UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Nicholas Vaglica, individually and on behalf of all others similarly situated,

Plaintiff,

-against-

Reckitt Benckiser LLC,

Defendant.

Case No. 2:22-cv-05730-NGG-ARL

NOTICE OF MOTION TO DISMISS FIRST AMENDED COMPLAINT

PLEASE TAKE NOTICE that, upon the accompanying Memorandum of Law in Support of Defendant's Motion to Dismiss Plaintiff's First Amended Complaint, Defendant Reckitt Benckiser LLC, moves before the Honorable Nicholas G. Garaufis, United States District Court Judge for the Eastern District of New York, at the United States District Courthouse, 225 Cadman Plaza East, Brooklyn, New York 11201, Room 1426 S, for an order dismissing the First Amended Complaint of Plaintiff Nicholas Vaglica (Dkt. 10) pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, on the grounds that the Complaint fails to state a claim upon which relief can be granted.

Dated: May 1, 2023

Respectfully submitted,

/s/ August T. Horvath

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Attorneys for Defendant Reckitt Benckiser LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 1st day of May 2023, a true and correct copy of the foregoing document has been served on counsel of record who are deemed to have consented to electronic service via electronic mail.

/s/ August T. Horvath
August T. Horvath

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Nicholas Vaglica, individually and on behalf of all others similarly situated, Plaintiff, -against- Reckitt Benckiser LLC, Defendant.

Case No. 2:22-cv-05730-NGG-ARL

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS FIRST AMENDED COMPLAINT

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INTRODUCTION

This putative class action concerns Defendant Reckitt Benckiser LLC's ("Defendant's" or "Reckitt's") Lysol Laundry Sanitizer (the "Product"), whose labeling accurately states that it "kills 99.9% of bacteria." Plaintiff does not claim that the Product fails to sanitize laundry or does not kill 99.9% of bacteria. Rather, Plaintiff alleges that the Product's label is deceptive because it implies a material benefit relative to standard laundry practices consisting of washing clothes with normal laundry detergents, which it allegedly fails to provide. Indeed, Plaintiff challenges the very existence of the product category of laundry sanitizers, and his counsel appears to be gearing up for a copy/paste litigation campaign against the entire market sector. *See Craw v. The Clorox Company*, No. 2:22-cv-02225 (C.D. Ill. Oct. 19, 2022) (complaint against Clorox laundry sanitizer filed by same plaintiff's counsel).

The central premise of Plaintiff's First Amended Complaint ("FAC") – that the Product provides no "meaningful benefit beyond the standard laundering process" – is pled without any basis and is demonstrably false. Plaintiff asserts that the majority of Americans wash all of their clothes in hot water (FAC ¶ 20), that washing in hot water already removes 99.9% of bacteria (FAC ¶ 4). The truth is that most clothes are damaged if they are washed in hot water and that most Americans wash most of their clothes in cold or warm water as directed on their mandated care tags; that the Product indisputably eliminates far more bacteria than washing with cold or warm water does, and even more than the hot water temperatures achieved by home washing machines; and that the Product and its product category are registered and approved by the Environmental Protection Agency (EPA) as providing material consumer benefits over washing with detergent alone, irrespective of temperature. Moreover, even if a consumer does wash all clothes in hot water, as Plaintiff allegedly does, and even if hot water were as effective at

removing bacteria as the Product (which it is not), that consumer could stop damaging his clothing and save on energy bills by switching to appropriate water temperatures and using the Product to kill bacteria – a clear material benefit that is being offered to the consumer, whether or not he acknowledges or takes advantage of it.

Because the implied false claim asserted by Plaintiff – that the Product offers a material benefit over washing laundry with detergent alone – is not false, and can be determined by the Court not to be false as a matter of law by reference to (1) admissions in the Complaint, (2) materials of which the Court can take judicial notice, and (3) common knowledge and common sense, Plaintiff fails to state a claim for any of his alleged causes of action under Rule 12(b)(6) and his case should be dismissed, with prejudice, in its entirety.

Plaintiff's lawsuit not only fails to state a claim, but also is preempted by the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). Because Defendant's Lysol Laundry Sanitizer is a "pesticide," the Environmental Protection Agency ("EPA") must register its labeling – which requires the EPA to determine, among other things, that the label complies with FIFRA's prohibition against misbranding. Under Plaintiff's theory, any mention on the Product's label of what the Product does (or even what it is) would be misleading because it would convey to consumers that the Product confers a material benefit that is not already conferred through the "standard" laundering process. It would thus be impossible for anyone to both comply with the labeling requirements under FIFRA and New York General Business Law ("NYGBL") §§ 349 and 350 since compliance with the former would be a violation with the latter. Therefore, Plaintiff's claims are preempted by FIFRA.

Finally, as set forth below, Plaintiff's ancillary causes of action are fatally defective for various reasons including lack of standing, improper pleading, and inappropriateness to Plaintiff's theory of liability.

