UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

BARBARA MIHALICH, individually and on behalf of all others similarly situated, Plaintiff, v. JOHNSON & JOHNSON and JOHNSON & JOHNSON CONSUMER COMPANIES, INC., Defendants.	Case No. 3:14-CV-00600-DRH-SCW Complaint Filed: May 23, 2014

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS COMPLAINT AND ALTERNATIVE MOTION TO STRIKE

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I. INTRODUCTION

Plaintiff Barbara Mihalich ("Plaintiff") contends that everyone who bought Baby Powder should get their money back because of an alleged health risk that had no impact on the vast majority of class members, including Plaintiff herself. In this case, Plaintiff contends that a subset of purchasers—adult women who regularly used Johnson's Baby Powder ("Baby Powder") directly on their genital area for years—were exposed to a risk of ovarian cancer from the talc in that product. If this case proceeds, Defendants Johnson & Johnson and Johnson & Johnson Consumer Companies, Inc. (collectively, "J&J")[1] will prove that Plaintiff's assertion about that "risk" is meritless.[2] But that is of no moment here because the facts Plaintiff alleges show that ***she*** was never harmed in any way. Plaintiff apparently contends that she suffered some kind of economic loss, although she pleads no facts to explain the amount or nature of any "financial" injury—indeed, she does ***not*** seek compensatory damages under the Illinois Consumer Fraud and Deceptive Business Practices Act ("CFA"), 815 ILCS 505/1 *et seq.* (Comp. Prayer.) Instead, for Plaintiff the product performed exactly as promised ("eliminate[d]

[1] To be clear, although Defendants are collectively referred to as "J&J" herein, only Johnson & Johnson Consumer Companies, Inc. manufactured and marketed Johnson's Baby Powder.

[2] For purposes of this Motion, the Court must accept Plaintiff's allegation that extended use of talc by adult women in their genital area is associated with a 33% increased risk of ovarian cancer. (Comp. ¶¶ 4, 62.) But none of the studies Plaintiff cites establish a causal relationship between female genital talc use and ovarian cancer, and many of those studies are seriously flawed. For example, none of the studies were conducted on the actual product at issue; Cramer (1982), Chen (1992), and Mills (2004) (*id.* ¶¶ 29, 36, 47) did not account for confounding factors such as age and obesity; and Egi (1961), Cralley (1968), Henderson (1971), Rohl (1976), Cramer (1982), Hartge (1983), Whittemore (1988), Harlow (1989), Cook (1997), Gertig (2000), and Mills (2004) (*id.* ¶¶ 26-29, 31-32, 34, 41, 46-47) included exposures to products with asbestiform talc (J&J's products have been free of asbestiform talc for decades). The FDA has not restricted the use of non-asbestiform talc. *See* http://www.fda.gov/cosmetics/productsingredients/ingredients/ucm293184.htm. Non-asbestiform talc is also not listed as a cancer-causing agent by the American Cancer Society. *See* www.cancer.org/cancer/cancercauses/othercarcinogens/generalinformationaboutcarcinogens/known-and-probable-human-carcinogens. And the Centers for Disease Control and Prevention ("CDC") does not list talc use in their risk factors for ovarian cancer. *See* http://www.cdc.gov/cancer/ovarian/basic_info/risk_factors.htm.

friction on the skin" and "absorb[ed] unwanted excess moisture"), and Plaintiff suffered no ill effects and does not claim to be threatened by any future injury. (Comp. ¶¶ 8, 86 ("Plaintiff is not claiming physical harm or seeking the recovery of personal injury or other monetary damages.").) In fact, Plaintiff does not even allege she was ever exposed to the risk she contends exists—she pleads almost no facts about her own purchase and use, and does not allege that ***she*** bought the product to use in her genital area, even though that is the only use she claims is associated with ovarian cancer. (*See, e.g.*, *id.* ¶ 81.) Accordingly, by this Motion J&J seeks an order: (1) dismissing the entire complaint (for lack of injury and standing, for failure to state a claim under any cause of action, and for failure to plead fraud with particularity); (2) striking the class allegations; and/or (3) striking the prayer for injunctive relief.

Here, Plaintiff's claims boil down to: "[Defendants] sold [a product]; [Plaintiff] purchased and used [that product]; [Defendants] did not list enough warnings on [the product], and/or [the product] was defective; other [consumers] were injured by [the product]; [Plaintiff] would like her money back." *Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315, 319-20 (5th Cir. 2002) ("[b]y plaintiff['s] own admission, [she] paid for an effective [product], and she received just that—the benefit of her bargain."). Under these circumstances, Plaintiff has suffered neither a cognizable injury nor any "actual damage"[3] under the Illinois Consumer Fraud and Deceptive Business Practices Act ("CFA"), 815 ILCS 505/1 *et seq.*[4] In fact, Plaintiff's assertion that "all"

[3] In fact, Plaintiff does not even seek actual damages under the CFA (Comp. Prayer) and her failure to *allege* actual damages (as set out below) bars her CFA claim. *See* 815 ILCS 505/10a (private plaintiff must "suffer[] actual damage"); *see also Schilke v. Wachovia Mortgage*, 820 F. Supp. 2d 825, 838 n.5 (N.D. Ill. 2011) (Dow Jr., J.) ("Because Plaintiff has suffered no damages, her [CFA] injunctive relief claim cannot withstand a motion to dismiss."); *Camasta v. Jos. A. Bank Clothiers, Inc.*, 2013 WL 3866507, at *5 (N.D. Ill. July 25, 2013) (Eve, J.).

