UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

WILLIAM MONTGOMERY and DONALD WOOD, JR., individually and on behalf of all others similarly situated, Plaintiffs, v. STANLEY BLACK & DECKER, INC., d/b/a CRAFTSMAN, Defendant.	:	CIVIL NO. 3:19-cv-01182 (AVC) NOVEMBER 1, 2021

STANLEY BLACK & DECKER, INC.'S MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

Defendant Stanley Black & Decker, Inc. hereby moves to dismiss Plaintiffs' second amended complaint. The Second Circuit's order remanding this case has given the Plaintiffs an opportunity to raise their new argument, never before pleaded in Plaintiffs' earlier complaints, that the clarifying language on the packaging for their vacuums was "insufficient because it appeared in small point letters . . . separated from the peak HP claims." *Montgomery v. Stanley Black & Decker Inc.*, 857 Fed. Appx. 46, 48 (2d Cir. 2021).

As explained in the accompanying memorandum of law, this argument cannot save Plaintiffs' claims from dismissal, and the Court should reject it here. The product packaging in this case prominently featured—as part of the challenged "PEAK HP†" language—a large dagger ("†") which clearly directed consumers to the court-approved clarifying language located on both the front and side panels of the packaging. As a matter of law, a reasonable consumer interested in the precise meaning of the term "PEAK HP†" could have easily kept on reading, reviewed the packaging's clarifying language, and thereby resolved any possible confusion.

ORAL ARGUMENT REQUESTED

Moreover, and as further explained in the attached memorandum of law, even if some portion of the second amended complaint survives this motion to dismiss, several individual counts continue to have independent defects that separately warrant dismissal.

WHEREFORE, defendant Stanley Black & Decker, Inc. respectfully moves to dismiss the second amended complaint with prejudice.

Dated: November 1, 2021

DEFENDANT,
STANLEY BLACK & DECKER, INC.,
d/b/a CRAFTSMAN

By: /s/ Paul D. Williams

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Motion to Dismiss was filed electronically. Notice of this filing will be sent by email to all parties by operation of the court's electronic filing system. Parties may access this filing through the court's CM/ECF system.

By: /s/ Paul D. Williams

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

WILLIAM MONTGOMERY and DONALD WOOD, JR., individually and on behalf of all others similarly situated,	:	CIVIL NO. 3:19-cv-01182-AVC
Plaintiff,	:	
-v.-	:	
STANLEY BLACK & DECKER, INC., d/b/a CRAFTSMAN,	:	
Defendant.	:	NOVEMBER 1, 2021

MEMORANDUM OF LAW IN SUPPORT OF STANLEY BLACK & DECKER'S MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

Other Authorities

INTRODUCTION

On remand from the Second Circuit, Plaintiffs now make a *third* attempt to plead claims that they were misled by representations about "PEAK HP†" on the packaging of their Craftsman wet-dry vacuums. Plaintiffs' latest amended pleading does nothing to remedy the fatal defects that compelled—and continue to compel—dismissal of their claims.

Once again, Plaintiffs seek to rehash a nationwide, judicially-approved class action settlement that provided for clarifying language explaining the meaning of "PEAK HP" on the product packaging of Shop-Vac wet-dry vacuums. Ex. A, *In re Shop-Vac Mktg. & Sales Practices Litig.*, MDL No. 2380, Case No. 4:12-md-02380-YK ("*In re Shop-Vac* MDL"), ECF 162-1, at p. 12 (M.D. Pa.).[1] As Plaintiffs' new complaint acknowledges, the same clarifying language approved in that class-action settlement was printed on the packaging for Plaintiffs' vacuums here. *See* Second Am. Compl. ¶ 35, ECF 53 (Oct. 18, 2021). And as both the *Shop-Vac MDL* Court and this Court concluded, that court-approved clarifying language removes any "potential for misrepresentation," Ex. B, *In re Shop-Vac* MDL, ECF No. 173, at p. 19, because it expressly states that PEAK HP refers to the "horsepower output of a motor . . . in laboratory testing," not "operational horsepower" of a vacuum "in actual use," Memorandum of Decision, ECF 46, at 28 (Sept. 27, 2019).

Nothing in the Second Circuit's remand order disagrees with that conclusion or otherwise addresses it on the merits. The Second Circuit simply vacated and remanded with instructions to

[1] Defendant Stanley Black & Decker Corporation (SBD) does not manufacture corded wet-dry vacuums. Rather, SBD licenses the "Craftsman" brand name to various companies that make Craftsman-brand corded wet-dry vacuums. The manufacturer of the unit Plaintiff Montgomery alleges he bought was not SBD, but Shop-Vac Corporation—one of the defendants in the MDL litigation.

consider Plaintiffs' argument, which Plaintiffs excluded from two prior complaints, challenging the clarifying language on the packaging as "insufficient because it appeared in small point letters . . . separated from the peak HP claims." *Montgomery v. Stanley Black & Decker Inc.*, 857 F. App'x 46, 48 (2d Cir. 2021).

This argument, however, cannot save Plaintiffs' claims from dismissal, and the Court should reject it here. The product packaging in this case prominently featured—as part of the challenged "PEAK HP†" language—a large dagger (that is, a "†" symbol) which clearly directed consumers to the court-approved clarifying language located on both the front and side panels of the packaging. Declaration of Susan H. Wolf ("Wolf Decl.") Exs. A, B & C; Declaration of David Appel ("Appel Decl.") Exs. A, B. Plaintiffs do not and cannot claim that a reasonable consumer would miss the dagger on the front of the box immediately next to the "PEAK HP†" representation that Plaintiffs now claim was so material to their purchase decisions. Nor can Plaintiffs claim that this clarifying language was illegible or unreadable. Second Am. Compl., ECF 53 ¶ 37 (Oct. 18, 2021) (alleging only that the clarifying language was smaller font than other language on the packaging). As a matter of law, a reasonable consumer who thought the term "PEAK HP†" was material to a decision to purchase could have—and, prompted by the dagger symbol, would have—kept on reading, reviewed the packaging's clarifying language, and thereby resolved any possible confusion. *See, e.g.*, *Dinan v. Sandisk LLC*, No. 18-cv-05420, 2019 WL 2327923, *5 (N.D. Cal. May 31, 2019) (dismissing consumer misrepresentation claims where an "asterisk directly inform[ed] the consumer that he . . . need[ed] to look elsewhere on the package before applying his own assumptions" about a term's meaning).

The Court should hold that Plaintiffs' latest amended complaint is just as deficient as the earlier pleadings, and it should dismiss the complaint with prejudice.