BACKGROUND

Defendant markets Lysol Laundry Sanitizer as an additive to standard laundry detergent, with a label claim that it "kills 99.9% of bacteria." The Product is used with detergent to kill bacteria and remove odors. The Product's label informs consumers that it "kills 99.9% of bacteria":

FAC ¶ 5. Unlike detergents, which remove dirt and microbes from fabric using surfactants that unstick them from the fabric and allow them to be carried away by water, the Product contains chemicals that kill bacteria. The Product thus falls within FIFRA's definition of a "pesticide" and is regulated accordingly by the EPA. Pursuant to this regulatory scheme, Reckitt was required to submit its labeling and data substantiating its claims to the EPA as part of the pesticide registration process.[1] The Product has been so registered since 2016, with number 777-

[1] The facts set forth here regarding the EPA-regulated category of laundry sanitizers, and the Product's registration status thereunder, are available on the public web site of the U.S. Environmental Protection Agency (EPA) and are judicially noticeable by the Court for purposes of this motion. *See Bourbia v. S.C.*

128.[2] Registrants must submit substantiation for this benefit in the form of controlled, standardized testing, which EPA reviews and approves.[3] EPA also reviews the product label, including all relevant product claims. When changes are made to the label, they must be submitted to EPA for review and approval, which in the case of the Product, has resulted in a series of further approval notices relating to the exact claim challenged here.[4]

The State of New York maintains a parallel pesticide regulation and registration program requiring that every pesticide nationally registered with the EPA also be registered with the

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Johnson & Son, Inc., 375 F. Supp. 3d 454, 460 n. 1 (S.D.N.Y. 2019) (taking judicial notice of documents relating to the registration and approval of a pesticide as mandated by FIFRA because "the documents' authenticity have not been and cannot be reasonably disputed."); *Wells Fargo Bank, N.A. v. Wrights Mill Holdings, LLC*, 127 F. Supp. 3d 156 (S.D.N.Y. 2015) (taking judicial notice of "documents filed with governmental entities and available on their official websites."); *Crespo v. S.C. Johnson & Sons, Inc.*, 394 F. Supp. 3d 260, 266 n.3 (E.D.N.Y. 2019) (taking judicial notice of the EPA website and documents maintained on it). In any event, these facts are undisputed.

[2] Notice of Pesticide Registration, Feb. 9, 2016, https://www3.epa.gov/pesticides/chem_search/ppls/000777-00128-20160209.pdf, attached to Declaration of August T. Horvath, May 1, 2023 ("Horvath Decl."), submitted herewith, as Exhibit 1.

[3] See EPA, Efficacy Data and Labeling Requirements, Laundry Additives – Sanitization and Disinfection, at https://archive.epa.gov/pesticides/oppad001/web/html/dis-13.html, attached to Horvath Decl., submitted herewith, as Exhibit 2.

[4] See notifications regarding added or modified marketing claims for Product 777-128 dated Sept. 27, 2016, https://www3.epa.gov/pesticides/chem_search/ppls/000777-00128-20160927.pdf; Apr. 3, 2017, https://www3.epa.gov/pesticides/chem_search/ppls/000777-00128-20170403.pdf; Dec. 19, 2017, https://www3.epa.gov/pesticides/chem_search/ppls/000777-00128-20171219.pdf; Sept. 4, 2018, https://www3.epa.gov/pesticides/chem_search/ppls/000777-00128-20180904.pdf; Aug. 7, 2020, https://www3.epa.gov/pesticides/chem_search/ppls/000777-00128-20200807.pdf; Jan. 27, 2022, https://www3.epa.gov/pesticides/chem_search/ppls/000777-00128-20220127.pdf, attached to Horvath Decl., submitted herewith, as Exhibit 3.

Bureau of Pesticides Management of the New York Department of Environmental Conservation ("NYDEC"), and the Product is accordingly so registered.[5]

Plaintiff filed the original Complaint on September 25, 2022, and the FAC on March 24, 2023, alleging that the Product's label is deceptive not because any claim on it is false, but because the label implies that the Product provides a material benefit beyond the standard laundry practices consisting of washing clothes with normal laundry detergents. FAC ¶¶ 4, 6, 24, 25, 41, 42, 43, 57, 61, 64, 66, 75, 76, 78. Plaintiff asserts, without basis, that "standard laundering at hot, warm, or even cold temperatures, followed by drying, is sufficient to achieve a reduction in 99.9% of bacteria, and that Lysol laundry sanitizer is not needed '[T]o kill bacteria.'" FAC ¶ 4. Plaintiff's primary basis for this assertion is a 2021 TikTok video by a Canadian appliance salesman having no discernable expertise in the subject matter. FAC ¶¶ 7-12.

Based on this theory of deception, Plaintiff asserts claims for violations of Sections 349 and 350 of the New York General Business Law and other unspecified "state consumer fraud acts," as well as claims for breaches of express warranty, implied warranty of merchantability/ fitness for a particular purpose and Magnuson Moss Warranty Act, negligent misrepresentation, common-law fraud, and unjust enrichment. FAC ¶¶ 49-79. Plaintiff purports to assert these claims on behalf of himself, a putative class of New York consumers, and a putative "multi-state

[5] See Product Registration, LYSOL BRAND KILLS 99.9% OF BACTERIA LAUNDRY SANITIZER 0% BLEACH USE AS AN ADDITIVE SPORT Details (March 2, 2018), available at https://www.dec.ny.gov/nyspad/products?1, attached to Horvath Decl., submitted herewith, as Exhibit 4.

class" of New Mexico, West Virginia, Iowa, Arkansas, Wyoming, Utah, Montana, Idaho and Alaska consumers. FAC ¶ 49.

ARGUMENT

I. Plaintiff Has Failed to Allege a Plausible Deception

A. Legal Standard

"To survive a motion to dismiss" under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* at 678 (citing *Twombly*, 550 U.S. at 570).

