UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JILL CLARK, on behalf of herself and others similarly situated, Plaintiff, v. SAMSUNG ELECTRONICS AMERICA, INC., Defendant.	Civil Action No. 2:20-cv-12969 (WJM) (MF) **MOTION RETURN DATE: JANUARY 4, 2021** **ORAL ARGUMENT REQUESTED**

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

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Defendant Samsung Electronics America, Inc. respectfully submits this Memorandum of Law in support of its Motion, pursuant to Fed. R. Civ. P. 12(b)(1) and (6), to dismiss the Plaintiff Jill Clark's Complaint in its entirety.

I. PRELIMINARY STATEMENT

Plaintiff Jill Clark seeks to represent a purported "New Jersey class" of consumers, asserting claims under the New Jersey Consumer Fraud Act ("NJCFA"), as well as for common law fraud and unjust enrichment, based on the allegation that Samsung Galaxy S7, S7 Edge and S7 Active phones were not as water resistant as advertised.[1] As a threshold matter, this Court lacks subject matter jurisdiction over the action and should dismiss the Complaint on that ground alone, pursuant to Rule 12(b)(1).

First, Clark's attempt to rely on the Class Action Fairness Act ("CAFA") fails because she offers only conclusory assertions about the jurisdictional requirements. As the proponent of federal jurisdiction, Clark has the burden of proving by a preponderance of the evidence that all CAFA's requirements are satisfied: an amount in controversy exceeding $5,000,000, minimal diversity, and at least 100 class members. But Clark fails to allege any facts to support her conclusory assertion that these requirements are met, and naked legal conclusions are not taken as true in evaluating jurisdiction. Because Plaintiff fails to allege any

[1] Clark also alleges an individual claim under the Magnuson-Moss Warranty Act solely on a breach of express warranty theory.

facts showing that CAFA's requirements are met, dismissal is required.

Second, Clark cannot manufacture federal question jurisdiction by asserting an individual claim for violation of the Magnuson-Moss Warranty Act ("MMWA") because her individual claim (the only MMWA claim asserted) does not satisfy the $50,000 amount-in-controversy requirement for bringing such claims in federal court. Courts in this circuit have consistently held that this requirement must be based solely on the MMWA claims in the case; pendent state claims, attorneys' fees, and court costs are not included. And because Plaintiff asserts her MMWA claim individually, the *only* damages that can be considered in determining whether the $50,000 amount-in-controversy requirement is satisfied are those associated with her individual MMWA claim, which fall far short of the jurisdictional threshold. Accordingly, the Court has no federal question jurisdiction over Plaintiff's individual MMWA claim.

Third, even if Plaintiff could establish federal jurisdiction (she cannot), all of her claims should be dismissed under Rule 12(b)(6) because she fails to allege facts that plausibly state a claim. Plaintiff's MMWA claim does not identify any written affirmation that qualifies as a warranty under the statute. The fraud-based allegations are too conclusory to meet the heightened Rule 9(b) pleading standard. And the unjust enrichment claim fails because there is no direct relationship between Plaintiff, an indirect purchaser, and Samsung, and thus Plaintiff cannot

allege that she expected remuneration from Samsung. Thus, all of Clark's claims should be dismissed.

II. RELEVANT BACKGROUND

A. Procedural History

On September 12, 2016, plaintiff Dulce Alondra Velasquez-Reyes filed a putative class action against Samsung in the District Court for the Central District of California, styled *Velasquez-Reyes v. Samsung*, Docket No. 5:16-cv-01953, alleging fraud, false advertising, and related claims based on the sale of Samsung's Galaxy S7, S7 Edge and S7 Active phones (the "California Action"). (California Action ECF No. 1.)[2] Almost four years later, on May 19, 2020, a Second Amended Complaint was filed in the California Action ("SAC"), which, among other things, added Clark as a new named plaintiff, and added claims under the NJCFA (N.J.S.A. § 56:8-1 *et seq.*) on behalf of Clark and a proposed New Jersey Class, as well as a claim under the MMWA (15 U.S.C. §§ 2301-2312) individually on behalf of Clark. (California Action ECF No. 83.) In exchange for Samsung's stipulation to the filing of the SAC (among other things), plaintiffs removed all

[2] The complete procedural history of the California Action is beyond the scope of this Motion. But plaintiff Dulce Alondra Velasquez-Reyes's claims were dismissed from the California Action on July 16, 2020. (California Action ECF No. 97.) And the claims of the only other remaining plaintiff in the California Action, Martin Baclija, were compelled to arbitration on October 21, 2020. (California Action ECF No. 124.) At this time, the California Action is stayed in its entirety pending arbitration of Baclija's claims on an individual basis. (*Id.*)

nationwide class allegations, and the California District Court ordered—pursuant to the parties' stipulation—that plaintiffs "shall not seek further leave to amend the SAC[.]" (*Id.* ECF No. 82.)

On June 18, 2020, Samsung filed a motion to dismiss Clark's complaint under Rule 12(b)(2) and (6), for lack of personal jurisdiction and failure to state a claim, showing that there was no general or specific jurisdiction over Clark's claims in California. (*Id.* ECF No. 87.) Clark did not contest the jurisdictional challenge, instead filing a cross-motion to transfer to the District of New Jersey. (*Id.* ECF Nos. 99, 100.) On September 17, 2020, the California District Court ordered Clark's claims severed and transferred to the District of New Jersey. (*Id.* ECF No. 115.) Consistent with the parties' stipulation that there would be no further amendments to the Complaint (*id.* ECF No. 79), Clark rests on her allegations as set forth in the SAC filed in the California Action. (*See* New Jersey ECF No. 126.)

B. Plaintiff's Allegations

Clark alleges that she purchased a new Galaxy S7 phone (the "S7") from a Best Buy in New Jersey on or about December 27, 2017, after supposedly reviewing (unspecified) advertisements saying the phone is water resistant. (Compl. ¶ 32.) Clark complains that, after she purchased her S7, the device was "briefly exposed to water and began acting strange." (*Id.* ¶ 35.) Clark alleges that

she contacted Samsung by phone about the problems, but Samsung supposedly "never followed up with any feedback." (*Id.* ¶ 36.)