[4] *See Frye v. L'Oreal USA, Inc.*, 583 F. Supp. 2d 954, 958 (N.D. Ill. 2008) (Gettleman, J.) (no injury where plaintiff who bought lipstick marketed as "safe for use" but that contained lead did "not allege that she would not have purchased [any] lipstick [at all], that she would have

purchasers suffered an economic injury is implausible on its face.[5] Plaintiff argues that "[a]ll Illinois consumers who . . . purchased Johnson's Baby Powder" should get their money back because, she contends, adult women who apply the product to their genitals have an increased risk. But talcum powder has dozens of beneficial uses that have nothing to do with that specific use,[6] and Plaintiff never explains why eliminating that single use would render the product worthless or significantly inhibit its utility—for her or for anyone else. Again, Plaintiff does not allege her use of the product had anything to do with any "risk," much less that she purchased it exclusively for use in the genital area and cannot put it to any other useful purpose. (*See* Comp. ¶ 80 ("Plaintiff . . . purchased Johnson's® Baby Powder primarily for personal, family or household purposes.").) *See also Verb v. Motorola, Inc.*, 284 Ill. App. 3d 460, 470 (1996) (no injury where cell phone users could not allege they were personally exposed to actual health risks). At a minimum, Plaintiff's proposed class allegations should be stricken because her putative classes of "all Illinois consumers" includes many individuals who (like Plaintiff) were

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purchased cheaper lipstick, or that the lipstick in question had diminished value because of the lead"); *In re Bisphenol-A (BPA) Litig.*, 687 F. Supp. 2d 897, 912 (W.D. Mo. 2009) ("*In re BPA I*") (Smith, J.) (plaintiffs "who disposed of or used the products before learning about [alleged toxin] BPA . . . received all the benefits they desired and were unaffected by Defendants' alleged concealment").

[5] *See, e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (deciding whether claims are plausible is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (plaintiff's claims must move "across the line from conceivable to plausible").

[6] For example, talcum powder is commonly used in shoes and on the feet to eliminate moisture and odors, under the arms in addition to or instead of deodorant, on the hands of athletes to prevent slipperiness, on clothing or carpets to absorb grease, on pets as dry shampoo, on sheets to make sleeping more comfortable, on the skin after shaving, on floor boards to silence squeaks, on skin to help remove sticky sand, on sticky rubber products (such as dish gloves) to store and separate, in litter boxes for freshness, etc. *See, e.g.*, *Brilliant Uses for Baby Powder*, Reader's Digest, www.rd.com/home/brilliant-uses-for-baby-powder (retrieved on June 11, 2014).

never exposed to any "risk" in the first place: (1) men (who obviously do not have ovaries), and (2) women who bought Baby Powder for uses other than in their genital area.[7]

Plaintiff also fails to plead "the who, what, when, where, and how" of J&J's alleged "fraud" as required by Rule 9(b). *Thrasher-Lyon v. Illinois Farmers Ins. Co.*, 861 F. Supp. 2d 898, 909 (N.D. Ill. 2012) (Castillo, J.); *Frye v. L'Oreal USA, Inc.*, 583 F. Supp. 2d 954, 957 (N.D. Ill. 2008) ("a claim under the [CFA] must be pled with particularity."). Plaintiff does include images of "representative product packaging" in her Complaint.[8] But she does not contend that the statements on the label are actually false. (*See* Comp. ¶ 18 ("clinically proven mildness," "silky soft skin," and "designed to gently absorb excess moisture helping skin feel comfortable").)[9] And while Plaintiff asserts J&J "historically" marketed Baby Powder for adult female genital use, she never identifies a single statement by J&J to this effect. (*See id.* ¶¶ 5, 16, 17, 19.) Instead, Plaintiff appears to base her claims on statements from J&J websites that she never even saw—let alone relied on. (*Id.* ¶¶ 6, 19-22.) J&J is entitled to know which "false" statements Plaintiff saw (if any), when the statements were made, and how the statements caused Plaintiff to suffer concrete, pecuniary loss. And with respect to her omissions claims, Plaintiff

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[7] Likewise, these "class members" (e.g., men, and women who bought the product for other uses) could not have been "deceived" by "misrepresentations and omissions" that had nothing to do with ***their*** use of Baby Powder. *See Oshana v. Coca-Cola Co.*, 472 F.3d 506, 513-14 (7th Cir. 2006) (affirming denial of class certification where class "could include millions who were not deceived and thus have no grievance under the [CFA]"); *Korsmo v. Am. Honda Motor Co.*, 2012 U.S. Dist. LEXIS 65709, at *15 (N.D. Ill. May 10, 2012) (Der-Yeghiayan, J.) (refusing to certify CFA and unjust enrichment claims because "Plaintiff's Rule 23(b)(3) proposed classes include consumers who were not deceived and suffered no harm . . . .").

[8] As the Complaint makes clear, the statement "clinically proven to be safe, gentle, and mild" appears on the www.johnsonsbaby.com website, ***not*** on the "representative product packaging" shown in ¶ 18. (*See* Comp. ¶ 101 (wrongfully attributing this statement to the label).)

[9] *See Oliveira v. Amoco Oil Co.*, 201 Ill. 2d 134, 154 (2002) (no CFA claim where plaintiff did not see (and thus was not deceived by) defendant's advertisements touting environmental benefits of its gasoline; plaintiff received "what he expected to receive . . . a certain amount of gasoline, with a certain octane level, for the price listed on the pump."); *Stavropoulos v. Hewlett-Packard Co.*, 2014 WL 2609431, at *5 (N.D. Ill. June 9, 2014) (Ellis, J.) (same).

must identify what exactly J&J should have said on the label and how the omission of those statements caused her "injury." *McMahan v. Deutsche Bank AG*, 938 F. Supp. 2d 795, 805-06 & n.2 (N.D. Ill. 2013) (Zagel, J.) (plaintiff must plead "detail[s] about the circumstances surrounding the omissions, including when and where they occurred, and what material facts should have been disclosed at what times.").