To prove conduct is materially misleading as required under NYGBL §§ 349 and 350, a plaintiff must demonstrate that "a reasonable consumer acting reasonably under the circumstances" would be misled. *Orlander v. Staples, Inc.*, 802 F.3d 289, 300 (2d Cir. 2015). "To state a claim, 'plaintiffs must do more than plausibly allege that a 'label might conceivably be misunderstood by some few consumers.'" *Sarr v. BEF Foods, Inc.*, No. 18-cv-6409, 2020 WL 729883, at *11 (E.D.N.Y. Feb. 13, 2020) (quoting *Jessani v. Monini N. Am., Inc.*, 744 F. App'x 18, 19 (2d Cir. 2018)). A court may determine as a matter of law that an allegedly deceptive practice would not have misled a reasonable consumer. *See Fink v. Time Warner Cable*, 714 F.3d 739, 741 (2d Cir. 2013). In so doing, courts consider the entire context of the alleged misrepresentations, including disclaimers and other disclosures elsewhere on the packaging. *See Fermin v. Pfizer Inc.*, 215 F. Supp. 3d 209, 211-12 (E.D.N.Y. 2016); *Freeman v. Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995) (considering both large and small print in ad in

dismissing consumer protection claims); *Verzani v. Costco Wholesale Corp.*, No. 09-CV-2117, 2010 WL 3911499, at *5-7 (S.D.N.Y. Sept. 28, 2010) (considering entire label on a food tray, which listed each item on the tray and its relative weight, in dismissing case alleging that the food tray's "net weight" label referred only to one item in the tray, not all of the items on the tray).

Under New York law, the elements of fraud are "a representation of material fact, falsity, scienter, reliance and injury." *Vermeer Owners, Inc. v. Guterman*, 78 N.Y.2d 1114, 1116, 585 N.E.2d 377, 578 N.Y.S.2d 128 (N.Y. 1991). "The plaintiff must demonstrate each of the fraud elements 'by clear and convincing evidence.'" *Brassco, Inc. v. Klipo*, No. 99-CV-3014, 2006 WL 223154, at *16 (S.D.N.Y. Jan. 27, 2006) (citing *Vermeer Owners, Inc.*, 78 N.Y.2d at 1116).

Under New York law, breach of an express warranty requires: (1) the existence of an express warranty; (2) material breach of the warranty; (3) damages proximately resulting from the breach; and (4) justifiable reliance on the warranty. *Am. Tax Funding, LLC v. City of Syracuse*, No. 5:12-CV-0290, 2016 WL 1175220, at *16 (N.D.N.Y. Mar. 24, 2016) (citing *Metromedia Co. v. Fugazy*, 983 F.2d 350, 360 (2d Cir.1992)). "A breach of the implied warranty of merchantability occurs when the product at issue is 'unfit for the ordinary purposes for which such goods are used.'" *Twohig v. Shop-Rite Supermarkets, Inc.*, 519 F. Supp. 3d 154, 167 (S.D.N.Y. 2021) (quoting U.C.C. § 2-314(c)).

Under New York law a claim for unjust enrichment must show that "(1) the defendant was enriched; (2) enrichment was at the plaintiff's expense; and (3) the defendant's retention of the benefit would be unjust." *Gidadex, S.r.L. v. Campaniello Imps, Ltd.* 49 F. Supp. 2d. 298, 301 (S.D.N.Y. 1999) (citation omitted).

B. Plaintiff's Claim that the Product Does Not Confer a Material Benefit Has No Factual Basis and is Belied by the Studies Cited in the FAC

1. Plaintiff Inappropriately Seeks to Eliminate the Whole Category of Laundry Sanitizers

Although styled as a false labeling claim in order to shoehorn it into a recognized cause of action, this case is really an effort to eliminate the entire category of laundry sanitizers. Apparently inspired by an appliance salesman's TikTok video claiming that sanitizers are unnecessary, Plaintiff devotes most of the FAC not to attacking any particular element of the Product label, but to general arguments that the product category is unnecessary. The labeling claim attacked by Plaintiff as a "hook" for the alleged deception is "kills 99.9% of bacteria," which is not just a marketing claim, but also the required performance of the product category of laundry sanitizers as regulated by the EPA and by New York. Every product registered in this category must submit substantiation that it kills 99.9% of bacteria under test conditions specified by the agency. "Kills 99.9% of bacteria" is synonymous with labeling the product a "sanitizer."

The EPA, the NYDEC, and other state environmental agencies authorize and regulate the sale of laundry sanitizers for good reason. The EPA explicitly states that "antimicrobial products registered by EPA are effective against common pathogens."[6] In guidance to consumers, EPA distinguishes between sanitizers and detergents that merely clean surfaces, emphasizing that cleaning products, not registered with EPA, only "remove dirt and organic matter from surfaces using soap or detergents" whereas a sanitizer "kills bacteria on surfaces using chemicals."[7]

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[6] EPA, Selected EPA-Registered Disinfectants, available at https://www.epa.gov/pesticide-registration/selected-epa-registered-disinfectants, attached to Horvath Decl., submitted herewith, as Exhibit 5.

[7] EPA, *What's the Difference Between Products that Disinfect, Sanitize, and Clean Surfaces?*, https://www.epa.gov/coronavirus/whats-difference-between-products-disinfect-sanitize-and-clean-surfaces, attached to Horvath Decl., submitted herewith, as Exhibit 6.