BACKGROUND

In their latest complaint, Plaintiffs William Montgomery and Donald Wood once again allege that they were induced to purchase wet-dry vacuums by representations about the vacuums' "PEAK HP." Second Am. Compl. ¶¶ 1-39. Plaintiffs' current complaint is largely identical to the first amended complaint previously dismissed by this Court. Ex. C, Redline Comparison of First and Second Amended Complaints. As in the earlier complaints, Plaintiffs assert that the "PEAK HP" listed on the product packaging is misleading, because it reflects the motor's power during lab testing, as opposed to "the actual operating power and functionality of the Vacuums." Second Am. Compl. ¶ 16. Based on these allegations, Plaintiffs again plead claims for breach of express warranty (*id.* ¶¶ 48-53), breach of the implied warranty of merchantability (*id.* ¶¶ 54-63), unjust enrichment (*id.* ¶¶ 64-68), negligent misrepresentation (*id.* ¶¶ 69-76), fraud (*id.* ¶¶ 77-81), and violations of the Virginia Consumer Protection Act (VCPA) and New York General Business Law ("NYGBL") (*id.* ¶¶ 82-120).[2]

Unlike prior versions of the complaint, however, the new complaint acknowledges, for the first time, that the packaging for Plaintiffs' vacuums included clarifying language addressing the meaning of the term "PEAK HP." Second Am. Compl. ¶¶ 35-39. On the packaging for Plaintiffs' vacuums, the challenged claims of "5.0† PEAK-HP" and "5.5 PEAK HP†" are both placed alongside a prominent dagger symbol ("†"). Appel Decl. ¶ 9 & Ex. A; Wolf Decl. ¶ 10 & Ex. B.[3]

[2] As this Court noted in its initial order on remand, because "the second circuit affirmed the court's dismissal of Wood's negligent misrepresentation claim," the portion of the "court's judgment dismissing Wood's negligent misrepresentation claim with prejudice remains unchanged." ECF 52 (Sept. 17, 2021).

[3] As the Court explained in its prior opinion, "the labeling and packaging" of Plaintiffs' vacuums "is integral to their claims," and Plaintiffs have never disputed "that the packaging attached to Stanley's motion to dismiss is a complete representation of the product packaging on the products that they purchased." Mem. of Decision at 15-16. As a result, "the clarifying language

These references were then followed by clarifying language, also accompanied by an immediately adjacent dagger, elaborating on the purpose and meaning of the term "PEAK HP†":

> †"Peak Horsepower" (PHP) is a term used in the wet-dry vacuum industry for consumer comparison purposes. It does not denote the operational horsepower of a wet-dry vacuum but rather the horsepower output of a motor, including the motor's inertial contribution, achieved in laboratory testing. In actual use, Shop-Vac's motors do not operate at the peak horsepower shown.

Second Am. Compl. ¶ 35.

While the second amended complaint notes that this explanatory language appeared in type that was smaller than other language on the packaging, the complaint makes no claim that it was illegible or otherwise incapable of being read and understood. *Id*. ¶¶ 35-39. Nor do Plaintiffs allege that they could not or did not see the clarifying language indisputably on the boxes containing the vacuums they purchased. Indeed, the clarifying language on Plaintiff Montgomery's product packaging was demonstrably legible, "measur[ing] 3.8819 inches wide by .373 inches high" on *both* the front and side panels of the box. Wolf Decl. ¶ 11 & Ex. C. The explanatory statement on Plaintiff Wood's packaging was even larger, "measur[ing] 7 inches wide by 1.1 inches high," also on both the front and side panels of the box. Appel Decl. ¶ 10 & Ex. B.

I. The nationwide class-action settlement in the *Shop-Vac* MDL required the addition of clarifying language to vacuum packaging and resolved the claims at issue in this litigation.

The clarifying language included on the vacuums' packaging comes straight from a court-approved class-action settlement in the earlier *Shop-Vac* MDL. That settlement resolved claims

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on the boxes purchased by Montgomery and Wood can be considered by the court in a Rule 12(b)(6) motion without converting the motion to a motion for summary judgment." *Id*. at 17. The Second Circuit did not disturb or disagree with that conclusion in any way; in fact, it too considered the product packaging in the course of its analysis. *Montgomery*, 857 F. App'x at 47-48. The Court's decision to consider the product packaging at the motion-to-dismiss stage continues to apply with full force.

exactly like the ones at issue here—namely, that the "PEAK HP" measurements of Shop-Vac vacuums were misleading because they did not reflect "the actual operating power and functionality of [the] vacuums." Ex. D, Second Cons. Am. Compl., *In re Shop-Vac MDL*, ECF No. 97, at ¶ 24. At the conclusion of the *Shop-Vac* MDL, the parties entered into a nationwide settlement under which Shop-Vac agreed to change its marketing and product packaging to expressly define and explain the term "PEAK HP." The settlement provided that this clarifying language would be placed directly on the product packaging of all Shop-Vac products going forward.

The clarifying language added to the product packaging was heavily negotiated in the *Shop-Vac* MDL, and also reviewed by a retired federal magistrate judge serving as mediator. In addition, as part of the settlement approval, the MDL plaintiffs' counsel, who were required by Federal Rule of Civil Procedure 23 to fairly represent the interests of the nationwide settlement class, argued to the MDL court that the settlement was in all respects fair and reasonable. With respect to the agreed upon changes to the product labeling, MDL plaintiffs' counsel argued:

> Shop-Vac will alter the manner in which the Vacuums are marketed and labeled, ***to eliminate the potential for misrepresentation.*** The Settlement grants relief addressing the alleged deceptive and misleading practices asserted in this litigation, and remediates their effects upon consumers.

Ex. B, Plfs.' Mem. Supp. Final Approval, *In re Shop-Vac* MDL, ECF No. 173, at 19-20 (July 26, 2016) (emphasis added and citations omitted).

The *Shop-Vac* MDL Court agreed with plaintiffs' counsel and approved the settlement in December of 2016. When two objectors argued that the relief proposed would not prevent consumers from being misled, the court overruled those objections, specifically finding that with the addition of the clarifying language the claim that consumers could be misled "lack[ed] merit." Ex. E, Memorandum Approving Settlement, *In re Shop-Vac* MDL, ECF No. 211, at p. 20 (Dec. 9,

2016). The court-approved clarifying language explaining exactly what "PEAK HP" means was then included on the labeling of all Shop-Vac and Cleva-made wet-dry vacuums during 2018—including the two vacuums bought by Plaintiffs here.[4]

II. After the *Shop-Vac* MDL settlement was implemented, Plaintiff Montgomery filed this copycat lawsuit.

On August 1, 2019, plaintiff Montgomery filed the original complaint in this case, which was virtually identical to the earlier *Shop-Vac* MDL complaint. *Compare* Complaint, ECF 1 (Aug. 1, 2019), *with* Ex. D, Second Cons. Am. Compl. in *Shop-Vac* MDL. Montgomery's complaint parroted many of the MDL complaint's allegations almost verbatim. In so doing, however, Montgomery failed to disclose a critical difference between the packaging of his Craftsman wet-dry vacuum and that of the products in the MDL action: The unit that Montgomery bought—like all wet-dry vacuums manufactured by Shop-Vac following the effective date of the MDL settlement—included the clarifying language approved by the MDL court. None of that was disclosed in the first (or second) complaint filed in this Court.