Clark alleges that Samsung's advertising supposedly included "objective affirmations of facts and promise[s]," but the only specific statement she identifies in her MMWA claim is that the S7 is "water resistant up to 5 feet of water for up to 30 minutes." (*Id.* ¶ 109.) Clark alleges that she "was exposed to and relied on" this statement "when she decided to buy an S7 Phone," but does not explain when, where, or how she saw it. (*Id.* ¶ 110.)

Based on these allegations, Clark has asserted claims for fraud, violation of the NJCFA, and unjust enrichment against Samsung, on behalf of herself and a proposed New Jersey Class defined as "all individuals who purchased a new Galaxy S7, Galaxy S7 Edge or Galaxy S7 Active cellular phone in New Jersey." (*Id.* ¶ 41.)[3] Plaintiff also brings a claim under the MMWA, individually.

Plaintiff asserts, without any supporting factual allegations, that the Court has jurisdiction under the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d). (*Id.* ¶ 11.) Yet Clark alleges she is a citizen of New Jersey (*id.* ¶ 9), that Samsung has its headquarters and principal place of business in New Jersey (*id.* ¶ 6), and that the putative class is limited to New Jersey purchasers. (*Id.* ¶ 41.) The Complaint contains no factual allegations supporting the requirements for CAFA

[3] Clark did not purchase an S7 Edge or S7 Active but purports to represent individuals who purchased these different devices.

jurisdiction – minimal diversity, over 100 class members or the $5 million amount-in-controversy. Plaintiff also alleges, incorrectly, that this Court has jurisdiction under 28 U.S.C. § 1331 based on her MMWA claim, and that supplemental jurisdiction exists over her state law claims under 28 U.S.C. § 1367. (*Id.* ¶ 10.)

III. ARGUMENT

A. Standard of Review

A party attempting to invoke the jurisdiction of the federal courts has the burden to show that the jurisdictional requirements are satisfied. *Samuel-Bassett v. Kia Motors Am., Inc.*, 357 F.3d 392, 396 (3d Cir. 2004). There are two principal bases upon which a district court may exercise subject matter jurisdiction: federal question or diversity of citizenship among the parties. *See* 28 U.S.C. §§ 1331, 1332. "The limited nature of federal jurisdiction needs little discussion. This principle marks a fundamental precept of the American court system." *New Rock Asset Partners, L.P. v. Preferred Entity Advancements*, 101 F.3d 1492, 1502 (3d Cir. 1996).

Under Rule 12(b)(1), "a court must grant a motion to dismiss if it lacks subject matter jurisdiction to hear a claim." *Shibles v. Bank of Am., N.A.*, 730 F. App'x 103, 105 (3d Cir. 2018) (quoting *In re Schering Plough Corp. Intron*, 678 F.3d 235, 243 (3d Cir. 2012)). "When subject matter jurisdiction is challenged under Rule 12(b)(1), the plaintiff must bear the burden of persuasion." *Neuss v.*

Rubi Rose, LLC, 2017 U.S. Dist. LEXIS 83444, at *7 (D.N.J. May 31, 2017) (citation omitted); *see also Gallagher v. Johnson & Johnson Consumer Cos.*, 169 F. Supp. 3d 598, 602 (D.N.J. 2016).

In deciding a motion under Rule 12(b)(6), the district court is "required to accept as true all factual allegations in the complaint and draw all inferences in the facts alleged in the light most favorable to the [plaintiff]." *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 228 (3d Cir. 2008). This Rule, however, "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see also Phillips*, 515 F.3d at 231. "A court need not credit either 'bald assertions' or 'legal conclusions' in a complaint when deciding a motion to dismiss." *Kanter v. Barella*, 489 F.3d 170, 177 (3d Cir. 2007) (quoting *Evancho v. Fisher*, 423 F.3d 347, 351 (3d Cir. 2005)). "Legal conclusions receive no such deference, and the court is 'not bound to accept as true a legal conclusion couched as a factual allegation.'" *Boring v. Google Inc.*, 362 F. App'x 273, 278 (3d Cir. 2010).

Here, it is clear from the face of Plaintiff's Complaint that this Court does not have subject matter jurisdiction based on CAFA or Plaintiff's individual MMWA claim, and thus the Complaint must be dismissed. In the alternative, Plaintiff's allegations do not state any claims and should be dismissed under Rule

12(b)(6).

B. The Court Lacks Federal Jurisdiction Over Plaintiff's Complaint.

This Court lacks federal jurisdiction because Plaintiff does not allege a factual basis to support CAFA jurisdiction, and she cannot satisfy the requirements for CAFA. Plaintiff's MMWA claim also does not meet the $50,000 amount-in-controversy requirement for bringing claims in federal court. Accordingly, there is no federal jurisdiction and Plaintiff's Complaint must be dismissed in its entirety.

A defendant may attack a district court's subject matter jurisdiction in one of two ways. First, a defendant may challenge subject matter jurisdiction by asserting that the complaint, on its face, does not allege sufficient grounds to establish jurisdiction. *See Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977). In evaluating a Rule 12(b)(1) motion based on the pleadings, the court must assume that the allegations contained in the complaint are true. *Id*. Second, a defendant may challenge a district court's subject matter jurisdiction by factually attacking the plaintiff's jurisdictional allegations as set forth in the complaint. *Id*. In such circumstances, "the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Id*. "[N]o presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." *Id*. Here, there is no subject matter jurisdiction because

the Complaint fails to allege any facts supporting jurisdiction at all, and the facts alleged show Plaintiff cannot satisfy CAFA's requirements.