Plaintiff's allegations that standard laundry detergent in hot or warm water is just as good as a laundry sanitizer are false both as a matter of law and as a matter of fact, established by a federal government agency, of which the Court therefore can take judicial notice. *See Bourbia v. S.C. Johnson & Son, Inc.*, 375 F. Supp. 3d at 460 n. 1; *Wells Fargo Bank v. Wrights Mill Holdings, LLC*, 127 F. Supp. 3d 156 (S.D.N.Y. 2015); *Crespo v. S.C. Johnson & Sons, Inc.*, 394 F. Supp. 3d 260, 266 n.3 (E.D.N.Y. 2019) (taking judicial notice of the EPA and other government agency websites and documents). Standard laundry detergents do not kill 99.9% of bacteria and cannot meet the EPA's criteria for being a sanitizer. A standard laundry detergent could not legally claim to kill or eliminate 99.9% of bacteria, even in hot water – making such a claim would make it a sanitizer, which would have to be registered with EPA and provide scientific substantiation.[8] The EPA and other government agencies thus have established, through the creation and maintenance of these regulatory regimes, that laundry sanitizers serve a purpose and confer a benefit to consumers, notwithstanding that an appliance salesman on TikTok may disagree. The Court should find that laundry sanitizers offer a material benefit to consumers as a matter of law, and dismiss Plaintiff's claims.

2. Plaintiff Does Not Plausibly Plead that Laundry Sanitizers Eliminate No More Bacteria than Washing, at Any Temperature

Laundry sanitizers also offer a material benefit to consumers as a matter of fact, demonstrable from the allegations of the FAC. Focusing on Plaintiff's narrow argument that the

[8] Such a product would be an unbranded or misbranded pesticide under FIFRA, subject to enforcement action. See EPA, *Will EPA Take Enforcement Action against Companies Making False Claims that their Disinfectants Work against SARS-CoV-2 (COVID-19)?*, https://www.epa.gov/coronavirus/will-epa-take-enforcement-action-against-companies-making-false-claims-their, attached to Horvath Decl., submitted herewith, as Exhibit 7.

phrase "kills 99.9% of bacteria" is misleading because standard laundry practices already eliminate 99.9% of bacteria, Plaintiff's claims should be dismissed because they fail to plead any plausible deception. Plaintiff's central claim has no factual basis and is belied by the very studies cited in the FAC. [9]

Plaintiff's lawsuit is premised on the allegation that the phrase "kills 99.9% of bacteria" falsely suggests that "standard laundering at hot, warm or even cold temperatures, followed by drying, is sufficient to achieve a reduction in 99.9% of bacteria." FAC ¶¶ 1, 4. Plaintiff claims that he only washes his clothing in hot and warm water and that the majority of Americans wash their clothing in hot water, with temperatures of 140°F. FAC ¶¶ 20, 43. Plaintiff provides no factual allegations supporting his contention that laundry is sanitized, to the same degree as by the Product, merely by being washed at these temperatures. The Centers for Disease Control study cited in the FAC, which addresses laundry practices in health-care facilities rather than domestic settings, recommends water temperature of ***at least*** 160°F, in a commercial grade washing machine. *See* CDC, "Guidelines for environmental infection control in health-care facilities: recommendations of CDC and Healthcare Infection Control Practices Advisory Committee (HICPAC)" (updated July 2019), at 116 (available at https://www.cdc.gov/infectioncontrol/pdf/guidelines/environmental-guidelines-P.pdf, attached to

[9] This Court can take into consideration the studies cited in the FAC when ruling on Defendant's motion to dismiss given that Plaintiff's claims relies on them. *See e.g. Ayers v. Suffolk Cty. DA Office*, No. 20-CV-1192, 2022 WL 4539580, at *5 (E.D.N.Y. Sep. 28, 2022) ("At the motion-to-dismiss stage, a court may consider only (i) the complaint itself, (ii) documents either attached to the complaint or incorporated in it by reference, (iii) documents the plaintiff relied on and knew of when bringing suit, and (iv) matters in the public record that are subject to judicial notice") (citing *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007)). Furthermore, this Court "need not feel constrained to accept as truth . . . pleadings that . . . are contradicted either by statements in the complaint itself or by documents upon which its pleadings rely." *Sveaas v. Christie's Inc.*, 452 F. App'x 63, 66 (2d Cir. 2011) (quoting *In re Livent, Inc. Noteholders Sec. Litig.*, 151 F. Supp. 2d 371, 405 (S.D.N.Y. 2001)) (ellipsis original).

Horvath Decl., filed herewith, as Exhibit 8) ("CDC Study"). This temperature is substantially higher than even the hot water temperature of 140°F alleged by Plaintiff (the actual standard definition of "hot water" in a residential machine is 130°F) that a typical residential washing machine can reach, let alone the much lower (80-90°F) temperature of "warm" water. Further, the CDC Study does not find that even washing in 160°F water achieves a 99.9% reduction in bacteria, and recommends, even with such washing, treatment with chlorine bleach or other laundry additives and a mild acid for extra antimicrobial safety. *Id.* at 116. Thus, the only study Plaintiff cites for his allegation that regular washing achieves the same bacteria reduction as the Product actually reports that regular washing does *not* fully eliminate germs from laundry, even at temperatures 20-30°F higher than the maximum temperature of regular washing machines. Plaintiff pleads no basis for his core claim that regular washing eliminates bacteria just as well as the Product, even in hot water, let alone in warm or cold water.

3. Even if Washing in Hot Water Eliminated Bacteria, the Product Still Offers a Material Benefit to Consumers

Even if Plaintiff's allegations that standard washing in hot water eliminates bacteria as effectively as the Product, and that most U.S. consumers wash their clothes only in hot water, were true (which they are not), the Product would still offer a material benefit to all consumers.