Montgomery's initial complaint alleged that he bought a "Craftsman 16 Gallon Wet/Dry Vac with 5.0 Peak HP, Model No. CMXEVBCPC1650, from a Lowe's retail store in Virginia Beach, Virginia" in November or December 2018. Compl. ¶ 3. Montgomery complained that the "Peak HP" rating on this vacuum misled him and others "into believing that the Vacuums can in fact generate the claimed horsepower, even though these claims are illusory and can never be obtained in actual use." *Id*. ¶ 1. Montgomery stated that, prior to his purchase, he "reviewed the product's labeling and packaging," and "relied on that labeling and packaging to choose his vacuum over

[4] Cleva was not a party to the *Shop-Vac* MDL, but it nonetheless included the clarifying language on its packaging. Appel Decl., ECF 37-12.

comparable models." *Id*. ¶ 5. He also claimed to have "paid a substantial price premium" attributable to the "Peak HP" statement, which he would not have done if he had known the operational horsepower of the vacuum in day-to-day use. *Id.* Montgomery did not, however, allege that the product failed to perform as intended, or even that he was unhappy with it.

As noted, Montgomery's initial complaint never mentioned, let alone discussed, the clarifying language included on the packaging pursuant to the MDL settlement. Yet on the actual packaging, right in the midst of the challenged "5.0† PEAK-HP" claim, a clear "†" symbol directed consumers to the court-approved clarifying language from the *Shop-Vac* MDL. That language, located on both the front panel and one of the side panels of the packaging, explained:

> †"Peak Horsepower" (PHP) is a term used by the wet-dry vacuum industry for consumer comparison purposes. It does not denote the operational horsepower of a wet-dry vacuum but rather the horsepower output of a motor, including the motor's inertial contribution, achieved in laboratory testing. In actual use, wet dry motors do not operate at the peak horsepower shown.

Wolf Decl. ¶¶ 9-11 & Exs. A, B & C.

III. In response to Defendant's motion to dismiss, Plaintiffs amend their complaint to add the additional claims of Plaintiff Wood, but do nothing to address the clarifying language.

SBD moved to dismiss Montgomery's complaint, *see* ECF 25, and, in so doing, it included as an exhibit a replica of the images on Montgomery's vacuum box, including the court-approved clarifying language that fatally undermined Montgomery's claims. *See* Wolf Decl. Exs. A, B & C. In response, Montgomery elected not to oppose the motion and instead filed an amended complaint as of right. The amended complaint, however, again made no mention of either the nationwide MDL class-action settlement or the court-approved clarifying language included on Montgomery's vacuum packaging. In fact, the only material change to the complaint was the addition of another named plaintiff—Donald Wood, Jr. *See* First Am. Compl. ¶ 6, ECF 31 (Oct. 14, 2019).

Plaintiff Wood's allegations mirrored those of Montgomery, with the exception of where and when he bought his vacuum. *Id.* Wood claimed to have bought a "Craftsman XSP 12 Gallon Wet/Dry Vac" with "5.5 Peak HP," Model No. 12006, from a Sears retail store in Massapequa, New York in June 2018. *Id.* With respect to Wood's wet-dry vacuum, SBD licensed the Craftsman brand to Cleva, which in turn manufactured, packaged, and sold units to Sears. The packaging for Wood's vacuum contained materially identical "5.5 PEAK HP†" language, the same dagger symbol alongside the claim, and explanatory language that was nearly identical to the language on Montgomery's box:

> †"Peak Horsepower" (PHP) is a term used by the wet-dry vac industry for consumer comparison purposes. It does not denote the operational horsepower of a wet-dry vac but rather the horsepower output of a motor, including the motor's inertial contribution, achieved in laboratory testing. In actual use, motors do not operate at the peak horsepower shown.

Appel Decl. ¶ 9 & Ex. A. The artwork and labeling on Wood's vacuum box was present on the boxes "for all units shipped to Sears retail locations in 2018," including the box Wood purchased in June 2018. *Id.* ¶ 9.

Like Montgomery, Wood claimed that he was deceived by the "5.5 PEAK HP†" statement. First Am. Compl. ¶ 6. Wood also alleged that, prior to his purchase, he "reviewed the product's labeling and packaging," and "relied on that labeling and packaging to choose his vacuum over comparable models." *Id.* Also like Montgomery, Wood never acknowledged the court-approved clarifying language included on his vacuum box eliminating any possible confusion about the meaning of "PEAK HP†." Based on these allegations, Plaintiffs collectively brought claims against SBD for breach of express warranty, breach of the implied warranty of merchantability, unjust enrichment, negligent misrepresentation, fraud, violation of the VCPA (as to Montgomery and a

putative Virginia sub-class), and violation of the NYGBL (as to Wood and a putative New York sub-class). *Id.* ¶¶ 43-115.

IV. This Court dismisses the first amended complaint.

SBD then renewed its motion to dismiss. In a thorough, 50-page opinion, this Court granted that motion and dismissed the first amended complaint with prejudice. Mem. of Decision, ECF 46 (Nov. 30, 2020). The Court accepted the facts alleged in the complaint as true and drew all reasonable inferences in favor of Plaintiffs. *Id.* at 8-9. It acknowledged that "[i]f the named plaintiffs have no cause of action in their own right, their complaint must be dismissed, even though the facts set forth in the complaint may show that others might have a valid claim." *Id.* at 16 (quoting *Goldberger v. Bear, Stearns & Co.*, No. 98-cv-8677, 2000 WL 1886605, at *1 (S.D.N.Y. Dec. 28, 2000)). The Court also took judicial notice of the publicly-filed settlement papers from the *Shop-Vac* MDL, *see id.* at 12, and considered the product packaging for both Montgomery's and Wood's Craftsman wet-dry vacuums on the ground that they had been incorporated by reference into the complaint, *see id.* at 14-15.

Because none of the allegations (or images) in the amended complaint mentioned the court-approved clarifying language included on the vacuums' packaging—let alone explained why Plaintiffs' claims could survive in light of that language—this Court declined to consider Plaintiffs' arguments, raised "for the first time in opposition to [the] motion to dismiss," about the supposed inconspicuousness of the clarifying language. *Id.* at 25 (citing *Peacock v. Suffolk Bus Corp.*, 100 F. Supp. 3d 225, 231 (E.D.N.Y 2015)). On the merits, though, the Court held that, "taking into consideration the clarifying language on the packaging," Plaintiffs "failed to provide sufficient factual support for their conclusory allegation that a reasonable consumer would have been misled by the Peak HP rating." *Id.* 128.

On the NYGBL claim in particular, the Court held that the clarifying language was "fatal to [Wood's] claim that a reasonable consumer would have been misled," because "[he] made no allegations in the amended complaint indicating how he believed that the 12 Gallon Wet/Dry Vac with 5.5 Peak HP . . . could perform [at] 5.5 horsepower, given the clarifying language on the packaging." *Id.* at 29. For the same reasons, the Court also held that Montgomery failed to plead a claim under the VCPA, as he had "failed to allege sufficient facts to establish a misrepresentation or show deception or fraud given the clarifying language." *Id.* at 33.