1. Plaintiff has not alleged a factual basis for and cannot prove that the elements of CAFA jurisdiction are satisfied.

Plaintiff's CAFA allegations are subject to both a facial and factual challenge, as she alleges nothing showing that CAFA's minimal diversity or amount-in-controversy requirements are satisfied. 28 U.S.C. § 1332(d). Plaintiff recites, in a single conclusory paragraph, the legal elements of CAFA without any facts to support her conclusions. (*See* Compl. ¶ 11.) These unsupported legal conclusions—which do not differentiate between the California and New Jersey "classes" and provide no information at all about the putative New Jersey class—should not be accepted as true in deciding this motion. *See Heleine v. Saxon Mortg. Servs.*, 2013 U.S. Dist. LEXIS 47466, at *9-10 (D.N.J. Apr. 2, 2013) ("Significantly, no presumption of truthfulness attaches to the allegations of the complaint insofar as they concern subject matter jurisdiction.") (citing *Mortensen*, 549 F.2d at 891).

The only allegations Clark does provide indicate that she cannot satisfy CAFA's requirements. Plaintiff alleges that she and Samsung are both New Jersey citizens (Comp. ¶¶ 6, 9), but she does not identify or even allege any diverse party, and thus these allegations show that Plaintiff has not satisfied the minimal-

diversity requirement.[4] Plaintiff also does not allege anything showing that the putative New Jersey Class satisfies the $5 million amount-in-controversy requirement. Clark does not allege how much she paid for her S7 or how much she can show in damages, nor does she plead any facts regarding the number of putative members of the New Jersey Class or the quantum of damages those putative class members are alleged to have suffered. In sum, she has entirely failed to allege facts supporting her legal contention that CAFA applies.

In addition to these facial deficiencies, which require dismissal, Plaintiff's Complaint is also subject to factual challenge. Plaintiff has the burden of proving by a preponderance of the evidence that CAFA's requirements are met. *See Nahas v. Shore Med. Ctr.*, 2016 U.S. Dist. LEXIS 33307, at *10-11 (D.N.J. Mar. 14, 2016) ("[W]here a defendant moves to dismiss under Rule 12(b)(1) for lack of subject-matter jurisdiction, the plaintiff bears the burden of proving by a preponderance of the evidence that the Court has subject matter jurisdiction."); *Heleine*, 2013 U.S. Dist. LEXIS 47466, at *13 ("When CAFA jurisdiction is

[4] The Complaint is not entirely clear about whether Plaintiff is purporting to represent California purchasers, but, if so, she lacks standing to do so. *See Ponzio v. Mercedes-Benz USA, LLC*, 447 F. Supp. 3d 194, 223 (D.N.J. 2020) ("Plaintiffs lack standing to assert claims on behalf of unnamed plaintiffs in jurisdictions where Plaintiffs have suffered no alleged injury."); *Semeran v. BlackBerry Corp.*, 2016 U.S. Dist. LEXIS 87379, at *18-19 (D.N.J. July 6, 2016) ("A named plaintiff must be a part of the class which he seeks to represent. . . . Thus, because Plaintiff is not a member of the class of thirty-one states, he cannot prosecute claims on behalf of those in that class.").

challenged, as it is in the instant matter, the party asserting proper jurisdiction — here, Plaintiffs — bears the burden of satisfying CAFA's requirements by a preponderance of the evidence."). Plaintiff cannot carry this burden.

First, the minimal-diversity requirement is not met because Plaintiff has not alleged or provided any reason to infer that any member of the proposed class is diverse. *See* 28 U.S.C. § 1332(d)(2)(A). Instead, she alleges that Samsung has a principal place of business in Ridgefield Park, New Jersey. (Compl. ¶ 6.) *See* 28 U.S.C. § 1332(c)(1) ("a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business . . ."). The only named plaintiff, Jill Clark, is also a citizen of New Jersey. (Compl. ¶ 9.) Clark asserts claim on behalf of herself, individually, and on behalf of a proposed class of New Jersey purchasers. (*Id.* ¶ 41.) But she has not identified, or alleged any reason to suppose that, any putative class member is diverse.[5]

[5] Under the mandatory "home state" exception, the district court also must decline to exercise jurisdiction where "two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed." 28 U.S.C. § 1332(d)(4)(B). Here, Plaintiff seeks to represent only a proposed "New Jersey Class" of purchasers. (Compl. ¶ 41.) Samsung is the only defendant in this action, and is a local defendant "from whom significant relief is sought by members of the plaintiff class" and "whose alleged conduct forms a significant basis for the claims asserted." 28 U.S.C. §§ 1332(d)(4)(A)(i)(II)(aa), (bb). Plaintiff provides no reason to believe that putative class members are not New Jersey citizens, and thus, the home state exception also would bar federal jurisdiction.

Second, Plaintiff's factual allegations indicate that she cannot satisfy the $5 million amount-in-controversy requirement. The only damage she alleges is that her Galaxy S7 "acts strange" when exposed to water, "goes haywire" when she touches it with a damp hand, and must be dried and restarted when wet. (Compl. ¶ 35.) But she does not allege that she cannot use her device or has had to replace or repair it or has incurred any quantifiable damage. Plaintiff also does not identify any other New Jersey purchaser who has experienced similar problems or the amount of any alleged damages. Thus, Plaintiff has offered no factual basis to quantify her own damages (if any), let alone those of the putative class. *See Heleine*, 2013 U.S. Dist. LEXIS 47466, at *16 (dismissing for lack of CAFA jurisdiction where court was "unable to determine from these various figures [noted in the complaint]" how $5 million was at issue).

Clark cannot excuse this failure by pointing the finger at Samsung. As a general matter, Samsung does not sell directly to consumers and thus does not regularly maintain information about where all Galaxy S7 users purchased their devices or how much they paid.[6] Thus, while the overall percentage of water damage claims made to Samsung was extremely low and highly unlikely to support a $5 million aggregate claim solely by New Jersey purchasers, Plaintiff

[6] Rather, Samsung generally sold the S7 to major retailers, distributors, and cellular carriers, who, in turn, used their own distribution networks to sell the phones to end-users. Thus, Samsung does not track where the retailers and carriers ultimately sold the phones to end-user consumers.

cannot rely upon Samsung to show how many New Jersey purchasers exist, much less how many of those New Jersey purchasers purportedly experienced issues with the phone's water-resistance features (if any).