Next, Plaintiff's claim for unjust enrichment should be dismissed for two reasons: First, since it is based on the same underlying conduct the CFA claim, the unjust enrichment claim also fails for lack of actual injury. *See Cleary v. Philip Morris Inc.*, 656 F.3d 511, 517 (7th Cir. 2011) (if claim is based "on the same improper conduct alleged in another claim, then the unjust enrichment claim will be tied to this related claim—and, of course, unjust enrichment will stand or fall with the related claim"). Second, the claim fails as a matter of law because "the mere violation of a consumer's legal right to know about a product's risks, without anything more, cannot support a claim that the manufacturer unjustly retained the revenue from the product's sale to the consumer's detriment." *Id.* at 520. Plaintiff is demanding precisely what the Seventh Circuit rejected in *Cleary*: a "refund" for a product that performed as advertised.

Finally, Plaintiff lacks standing to seek injunctive relief under the CFA because she has not alleged (and could not credibly allege) that she is personally threatened by any repetition of the injury she claims to have suffered. *See Bohn v. Boiron, Inc.*, 2013 WL 3975126, at *3 (N.D. Ill. Aug. 1, 2013) (Durkin, J.) (no standing to seek injunctive relief because plaintiff "fails to allege any facts showing that she faces a 'real and immediate threat' of future harm").

At the end of the day, Plaintiff got the benefits she bargained for, and cannot use her contention that ***others*** were allegedly injured to manufacture an economic loss claim. Her Complaint should be dismissed with prejudice.

II. BACKGROUND FACTS

Plaintiff Barbara Mihalich alleges she purchased Baby Powder for "personal use" "[d]uring the past few years," including "in 2014." (Comp. ¶ 12.) She has never developed ovarian cancer, and does ***not*** contend her use of the product has put her at an increased risk of developing cancer in the future. (*Id.* ¶ 8.) Nor does she claim she ever used Baby Powder on her genitals—much less that she bought the product solely for genital use. (*Id.* ¶¶ 12, 80, 97 ("personal, family or household purposes").) Nevertheless, Plaintiff contends that she (and everyone else) is entitled to a refund because, according to her, adult women who use talc on their genitals over time "have a 33% increased risk of ovarian cancer." (*Id.* ¶ 4.)[10]

Plaintiff does not claim to have been anything other than satisfied with the product's performance, and alleges ***no*** details about her own purchase or "personal" use of the product. (*Id.* ¶¶ 12, 80, 97.) She never explains what other products she would or could have used in place of Baby Powder to obtain the same benefits at a lower price (or without the alleged risk). Nor does she explain why she could not put the product at issue here—which has dozens of beneficial uses having nothing to do with the risk alleged—to any other use. *See supra* fn. 6. In addition, Plaintiff does not claim to have ever seen (let alone relied) on any of the statements that appear on the "representative product packaging and labeling" or on the J&J websites that she includes in her Complaint. Nevertheless, Plaintiff contends she "suffered an ascertainable loss of money by purchasing a dangerous product advertised as a safe product"—even though she alleges no facts to suggest her own use of the product (whatever it was) was "dangerous"—

[10] To support that assertion, Plaintiff cites to reports that conclude, for example, that the "limited evidence" that genital talc use is a "possible" carcinogen does not establish a causal relationship because "chance, bias or confounding could not be ruled out with reasonable confidence." (Comp. ¶ 64 (quoting 2006 World Health Organization paper summarizing scientific studies).)

(Comp. ¶¶ 81, 106),[11] and that she "overpaid" because she "paid a price that was based on Defendants' material misrepresentations and concealment." (*Id.* ¶ 118.)

Based on these allegations, Plaintiff seeks injunctive relief and punitive damages under the CFA, and also brings a claim for unjust enrichment.[12] She *does not* seek damages under the CFA for her alleged "injuries"—whatever they are. (*Id.* Prayer.) Plaintiff seeks to certify two overlapping classes of Illinois consumers who bought the product: (1) for the CFA claim, a Rule 23(b)(2) class (purchases within three years of the date of the complaint), and (2) for the unjust enrichment claim, Rule 23(b)(2) and 23(b)(3) classes (five years). (*Id.* ¶¶ 83, 84.)

III. LEGAL STANDARDS

Motions to dismiss should be granted where, as here, Plaintiff has failed to state any valid claim for relief. *See* Fed. R. Civ. P. 12(b)(6); *Iqbal*, 556 U.S. at 678. And while the Court must accept all well pled facts, "statements of law or unsupported conclusory allegations need not be taken at face value." *Chicago Faucet Shoppe, Inc. v. Nestle Waters N. Am., Inc.*, 2014 U.S. Dist. LEXIS 16871, at *24 (N.D. Ill. Feb. 11, 2014) (Tharp Jr., J.) (citation omitted); *Coss v. Playtex Prods.*, 2009 WL 2245657, at *1 (N.D. Ill. July 10, 2009) (Kapala, J.) ("[A] complaint will not suffice if it is simply naked assertions devoid of further factual enhancement.").

[11] The term "ascertainable loss" is from the MMPA. *Compare* 815 ILCS 505/10a (Illinois CFA) *with* Mo. Rev. Stat. § 407.025 (MMPA). Plaintiff's counsel recently filed a virtually identical complaint against J&J under the MMPA in the District Court for the Eastern District of Missouri (*Mikhlin v. Johnson & Johnson et al.*, No. 14-cv-00881-CDP) and apparently overlooked prior references to the MMPA when drafting this Complaint. (*See also* Comp. ¶ 8 (referring to "violations of the Missouri Merchandising Practices Act").) Accordingly, J&J moves to strike all references in the Complaint to the MMPA. *See* Fed. R. Civ. P. 12(f) (court may strike any "immaterial" matter).

[12] Much of the Complaint is copied verbatim from *Mikhlin* (filed May 7, 2014) and *Estrada v. Johnson & Johnson et al.*, No. 14-CV-1051-TLN (filed April 28, 2014 in the Eastern District of California). Defendants have moved to dismiss those complaints on similar grounds—but if those cases proceed, J&J may also move to stay this action.