Turning to the common law claims, the Court held that both Wood's additional claims (under New York law) and Montgomery's claims (under Virginia law) failed for similar reasons. The express warranty claim, the Court reasoned, was legally deficient because "the clarifying language on the labeling and packaging explicitly stated that the vacuums do not operate at the peak horsepower shown in actual use." *Id*. at 139. The implied warranty of merchantability claim failed because Plaintiffs "neither alleged facts establishing the standard of merchantability in the trade, nor . . . any facts establishing that the vacuum was inadequate for their personal use." *Id*. at 41. The Court rejected the unjust enrichment claim because, "[i]n light of the clarifying language, Montgomery and Wood failed to sufficiently plead a misrepresentation regarding the Peak HP under either New York or Virginia law." *Id*. at 44. It dismissed the negligent misrepresentation claim because Plaintiffs had not alleged "that a false representation of a material fact was made, given the clarifying language." *Id*. at 47.[5] And the Court held that Plaintiffs failed to plead several essential elements of fraud, including the existence of an actual misrepresentation. *Id*. at 49-50.

[5] The Court also held that Montgomery's negligent misrepresentation claim was "barred by Virginia's economic loss doctrine," *see id*. at 47, and noted that Wood had "concede[d] that he 'd[id] not allege a 'special relationship" with SBD "sufficient to state a claim for negligent misrepresentation under New York law," *see id.* at 45.

For all these reasons, this Court dismissed the first amended complaint with prejudice and entered judgment for SBD.

V. On appeal, the Second Circuit issues a narrow remand order.

On appeal, the Second Circuit affirmed in part, and vacated in part, this Court's judgment. *Montgomery v. Stanley Black & Decker, Inc.*, 857 F. App'x 46 (2d Cir. 2021). In so doing, the Court of Appeals did not disagree with any of this Court's reasoning on the merits. The Court of Appeals also acknowledged its prior precedent holding that a "plaintiff who alleges that he was deceived by an advertisement may not misquote or misleadingly excerpt the language of the advertisement in his pleadings and expect his action to survive a motion to dismiss, or, indeed, to escape admonishment." *Id.* at 48 (quoting *Fink v. Time Warner Cable*, 714 F.3d 739, 742 (2d Cir. 2013)). Nonetheless, the Second Circuit held that this Court should consider on the merits the Plaintiffs' argument that the "disclaimer was insufficient because it appeared in small point letters that were separated from the peak HP claims and not capitalized or bolded." *Id.* at 48. The Court thus affirmed "the dismissal of Wood's negligent misrepresentation claim," and otherwise vacated and remanded "with an instruction that the district court permit Appellants to make the argument that the disclaimer does not render Appellants' complaint insufficient." *Id.* at 48-49. The Court of Appeals also directed that Plaintiffs be granted leave to file another amended complaint. *Id.*

VI. On remand, Plaintiffs file their second amended complaint.

On remand, Plaintiffs filed their second amended class action complaint. This latest pleading repeats verbatim nearly all of the allegations included in the prior pleading. Ex. C, Redline Comparison of First and Second Amended Complaints. It also includes identical claims for breach of express warranty, breach of the implied warranty of merchantability, unjust enrichment, negligent misrepresentation, fraud, and violations of the VCPA and NYGBL. *Id.* ¶¶ 43-120.

The only material difference in the current complaint is the addition of five new paragraphs that acknowledge and discuss the court-approved clarifying language describing the "PEAK HP" rating. Second. Am. Compl. ¶¶ 35-39. The complaint alleges that the disclaimer's size ("less than an inch tall and 3.88 inches wide" on Plaintiff Montgomery's box) takes up only a small portion of the overall surface area of the vacuums' packaging ("1.5 feet wide by 1.8 feet high"). *Id.* ¶ 37. The complaint further notes the absence of "capitalized letters, bold, or italics." *Id.* ¶ 38. Taking a third bite at the apple, Plaintiffs now allege only that they do not recall seeing the clarifying language, not that they could not see it, or that it was obscured, or that they did see it but were confused by the express terms of the clarifying language. *Id.* ¶¶ 5-6. Critically, Plaintiffs do *not* allege a reasonable consumer would be unable to read the clarifying language printed on the box.

Despite these amendments, Plaintiffs still never acknowledge or discuss the clear dagger symbol that is *immediately* adjacent to the "PEAK HP" language—"5.0† PEAK-HP" and "5.5 PEAK HP†"—thereby drawing the reader's attention to the explanatory language included on both the front panel and one of the side panels of the packaging. Wolf Decl. Exs. A, B, C; Appel Decl. Exs. A, B. Nor does the complaint ever explain how it is that a reasonable consumer would "review the product's labeling," see a "5.5 PEAK HP†" rating, and then rely on that rating in "choos[ing] [a] vacuum," *see* Second Am. Compl. ¶ 5—while at the same time electing to ignore the prominent and immediately adjacent "†" symbol that alerts the reader to the presence of additional language explaining the meaning and purpose of the term "PEAK HP†."

DISCUSSION

I. The governing legal standard.

To survive a motion to dismiss, a complaint must state a claim that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The court should separate the legal and factual

elements of a claim, accept the non-conclusory facts, and disregard the plaintiff's legal conclusions. *Id.* "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* at 678.

In addition, where, as here, Plaintiffs allege fraud-based claims, they "must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). Rule 9(b)'s heightened pleading standard applies to all of Plaintiffs' claims (including the warranty claims) because they are all based on allegedly fraudulent conduct. *DiMuro v. Estee Lauder Cos., Inc.*, Civil No. 3:12-cv-01789 (AVC), 2013 WL 12080901, at *4-6 (D. Conn. Nov. 22, 2013) (applying Rule 9(b)'s standards to consumer misrepresentation claims, including claims for breach of warranty), *aff'd sub nom DiMuro v. Clinique Labs., LLC*, 572 F. App'x 27, 30-32 (2d Cir. 2014). To satisfy Rule 9(b), Plaintiff must "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *DiMuro*, 2013 WL 12080901, at *4 (quoting *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1175 (2d Cir. 1993)); *see also* Mem. of Decision at 47 n.32 (acknowledging Rule 9(b), but holding that this Court did not need to "apply the heightened pleading standard" to conclude that Plaintiffs' claims warranted dismissal).

II. Plaintiffs' claims remain legally infirm and should once again be dismissed on the merits.

As this Court has already held, the fundamental flaw in all of Plaintiffs' claims, under any potential theory of liability, is that SBD's product packaging, read as a whole, is accurate and contains no false, misleading, or deceptive statements. That is because, taken together, the "PEAK HP† " language on the packaging and its accompanying "clarifying language" truthfully and accurately convey "that the vacuums do not operate at the peak horsepower shown in actual use." Mem. of Decision at 39; *see id.* at 28-30, 32-33, 42, 45-46, 48-49. The Second Circuit has now

vacated and remanded that judgment to give Plaintiffs an opportunity to argue that the packaging's clarifying language is nonetheless "insufficient because it appeared in small point letters . . . separated from the peak HP claims," *Montgomery*, 857 F. App'x 48, but that argument cannot save Plaintiffs' claims from dismissal. At bottom, no reasonable consumer, faced with the statements included in the packaging for Plaintiffs' vacuums, would have been misled by the labels' statements regarding "PEAK HP."

