relied on this warranty as a basis for purchasing P&G's products; (3) P&G breached this warranty; and (4) the breach injured Plaintiff. *See Lugones v. Pete & Gerry's Organic, LLC*, 440 F. Supp. 3d 226, 244 (S.D.N.Y. 2020). As explained above, Plaintiff's express warranty claim should be dismissed because there are no plausible allegations that P&G misled consumers in connection with the phrase "64 loads." *See supra* pp. 6–12; *Avola v. Louisiana-Pac. Corp.*, 991 F. Supp. 2d 381, 391 (E.D.N.Y. 2013) ("Proof of 'breach' for express warranty claims and 'falsity' for false advertising claims are essentially the same."). The claim should also be dismissed because "[u]nder New York law, breach of warranty damages are usually measured by the benefit of the bargain rule," *Bennett v. United States Tr. Co.*, 770 F.2d 308, 316 (2d Cir. 1985), and Plaintiff fails to allege that she paid any price premium, *see supra* p. 14.

Plaintiff's express warranty claim should also be dismissed because Plaintiff failed to provide P&G with timely pre-suit notice of the alleged breach, which is a "condition precedent" to any breach of warranty claim. *Lugones*, 440 F. Supp. 3d at 244–45. New York law requires a buyer, "within a reasonable time after [s]he discovers or should have discovered any breach," to "notify the seller of breach or be barred from any remedy." N.Y. U.C.C. § 2-607(3)(a). To adequately plead the pre-suit notice requirement, a "plaintiff must provide factual allegations—such as the date and method plaintiff sent a pre-suit notice—supporting the contention that she notified defendant of the alleged breach within a reasonable time." *Grossman v. Simply Nourish Pet Food Co.*, 516 F. Supp. 3d 261, 283 (E.D.N.Y. 2021). "The primary reason for requiring notice is to give the seller the opportunity to make adjustments or replacements, opportunities to

minimize the buyer's loss and reduce the seller's own liability." *Singleton v. Fifth Generation, Inc.*, 2016 WL 406295, at *12 (N.D.N.Y. Jan. 12, 2016) (quotation omitted).

Plaintiff provided no such notice here. Instead, Plaintiff relies on the bald assertion that "Plaintiff provided or provides notice" to P&G of its alleged breach, and that P&G "received notice and should have been aware of these issues due to complaints by consumers and third parties." Am. Compl. ¶¶ 61-62. This Court previously rejected this exact same allegation in a case brought by Plaintiff's counsel as insufficient to plausibly allege pre-suit notice. *See Dwyer*, 598 F. Supp. at 155 (Seibel, J.); *see also Gordon v. Target Corp.*, 2022 WL 836773, at *14 (S.D.N.Y. Mar. 18, 2022). The allegation that P&G "received notice" from third parties "does not suggest that the *buyer* provided timely notice," as is required under New York law. *Warren v. Stop & Shop Supermarket, LLC*, 592 F. Supp. 3d 268, 286 n.6 (S.D.N.Y. 2022). And the allegation that Plaintiff "provided or provides notice" to P&G is "wholly equivocal." *Id.* at 286. Plaintiff alleges both that he did provide notice and that he did not provide notice (but will do so in the future). That sort of non-answer is insufficient to plead pre-suit notice. *Bynum*, 592 F. Supp. 3d at 315. "Plaintiff must allege that he provided notice. If he had done so, he could surely have so pleaded." *Id.* (addressing the same allegation).

B. The implied warranty claim suffers from several defects.

Plaintiff's implied warranty claim similarly fails for lack of pre-suit notice, as "[t]he U.C.C.'s notice requirement also applies to claims for breach of implied warranty." *Campbell v. Whole Foods Mkt. Grp., Inc.*, 516 F. Supp. 3d 370, 392 (S.D.N.Y. 2021); *see also Bynum*, 592 F. Supp. 3d at 315. The implied warranty claim should also be dismissed because Plaintiff did not purchase the product directly from P&G, and therefore privity does not exist. New York "law is clear that, absent any privity of contract between Plaintiff and Defendant, a breach of implied warranty claim cannot be sustained as a matter of law except to recover for personal injuries."

Gould v. Helen of Troy Ltd., 2017 WL 1319810, at *5 (S.D.N.Y. Mar. 30, 2017) (quotations omitted).

There is no dispute that Plaintiff did not purchase Tide from P&G. She allegedly purchased the product from "stores including Shoprite." Am. Compl. ¶ 28. And Plaintiff seeks only recompense for economic harms resulting from the breach. *Id.* ¶ 66. Her breach-of- implied-warranty claim thus fails as a matter of law. *See Colpitts v. Blue Diamond Growers*, 527 F. Supp. 3d 562, 591 (S.D.N.Y. 2021) (dismissing implied warranty claim where plaintiff purchased product from retail and online stores of third parties, not manufacturer).

In addition, the implied warranty of merchantability "requires only that the goods sold be of a minimal level of quality" so that they are "fit for the ordinary purposes for which such goods are used." *Caronia v. Phillip Morris USA, Inc.*, 715 F.3d 417, 433–34 (2d Cir. 2013). That means Plaintiff must show that the product is unsafe to use or unfit for human consumption. *See Wynn*, 2021 WL 168541, at *7 (implied warranty claim dismissed because "there is no allegation that the almond milk was unfit for human consumption"); *Barreto v. Westbrae Nat., Inc.*, 518 F. Supp. 3d 795, 807 (S.D.N.Y. 2021) (dismissing implied warranty claim where there were "no allegations" that beverage was unfit for human consumption); *Brumfield v. Trader Joe's Co.*, 2018 WL 4168956, at *4 (S.D.N.Y. Aug. 30, 2018) (implied warranty claim dismissed because there were no allegations that black truffle oil did not "mak[e] food taste like black truffle"). Plaintiff does not—and cannot—allege that Tide is unsafe or unfit for human consumption.