Moreover, if a plaintiff lacks standing, "dismissal under [Federal Rule of Civil Procedure] 12(b)(1) is the appropriate disposition." *Am. Fed'n of Gov't Employees v. Cohen*, 171 F.3d 460, 465 (S.D. Ill. 1999). Because standing is not [a] mere pleading requirement[ ] but rather an indispensable part of the plaintiff's case, [it] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Apex Digital, Inc. v. Sears Roebuck & Co.*, 572 F.3d 440, 443 (7th Cir. 2009). Here, Plaintiff "must show three things: an 'injury in fact,' that is, a concrete, particularized, and actual or imminent harm, not one that is conjectural or hypothetical; a fairly traceable causal connection between the harm and a defendant's complained-of conduct; and a likelihood that requested relief will redress the harm." *In re Gen. Motors Corp.*, 241 F.R.D. 305, 309 (S.D. Ill. 2007). And if Plaintiff cannot this action on her own behalf, she cannot seek relief on behalf of any class. *See id.* at 310.

In addition, since Plaintiff's claims sound in fraud, Plaintiff must "state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b); *see Thrasher-Lyon*, 861 F. Supp. 2d at 909 (Rule 9(b) applies to CFA claims). Thus, Plaintiff "must plead . . . the time, place, and content of the misrepresentation, and the method by which the misrepresentation was communicated to the plaintiff." *Johnson v. Allstate Ins. Co.*, 2009 WL 3230157, at *4 (S.D. Ill. Sept. 30, 2009); *McMahan*, 938 F. Supp. 2d at 805-06 & n.2 (same standard for omissions).

Finally, the Court "may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f).

IV. ARGUMENT

A. Plaintiff Suffered No Injury

Plaintiff's entire Complaint should be dismissed because she has not suffered any cognizable "injury" sufficient to satisfy either Article III or to state a claim under the CFA. *See*

815 ILCS 505/10a(a) (plaintiff must suffer "actual damage" as a result of unlawful conduct). Under the CFA, "it is not enough" to simply claim that J&J "deceived the plaintiff[] and induced [her] to buy" the product. *Kim v. Carter's Inc.*, 598 F.3d 362, 365-66 (7th Cir. 2010). Instead, Plaintiff must plead facts showing she was "deprived of the benefit of the bargain" because she received a product that, for her, "was defective or worth less than what [she] actually paid." *Id*. In other words, Plaintiff must either plead that the product failed to provide her with the benefits she expected, or state facts showing what she would have done differently (had she known about the alleged "risk") that would have made her better off financially.[13]

Regardless of how this Court addresses this issue—as a lack of standing under Rule 12(b)(1) or as a failure to state a claim under Rule 12(b)(6)—Plaintiff has simply not alleged any compensable injury, financial or otherwise. In fact, Plaintiff does not even ***seek*** compensatory damages under the CFA. (Comp. Prayer.) Nor could she: Plaintiff admits she never suffered any ill effects from Baby Powder, does not assert any kind of "medical monitoring" claim (*i.e.*, she does not allege she still suffers from an increased risk today), and has failed to articulate any facts that could establish pecuniary harm: she does not claim, for example, that she could have purchased a cheaper product that would have provided similar benefits if J&J had "disclosed" the alleged "risk,"[14] and never explains why Baby Powder failed to provide here with some benefit

[13] *Frye*, 583 F. Supp. 2d at 957-58 (no CFA claim for nondisclosure of lead in lipstick because "there is no allegation that the presence of lead in the lipstick had any observable economic consequences."); *Ibarrola v. Kind, LLC*, 2014 U.S. Dist. LEXIS 95833, at *11 (N.D. Ill. July 14, 2014) (Ellis, J.) (no CFA claim for nondisclosure of "sugar cane syrup" in snack where plaintiff failed to allege facts explaining claim of economic harm).

[14] *See Lipton v. Chattem, Inc.*, 2012 WL 1192083, at *5 (N.D. Ill. Apr. 10, 2012) (Feinerman, J.) ("[A]n economic injury plaintiff seeking recovery on the theory that she paid more for a product than it was worth must prove the existence of less expensive substitutes.") (quoting *Price v. Philip Morris, Inc.*, 219 Ill. 2d 182 (2005) (Karmeier, J., specially concurring)); *see also Frye*, 583 F. Supp. 2d at 957-58; *Ibarrola*, 2014 U.S. Dist. LEXIS 95833, at *11.

she expected.[15] In fact, Plaintiff does not allege that her own use of the product was anything other than "safe"—although Plaintiff contends that one particular use is associated with a risk (direct application on the genital area by adult women) she does not contend that ***she*** used the product in that "risk[y]" way, much less that she—or the vast majority of "class" members—were unable to put the product to any of its multitude of other (non-"risk[y]") uses.[16]

In short, Plaintiff does not contend that the product failed to perform as advertised or that the "risk" she alleges had anything to do with her own purchase and use. But even if she had purchased the product solely for use on her genital area (again, she alleges no facts to that effect) Plaintiff would still lack economic injury because she consumed the product (and enjoyed its benefits) without incident. As many courts have held, consumers who fully consume a product that performs as expected have no economic injury as a matter of law.[17]

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[15] *See Camasta*, 2013 WL 3866507, at *5 (dismissing CFA claim over alleged false statements about "sale price" of clothing because plaintiff's "allegations and arguments . . . do not show that he paid more than the value of the shirts because he merely guesses that the shirts are worth $29.16 and $26.50.").

[16] S*ee supra* fn. 6; *Verb*, 284 Ill. App. 3d at 472 (no injury where cell phone users could not allege they were personally exposed to actual health risk and failed to plead "specific facts" they personally changed their behavior to avoid risk).