Washing in hot water harms clothes. Hot water causes many fabrics, such as cotton, to shrink. Hot water fades the colors of many clothes. Hot water directly damages many synthetic fabrics, such as nylon, lycra, and spandex, by melting the fibers. Because of this, all textiles are sold with care tags, mandated by the Federal Trade Commission, that prominently state what temperature the garment should be washed in, if it is washable. Reasonable consumers know to look for and follow these labels to care properly for their clothes, as a matter of common knowledge and common sense; or at least, they are aware of general rules, such as to wash

delicates and brightly or dark colored clothes in cold water, most items in warm water, and to use hot water only for linens, white clothes, and heavily stained items. When reasonable consumers follow these instructions to care properly for their clothes, by washing most of them in cold and warm water, a substantial reduction in surviving bacteria can be achieved by using the Product.

Plaintiff Vaglica himself is a perfect example of a consumer to whom a material benefit is offered by the Product. Plaintiff allegedly washes clothes only in warm or hot water, presumably to kill germs. FAC ¶ 43. In all likelihood, this means Plaintiff is damaging his clothes, many of which likely should be washed in cold water. In addition, Plaintiff is spending more than necessary on energy to heat the water for his laundry. Plaintiff could kill more germs, prolong the life of his clothing, and save money on energy bills by using the Product and by switching to the temperatures specified on his clothes' care tags. These are undeniably material benefits. It doesn't matter if Plaintiff chooses to forgo these benefits for whatever reason. The material benefits relative to regular washing are still being offered to Plaintiff and to all other consumers.

Indeed, the CDC Study cited in the FAC says that washing clothing at lower temperatures allows for the survival of more bacteria on clothing and thus "low-temperature laundry cycles rely heavily on the presence of chlorine- or oxygen-activated bleach to reduce the levels of microbial contamination." CDC Study, Horvath Decl. Ex. 8, at 116. Outside of a hospital context, where bleach cannot always be used, Defendant's bleach-free sanitizer is precisely the kind of laundry product that consumers need when facing this dilemma; it allows consumers to wash and dry their clothing at low temperatures, and thus preserve their color and integrity for longer periods, while also eliminating as much bacteria as possible.

Plaintiff has failed to plausibly allege that the Product's label (or the Product itself) is capable of misleading a significant portion of reasonable consumers acting reasonably under the circumstances. The Product clearly provides a significant and material benefit for consumers who wish to preserve the integrity and coloring of their clothing while also eliminating the greatest amount of bacteria possible. This Court need not consider whether some consumers wash their clothing at high temperatures regardless of what the instructions on their clothing say, because the guiding criterion for determining whether the Product's label is misleading is whether it is capable of misleading a significant portion of *reasonable* consumers acting *reasonably* under the circumstances. *See Orlander* 802 F.3d at 300; *Sarr*, No. 18-cv-6409, 2020 WL 729883, at *11 (quoting *Jessani*, 744 F. App'x at 19).

Accordingly, Plaintiff's claims under NYGBL §§ 349 and 350, and all similar state consumer protection statutes, should be dismissed. Courts in New York have taken this approach in lawsuits asserting the same or substantially similar claims after dismissing the GBL claims. *Russett v. Kellogg Sales Co.*, No. 7:21-cv-08572, 2022 WL 2789837, at *12 (S.D.N.Y. July 15, 2022); *Santiful v. Wegmans Food Mkts., Inc.*, No. 20-CV-2933, 2023 WL 2457801, at *12 (S.D.N.Y. Mar. 10, 2023) *Bynum v. Family Dollar Stores, Inc.*, 592 F. Supp. 3d 304, 313 (S.D.N.Y. 2022); *Wallace v. Wise Foods, Inc.*, No. 20-CV-683, 2021 WL 3163599, at *3 (S.D.N.Y. July 26, 2021); *Dashnau v. Unilever Mfg. (US), Inc.*, 529 F. Supp. 3d 235, 241 (S.D.N.Y. 2021); *Wynn v. Topo Assocs. LLC*, No. 19-CV-11104, 2021 WL 168541, at *6-7 (S.D.N.Y. Jan. 19, 2021).

II. Plaintiff's Claims Are Also Preempted Because the EPA Has Approved Reckitt's Labeling, Including Its Use of "Kills 99.9% of Bacteria"

Plaintiff's claims are also preempted. When a product makes claims about killing bacteria or other microorganisms, federal law regards it as a "pesticide," which means that the

manufacturer must submit a proposed label and other supporting data to the EPA as part of the "registration" process. *See generally* 7 U.S.C. § 136 (defining "pests" and "pesticides"); 7 U.S.C. § 136a (describing the pesticide registration process). The EPA "will register the pesticide if it determines," among other things, "that its label complies with [FIFRA's] prohibition on misbranding." *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 438 (2005) (citing 7 U.S.C. § 136(q)(1)(A), 40 C.F.R. § 156.10(a)(5)(ii)). FIFRA sets out certain requirements that a label must comply with in order to not be considered misbranded. Among those requirements is that the label must contain directions on how to use the product to effectuate the purpose for which it is intended in a safe manner. 7 U.S.C.S §136(q)(1)(A).