A. Settled law establishes that courts can and should determine as a matter of law when a statement would not mislead a reasonable consumer.

"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 v. Time Warner Cable*, 714 F.3d 739, 741 (2d Cir. 2013). As the Second Circuit explained in *Fink*, "[i]n determining whether a reasonable consumer would have been misled by a particular advertisement, context is crucial," and at the pleading stage, "the presence of a disclaimer or similar clarifying language may defeat a claim of deception." *Id.* at 742 (affirming dismissal of a complaint with prejudice because the complaint's allegations were "materially inconsistent with the sole advertisement Plaintiffs have submitted"). The Court's task at the motion-to-dismiss stage is to "view each allegedly misleading statement in light of its context on the product label or advertisement as a whole." *Wurtzburger v. Ky. Fried Chicken*, No. 16-cv-08186, 2017 WL 6416296, at *3 (S.D.N.Y. Dec. 13, 2017) (quotation marks omitted).

As a practical matter, this contextual approach often turns on the severity of the allegedly misleading statement at issue. "Where the front of a package makes a bold and blatant misstatement about a key element of a product," further "clarification or context on the reverse of the package" may not be enough "to overcome a deception claim" at the motion-to-dismiss stage. *Engram v. GSK Consumer Healthcare Holdings (US) Inc.*, No. 10-cv-02886, 2021 WL 4502439,

*3 (S.D.N.Y. Sept. 30, 2021) (citing *Mantikas v. Kellogg Co.*, 910 F.3d 633 (2d Cir. 2018)). But in cases where "the front of the package is better characterized as ambiguous," courts considering disclaimers and reviewing "alleged misrepresentations in their full context are more likely to grant a motion to dismiss." *Engram*, 2021 WL 4502439, *3-4; *see also Nelson v. MillerCoors*, LLC, 246 F. Supp. 3d 666, 674-76 (E.D.N.Y. 2017) ("[D]isclaimers fail to cure allegedly misleading representations on the front of packaging only where the alleged misrepresentation is clearly stated and the disclaimer is exceedingly vague or requires consumers to make inferences.").

The decision in *Bowring v. Sapporo U.S.A., Inc.*, 234 F. Supp. 3d 386 (E.D.N.Y. 2017), is a useful example. There, the plaintiff argued that statements indicating the product was "Japanese beer" and "Imported" misled reasonable consumers into believing the beer was brewed in Japan. The court, however, dismissed plaintiff's NYGBL claims with prejudice. As the court explained, the accurate statement that the beer was "Imported" and references "to the company's actual Japanese heritage" were "clearly qualified by [a] disclaimer" in "contrasting, visible font" stating "in clear language [that] the product [was] produced" in Canada. *Id.* at 390-92. Considering the representations as a whole and in context, no reasonable consumer could have been misled. *Id.*; *accord Dumas v. Diageo PLC*, No. 15-cv-01681, 2016 WL 1367511, *3-4 (S.D. Cal. April 6, 2016) (slogans describing Red Stripe Beer as "Jamaican Style Lager" and "The Taste of Jamaica" held non-misleading as a matter of law where "small . . . contrasting white print" at the label's edge legibly stated "Brewed & bottled by Red Stripe Beer Company Latrobe, PA"); *Pernod Ricard USA, LLC v. Bacardi U.S.A., Inc.*, 653 F.3d 241, 246-47, 252-53 (3d Cir. 2011) (while in isolation the words "Havana Club" in "large stylized letters" on a bottle of rum could be understood as indicating the product's geographic origin in Havana, Cuba, smaller, legible disclaimers stating

that the product was "Puerto Rican Rum" and "distilled and crafted in Puerto Rico" established that the label as a whole would not have misled a reasonable consumer).

The recent decision in *Engram v. GSK Consumer Healthcare Holdings (US) Inc.*, No. 19-cv-02886, 2021 WL 4502439 (S.D.N.Y. Sept. 30, 2021), similarly illustrates how these principles apply in practice. In *Engram*, the product label for ChapStick lip balm stated, in large font on the front of the label, that the product provided "8 HOUR MOISTURE" and "SPF 15." *Id.* at *1. The plaintiff alleged that, taken together, these prominent statements on the front of the packaging falsely suggested that "the product contains '8 hour sun protection,'" *see id.* at *1-2, but the Court disagreed. Even if "8 hour moisture" combined with the label's "SPF figure" reasonably conveyed a message about the duration of the sun protection provided, the fine print on the back of the label put that "ambiguity to rest" by "directing the consumer 'to apply [the product] liberally 15 minutes before sun exposure" and to "reapply at least every 2 hours." *Id.* at *5-6 (alteration in original). The plaintiffs' claims of deceptive advertising under the NYGBL and related common law theories thus failed as a matter of law in light of "the presence of a clear disclaimer on the reverse" of the packaging. *Id.* at *6; *accord Nelson v. MillerCoors, LLC*, 246 F. Supp. 3d 666, 675-678 (E.D.N.Y. 2017) (in light of legible disclaimer that Foster's Beer was brewed in Georgia and Texas, larger images of kangaroos, a Southern Cross constellation, and allusions to the beer's Australian roots would not have misled reasonable consumers as to the product's origin); *Fermin v. Pfizer, Inc.*, 215 F. Supp. 3d 209, 212-13 (E.D.N.Y. 2016) (dismissing with prejudice consumer fraud claims under California, New York, and Florida law asserting that the size of defendant's pill bottles misled consumers into thinking they were getting more product than they actually received, as the "entire context of the [package]" revealed a statement indicating a tablet count on the label) (quotation marks omitted).

And to take one more example, *Dinan v. Sandisk LLC*, 2019 WL 2327923 (N.D. Cal. May 31, 2019), is also particularly instructive. The plaintiff there purchased a flash drive that claimed to offer "64 GB" of storage. *Id*. at *1. Under the standard binary system used by "[a]ll computers and digital processers, including Microsoft Windows, Linux, and Apple," "1 GB = 1,024 megabytes = 1,073,741,824 bytes." *Id*. Yet on the defendant's packaging, it "calculate[d] the GBs in its products using the decimal system," under which 1 GB equaled only "1,000,000,000 bytes, not 1,073,741,824 bytes." *Id.* The plaintiff claimed that this alternative measurement misled him and "cause[d] consumers to pay more for the drives than they otherwise would pay," but the Court disagreed and dismissed all of plaintiffs' common law and statutory claims. *Id.* at *1, *8.