[17] *E.g.*, *Frye*, 583 F. Supp. 2d at 958 ("There is no allegation that the presence of lead in the lipstick had any observable economic consequences."); BPA *I*, 687 F. Supp. 2d at 910 & n.7, 912 (plaintiffs "disposed of or used the products [baby formula and bottles] before learning about" the alleged risk, and thus "received all the benefits they desired and were unaffected by Defendant's alleged concealment. While they may contend they would not have purchased the goods had they known about [the alleged risk], these Plaintiffs received 100% use (and benefit) from the products and have no quantifiable damages."); *Herrington v. Johnson & Johnson*, 2010 WL 3448531, at *4 (N.D. Cal. Sept. 1, 2010) (Wilken, J.) (no economic harm from purchase of juice containing lead and arsenic where plaintiff already consumed juice); *Myers-Armstrong v. Actavis Totowa*, 2009 WL 1082026, at *4 (N.D. Cal. Apr. 22, 2009) (Alsup, J.) ("[A]fter consuming the pills and obtaining their beneficial effect with no downside, the consumer cannot get a refund on the theory that [he would not have purchased the pills had he known they] came from a source of uncertain quality . . . [T]he civil law should not be expanded to regulate every hypothetical ill in the absence of some real injury to the civil plaintiff"); *James v. Johnson & Johnson*, 2011 WL 198026, at *2 (D.N.J. Jan. 20, 2011) (Cavanaugh, J.) ("Plaintiffs bought and used shampoo, and subsequently wished that they had not done so because they feared for the

Here, Plaintiff asserts only that she "suffered an ascertainable loss of money by purchasing a dangerous product advertised as safe" (Comp. ¶¶ 81, 106), and "overpaid for Baby Powder because [she] paid a price that was based on Defendants' material misrepresentations and concealments." (*Id.* ¶ 118.) That is exactly the sort of fact-free legal boilerplate that fails "to state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 697 (quoting *Twombly*, 550 U.S. at 570); *see also Thrasher-Lyon*, 861 F. Supp. 2d at 908 (allegations that "fail to [identify] how exactly [plaintiff] was damaged or injured . . . . are not factual in nature and they cannot save Plaintiff's" CFA claim). Under the CFA, Plaintiff's purchase alone—without allegations that the product failed to perform or that her own use of the product was impaired—is insufficient to establish economic injury.[18] Instead, Plaintiff "paid for an effective [product], and [she] received just that—the benefit of [her] bargain." *Rivera*, 283 F.3d at 320; *see also In re Fruit Juice Prods. Litig.*, 831 F. Supp. 2d 507, 512 (D. Mass 2011) (undisclosed lead in juice);

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future safety of their children. . . . Once the product had been consumed . . . there was no economic injury for Plaintiffs to complain of . . . ."); *Rivera*, 283 F.3d at 320 (no injury where "[b]y plaintiff[s'] own admission, [they] paid for an effective [product], and [they] received just that—the benefit of [their] bargain."); *Briehl v. Gen. Motors*, 172 F.3d 623, 628 (8th Cir. 1999) ("It is well established that purchasers of an allegedly defective product have no legally recognizable claim where the alleged defect has not manifested itself in the product they own."); *O'Neil v. Simplicity*, 574 F.3d 501, 504 (8th Cir. 2009) (no economic injury where children's crib "ha[d] not exhibited the alleged defect [and Plaintiffs] have necessarily received the benefit of their bargain"); *In re Fruit Juice Prods. Litig.*, 831 F. Supp. 2d 507, 512 (D. Mass. 2011) ("Plaintiffs are unable to show that any actual harm resulted from consumption of the [lead-containing] fruit juice . . . The fact is that Plaintiffs paid for fruit juice, and they received fruit juice, which they consumed without suffering harm").

[18] *See Kim*, 598 F.3d at 365-66 ("[I]t is not enough" to claim that defendant "deceived the plaintiff[] and induced [her] to buy" the product); *Mulligan v. QVC*, 382 Ill. App. 3d 620, 628 (2008) (no CFA claim for jewelry sold at discount off inflated "suggested retail value, " because "[e]ven if QVC's alleged inflated retail values may have induced Mulligan into altering her purchasing decision because of the represented *bona fide* savings, she suffered no actual pecuniary loss.").

Frye, 584 F. Supp. 2d at 957-58 (undisclosed lead in lipstick). Her claims should be dismissed.[19]

B. The *Aqua Dots* Line of Cases Is Distinguishable[20]

Any attempt by Plaintiff to rely on *In re Aqua Dots Products Liab. Litig.*, 654 F.3d 748 (7th Cir. 2011), and its progeny, would be misguided.[21] As a preliminary matter, Plaintiff's claims here differ from those cases in a key (and fundamental) way: in those cases, there was no "safe" use of the product. Instead, the product at issue in those cases subjected everyone to an undisclosed risk. *Aqua Dots*, 654 F.3d at 749-50 (toxic chemical in children's toy); *Lipton v. Chattem, Inc.*, 2012 WL 1192083 (N.D. Ill. Apr. 10, 2011) (diet supplement contained toxic chromium); *Askin v. Quaker Oats Co.*, 818 F. Supp. 2d 1081, 1082-83 (N.D. Ill. 2011) ("heart healthy" snack contained dangerous trans fats). But here, only a small subset of consumers were exposed to the "risk": adult women who used the product directly on their genitals for an extended period of time. Even accepting (for the moment) that Plaintiff's allegations of "risk" are true, many purchasers used the product in ways that never exposed them to any "risk"—including, apparently, Plaintiff herself—and Plaintiff's claim that literally all consumers suffered an economic injury is absurd on its face. Men, for example, have no ovaries and thus no possible

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[19] Plaintiff's contention that she "overpaid" suggests that Plaintiff may attempt to assert a "price inflation" or "fraud on the market" theory of economic injury—*i.e.*, that the price of Baby Powder should be treated like the price of a stock, and that literally all consumers "overpaid" for Baby Powder even if they bought the product for reasons that have nothing to do with the allegedly "risk[y]" use and never relied on any false statement or omission. (*E.g.*, Comp. ¶ 118 ("Plaintiff and the Class members overpaid for the Johnson's Baby Powder because they paid a price that was based on Defendants' material misrepresentations and concealments regarding the safety of the Baby Powder"). The Illinois Supreme Court has expressly rejected the use of that theory in CFA claims. *Oliveira*, 201 Ill. 2d at 155 (rejecting claim that consumers who purchased defendant's premium gasoline were "damaged" by deceptive ads "because they paid a higher price for the gasoline then they would have paid in the absence of the ads").