To ensure the exclusivity of the EPA's regulatory scheme, FIFRA contains an express preemption provision, which provides that no state shall "impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter." 7 U.S.C. § 136v(b). "If a state law requirement imposes any obligations that are broader than FIFRA's requirements, 'that state law cause of action would be pre-empted by § 136v(b) to the extent of that difference.'" *Carias v. Monsanto Co.*, No. 15-CV-3677, 2016 U.S. Dist. LEXIS 139883, at *9 (E.D.N.Y. Sep. 30, 2016). While states and localities have ample room to supplement federal efforts, they cannot penalize what federal law requires or come in direct conflict with federal law. *Bates*, 544 U.S. at 442; *Davis v. 2191 Niagara St., LLC*, 351 F. Supp. 3d 394, 403-04 (W.D.N.Y. 2019) (citing *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873 (2000) and *Am. Telephone & Telegraph Co. v. Central Office Telephone, Inc.*, 524 U.S. 214, 227 (1998)). Further, "federal law will preempt state law . . . when 'compliance with both federal and state regulations is a physical impossibility.'" *In re Methyl Tertiary Butyl Ether*

Products Liab. Litig. (*In re MTBE Litig.*), 725 F.3d 65, 96 (2d Cir. 2013) (quoting *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963)).

Here, it is indisputable – and a matter of public record – that the EPA has registered the labeling of Lysol Laundry Sanitizer, as set forth above. Each EPA registration includes a list of approved labeling claims, including permutations of the phrase "kills 99.9% of bacteria" in laundry. Plaintiff acknowledges as much in the FAC, that Reckitt "may be authorized to claim" that its Laundry Sanitizer "can achieve a reduction in 99.9% of bacteria." FAC ¶ 24. However, Plaintiff's main contention is not that the claim "kills 99.9% of bacteria" is false, but that it is misleading because it implies that the Product confers a meaningful benefit beyond what the standard laundering process already provides. This is essentially a challenge to the very existence of the Product as a laundry sanitizer because the very description of what the Product is or what it does allegedly misleads consumers into believing that there is a material benefit to using it when washing and drying their clothing is enough. Under Plaintiff's theory, no business could ever market a laundry sanitizer in compliance with FIFRA while also complying with the GBL (or other "state consumer fraud acts") because complying with FIFRA, by stating accurately what the Product does, would mean running afoul of the GBL. For example, if a manufacturer lists instructions on how to use the Product to disinfect clothing, as required by Section 136v(b) of FIFRA, they would be violating the GBL by implying that consumers can use the Product to sterilize their laundry. Even identifying the Product as a sanitizer, which manufacturers obviously must do for consumers' safety, would be misleading under Plaintiff's theory of deception because, again, it would imply that washing clothes with normal detergents does not fully sanitize clothing. *See* 7 U.S.C.S. § 136(q)(1)(A). Therefore, Plaintiff's claims are

preempted by Section 136(v)(a) of FIFRA because it would be impossible for Defendant to both comply with FIFRA and NYGBL under Plaintiff's theory of deception.

In addition, the registration and approval of the Product's label by both EPA and the New York Department of Environmental Conservation precludes this suit under the safe harbor provisions of GBL § 349(d) ("it shall be a complete defense that the act or practice is . . . subject to and complies with the rules and regulations of, and the statutes administered by [any] agency of the United States") and § 350-d ("it shall be a complete defense that the advertisement is subject to and complies with the rules and regulations of, and the statutes administered by … any official department, division, commission or agency of the state of New York"). This is especially true because the specific label claim challenged by the Plaintiff, "kills 99.9% of bacteria," is precisely the defining characteristic of this product category as required and regulated by these agencies. It cannot be unlawful to market a product whose existence is specifically permitted and guided by government agencies and to characterize the Product in exactly the way that characterizes this category.

III. Plaintiff's Ancillary Causes of Action and other "State Consumer Fraud Acts" Would Fail Even If Plaintiff's Deception Theory Held Water

Plaintiff's ancillary state and common-law causes of action must be dismissed even if Plaintiff's deception theory were plausible. These ancillary claims fail because Plaintiff has no standing to bring these causes of action, they are inadequately or improperly pled, and/or they are simply inappropriate to the fact pattern Plaintiff alleges.

A. Plaintiff Lacks Standing to Bring Violations Under Other "State Consumer Fraud Acts"

Plaintiff lacks standing to sue under the laws of any state other than New York. As the FAC makes clear, Plaintiff is a resident of New York and allegedly purchased the Product in

New York. FAC ¶¶29, 38. He therefore lacks standing to sue under the laws of any state other than New York, and this Court should dismiss those claims. *Parks v. Dick's Sporting Goods, Inc.*, No. 05-CV-6590, 2006 WL 1704477, at *5-7 (W.D.N.Y. June 15, 2006) (plaintiff lacked standing "to assert state-law claims arising under the laws of states other than New York, since he was never employed by defendant anywhere other than New York"); *In re Propranolol Antitrust Litig.*, 249 F. Supp. 3d 712, 727 (S.D.N.Y. 2017) (" '[A] plaintiff must demonstrate standing for each claim [s]he seeks to press, each state law claim must be accompanied by a named plaintiff who has suffered an injury under that state's statute, and class certification does not remedy this requirement") (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 335 (2006)); *Gonzales v. Agway Energy Servs., LLC*, No. 5:18-cv-235 (MAD/ATB), 2018 WL 5118509, at *6 (N.D.N.Y. Oct. 22, 2018) (same).

In addition, this Court lacks both general and specific jurisdiction over Reckitt as to the out-of-state claims and class members. Plaintiff Vaglica is a New York resident and Defendant Reckitt is correctly alleged to be a Delaware corporation with its principal place of business in New Jersey. FAC ¶¶ 29, 30. Plaintiff purports to represent two consumer classes, one of New York consumers and one of consumers in nine other states. FAC ¶ 49. Plaintiff purports to assert claims under the individual state "Consumer Fraud Acts" without even identifying or citing them. FAC ¶ 59. Plaintiff Vaglica is not protected by the statutory or common law of any of these nine states and has no standing to assert claims under them. *Parks*, 2006 WL 1704477, at *5-7; 1 McLaughlin on Class Actions § 4:28 (13th ed. 2016) ("The named plaintiffs in a putative class action lack standing to assert claims under the laws of states in which they do not reside or in which they suffered no injury."). No other plaintiff has appeared or alleged injury in any of these nine states.