C. The Magnuson-Moss Warranty Act claim suffers from several defects.

The MMWA requires Plaintiff to "adequately plead a cause of action for breach of written or implied warranty under state law." *Budhani v. Monster Energy Co.*, 527 F. Supp. 3d 667, 686 (S.D.N.Y. 2021). As noted above, however, Plaintiff's state-law warranty claims fail because there are no plausible allegations that P&G breached any warranty, Plaintiff was injured by any

purported breach of warranty, Plaintiff provided P&G with timely pre-suit notice, and (with respect to the implied warranty claim) Plaintiff was in privity with P&G. The derivative MMWA claim fails for the same reasons.

The MMWA claim is defective for three additional reasons.

First, the challenged representation is not a covered "warranty" as defined in the MMWA. The MMWA defines "warranty" as a "written affirmation" that a consumer product will be "defect free or will meet a specified level of performance over a specified period of time." 15 U.S.C. § 2301(6). The phrase "64 loads" is not an affirmation that it will be defect free or meet some specified level of performance over time. *See, e.g.*, *Bowling v. Johnson & Johnson*, 65 F. Supp. 3d 371, 378 (S.D.N.Y. 2014) (dismissing MMWA claim because representation "Restores Enamel" on label was product description, not a warranty).

Second, Plaintiff cannot satisfy the $25 amount-in-controversy threshold for MMWA claims. Under the statute, "[n]o claim shall be cognizable . . . if the amount in controversy of any individual claim is less than the sum or value of $25." 15 U.S.C. § 2310(d)(3)(A). Plaintiff does not allege she paid more than $25 for her purchase of Tide (nor could she). *See* Am. Compl. ¶ 17 (alleging Tide costs $12.99). She is therefore statutorily barred from asserting a MMWA claim. *See Trisvan v. Regal Ent. Grp.*, 2021 WL 620981, at *4 (E.D.N.Y. Feb. 17, 2021) (dismissing MMWA claim when plaintiff did not meet amount-in-controversy requirement); *Ebin v. Kangadis Food Inc.*, 2013 WL 3936193, at *1 (S.D.N.Y. July 26, 2013) (similar, and rejecting argument that CAFA jurisdiction allows a plaintiff to avoid the amount-in-controversy requirement).

Third, MMWA claims are only permitted if the number of *named plaintiffs* exceeds 100. *See* 15 U.S.C. § 2310(d)(3)(C) ("No claim shall be cognizable . . . if the action is brought as a

class action, and the number of named plaintiffs is less than one hundred."). Because Plaintiff is the sole named plaintiff in this action, she does not meet the 100-named plaintiff threshold for bringing a MMWA claim. *See Glover v. Bob's Disc. Furniture, LLC*, — F. Supp. 3d —, 2022 WL 3353454, at *6 (S.D.N.Y. Aug. 12, 2022) (dismissing MMWA claims "[b]ecause there are not 100 named plaintiffs in this class action"); *Gavilanes v. Gerber Prod. Co.*, 2021 WL 5052896, at *7 (E.D.N.Y. Nov. 1, 2021) (same).

V. Plaintiff's Unjust Enrichment Claims Should Be Dismissed.

In a single sentence at the end of her Amended Complaint, Plaintiff purports to assert a claim for unjust enrichment under New York law. *See* Am. Compl. ¶ 66. Such a claim requires Plaintiff to plead that "(1) the other party was enriched, (2) at the other party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered." *McCracken v. Verisma Sys., Inc.*, 2022 WL 3566682, at *5 (W.D.N.Y. Aug. 18, 2022). Plaintiff's unjust enrichment claim should be dismissed for the same reasons described above: the Amended Complaint fails to allege a false or misleading statement.

The unjust enrichment claim faces two additional hurdles. *First*, the unjust enrichment claim should be dismissed as duplicative of Plaintiff's other claims. Under New York law, courts "routinely dismiss an unjust enrichment claim that simply duplicates, or replaces, a conventional contract or tort claim." *Dwyer*, 598 F. Supp. 3d at 157 (Seibel, J.). Here, Plaintiff's one-paragraph unjust enrichment claim is entirely duplicative of her other causes of action: it relies on the same factual allegations and the same theory of liability. *See* Am. Compl. ¶ 66.

Second, Plaintiff does not adequately allege that she conferred any direct benefits on P&G. Instead, Plaintiff admits she purchased the product from a third party, *see id.* ¶ 28, and such claims cannot support an unjust enrichment claim because it is the third party, not the product

manufacturer, that receives the benefit of the transaction, *see In re Keurig Green Mountain Single- Serve Coffee Antitrust Litig.*, 383 F. Supp. 3d 187, 272 (S.D.N.Y. 2019).

CONCLUSION

For the foregoing reasons, this Court should dismiss the Complaint with prejudice.

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Respectfully Submitted,

/s/ Henry Liu

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