[20] J&J is mindful of this Court's practice of permitting reply briefs only in exceptional circumstances, and has attempted to anticipate cases that Plaintiff might contend apply here.

[21] *Muir v. Playtex Prods., Inc.*, 983 F. Supp. 2d 980 (N.D. Ill. 2013) (Feinerman, J.); *Askin v. Quaker Oats Co.*, 818 F. Supp. 2d 1081 (N.D. Ill. 2011) (Kim, J.); *Lipton*, 2012 WL 1192083 (N.D. Ill. Apr. 10, 2012).

"risk." Yet Plaintiff apparently contends that even they "overpaid" for the product. Under the circumstances, Plaintiff should be required to plead facts that articulate why consumers who were never exposed to any "risk" (like her) were nevertheless "injured."

In *Aqua Dots*, the plaintiffs bought kits with beads that could be sculpted into shapes when wet—once dry, the shapes would stay rigid. 654 F.3d at 749-50. The product was recalled because the beads were toxic if ingested, and the plaintiffs moved to certify a class of buyers who had not yet sought a refund for unused kits; the defendant argued the plaintiffs lacked standing because they lacked a physical injury. *Id.* But as the Court explained, the lack of "physical injury . . . does not mean that they were uninjured. The plaintiffs' loss is financial: they paid more for the toys than they would have, had they known of the risk the beads posed to children." *Id.* at 751.

The *Aqua Dots* Court did not address whether customers who consume products without incident have an "economic" injury, much less hold that plaintiffs can plead such an injury by merely alleging that they "overpaid" for a product. Indeed, in *Aqua Dots* those "[c]onsumers whose children [had already] used their kits [were] not members of the proposed class" (*id.* at 751) and, as the Court noted, anyone who "used the product without problems" was not entitled to a remedy. *Id.* at 752 ("No one knows who used [the kits] without problems . . . this would make it difficult if not impossible to determine who would be entitled to a remedy.").

Thus, under *Aqua Dots*, consumers can allege an economic injury even if they suffered no physical injury from a defective product. Fair enough. But the case does not support Plaintiff's claims here—*i.e.*, that everyone who bought the product has an "economic loss," regardless of the use to which they put the product or whether the product provided the advertised benefits without incident. Rather, consistent with *Aqua Dots*, to allege a financial

injury Plaintiff must plead facts to show why she did not get the benefits she bargained for, *i.e.*, that the product did not perform as she expected or that it made her "tangibly worse off" in some articulable way. *Frye*, 583 F. Supp. 2d at 957.[22]

The handful of cases that have allowed CFA claims to proceed under *Aqua Dots* are of no help to Plaintiff. Instead, in those cases the plaintiff alleged he or she was promised something specific about the product's performance that the product failed to deliver. In *Muir v. Playtex Products, Inc.*, for example, a diaper disposal system was advertised as "Proven #1 in Odor Control," when it was inferior to its competitors. 983 F. Supp. 2d 980, 985-86 (N.D. Ill. 2013). Likewise, in *Askin*, the defendant's oatmeal was falsely advertised as "heart healthy." 818 F. Supp. 2d at 1082-83. In contrast to Plaintiff's claims here, in both *Muir* and *Askin* the plaintiffs alleged that they paid (including a "premium") for benefits they were expressly promised but never received.

Finally, the decision in *Lipton* was based on the (incorrect) assumption that *Aqua Dots* held that there was no valid distinction between plaintiffs who had fully consumed a product (and thus had no injury) and plaintiffs who still possessed a product that did not conform to the manufacturer's promises. *Lipton*, 2012 WL 1192083, at *3-4 ("*Aqua Dots* did not mention this distinction or even hint at its existence"). As discussed above, that is wrong—according to the Seventh Circuit, customers who used the product without incident had no claim. *E.g.*, *Aqua Dots*, 654 F.3d at 751-52 (since "[n]o one knows who used [the products] without problems . . . it would be impossible to determine who would be entitled to a remedy."). Unfortunately, the parties apparently failed to bring that aspect of *Aqua Dots* to the *Lipton* court's attention.

[22] *See also supra* Section IV.A.

In sum, *Aqua Dots* holds that economic injury ***can*** be sufficient to create standing. It does not relieve Plaintiff of her obligation under the CFA, *Iqbal* and Rule 9(b) to allege facts (as opposed to conclusory boilerplate) demonstrating that she personally failed to receive the benefits she bargained for when she purchased Baby Powder.

C. Plaintiff's Class Allegations Should be Stricken or Dismissed

1. The Vast Majority of Putative Class Members Have No Standing

Next, Plaintiff's class allegations should be stricken and/or dismissed because the putative class is extraordinarily overbroad. "A class is overbroad if it sweeps in many members who could not have been harmed at all." *McManus v. Sturm Foods, Inc.*, 292 F.R.D. 606, 610 (S.D. Ill. 2013).[23] Many—and in all likelihood, most—members of Plaintiff's proposed class were not exposed to the risk Plaintiff alleges, which applies only to a small subset of consumers: adult women who use the product in a particular way for an extended period of time. (Comp. ¶ 4.) As set out above, Plaintiff's proposed class includes consumers—all men, and women who purchased Baby Powder for uses other than directly on their genitals—who cannot claim that the alleged nondisclosure affected their use of the product. Even if Plaintiff's economic loss claims were proper (they are not), the only consumers who could conceivably assert such a claim would be women who bought the product exclusively for use in their genital area and are now unable to use the product they purchased.