Under the Supreme Court's ruling in *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*, 137 S. Ct. 1773, 198 L. Ed. 2d 395 (2017), a New York court lacks personal jurisdiction over Reckitt as to claims brought on behalf of plaintiffs who are neither New York residents nor suffered their alleged injuries in New York. Courts in this District have ruled that the logic of *Bristol-Myers* applies also to U.S. District Courts adjudicating class actions brought under state laws. *In re Dental Supplies Antitrust Litig.*, No. 16 Civ. 696, 2017 WL 4217115, at *37 (E.D.N.Y. Sep. 20, 2017) (dismissing class action for failure to allege a direct connection between the forum and the specific claims); *Gonzalez v. Costco Wholesale Corp.*, No. 16-CV-2590, 2018 U.S. Dist. LEXIS 171000, at *18 (E.D.N.Y. Sep. 29, 2018) ("the court lacks general personal jurisdiction over Defendant to adjudicate the claims of the out-of-state class members because New York is not the state where Defendant's principal place of business is located nor is it where Defendant is incorporated").

B. Plaintiff Fails to State a Claim for Negligent Misrepresentation

Plaintiff's claim for negligent misrepresentation is inappropriate under these circumstances, in which Plaintiff alleges misstatements by an advertiser to a mass audience of consumers engaging in arm's-length transactions. In New York, there must be a special relationship of confidence and trust to establish potential liability for negligent misrepresentation. *Kimmell v. Schaefer*, 89 N.Y.2d 257, 263 (1996) (requiring "special relationship" that places an exceptional duty of care on a speaker, such as where plaintiffs were investors in a limited partnership and defendant was attorney and director of an affiliated company who personally solicited plaintiffs as investors). The duty to speak with care arises when "the relationship of the parties, arising out of a contract or otherwise, [is] such that in morals and good conscience the one has a right to rely upon the other for information." *Id.* at 263, quoting *International Prods. Co. v. Erie R. R. Co.*, 244 N.Y. 331, 338 (1927). To establish

a claim for negligent representation the plaintiff must demonstrate "(1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information." *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 180 (2011); see also *J.A.O. Acquisition Corp. v. Stavitsky*, 8 N.Y.3d 144, 148 (2007); *Basis Yield Alpha Fund (Master) v. Goldman Sachs Grp., Inc.*, 115 A.D.3d 128, 141 (App. Div. 2014) (cause of action dismissed for complaint's lack of allegation of a relationship of trust and confidence between the parties). Negligent misrepresentation claims generally are lodged against individuals with a direct, one-on-one relationship with the plaintiff, especially professionals having special expertise, such as attorneys, accountants and consultants. *Kimmell*, 89 N.Y.2d at 263-64. Applying this theory where Plaintiff, and the putative class, are members of a mass audience of consumers, with no direct relationship to Reckitt, is improper, and the claim should be dismissed.

C. Plaintiff Fails to State a Claim for Breach of Express Warranty or Implied Warranty of Merchantability

Plaintiff alleges that the Product "expressly and impliedly warranted to Plaintiff and class members that it provided a meaningful benefit beyond the standard laundering process in terms of sanitizing laundry and reducing bacteria." FAC ¶61. These are allegedly implied, not express, representations. Express warranty claims must be founded on express representations – that is, a literal affirmation of fact or promise about the specific thing Plaintiff alleges to be untrue. *See Parks v. Ainsworth Pet Nutrition, LLC*, 377 F. Supp. 3d 241, 248 (S.D.N.Y. 2019) ("Generalized statements by a defendant …. do not support an express warranty claim if they are such that a reasonable consumer would not interpret the statement as a factual claim upon which he or she could rely."); *In re Frito-Lay North America All Natural Litigation*, 12-MD-2413, 2013 WL 4647512, at *84-85 (E.D.N.Y. Aug. 29, 2013).

Firstly, Plaintiff failed to provide Reckitt the pre-suit notice required to bring express or implied warranty claims. Plaintiff merely stated that he "provided or will provide notice to defendant, its agents, representatives, retailers and their employees." FAC ¶ 70. "In New York, 'a buyer must provide the seller with timely notice of an alleged breach of warranty.'" *Warren v. Whole Foods Mkt. Grp., Inc.*, No. 19-CV-6448, 2021 WL 5759702, at *22 (E.D.N.Y. Dec. 3, 2021) (quoting *Colella v. Atkins Nutritionals, Inc.*, 348 F. Supp. 3d 120, 143 (E.D.N.Y. 2018) (citing N.Y. U.C.C. § 2-607(3)(a) ("[T]he buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy.")). Claims brought without notice must be dismissed. *Id.* at 144. "While [it] is true that several New York cases recognize a notice-requirement exception for retail sales, 'the exception appears to be exclusively applied where a party alleges physical, in addition to economic injury.'" *Warren*, 2021 WL 5759702, at *22 (quoting *Colella*, 348 F. Supp. 3d at 144).