The *Dinan* Court assumed that a "reasonable consumer would not understand 'GB' on the packaging to be in decimal." *Id.* at *6. But as the Court explained, the "large '64 GB' representation" on the packaging was "accompanied by an asterisk," which the reader could then follow to an asterisk footnote in the "fine print" at "the back" of the packaging. *Id*. at *1. That footnote expressly clarified that "'1 GB = 1,000,000,000 bytes.'" *Id.* ("The disclosure is in fine print, but legible."). This was sufficient, the Court held, to warrant dismissal as a matter of law. Because "the asterisk call[ed] the consumer's attention to the fact that there [was] supplemental information on the package that the consumer should read," a reasonable consumer would have recognized the need to keep reading before "applying his own assumptions" about the meaning of "GB." *Id.* at *6-7;[6] *accord Sponchiado v. Apple, Inc*., No. 18-cv-07533, 2019 WL 6117482, *4 (N.D. Cal. Nov. 18, 2019) (holding that "a reasonable consumer could not be deceived by the iPhone Products' screen size representation," where the diagonal measurements provided were

[6] *See also Dinan v. Sandisk LLC*, No. 18-cv-05420, 2020 WL 364277 (N.D. Cal. Jan. 22, 2020) (dismissing same claims without leave to amend), *aff'd* 844 F. App'x 978 (9th Cir 2021).

accompanied by an asterisk with "qualifying language expressly notifying the consumer that the actual screen area [was] less than indicated" by the diagonal measurement).

B. Considered as a whole and in context, the product packaging for Plaintiffs' vacuums would not have misled a reasonable consumer.

When viewed "in light of its context on the product label . . . as a whole," the "PEAK HP" statements on the packaging for Plaintiffs' vacuums would not have misled a reasonable consumer. *See Wurtzburger*, 2017 WL 6416296, *3 (quotation marks omitted).

As an initial matter, it is particularly crucial (and yet totally ignored by Plaintiffs) that the challenged claims include *immediately* adjacent dagger symbols—"5.0† PEAK-HP" and "5.5 PEAK HP†"—that readily signal the availability of additional explanatory information elsewhere on the label. Wolf Dec. Ex. B; Appel Decl. Ex. A. "[A]n asterisk or footnote expressly tells the consumer to look for supplemental information concerning the statement immediately preceding it." *Sponchiado*, 2019 WL 6117482, at *4. And when a large dagger symbol appears on product packaging directly adjacent to terms like "5.0† PEAK-HP" and "5.5 PEAK HP†," a reasonable consumer will understand that "he needs to look elsewhere on the package before applying his own assumptions." *Dinan*, 2019 WL 2327923, at *708 (dismissing consumer deception claims based on clarifying disclosure in asterisk footnote). Having been prompted by the dagger symbol to keep reading for additional information about "PEAK HP†," Plaintiffs could have easily proceeded to "look for [that information] and . . . find it" in the packaging's clarifying language. *Id.* at *7. Had they done so, Plaintiffs would have learned that "PEAK HP" is a "term used in the wet-dry vac industry for comparison purposes"; that it "does not denote the operational horsepower output of a wet-dry vac"; and that, "[i]n actual use, motors do not operate at the peak horsepower shown." Appel Decl. Ex. C; *see Kommer v. Bayer Consumer Health*, 252 F. Supp. 3d 304, 312 (S.D.N.Y. 2017) ("Assuming that a reasonable consumer might ignore the evidence plainly before

him attributes to consumers a level of stupidity that the Court cannot countenance and that is not actionable under G.B.L. § 349"), *aff'd* 710 F. App'x 43 (2d Cir. 2018).

Plaintiffs fail to allege that a reasonable consumer would not see the dagger. Nor do Plaintiffs allege that a reasonable consumer would fail to understand that the dagger—much like an asterisk ("*")—is commonly used to alert readers to the presence of additional explanatory language.[7] Indeed, the need to look for additional language explaining the meaning of "PEAK HP†" would have been particularly apparent to a reasonable consumer in these Plaintiffs' position. According to the complaint, both Plaintiffs "reviewed the product's labeling and packaging" and saw the "PEAK HP" ratings included on the label. Second Am. Compl. ¶¶ 5-6. Plaintiffs then proceeded to "choose [their] vacuum[s] over comparable models" on the understanding that the vacuums were "capable of producing" a horsepower output of 5 and 5.5 (respectively) "during normal use and operation." *Id.* ¶¶ 5-6. Yet, having reviewed this language and confronted the clear dagger symbols adjacent to the claims of "5.0† PEAK-HP" and "5.5 PEAK HP†," *see* Wolf Decl. Ex. B & Appel Decl. Ex. A, Plaintiffs unaccountably stopped reading, "appl[ied] [their] own assumptions" about the meaning of "PEAK HP†," *see Dinan*, 2019 WL 2327923, at *7, and failed "to look for supplemental information concerning the statement" elsewhere on the label. *Sponchiado* 2019 WL 6117482, at *4; *see* Second Am. Compl. ¶¶ 5-6 (alleging that Plaintiffs do "not recall seeing a disclaimer or any clarifying language prior to purchasing [their] Craftsman vacuum[s]"). That is not how reasonable consumers act when faced with an asterisk, dagger, or

[7] *See generally* Keith Houston, *Shady Characters: The Secret Life of Punctuation, Symbols & Other Typographical Marks* 97 (2013) ("The asterisk and dagger have performed a punctuational double-act for millennia. Today they appear most often when pointing the reader to a footnote or endnote."); Frank Jefkins, *International Dictionary of Marketing and Communication* 71 (2012) (the "dagger" is the "footnote symbol which usually follows use of an asterisk").

similar symbol alerting the reader to the presence of "supplemental information on the package that the consumer should read." *Dinan*, 2019 WL 2327923, at *7.

Indeed, even when taken in isolation, the statements that the vacuums had a "5.0† PEAK-HP" or a "5.5 PEAK HP†" were, at most, arguably ambiguous and unclear. Wolf Decl. Ex. B, Appel Decl. Ex. A; *see Engram*, 2021 WL 4502439, *3. As this Court pointed out in its earlier opinion, Plaintiffs "conflate the term 'Peak HP' with horsepower and focus on the fact that the vacuum scientifically can never reach a horsepower" output of 5.0 or 5.5. Mem. of Decision 28. But even if, taken in isolation, a claim about "PEAK HP†" might reasonably be construed as a claim about the "total possible output power" of a wet-dry vacuum expressed in units of horsepower, *see* Second Am. Compl. ¶ 2, that is certainly not the term's necessary or only meaning. The term "PEAK HP†" is, at most, potentially ambiguous, with different meanings to different people. It might conceivably be understood as a wet-dry vacuum's "total possible output power" in units of horsepower, *see id.* ¶ 2, or as a reference to "the horsepower output of *a motor*, including the motor's inertial contribution," *see* Appel Decl. Ex. C (emphasis added), or perhaps as a reference to some other industry-specific usage altogether.[8] That is why it is essential to consider the "alleged misrepresentation[] in [its] full context," based on the packaging as whole. *Engram*, 2021 WL 4502439, at *3. That overall context establishes that reasonable consumers would have little trouble following the dagger symbol accompanying "PEAK HP†" to the clarifying language that resolves any ambiguity about the term's meaning. *See Sponchiado*, 2019 WL 6117482, at *4.