Under these circumstances, when there are simply no facts or proof offered regarding the amount-in-controversy, and the facts that are alleged do not show that more than $5 million is at issue, dismissal for lack of jurisdiction is appropriate. *See Rosenblatt v. Nuplexa Group, Inc*., 2016 U.S. Dist. LEXIS 84302, at *9-11 (D.N.J. June 29, 2016) (dismissing for lack of CAFA jurisdiction where neither side provided "any evidence in the form of, for example, affidavits or declarations," because "there simply are no *proofs* that make it more likely than not that this [$5,000,000] sum or value is exceeded") (emphasis in original).[7]

2. Plaintiff cannot meet the MMWA's amount-in-controversy requirement.

Nor can Clark show federal jurisdiction based on her individual MMWA claim. Federal jurisdiction over MMWA claims exists only where the $50,000 amount-in-controversy requirement is satisfied for the MMWA claims asserted in the case. 15 U.S.C. § 2310(d)(3). Plaintiff cannot meet this jurisdictional threshold

[7] Clark also stipulated, and the California District Court ordered, that Clark "shall not seek further leave to amend[.]" (California Action ECF No. 82.); *see also Armco, Inc. v. Glenfed Fin. Corp.*, 746 F. Supp. 1249, 1258 (D.N.J. 1990) ("In a complex litigation such as this, the stipulations and representations of counsel must be accepted and relied upon in order to accomplish an orderly adjudication of the case.").

with her individual MMWA claim.[8]

The MMWA provides that both state and federal courts have jurisdiction over claims for violations of the statute, but "the scope of jurisdiction conferred on each differs." *Mele v. BMW of N. Am., Inc.*, 1993 U.S. Dist. LEXIS 16185, at *7 (D.N.J. Nov. 12, 1993). "State courts have jurisdiction over all claims under the [MMWA], while the federal court's jurisdiction over such claims is limited by the provisions of" 15 U.S.C. § 2310(d)(3), which provide:

> No claim shall be cognizable in a suit brought under paragraph (1)(B) of this subsection -
>
> (A) if the amount in controversy of any individual claim is less than the sum or value of $25;
>
> (B) if the amount in controversy is less than the sum or value of $50,000 (exclusive of interests and costs) computed on the basis of all claims to be determined in this suit; or
>
> (C) if the action is brought as a class action, and the number of named plaintiffs is less than one hundred.

Id. (quoting 15 U.S.C. § 2310(d)(3)).

In considering subsection (B) of 15 U.S.C. § 2310(d)(3), courts in this district have routinely held that the amount-in-controversy determination is based solely on the MMWA claims in the case. *See Drake v. Thor Indus.*, 2018 U.S. Dist. LEXIS 202216, at *4 (D.N.J. Nov. 28, 2018) ("The amount-in-controversy

[8] Plaintiff asserts her MMWA claim individually and not on behalf of a putative class because an MMWA claim cannot be asserted on behalf of a class in federal court unless there are 100 named plaintiffs. 15 U.S.C. § 2310(d)(3)(C).

determination is made based on a plaintiff's MMWA claim alone; pendent state claims, attorneys' fees, and court costs are not included.").[9] Here, MMWA claims are not asserted on behalf of the putative class, leaving only plaintiff's claim relating to her individual phone. Meanwhile, pendent state claims, attorneys' fees, and costs are not included. *Id.*

This rule exists because "Congress intended § 2310(d)(3) to limit the number of MMWA suits brought in federal court for two reasons: '1) to avoid trivial or minor actions being brought as class actions in the federal district courts; and 2) to overcome the absence of an amount in controversy requirement in 28 U.S.C. §1337, since the Magnuson-Moss Warranty Act is an act regulating commerce.'" *Mele*, 1993 U.S. Dist. LEXIS 16185, at *7-8 (citations omitted). "Courts that have addressed the amount-in-controversy issue in the context of non-diversity suits brought under the MMWA have refused to allow plaintiffs to incorporate damages recoverable under a pendent state claim when calculating the MMWA amount in controversy." *Id.*

Thus, in this case, only the value of Plaintiff's individual MMWA claim can

[9] *See also Roxbury v. Gulf Stream Coach, Inc.*, 2008 U.S. Dist. LEXIS 69877, at *5 (D.N.J. Sep. 15, 2008) (noting that the MMWA "limits the jurisdiction of the federal courts by providing, *inter alia*, that a cause of action may not proceed in federal court 'if the amount in controversy is less than the sum or value of $50,000 (exclusive of interest and costs) computed on the basis of all claims to be determined in this suit. . . . Pendent state claims and attorneys' fees are not considered in this amount."); *Cole v. Jaguar Land Rover N. Am. LLC*, 2011 U.S. Dist. LEXIS 153800, at *7 (D.N.J. 2011) (same).

be considered. *Mele*, 1993 U.S. Dist. LEXIS 16185, at *7-8. The *only* damages Plaintiff seeks for her MMWA claim are for her S7 phone. (*See* Compl. ¶ 119.) Plaintiff does not allege what she paid for her device, but the amount likely was a few hundred dollars at most. Thus, even accepting all Plaintiff's allegations as true, she has not shown (and cannot show) that her individual MMWA claim exceeds the $50,000 jurisdictional threshold. Accordingly, the Court does not have federal question jurisdiction over Plaintiff's MMWA claim or supplemental jurisdiction over Plaintiff's state-law claims, and her Complaint must be dismissed. *See id.*; *Drake*, 2018 U.S. Dist. LEXIS 202216, at *4.