Plaintiff's allegation that he "provided or will provide" notice is nothing more than an obfuscation of the fact that Plaintiff provided no such notice. Furthermore, neither exception to the notice requirement applies because Plaintiff did not allege any personal injury nor can he merely depend on Reckitt's knowledge of the Product. Plaintiff's claim for breach of implied warranty of merchantability must also be dismissed because of lack of pre-suit notice. *Warren*, 2021 WL 5759702, at *23-24, ("[F]ailure to provide presuit notice that dooms plaintiffs' express warranty claim is also fatal to plaintiffs' implied warranty claim") (referencing *Campbell v. Whole Foods Mkt. Grp., Inc.*, 516 F. Supp. 3d 370, 392 (S.D.N.Y. 2021) (collecting cases)). The only other plausible argument for a breach of implied warranty of merchantability is that the Product does not "conform to the promise or affirmations of fact made on the container or label"

(U.C.C. § 2-314(f)), which is just a restatement of the definition of an express warranty, and requires a literal affirmation or promise. These, again, were not pled; Plaintiff's case is based entirely on implied, not express, claims.

Plaintiff's Magnuson Moss Warranty Act ("MMWA") claim should also be dismissed because Plaintiff does not identify statements on the label that warrant a product free from defect, nor does anything on the labels constitute a promise that the product will meet a specified level of performance as required to state a sufficient MMWA claim. The only statement Plaintiff identifies as constituting any warranty is that the Product claims to "kill 99.9% of bacteria" which is not sufficient to maintain a MMWA claim because the challenged statement is not a "warranty" against a product defect over a specific time period. *See Chufen Chen v. Dunkin' Brands, Inc.*, No. 17-CV-3808, 2018 WL 9346682, at *16 (E.D.N.Y. Sep. 17, 2018). Plaintiff's MMWA claim also fails because it is merely duplicative of his other warranty claims, which are deficient in themselves for the aforementioned reasons. *See Cali v. Chrysler Grp.* LLC, No. 10-CV-7606, 2011 WL 383952, at *11 (S.D.N.Y. Jan. 18, 2011) (dismissing MMWA claims where underlying state-law claims were dismissed).

D. Plaintiff Fails to State a Claim for Fraud

Plaintiff's claim for fraudulent misrepresentation fails because he has not pled fraud with the required specificity. "To state a cause of action for fraudulent misrepresentation under New York law, a plaintiff must allege 'a representation of material fact, the falsity of the representation, knowledge by the party making the representation that it was false when made, justifiable reliance by the plaintiff and resulting injury.'" *McBeth v. Porges*, 171 F. Supp. 3d 216, 225 (S.D.N.Y. 2016) (quoting *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 291 (2d Cir. 2006)). Claims of fraud "must be pled with particularity" beyond that of a normal claim. *Schwartzco Enterprises LLC v. TMH Mgmt., LLC*, 60 F. Supp. 3d 331, 344 (E.D.N.Y. 2014).

Further, under Fed. R. Civ. P. 9(b), Plaintiff must plead "details that 'give rise to a strong inference that the defendant[] had an intent to defraud, knowledge of the falsity, or a reckless disregard for the truth.'" *Id.* (quoting *Cohen v. S.A.C. Trading Corp.*, 711 F.3d 353, 359 (2d Cir. 2013)).

New York courts have held that in false-advertising cases involving mass-marketed products, allegations that the defendant was commercially motivated to increase its market share, to satisfy consumer desires and expectations, and to increase its sales and profits do not give rise to the necessary strong inference that the defendant had an intent to defraud. *See Sarr*, 2020 WL 729883 at 26-27 (citing *In re Frito-Lay*, 2013 WL 4647512, at *25 and *Chill v. Gen. Elec. Co.*, 101 F.3d 263, 268 (2d Cir. 1996)). Plaintiff here does not even do this. His only allegation of fraudulent intent just circularly reiterates his allegation of a false or misleading statement: "Defendant misrepresented and/or omitted the attributes and qualities of the Product relative to the efficacy of the standard laundering process, which conveyed to Plaintiff it provided a meaningful benefit beyond the standard laundering process." FAC ¶ 78. No basis for any finding of "strong inference of intent to defraud" is pled.

E. Plaintiff Fails to State a Claim for Unjust Enrichment

Plaintiff's claim for unjust enrichment must fail because it is duplicative of his fraud and false advertising claims. An unjust enrichment claim is not available where it simply replicates another claim. *See Weisblum v. Prophase Labs, Inc.*, 88 F. Supp. 3d 283, 296-97 (S.D.N.Y. 2015) (dismissing unjust enrichment claim that was duplicative of GBL claims); *Bowring v. Sapporo U.S.A., Inc.*, 234 F. Supp. 3d 386, 392 (E.D.N.Y. 2017) (same). This rule has been repeatedly applied by New York's federal courts to dismiss add-on unjust enrichment claims in cases similar to the current one. *See, e.g., Price v. L'Oreal USA, Inc.*, No. 17-civ-0614, 2017 WL 4480887, at *13 (S.D.N.Y. Oct. 5, 2017) ("All of the claims in the Complaint are based on

the same alleged misrepresentation by Defendants that the Products contain keratin. Accordingly, Plaintiff's New York unjust enrichment claim is dismissed as duplicative."); *Buonasera v. Honest Co., Inc.*, 208 F. Supp. 3d 555, 568 (S.D.N.Y. 2016) (dismissing unjust enrichment claim on the grounds that it was duplicative).

CONCLUSION

For the foregoing reasons, Reckitt respectfully requests that this Court grant its motion to dismiss Plaintiff's First Amended Complaint.

Dated: May 1, 2023

Respectfully submitted,

/s/ August T. Horvath

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 1st day of May 2023, a true and correct copy of the foregoing document has been served on counsel of record by electronic mail at the addresses entered by counsel of record for ECF service in this matter.

/s/ August T. Horvath
August T. Horvath