The Plaintiffs' contention that the "placement, size, and lack of emphasis" on the explanatory language render it too inconspicuous to be effective, *see* Second Am. Compl. ¶¶ 35-39, cannot

[8] However they perceive the term, consumers are able to use peak horsepower ratings to compare vacuums to each other—which is the entire point of the ratings.

save Plaintiffs' claims from dismissal as a matter of law. There was, in fact, nothing inconspicuous about the presence of clarifying language on the packaging here. As discussed above, the manufacturers of Plaintiffs' vacuums included clear and prominent dagger symbols immediately adjacent to the challenged "PEAK HP" representations—"5.0† PEAK-HP" and "5.5 PEAK HP†"—which directly signaled to consumers that additional clarifying information was available and present on the label. Wolf Decl. Ex. B & Appel Decl. Ex. A; *see Dinan*, 2019 WL 2327923, at *7 ("Once the consumer is directed to look for the disclosure because of the asterisk, he knows to look for it and can find it in the fine print."). That clarifying information was clear, legible and readable on both the front and side panels of the product packaging. Wolf Decl. ¶ 11 & Ex. C (reproducing clear, legible clarifying language on Montgomery's product packaging "measur[ing] 3.8819 inches wide by .373 inches high"); Appel Decl. ¶ 10 & Ex. B (even larger explanatory statement on Wood's packaging "measur[ing] 7 inches wide by 1.1 inches high"). Even if the disclosures did not "contain any capitalized letters, bold, or italics," *see* Second Am. Compl. ¶ 38, the packaging's use of a prominent dagger symbol signaling the presence of unambiguous explanatory language readily negates any claim of deception or misrepresentation. *See Dinan*, 2019 WL 2327923, at *1, *6-7 (dismissing misrepresentation claims as a matter of law where asterisk directed the reader to an unambiguous disclosure that was "in fine print, but legible."); *Dumas*, 2016 WL 1367511, at *3-6 (disclaimer in "small . . . contrasting white print" at the edge of the product label eliminated any claim of deception regarding the origin of Red Stripe beer where it disclosed the beer was "[b]rewed & bottled [in] Latrobe, PA").

Nor is this a case where the disclaimer is too "vague" or requires too many "inferences" to avoid dismissal at the pleadings stage. *Nelson*, 246 F. Supp. 3d at 674-76. The clarifying language included in the product packaging for Plaintiffs' vacuums was heavily negotiated in contentious

multi-district litigation and approved by: (1) a retired federal judge serving as a mediator; (2) sophisticated plaintiffs' counsel representing the interests of the nationwide settlement class; and (3) the district court judge who expressly rejected objections that the clarifying language would not prevent consumer confusion about the meaning of "PEAK HP." Because the clarifying language approved in the *Shop-Vac* MDL eliminates any "potential for misrepresentation," Ex. B, *In re Shop-Vac MDL*, ECF No. 173, at p. 19, it is all the more appropriate to hold, as this Court has already held, that Plaintiffs cannot plausibly allege any misrepresentation or consumer deception.

Plaintiffs' inability to plausibly allege any misrepresentation or deceptive statement mandates dismissal of all their statutory and common-law claims, including the claims for breach of warranty. *E.g.*, *Nelson*, 246 F. Supp. 3d at 678 (dismissing express warranty claim alleging defendant misrepresented the location of brewery where label "explicitly identif[ied]" where beer was brewed); *McKinniss v. Gen. Mills, Inc.*, No. 07-cv-02521, 2007 WL 4762172, at *5 (C.D. Cal. Sept. 18, 2007) (a "selective reading or alleged misunderstanding cannot give rise to an express warranty claim"); *Chin v. Gen. Mills, Inc.*, No. 12-cv-02150, 2013 WL 2420455, at *7 (D. Minn. June 3, 2013) (dismissing express warranty claims because a label "cannot be viewed in isolation and must be read in the context of the entire package" and therefore "the specific terms determine the scope of the express warranty that was allegedly made to the Plaintiffs"); *Tears v. Boston Sci. Corp.*, 344 F. Supp. 3d 500, 512 (S.D.N.Y. 2018) (dismissing warranty claim absent plausible allegation that product was defective or failed to perform according to label description). The Court should hold that, when considered as a whole and in context, the packaging for Plaintiffs' vacuums would not mislead or deceive any reasonable consumer, and it should dismiss with prejudice all of Plaintiffs' claims.

III. Even if the Court declines to dismiss the complaint in its entirety, several of the counts must be dismissed for independent reasons.

Based on the foregoing, this Court should enter judgment dismissing the second amended complaint in its entirety. But even if the Court holds that the size and location of the clarifying language presents questions of fact warranting further litigation, several of Plaintiffs' claims remain subject to dismissal on independent grounds.

A. Plaintiffs' express and implied warranty claims (Counts I and II) are independently subject to dismissal.

1. The warranty claims fail based on the lack of privity between Plaintiffs and SBD.

Under both New York and Virginia law, the absence of privity between Plaintiffs and SBD independently bars any warranty claims in this case. New York cases hold that privity is an essential element of a cause of action for breach of express warranty, unless the plaintiff claims to have suffered a personal injury. *See Koenig v. Boulder Brands, Inc.*, 995 F. Supp. 2d 274, 290 (S.D.N.Y. 2014) (dismissing express warranty claim based on "fat free" label statement where plaintiff did not buy milk from defendant); *Ebin v. Kangadis Food, Inc.*, No. 13-cv-02311, 2013 WL 6504547, at *6 (S.D.N.Y. Dec. 11, 2013) (dismissing express warranty claim predicated on "100% Pure Olive Oil" label statement). A claim for breach of implied warranty also "requires a showing of privity between the manufacturer and the plaintiff." *Bristol Village, Inc. v. La. Pacific Corp.*, 916 F. Supp. 2d 357, 362-63 (W.D.N.Y. 2013); *accord Feliciano v. Gen. Motors LLC*, No. 14-cv-06374, 2016 WL 9344120, at *6 (S.D.N.Y. Mar. 31, 2016). Virginia law too requires privity for both breach of express and implied warranty claims "[w]here a plaintiff has suffered only economic loss." Robert E. Draim, Va. Prac. Products Liability § 6:4 n.1; *accord Madison v. Milton Home Sys., Inc.*, 86 Va.

Cir. 417, 2013 WL 8211015, at *2 (2013) (citing *Pulte Home Corp. v. Parex, Inc.*, 238 Va. 85, 89 (Va. 2003).

The Plaintiffs in this case have alleged only economic losses, and they have acknowledged that they purchased their products from Lowe's and Sears—not SBD. Second Am. Compl. ¶¶ 48-120; *see* Mem. of Decision, ECF 46, at 46 (recognizing that plaintiffs alleged only economic injury). In light of the acknowledged absence of privity in this case, Plaintiffs' warranty claims are subject to dismissal.