C. Plaintiff's Complaint Fails To State A Plausible Claim For Relief.

Even if Clark could establish federal jurisdiction here (she cannot), each claim fails because she does not allege facts sufficient to state a claim.

1. The MMWA claim fails because Plaintiff has not identified any written affirmation that qualifies as a warranty under the statute.

Plaintiff's MMWA claim fails because she does not identify a statement that satisfies the narrow, statutory definition of a "written warranty," which is a required element to state a claim. The MMWA defines a "written warranty" as:

> (A) Any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time, or

> (B) Any undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking, which written affirmation, promise, or undertaking becomes part of the basis of the bargain between a supplier and a buyer for purposes other than resale of such product.

15 U.S.C. § 2301(6). Clark is basing her claim only on the first type of warranty and is not relying on subsection (B). (Compl. ¶¶ 107-109).[10]

For a "written affirmation of fact or written promise" to constitute a "warranty" under the MMWA, it must "affirm[] or promise[] that such material or workmanship is defect free; or will meet a specified level of performance ***over a specified period of time***." 15 U.S.C. § 2301(6)(A) (emphasis added). Clark identifies a single written statement in her MMWA claim: that the S7 is "water resistant up to 5 feet of water for up to 30 minutes." (Compl. ¶ 109). On its face, this statement is not a promise that the S7 is "defect free."[11] Nor is this statement a

[10] Samsung provided a Standard Limited Warranty on all S7 devices that offered repair or replacement, provided the product was returned in accordance with the Warranty terms. *See* https://www.samsung.com/us/Legal/Phone-HSGuide/ (setting forth the Standard Limited Warranty). Clark avoided relying on the terms of the Standard Limited Warranty, however, because that Warranty includes an arbitration provision.

[11] The statement Plaintiff cites does not affirm that the S7 or any feature of the S7 is free from imperfections, and thus it does not constitute a written warranty that the product is "defect free" within the meaning of the MMWA. *See Walters v. Vitamin Shoppe Indus.*, 701 F. App'x 667, 669 (9th Cir. 2017) (affirming dismissal of MMWA claim because the product label did not "affirm that the product [wa]s

promise that the S7 "will meet a specified level of performance *over a specified period of time*" in the life of the product, as required under 15 U.S.C. § 2301(6)(A) (emphasis added).

Guidance from the Federal Trade Commission ("FTC") explains that "[c]ertain representations, such as energy efficiency ratings for electrical appliances, care labeling of wearing apparel, and other product information disclosures may be express warranties under the Uniform Commercial Code. However, these disclosures alone are not written warranties under th[e] [MMWA]." 16 C.F.R. § 700.3(a). To constitute a written warranty, the MMWA requires a statement that the product will "meet a specified level of performance over a specified period of time." 15 U.S.C. § 2301(6)(A). Thus, the FTC has explained that "[a] product information disclosure ***without a specified time period to which the disclosure relates is . . . not a written warranty***" under the MMWA. 16 C.F.R. § 700.3(a) (emphasis added). The FTC adopted this guidance for good

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free from imperfections"); *Forcellati v. Hyland's, Inc.*, 2015 U.S. Dist. LEXIS 3867, at *20 (C.D. Cal. Jan. 12, 2015) (finding that a promise the product was "effective and fast-acting" was not a written warranty under the MMWA, and that "guaranteeing that something is effective or fast-acting is not a guarantee that it will not have flaws"); *Littlehale v. Hain Celestial Grp., Inc.*, 2012 U.S. Dist. LEXIS 162530, at *2-3 (N.D. Cal. July 2, 2012) ("To accept plaintiffs' argument would be to transform most, if not all, product descriptions into warranties against a defect, and plaintiffs have not articulated any limiting principle to convince the court otherwise."); *Martin v. Monsanto Co.*, 2017 U.S. Dist. LEXIS 22565, at *12-13 (C.D. Cal. Feb. 16, 2017) (dismissing MMWA claim where defendant did not explicitly promise a "defect-free product").

reason: because it "encourages the disclosure of product information which is not deceptive and which may benefit consumers, and will not construe the Act to impede information disclosure in product advertising or labeling." *Id.*

Here, the statement Clark relies on does not promise any *duration* over which the S7 will maintain any specified performance level. Instead, she quotes a product description defining the S7's "IP68" rating—a universal product classification indicating a device was certified to a maximum depth of approximately 5 feet of water for up to 30 minutes under specific testing conditions.[12] Nowhere does Clark allege any statement promising that the S7 will maintain the IP68 performance rating over any specified duration, and thus this statement does not promise "a specified level of performance *over a specified period of time*." 15 U.S.C. § 2301(6)(A) (emphasis added); *see also In re Scotts EZ Seed Litig.*, 2013 U.S. Dist. LEXIS 73808, at *13 (S.D.N.Y. May 22, 2013) ("Courts have found promises are written warranties under the MMWA *only if* the promise clearly states the specific time period over which the promised

[12] *See* Compl. at ¶ 20 (showing the phrase "water-resistant in up to 5 feet of water for up to 30 minutes; rinse residue/dry after wet" as explaining the meaning of "IP68 rating"); https://www.samsung.com/us/support/answer/ANS00077679/ (explaining that "an IP rating or Ingress Protection rating is a universally accepted measurement for dust and liquid resistance.").

performance is to occur.") (emphasis added). [13]

Clark may try to argue that the reference to "30 minutes" is enough to qualify as a "written warranty" under the MMWA, but this argument is inconsistent with the statutory language, the FTC's guidance, and the case law. Following the FTC's guidance, "courts have found promises are written warranties under the MMWA *only if* the promise clearly states the specific time period over which the promised performance is to occur." *In re Scotts EZ Seed Litig.*, 2013 U.S. Dist. LEXIS 73808, at *13 (emphasis added); *see also Kelley v. Microsoft Corp.*, 2007 U.S. Dist. LEXIS 66721, at *13 (W.D. Wash. Sept. 10, 2007) (to qualify under the MMWA, there must be "language that specifically identifies the duration of the warranty."). Unlike the one-year duration of Samsung's Standard Limited Warranty (which Clark has intentionally avoided), the description of the IP68 certification says nothing about the duration of the alleged warranty or the period over which the S7 will maintain this rating. Rather, the reference to "30 minutes" merely describes the IP68 certification, precisely the type of description the FTC excluded from coverage under the MMWA. *See* 16 C.F.R. § 700.3(a) ("The Commission encourages the disclosure of product information which is not

