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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

DAVID SWARTZ, CRISTINA SALGADO, and MARCELO MUTO, on behalf of themselves and those similarly situated,

Plaintiffs,

v.

THE COCA-COLA COMPANY, BLUETRITON BRANDS, INC., and NIAGARA BOTTLING, LLC,

Defendants.

Case No. 3:21-cv-04643-JD

DEFENDANT BLUETRITON BRANDS, INC.'S NOTICE OF MOTION AND MOTION TO DISMISS; MEMORANDUM OF POINTS AND AUTHORITIES

Date: January 13, 2022
Time: 10:00 a.m.
Judge: Hon. James Donato
Courtroom: 11, 19th Floor

NOTICE OF MOTION AND MOTION

TO PLAINTIFFS AND THEIR COUNSEL OF RECORD, PLEASE TAKE NOTICE THAT on January 13, 2022, at 10:00 a.m., or as soon thereafter as counsel may be heard, in Courtroom 11 of the United States District Court for the Northern District of California, San Francisco Division, located at 450 Golden Gate Ave., 19th Floor, San Francisco, California 94102, Defendant BlueTriton Brands, Inc. ("BTB") hereby moves pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) for an order dismissing this action on the grounds that Plaintiffs lack Article III standing and that they fail to state a claim.

Dated: September 27, 2021

O'MELVENY & MYERS LLP

By: /s/ *Dawn Sestito*

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I. INTRODUCTION[1]

Recycl*able*. It means just what it sounds like: *able* to be recycled. And that definition lives not just in the dictionary[2] but in federal guidelines that the California legislature adopted to control whether a product can be labeled as recyclable. But Plaintiffs concoct their own novel definition, arguing that a product is only recyclable if it is *ultimately recycled*. They allege that to be labeled as "recyclable," a product "*must*, if discarded into a recycling bin, be: (i) accepted for collection by a recycling facility; and (ii) processed for reuse or use in manufacturing another item." Compl. ¶¶ 37, 62. That flawed definition contradicts labeling guidance from the Federal Trade Commission ("FTC") – and therefore California law.[3] Because this extreme definition underpins Plaintiffs' claims, all their claims fail.

The FTC's Green Guides, which control marketing claims about recyclability, recognize that the phrase "recyclable" promises consumers only that the materials are *able* to be recycled—that is, capable of being accepted at recycling facilities. Specifically, the FTC permits use of the term "recyclable" to the extent that consumers and communities where a product is sold have access to recycling facilities that accept that product, and it only requires producers to disclaim that term to the extent that such facilities are available to less than 60% of the consumers. The Court should not credit any suggestion that "100% Recyclable" products from BTB were made from materials that *cannot* be recycled. Plaintiffs' factual allegations simply do not add up to such a theory: Plaintiffs rely entirely on general allegations about nationwide recycling capacity that say nothing as to BTB's packaging components sold in California and whether they are accepted for processing by California's recycling programs, and admit that recycling facilities are generally capable of processing all three types of plastic at issue here. Plaintiffs never allege that recycling facilities are unavailable to most communities and customers BTB serves in California. They also fail to allege anything to suggest that anyone other than the named plaintiffs accept their idiosyncratic definition

[1] Unless otherwise stated, all emphasis is added and citations and quotation marks are omitted.
[2] *See* Chanoine Decl. Exhibit 5 at PDF p. 2, Cambridge Dictionary, https://dictionary.cambridge.org/dictionary/english/recyclable (*recyclable* means "able to be recycled").
[3] This brief is submitted concurrently with a motion seeking judicial notice and incorporating by reference the documents attached as Exhibits 1-5 to the Declaration of Hannah Y. Chanoine.

of "recyclable" as meaning that every molecule of plastic will be recovered and repurposed. These failures and omissions doom Plaintiffs' claims.

In California, the Green Guides are more than commonsense guidance based on FTC's consumer surveys. California lawmakers enacted what Plaintiffs call the "Environmental Marketing Claims Act" or "EMCA," Cal. Bus. & Prof. Code § 17580.5, to govern marketing statements involving the term "recyclable." That statute is the *exclusive* California law defining "recyclable" for the purposes of consumer protection claims. In other words, Plaintiffs cannot deploy general consumer fraud theories under the UCL, CLRA, FAL, or common law to claim deception based on a *different* definition of "recyclable" than the EMCA's – as they do here.