2. Plaintiffs also fail to allege that that their vacuums were not merchantable.

The implied warranty claim also fails as a matter of law for another distinct reason: Plaintiffs cannot plausibly allege that their vacuums were not merchantable. To breach an implied warranty of merchantability, Plaintiffs must establish that their vacuums were not "reasonably capable of performing [their] ordinary function." *Bayliner Marine Corp. v. Crow*, 257 Va. 121, 128 (1999) (quotation marks omitted). The standard is "ordinary" use, which "incorporates trade quality standards and the consumer's reasonable expectations into the concept of merchantability." *Robinson v. Am. Honda Motor Co., Inc*., 551 F.3d 218, 225 (4th Cir. 2009). "[T]o prove that a product is not merchantable, the complaining party must first establish the standard of merchantability in the trade." *Bayliner*, 257 Va. at 128 (dismissing implied warranty claim and finding no evidence that boat was not generally merchantable as fishing boat); *see also Robinson*, 551 F.3d at 225 (dismissing implied warranty claim after analyzing product performance in context of the trade). Similarly, under New York law, Plaintiffs must prove that the vacuum was not "reasonably fit for [its] intended purpose," an inquiry that "focuses on the expectations for the performance of the product when used in the customary, usual and reasonably foreseeable

manners." *Wojcik v. Empire Forklift, Inc*., 14 A.D.3d 63, 66 (N.Y. App. App. Div. 2004) (quoting *Denny v. Ford Motor Co*., 87 N.Y.2d 248, 258–259 (1995)).

Here, there is no allegation that Plaintiffs' wet-dry vacuums failed to do what they are intended to do: namely, clean up debris and liquids. Indeed, this Court's prior opinion in this case expressly concluded that Plaintiffs had not "alleged facts establishing the standard of merchantability in the trade" or "any facts establishing that the vacuum was inadequate for their personal use." Mem. of Decision at 41. On this basis, the Court concluded that Plaintiffs "failed to plausibly allege that the vacuums they purchased would not pass without objection in the trade or were not fit for . . . ordinary use as a wet/dry vacuum." *Id*. Nothing in the Second Circuit's decision undermines that analysis or provides any basis for revisiting those conclusions now. The Court should adhere to its earlier ruling and hold that the implied warranty of merchantability claim fails for this independent reason.

B. The unjust enrichment claim (Count III) is legally deficient.

Even if there had been some plausible allegation of misrepresentation or consumer deception, the unjust enrichment claim would remain legally infirm for several reasons. *First*, Plaintiffs must plausibly allege that they conferred a benefit directly upon *SBD*. "An indirect benefit or a benefit to a third party is simply insufficient to sustain an unjust enrichment claim." *Simpson v. Champion Petfoods USA, Inc*., 397 F. Supp. 3d 952, 973 (E.D. Ky. June 21, 2019) (construing Virginia law); *Kaye v. Grossman*, 202 F.3d 611, 616 (2nd Cir. 2000) (applying New York law) (requiring "specific and direct benefit" to defendant). Here, SBD did not make or sell the products Plaintiffs complain of, and no direct benefit was conferred on SBD as a result of Plaintiffs' purchase. The unjust enrichment claim therefore fails.

Second, plaintiff Wood's unjust enrichment claim separately fails because, under New York law, "[i]t is well settled that where a valid warranty governs the subject matter of a suit, a plaintiff cannot recover in quasi-contract, and it is appropriate to dismiss an unjust enrichment claim." *Haag v. Hyundai Motor Amer.*, 969 F. Supp. 2d 313, 317 (W.D.N.Y. 2013). Here, because Wood expressly alleges that the "PEAK HP" statement created an express warranty that was "part of the basis of the bargain" (Second Am. Compl. ¶ 6), the claim must be dismissed. *See Brady v. Basic Research LLC*, 101 F. Supp. 3d 217, 238 (E.D.N.Y. 2015) (dismissing unjust enrichment claim where plaintiff alleged that advertising and label statements created an express warranty).

Third, under New York law, an unjust enrichment claim is "not available where it simply duplicates, or replaces, a conventional contract or tort claim." *Corsello v. Verizon N.Y., Inc.*, 18 N.Y.3d 777, 790 (N.Y. App. 2012). As a result, courts properly dismiss unjust enrichment claims where a plaintiff alleges other claims predicated on the same alleged wrongdoing. *E.g.*, *Silva v. Smucker Nat. Foods, Inc.*, No. 14-cv-06154, 2015 WL 5360022, at *12 (E.D.N.Y. Sept. 14, 2015) (dismissing claim that defendant was unjustly enriched by root beer "Natural" label statement, when defendant alleged breach of warranty and New York General Business Law claims predicated on the falsity of the same statement); *Koenig v. Boulder Brands, Inc.*, 995 F. Supp. 2d 274, 290–91 (S.D.N.Y. 2014) (dismissing unjust enrichment claim stemming from defendants' misrepresentation that its milk products were fat-free); *see also Goldemberg v. Johnson & Johnson Consumer Cos. Inc.*, 8 F. Supp. 3d 467, 483 (S.D.N.Y. 2014) (rejecting argument that unjust enrichment may be pled in the alternative).

C. The negligent-misrepresentation claim (Count IV) must be dismissed in its entirety.

The Second Circuit has already affirmed this Court's "dismissal of Wood's negligent misrepresentation claim" under New York law. *See Montgomery*, 857 F. App'x at 48-49. However,

even if some portion of the second amended complaint survives, the Court should also reinstate its judgment dismissing the negligent-misrepresentation claim as to Montgomery under Virginia law.

In its prior opinion, this Court recognized that, under Virginia law, "negligent misrepresentation is not an exception to the economic loss rule," and a "plaintiff may not use the tort of negligent misrepresentation to recover pure economic loss resulting from a product's failure to perform as expected." Mem. of Decision at 46 (citing *Stoney v. Franklin*, 54 Va. Cir. 691, 2001 WL 683963, at *4 n.2 (2001)). The Court then proceeded to hold that because "Montgomery only alleged an economic loss, ... his negligent misrepresentation claim is barred by Virginia's economic loss doctrine." *Id*. at 47. Nothing in the Second Circuit's decision disturbs that conclusion or casts any doubt on the Court's holding. Whatever else becomes of the second amended complaint, the Court should reinstate its prior judgment dismissing the negligent misrepresentation count as to Montgomery under the economic-loss doctrine.

D. The Court should also reinstate its judgment dismissing Montgomery's and Wood's request for injunctive relief.

The Court's prior opinion also held that "Montgomery and Wood failed to make any allegations . . . as a basis for future non-monetary damages" and thus "lack[ed] standing to pursue injunctive relief." Mem. of Decision. at 20-21. On that basis, the Court "dismiss[ed] Montgomery and Wood's request for injunctive relief." *Id.* Once again, nothing in the Second Circuit's opinion casts doubt on this analysis or provides any basis for the Court to revisit its holding. The Court should therefore reinstate its judgment of dismissal as to the claims for injunctive relief.

CONCLUSION

The Court should grant the motion and should dismiss the second amended complaint with prejudice.

Dated: November 1, 2021

DEFENDANT,
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By: /s/ Paul D. Williams