[13] In stark contrast to the IP68 certification, which contains no specified duration in the life of the phone, Samsung's Standard Limited Warranty offers one-year of warranty coverage. *See* https://www.samsung.com/us/Legal/Phone-HSGuide/ (warranting the product to be "free from defects in material and workmanship under normal use and service for the warranty period" of "1 Year.").

deceptive and which may benefit consumers, and will not construe the Act to impede information disclosure in product advertising or labeling."). Plaintiffs cannot bootstrap this accurate description of the IP68 certification into a "written warranty" under the MMWA, particularly while ignoring that Samsung offers an actual one-year Standard Limited Warranty, which Clark has transparently avoided to evade arbitration.

In sum, the statement Clark relies on is not a written warranty under the MMWA, and this claim should be dismissed. *See In re Shop-Vac Mktg. & Sales Practices Litig.*, 964 F. Supp. 2d 355, 361 (M.D. Pa. 2013) ("Plaintiffs have not alleged that Defendants made a written affirmation of fact or promise that the vacuums are 'defect free' or 'will meet a specified level of performance over a specified period of time.'").

2. Plaintiff fails to state a common law or NJCFA fraud claim because she does not meet the heightened pleading standard under Rule 9(b).

To state a fraud claim under New Jersey law, plaintiff must allege: (1) a specific false representation of material fact; (2) knowledge by the person who made it of its falsity; (3) ignorance of its falsity by the person to whom it was made; (4) the intention that it should be acted upon; and (5) that the plaintiff acted upon it to its damage. *Christidis v. First Penn. Mortg. Trust*, 717 F.2d 96, 99 (3d Cir. 1983). A claim for fraud is subject to the heightened pleading standard set

forth in Rule 9(b), which provides that, for all averments of fraud, "the circumstances constituting fraud . . . shall be stated with particularity." Fed. R. Civ. P. 9(b). To satisfy this standard, Plaintiff must allege the date, time and place of the alleged fraud or otherwise "inject precision or some measure of substantiation into a fraud allegation." *Frederico v. Home Depot*, 507 F.3d 188, 200 (3d Cir. 2007).

As with a claim for common law fraud, "[i]t is well-established that NJCFA claims must meet the heightened pleading requirements of Fed. R. Civ. P. 9(b)." *Lieberson v. Johnson & Johnson Consumer Cos.*, 865 F. Supp. 2d 529, 538 (D.N.J. 2011). In a NJCFA claim, the plaintiff is required to prove three elements: "(1) unlawful conduct by defendant; (2) an ascertainable loss by plaintiff; and (3) a causal relationship between the unlawful conduct and the ascertainable loss." *Id*. "Unlawful practices under the NJCFA fall into three general categories: affirmative acts, knowing omissions, and regulation violations." *Id.*

A court should dismiss fraud and NJCFA claims if the allegations fail to state the who, what, where, and when – "all necessary to satisfy the heightened pleading requirements for fraud." *Donnelly v. Option One Mortg. Corp.*, 2013 U.S. Dist. LEXIS 92663, at *22 (D.N.J. July 1, 2013) ("Plaintiffs provide no support beyond that conclusory statement to bolster [the fraud] claim."); *see also F.D.I.C. v. Bathgate*, 27 F.3d 850, 876 (3d Cir. 1994) (affirming dismissal of NJCFA and common law fraud claims where the plaintiff failed to identify the speaker of the

allegedly misleading statements and otherwise allege facts to support the plaintiff's charges). Plaintiff's vague and conclusory allegations fail to meet the heightened pleading standard for either an affirmative misrepresentation or omission claim, and thus her fraud-based claims should be dismissed.

a. Plaintiff fails to state a claim for fraud or violation of the NJCFA based on an affirmative misrepresentation.

Plaintiff's affirmative misrepresentation claims generically allege that Samsung commits fraud "by intentionally misrepresenting that the S7 Phone possesses characteristics that it does not possess," and that Samsung's "intentional and material misrepresentations include its advertising, marketing materials and messages, and other standardized statements claiming the S7 Phone is water resistant." (Compl. ¶¶ 54-55.) Such conclusory allegations do not meet Rule 9(b)'s particularity requirement.

Plaintiff fails to allege what specific material misrepresentations Samsung made with the intent that the Plaintiff would rely on them. Instead, Clark's allegations simply mirror the language and elements of a fraud and NJCFA claim without any specifics. These conclusory allegations do not allege the who, what, where and when of the alleged fraud and thus fail to meet the heightened pleading standard. *See Bathgate*, 27 F.3d at 876; *Mardini v. Viking Freight, Inc.*, 92 F. Supp. 2d 378, 385 (D.N.J. 1999) (allegations that defendants made material misrepresentations but had "no indication of who made them, what specific

misrepresentations were made, and when these statements occurred" do not meet the required level of specificity articulated in Rule 9(b)).