Plaintiffs' claims fail for other reasons, too. They impermissibly lump Defendants' products together and fail to identify with the requisite specificity which allegations pertain to which Defendants' products. Their EMCA claim fails because the law offers a safe harbor to statements that, like BTB's here, do not violate the FTC's Green Guides and because the EMCA is not redressable as a standalone claim. Their fraud claim fails because Plaintiffs do not specify the state law invoked and do not allege scienter or an intent to defraud. Their negligent misrepresentation claim fails because Plaintiffs allege only an economic loss, not any physical harm. And their UCL claim fails because they do not allege a plausible EMCA violation.

Plaintiffs' deficient claims boil down to their dissatisfaction with the nation's recycling infrastructure and the market for recycled material. Neither their dissatisfaction nor alternative definition of "recyclable" creates an actionable claim. The Court should dismiss the Complaint.

II. STATEMENT OF ISSUES TO BE DECIDED

1. Have Plaintiffs sufficiently pleaded a violation of any of the consumer protection laws based on a definition of "recyclable" consistent with the FTC's Green Guides' definition, which the California legislature incorporated into the Business & Professions Code?
2. Would a significant portion of reasonable consumers interpret "100% Recyclable" to mean something other than the product *can be* recycled, and instead that a product, if discarded into a recycling bin, *must be*: (i) accepted for collection by a recycling facility; and (ii) processed for reuse or use in manufacturing another item (*i.e.*, that a product *will* be recycled)?

3. By making group pleadings about all Defendants' products and making few allegations about any specific product, do Plaintiffs satisfy Rule 9(b)?
4. Have Plaintiffs specified the state law governing their fraud claim and have they alleged scienter or an intent to defraud?
5. Do Plaintiffs allege a purely economic loss, barring their negligent misrepresentation claim?

III. STATEMENT OF RELEVANT FACTS

This is one in a series of putative class actions alleging similar claims about the recyclability of plastic packaging. Plaintiffs sue BTB, The Coca-Cola Company, and Niagara Bottling, LLC (together, "Defendants"), alleging that Defendants' "100% Recyclable" representations are false and misleading.[4] *See e.g.*, Compl. ¶¶ 37-64.

The Complaint relies mostly on collective allegations against all Defendants without providing any details about specific products. The only portions of the Complaint devoted specifically to BTB's products are images of an Arrowhead product different from the one Plaintiff alleges to have purchased (Compl. ¶¶ 29, 67), images of other BTB products (*id.* ¶¶ 30-32), and the assertion that in November 2020 Plaintiff Swartz purchased a bottle of Arrowhead water in California bearing a "100% Recyclable" label (*id.* ¶ 67, Compl. Ex. A).

Plaintiffs assert that the "100% Recyclable" representations on BTB's labels are false, violate California public policy and the FTC's Green Guides, and defraud the public because Defendants' bottles are not "100% Recyclable" under Plaintiffs' preferred definition of "recyclable." *See e.g.*, Compl. ¶¶ 39-64. According to Plaintiffs, a "recyclable" product "***must***, if discarded into a recycling bin, be: (i) accepted for collection by a recycling facility; and (ii) processed for reuse or use in manufacturing another item." *Id.* ¶ 37. So according to Plaintiffs, a product is recyclable only if it *will be* recycled.

[4] Plaintiffs allege six causes of action: (1) violation of the Consumers Legal Remedies Act, Cal. Civ. Code § 1750, *et seq.*, (2) false advertising under Cal. Bus. & Prof. Code § 17500, *et seq.*, (3) fraud, deceit, and misrepresentation, (4) negligent misrepresentation, (5) "Greenwashing" under the "Environmental Marketing Claims Act," Cal. Bus. & Prof. Code § 17580, *et seq.*, and (6) unfair, unlawful, and deceptive trade practices, Cal. Bus. & Prof. Code § 17200, *et seq.*