[23] Courts in this Circuit generally refuse to certify classes that contain a significant number of members who lack standing. *See Oshana*, 472 F.3d at 513-14 (class membership based only on the purchase of a product "could include millions who were not deceived and thus have no grievance under the [CFA]"); *Korsmo*, 2012 U.S. Dist. LEXIS 65709, at *15 (classes that "include[d] consumers who were not deceived and suffered no harm" were "not sufficiently definite"); *In re Sears, Roebuck & Co. Litig.*, 2007 U.S. Dist. LEXIS 89349, at *15 (N.D. Ill. Dec. 4, 2007) (Grady, J.) (rejecting class that included purchasers who (1) never saw the allegedly misleading advertising or (2) knew the truth about the products).

Striking class allegations on the pleadings is appropriate where class definition necessarily includes uninjured members.[24] And here, each of Plaintiff's proposed classes (of "all" consumers) necessarily include individuals who suffered no injury because for them, the alleged nondisclosure was irrelevant. *See Oshana*, 472 F.3d at 513; *Korsmo*, 2012 U.S. Dist. LEXIS 65709, at *15. The class definition is thus extraordinarily overbroad and should be stricken as a matter of law. *See Wright*, 2010 U.S. Dist. LEXIS 126643, at *4.

2. Plaintiff Cannot Craft a Viable Class Definition

These problems with Plaintiff's class definition cannot be solved by amendment. Even if Plaintiff were to limit her class,[25] there is no "administratively feasible" way to ascertain which Illinois consumers might actually qualify as class members under Rule 23(a). *See Clay v. Am. Tobacco Co.*, 188 F.R.D. 483, 490 (S.D. Ill. 1999). Proof of purchase would not establish membership because Baby Powder has many uses that have nothing to do with the alleged risk. *See supra* fn. 6. Instead, the Court would need to determine, on a consumer-by-consumer basis: (1) that the consumer purchased Baby Powder (rather than a similar J&J product, such as Johnson's Baby Pure Cornstarch Powder, or another brand of talcum powder); (2) when the product was purchased; (3) the price paid; (4) the quantity purchased; as well as, for each purchase, (5) that the product was purchased by an adult female or on behalf of an adult female; (6) who used the product on her genitals; and (7) did not put the product to any other use. Baby Powder is purchased over the counter for a few dollars—J&J obviously has no record of all

[24] *See Wright v. Family Dollar, Inc.*, 2010 U.S. Dist. LEXIS 126643, at *4 (N.D. Ill. Nov. 30, 2010) (Gettelman, J.) (striking class allegations because "when the defendant advances a legal argument based on the pleadings, discovery is not necessary for the court to evaluate whether a class action may be maintained. . . . [C]ourts may—and should—address the plaintiff's class allegations when the pleadings are facially defective and definitively establish that a class action cannot be maintained."); *Kasalo v. Harris & Harris, Ltd.*, 656 F.3d 557, 563 (7th Cir. 2011).

[25] *E.g.*, so that the class encompass only women who purchased Johnson's Baby Powder exclusively for use in their genital area.

purchasers, much less a record that could identify the purchasers' sex and reasons for purchase.

Courts often decline to certify classes that depend, as here, on "the often unreliable vagaries of human memory" to prove membership.[26] This is because "a class must be sufficiently definite that the members can be ascertained without a separate evidentiary inquiry into each member's claim." *In re McDonald's French Fries Litig.*, 257 F.R.D. 669, 671-73 (N.D. Ill. 2009) (Bucklo, J.) (rejecting class of allergic customers). Since any class in this case will require an individualized inquiry, the class allegations should be stricken with prejudice.

D. Plaintiff Has Not Pled Fraud With Particularity Under Rule 9(b)

Plaintiff's claims should also be dismissed because she fails to allege whether she ever saw any "false" statements before buying Baby Powder, where she saw those statements (if any), or why those statements are false. Fed. R. Civ. P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake."); *Stavropoulos v. Hewlett-Packard Co.*, 2014 WL 2609431, at *5 (N.D. Ill. June 9, 2014) (Ellis, J.); *Bohn*, 2013 WL 3975126, at *9 (applying Rule 9 to CFA claim); *Lipton*, 2012 WL 1192083 (applying Rule 9 to unjust enrichment claim).

Here, the only statements that Plaintiff arguably saw are those on the package itself. But Plaintiff does ***not*** allege that any statements on the "representative product packaging" are actually false. (Comp. ¶ 18). And while Plaintiff quotes several statements from websites and press releases, she does not claim to have seen any of them before she purchased Baby Powder. (*See Id.* ¶¶ 15-22.) If Plaintiff contends that she was misled by some affirmative statement about the product, Plaintiff must identify the statement, explain why it was false, and how she was

[26] *In re Yasmin & Yaz Mktg., Litig.*, 2012 U.S. Dist. LEXIS 33183, at *59 (S.D. Ill. Mar. 13, 2012); *see also McManus*, 292 F.R.D. at 617 (declining to redefine class as "individuals that were actually exposed to the deceptive packaging or advertisement" because it "would be largely subjective and thus improper.").

deceived by it, *i.e.*, how it caused her some injury.[27]

On the other hand, if Plaintiff's claims are based entirely on omissions, then Plaintiff should make that clear and explain what, exactly, Plaintiff contends should have been included on the label and explain why those statements would have been material to her.[28] *McMahan*, 938 F. Supp. 2d at 805-06 & n.2 (plaintiff must plead "detail about the circumstances surrounding the omissions, including when and where they occurred, and what material facts should have been disclosed at what times."); *Graue Mill Dev. Corp. v. Colonial Bank & Trust Co.*, 927 F.2d 988, 992 (7th Cir. 1991) (plaintiff must allege "time, place, and content" of omissions). Here, Plaintiff appears to contend that J&J should have disclosed something about the alleged "risks" associated with use by adult women in their genital area. But J&J should not have to guess what Plaintiff contends J&J should have put on the label—and as pled, Plaintiff never explains what specifically should have been disclosed or where the disclosure should have been made.