Clark also fails to allege specific facts showing reliance (as required for common law fraud) or causation (as required for violation of the NJCFA). *Yost v. Gen. Motors Corp.*, 651 F. Supp. 656, 658 (D.N.J. 1986) (dismissing fraud claim where plaintiff failed to show that she "relied to [her] detriment on any such representations."); *Frederico*, 507 F.3d at 203 (affirming dismissal of NJCFA claim where "Frederico failed to show that Home Depot's alleged unlawful practice *caused* her loss") (emphasis in original). Instead, Plaintiff baldly asserts that she "reviewed advertisements and other promotional materials" (Compl. ¶ 33), but she fails to specify *what* representation caused her to purchase the S7, *where* and *how* she saw the specific representation, or *when* she saw the specific representation. Without knowing the specific representations that Plaintiff saw and relied on, "it is impossible to determine whether it was [Samsung's] conduct . . . that caused her" any alleged damages. *Frederico*, 507 F.3d at 203.[14]

This Court's decision in *Popejoy v. Sharp Elecs. Corp.*, 2016 U.S. Dist. LEXIS 75182 (D.N.J. June 9, 2016) (Judge Martini), is instructive. In *Popejoy*, plaintiff filed a putative class action against Sharp Electronics alleging that Sharp's

[14] *Accord In re Toshiba Am. HD DVD Mktg. & Sales Practices Litig.*, 2009 U.S. Dist. LEXIS 82833, at *40 (D.N.J. 2009) ("Regarding the causation, Plaintiffs fail to allege when Toshiba made its alleged misrepresentations and when, if ever, the Plaintiffs were exposed to those misrepresentations.").

"false and misleading marketing and advertising were and are designed falsely to suggest that the televisions at issue are not LCD TVs at all, . . . when in fact, they were LED-lit LCD display TVs." Plaintiffs alleged that Sharp used "'multiple marketing channels,' including 'circulars, newspaper and magazine advertisements, and point of sale display materials to further its deception,'" and "included images of Sharp's cartons, marketing materials, website screen shots, and press releases." *Id.* at *2-3. The Court granted Sharp's motion to dismiss for failure to meet the heightened pleading standard of Rule 9(b). In granting the motion, the Court rejected plaintiff's allegations that "he chose Sharp's 'LED TV' model because of 'marketing assertions (made directly or facilitated and encouraged by Sharp' either 'on the internet' and/or through 'point of sale' materials provided to 'the reseller' by Sharp," ruling that plaintiffs had not specified:

> (1) 'the who,' *i.e.*, whether Sharp, or some other unidentified 'reseller' made these assertions;
> (2) 'the what,' *i.e.*, the specific marketing assertions, point of sale materials, or internet content that they viewed;
> (3) 'the when,' *i.e.*, at what point each Plaintiff viewed the materials; or
> (4) 'the where,' *i.e.*, the specific websites, newspapers, magazines, or brochures containing the marketing assertions.
>
> Moreover, with respect to 'how' the misrepresentations were misleading, Plaintiffs do not confirm whether Sharp's marketing materials contained disclosures that the 'LED TVs' had LCD displays, but instead conclude that, even if 'such disclosures were made, [they] would not have been sufficient to cure the false and misleading nature of the prominent LED television references.' This conclusion cannot

> be made without more detail as to the specific disclosure Sharp provided.

Id. at *7-8.

Here, as in *Popejoy*, Plaintiff fails to "inject precision and some measure of substantiation into [her] allegations of fraud.'" *Yost*, 651 F. Supp. 658 (quoting *Seville Indus. Machinery Corp. v. Southmost Machinery Corp.*, 742 F.2d 786, 791 (3d Cir. 1984)).[15] Her fraud and NJCFA claims therefore should be dismissed.[16]

b. Plaintiff fails to plead a claim for fraud based on omission because she does not allege facts that give rise to any duty to disclose.

When fraud is alleged based on a failure to disclose, rather than an affirmative false statement, a plaintiff must show a duty to disclose. *Argabright v. Rheem Mfg. Co.*, 201 F. Supp. 3d 578, 603 (D.N.J. Aug. 15, 2016) (holding that the claim "requires proof that [the] defendant was *legally obligated to disclose* [the information]") (quoting *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1185 (3d Cir. 1993) (alterations and emphasis in original)). "The mere fact that Plaintiff

[15] *Accord Ramon v. Budget Rent-A-Car Sys.*, 2007 U.S. Dist. LEXIS 11665, at *16-18 (D.N.J. Feb. 23, 2007) (Judge Martini) (dismissing NJCFA claim where the complaint "fails to identify or describe any misrepresentations made by Budget"); *Inventory Recovery Corp. v. Gabriel*, 2012 U.S. Dist. LEXIS 100908, at *7-8 (D.N.J. July 20, 2012) (Judge Martini) (plaintiff's allegations "fall[] far short of pleading the date, time, and place of the alleged fraud. . . . Such allegations do not meet the stringent pleading requirements of Rule 9(b).").

[16] Again, Clark has already stipulated, and there has been an Order, that there shall be no further attempt to seek leave to amend.

trusted and relied on Defendant is insufficient to show a special relationship requiring a duty to disclose." *Argabright*, 201 F. Supp. 3d at 603 (quoting *Stevenson v. Mazda Motor of Am., Inc.*, 2015 U.S. Dist. LEXIS 70945, at *26 (D.N.J. June 2, 2015)).

Here, Plaintiff's naked allegations that "in making the misrepresentations and omissions . . . Samsung intended that consumers would rely on such misrepresentations and omissions," and "Samsung owed a duty to disclose, rather than suppress, material facts" (Compl. ¶ 60), are precisely the type of conclusory allegations that our courts have routinely rejected. *See Stevenson*, 2015 U.S. Dist. LEXIS 70945, at *25-27 ("Plaintiff does not allege that he 'expressly' reposed trust in Mazda – that is, Plaintiff does not claim that he informed Mazda that he was relying on their representations."). Plaintiff does not allege that any "fiduciary or implied fiduciary relationship existed between Plaintiffs and Defendant, and nothing in Plaintiffs' Complaint suggests that Defendant 'did anything to encourage plaintiffs to repose special trust or confidence in their advice, thereby inducing plaintiffs' reliance.'" *Argabright*, 201 F. Supp. 3d at 603 (citation omitted). To the extent Plaintiff alleges that Samsung had a duty to disclose because it has "superior knowledge," "in New Jersey such knowledge does not create a duty . . . ." *Stevenson*, 2015 U.S. Dist. LEXIS 70945, at *28 (citing cases).

In sum, Plaintiff's vague and conclusory omission allegations fail to satisfy

the particularity standard required to successfully plead a cause of action either for common law fraud or under the NJCFA. Therefore, Plaintiff's fraud-based claims should be dismissed in their entirety.

3. Plaintiff's unjust enrichment claim should be dismissed because there is no direct relationship between Plaintiff, an indirect purchaser, and Samsung, and she cannot allege that she expected remuneration from Samsung.

Clark's boilerplate allegations do not state a claim for unjust enrichment for at least two reasons. First, "under New Jersey law, an indirect purchaser, like Clark, cannot succeed on a claim for unjust enrichment." *Toms v. Funai Corp.*, 2015 U.S. Dist. LEXIS 83413, at *36 (D.N.J. June 25, 2015) ("[T]here was no relationship conferring any direct benefit on Funai Corp through these purchases, as the purchases were through retailers. Therefore, no benefit was conferred within the meaning of New Jersey's doctrine of unjust enrichment."). Judge Arleo's decision in *Noble v. Samsung Elecs. Am., Inc.*, 2018 U.S. Dist. LEXIS 21545 (D.N.J. Feb. 8, 2018), is illustrative. There, the plaintiff alleged he viewed Samsung's representations on its website and in advertisements, and that, based on those representations, he bought a Samsung Smartwatch from an AT&T store. *Id.* at *2-3. The court explained that the "substantial majority" of courts to consider the issue have determined that a "plaintiff cannot bring an unjust enrichment claim in the absence of a direct relationship between the parties" (*id.* at *17) and dismissed the claim because the plaintiff purchased his product from AT&T.

Here, as in *Noble*, Clark cannot allege a direct purchase from Samsung because she purchased her S7 at Best Buy. (Compl. ¶ 32.) Because Clark admits that she did not purchase directly from Samsung, her claim for unjust enrichment is deficient, and any amendment would be futile. Her unjust enrichment claim fails for this reason alone. *Weske v. Samsung Elecs. Am., Inc*., 2012 U.S. Dist. LEXIS 32289, at *24 (D.N.J. Mar. 12, 2012) (Judge Martini) ("In light of the fact that an indirect purchaser cannot succeed on a claim for unjust enrichment against the manufacturer, further amendment would be futile, and so the dismissal will be with prejudice.") (citing *Grayson v. Mayview State Hosp*., 293 F.3d 103, 108 (3d Cir. 2002)); *see also Spera v. Samsung Elecs. Am., Inc.*, 2014 U.S. Dist. LEXIS 45073, at *25-26 (D.N.J. Apr. 2, 2014) (Judge Martini) (same).

Second, even if Clark could allege a direct purchase (she cannot), her unjust enrichment claim still fails because she has not alleged that she "expected remuneration from [Samsung] at the time [she] performed or conferred a benefit on [Samsung] and that the failure of remuneration enriched [Samsung] beyond its contractual rights." *In re Clorox Consumer Litig.*, 2013 U.S. Dist. LEXIS 107704, at *24-25 (C.D. Cal. July 31, 2013) (applying New Jersey law). "[A]n unjust enrichment claim should be dismissed where it is based on tortious conduct and there appear to be no allegations that the plaintiff expected or anticipated remuneration from the defendant." *Id.* (collecting cases); *see also Donachy v.*

Intrawest U.S. Holdings, Inc., 2012 U.S. Dist. LEXIS 34029, at *26 (D.N.J. Mar. 14, 2012) ("Under New Jersey law, the New Jersey Plaintiffs were required, and failed, to allege that they expected remuneration from Defendants when they made the purchases at issue.").

Clark does not and cannot allege that she expected remuneration from Samsung as part of her transaction with Best Buy. Rather, her claims are based on purportedly misleading advertising (Compl. ¶¶ 54-56, 94-95, 123) and sound in tort, which is not a recognized basis for an unjust enrichment claim in New Jersey. *See Warma Witter Kreisler, Inc. v. Samsung Elecs. Am., Inc.*, 2009 U.S. Dist. LEXIS 112773, at *24-27 (D.N.J. Dec. 3, 2009) (dismissing unjust enrichment claim with prejudice because plaintiff alleged it was misled by Samsung as to the fitness of a laser printer, a tort theory that New Jersey does not recognize as the basis for unjust enrichment claims); *see also Gray v. Bayer Corp.*, 2009 U.S. Dist. LEXIS 48181, at *9-10 (D.N.J. June 8, 2009) (rejecting attempt to characterize an impermissible tort-based unjust enrichment claim as a quasi-contract claim). When a plaintiff asserts claims based on alleged tortious activity (as Clark does), the plaintiff has "more specific and more appropriate causes of action" than unjust enrichment. *See, e.g.*, *Bedi v. BMW of N. Am., LLC*, 2016 U.S. Dist. LEXIS 9365, at *14-15, n.3 (D.N.J. Jan. 27, 2016) (plaintiff's assertion of tort claims persuaded the court to "follow the substantial majority" and conclude that "[u]njust

enrichment requires a direct relationship"). Clark's unjust enrichment claim fails for this reason as well.[17]

In sum, Clark has not stated and cannot state a claim for unjust enrichment under New Jersey law, and the claim should be dismissed with prejudice.

IV. CONCLUSION

Again, Clark stipulated, and the California District Court ordered, that she "shall not seek further leave to amend[.]" (California Action ECF No. 82.) Thus, Samsung respectfully requests that the Court dismiss Clark's Complaint in its entirety and with prejudice, and grant Samsung such other and further relief as the Court deems appropriate.

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Respectfully submitted,

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[17] Notably, Clark has alleged claims for fraud (first claim for relief) and violation of the New Jersey Consumer Fraud Act (fourth claim for relief), and her unjust enrichment claim is based on the same alleged misrepresentations as her fraud claims. (*Compare* Compl. at ¶¶ 54, 94, *with* Compl. at ¶ 123.)