E. Plaintiff Lacks Article III Standing to Seek Injunctive Relief

In addition, Plaintiff lacks standing to seek injunctive relief because she has not alleged (and could not credibly allege) that she faces a "real and immediate" threat of future injury. *Bohn*, 2013 WL 3975126, at *2-3 (threat of future injury must be "actual and imminent, not

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[27] *Stavropoulos*, 2014 WL 2609431, at *5 ("If a consumer has neither seen nor heard any such statement, then she cannot have relied on the statement and, consequently, cannot prove proximate cause" under CFA) (quoting *De Bouse v. Bayer*, 235 Ill. 2d 544 (2009)); *Oliveira*, 201 Ill. 2d at 155; *Kremers v. Coca-Cola Co.*, 712 F. Supp. 2d 759, 768-69 (S.D. Ill. 2010) ("To prove the element of proximate causation … under the [CFA], a plaintiff must allege that [s]he was, in some manner, deceived."); *Thrasher-Lyon*, 861 F. Supp. 2d at 913-14 (complaint "fail[ed] to provide … notice about the amount and any extent of harm Plaintiff has allegedly suffered or how exactly she was damaged or injured").

[28] As discussed above, Baby Powder has many uses, only one of which poses an alleged "risk" (*see supra* fn. 6). Plaintiff does not (and cannot) contend that "risk" is material to the vast majority of her class—*e.g.*, to a man, or to a woman buying the product to use in her shoes (for example). *See Coss*, 2009 WL 2245657, at *2 ("A material fact is one which would have caused the buyer to act differently, or is the type of information the buyer would expect to rely on … .").

conjectural and hypothetical").[29] Since Plaintiff is already personally aware of the alleged "risk" (and cannot possibly be deceived about that "risk" in the future) she lacks standing to seek injunctive relief.[30] Her demand for injunctive relief should therefore be stricken with prejudice.

F. Plaintiff Has Failed to State a Claim for Unjust Enrichment

Finally, Plaintiff's unjust enrichment claim fails because (1) it is based on the same alleged "misconduct" that, as discussed above, cannot sustain her CFA claim; and (2) as a matter of law, it is not "unjust" for J&J to retain the purchase price of a product that Plaintiff used without incident. *Cleary*, 656 F.3d at 516. First, when an unjust enrichment claim is based on "on the same improper conduct alleged in another claim, then the unjust enrichment claim will be tied to this related claim—and, of course, unjust enrichment will stand or fall with the related claim." *Id.* at 517.[31] Here, Plaintiff's unjust enrichment claim is based on the same conduct underlying her CFA claim, [32] and thus stands or falls with her CFA claim. And for the reasons discussed above, her CFA claim must be dismissed.

Second, there is nothing "unjust" about J&J retaining revenue from Baby Powder. In fact, the Seventh Circuit rejected this same argument in *Cleary v. Philip Morris Inc.* In *Cleary*,

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[29] While the CFA permits claims for injunctive relief under section 505/10a(c), "this does not alleviate [Plaintiff's] burden of alleging 'an injury in fact' necessary to establish Article III standing." *Bohn*, 2013 WL 3975126, at *3.

[30] *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) ("Past exposure to illegal conduct does not in itself show a present case for injunctive relief."); *Campbell v. Miller*, 373 F.3d 834, 836 (7th Cir. 2004) ("Unless the same events are likely to happen again to *him* there is no controversy between him and [the defendant.]") In addition, Plaintiff's failure to establish individual standing likewise dooms her prayer for injunctive relief on behalf of the class. *See Bohn*, 2013 WL 3975126, at *6 ("A party who cannot establish standing cannot seek relief on behalf of himself or any other member of the class").

[31] *See also Assn' Benefit Servs., Inc. v. Caremark RX, Inc.*, 493 F.3d 841, 855 (7th Cir. 2007) (no unjust enrichment based on failed fraud claim); *Kremers*, 712 F. Supp. 2d at 775-76 (no unjust enrichment based on failed CFA claim over corn syrup in beverages); *Siegel v. Shell Oil Co.*, 612 F.3d 932, 937 (7th Cir. 2010) (rejecting unjust enrichment where plaintiff failed to satisfy CFA); *Stavropoulos*, 2014 WL 2609431, at * 6; *Frye*, 583 F. Supp. 2d at 959.

[32] *E.g.*, Comp. ¶¶ 114, 118.

Illinois smokers sued tobacco companies for concealing tobacco's risks, claiming that it would be "unjust" for defendants to keep revenue earned by "violati[ng] their legal right as consumers to be informed of the true nature and risks" of cigarettes. 656 F.3d at 519. But the Court rejected that theory: "[W]ere we to accept the plaintiffs' theory of the case, it would have significant implications for our current legal system. All the revenue obtained by a malfeasant company from selling a dangerous product would be disgorged and distributed among all purchasers of the product according to the expenses incurred by each purchaser. The 'deep pockets' of the malfeasant company would be emptied, with little left to compensate those who were actually injured by the product. This course appears to us unwise, to say the least." *Id.* at 520 n.5. *See also Oshana*, 472 F.3d at 515 (no unjust enrichment when the plaintiff was not deceived about the purchased product).

Here, Plaintiff does not contend the product failed to perform as advertised or that she suffered any ill effects. (Comp. ¶ 8.) Nor does she claim, as explained *supra*, that she was deceived by or relied on J&J's alleged misrepresentations or omissions—and does not even contend that she used the product in the singular way she says is "risk[y]." Instead, she argues simply that it is "unjust" for J&J to keep revenue from a product it sold without disclosing an alleged "risk." But "the mere violation of a consumer's legal right to know about a product's risks, without anything more, cannot support a claim that the manufacturer unjustly retained the revenue from the product's sale to the consumer's detriment." *Cleary*, 656 F.3d at 520. Plaintiff's unjust enrichment claim should accordingly be dismissed.

V. CONCLUSION

For the reasons set forth above, J&J respectfully requests that the Court dismiss the Complaint and grant J&J's motion to strike.

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Respectfully submitted,

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