But that is not how the FTC defines "recyclable" in the Green Guides. According to the Green Guides, a product is recyclable—and can be labeled as such—if it "*can be* collected, separated, or otherwise recovered from the waste stream through an established recycling program for reuse or use in manufacturing or assembling another item." 16 C.F.R. § 260.12(a). The Green Guides permit the use of unqualified "recyclable" claims if "recycling facilities are available" to at least 60% "of consumers or communities where the item is sold." 16 C.F.R. § 260.12(b)(1). As Plaintiffs themselves allege, consumers and communities in California have access to at least 75 Materials Recovery Facilities ("MRFs"), that process recyclable materials, including the materials Plaintiffs allege Defendants' bottles are made of. *See* Compl. ¶ 38 (PET, HDPE, and PP sorted in sink-float tank). And Plaintiffs do not allege that any of BTB's California consumers or communities—let alone more than 40% of them—lack access to "recycling facilities." Because BTB's bottles are made entirely of recyclable material, and because its bottles can be collected and processed through available recycling facilities, BTB appropriately labels its bottles as "100% Recyclable." By relying on their own invented definition, Plaintiffs ask the Court to rewrite the Green Guides and enforce a definition of recyclability that the legislature neither considered nor codified.

IV. LEGAL STANDARD

To survive a Rule 12(b)(6) motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While the Court must accept well-pleaded facts as true, it need not accept "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008). Instead, the allegations in the complaint "must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. The "court need not . . . accept as true allegations that contradict matters properly subject to judicial notice or by exhibit." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001), *opinion amended on denial*

of reh'g, 275 F.3d 1187 (9th Cir. 2001). Because all of Plaintiffs' claims here sound in fraud, Plaintiffs must also satisfy Rule 9(b)'s heightened pleading standard.[5] To do so, they must sufficiently allege "the who, what, when, where, and how" of the fraud. *TransFresh Corp. v. Ganzerla & Assoc., Inc.*, 862 F. Supp. 2d 1009, 1017 (N.D. Cal. 2012). Any such claim must be "specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge." *Id.*

Plaintiffs must also establish that they have constitutional standing, pleading an "injury in fact that is fairly traceable to the defendant's conduct and that is likely to be redressed by a favorable judicial decision." *Bank of Am. Corp. v. City of Miami, Fla.*, 137 S. Ct. 1296, 1302 (2017).

V. ARGUMENT

A. The incorporation of the Green Guides definition into the Business & Profession Code for "recyclable" labeling supersedes any other definition.

California law is far from silent on what "recyclable" means. On the contrary: Plaintiffs' claims of deceptive environmental marketing all fail because they hinge on a "recyclable" definition that differs from the Green Guides, which is the *exclusive* standard for such claims in California. California lawmakers enacted the EMCA, Cal. Bus. & Prof. Code § 17580.5, for the specific purpose of governing environmental marketing claims, including what qualifies as "recyclable." Because lawmakers designed the EMCA to address the specific kind of claims at issue here, it supersedes Plaintiffs' attempt to impose a *different* definition of "recyclable" under the UCL, FAL, and CLRA claims, all of which arise from more general statutes. "It is a commonplace of statutory construction that the specific governs the general." *N.L.R.B. v. SW Gen., Inc.*, 137 S. Ct. 929, 941 (2017). The legislature's chosen definition also precludes Plaintiffs' common law claims, each turning on an alleged meaning of "recyclable" different from that in the Green Guides. *See Verdugo v. Target Corp.*, 59 Cal. 4th 312, 326 (2014) (when the legislature uses

[5] Courts routinely apply Rule 9(b) to similar causes of action. *Beecher v. Google N. Am. Inc.*, 2018 WL 4904914, at *1 (N.D. Cal. Oct. 9, 2018) (UCL, FAL, and CLRA); *TransFresh Corp. v. Ganzerla & Assoc., Inc.*, 862 F. Supp. 2d 1009, 1015 (N.D. Cal. 2012) (Greenwashing and UCL); *Neilson v. Union Bank of Cal., N.A.*, 290 F. Supp. 2d 1101, 1141 (C.D. Cal. 2003) (fraud and negligent misrepresentation).

"much clearer and more explicit statutory language" it reflects an intention "entirely to preclude the imposition of liability . . . under common law principles").

In fact, defining "recyclable" was among the legislature's key goals in enacting the EMCA.[6] The Senate Business and Professions Committee concluded that the FTC's definition of recyclable products—those that "*can be* collected, separated, or otherwise recovered from the solid waste stream for subsequent reuse"—was "[m]ost pertinent to California and this bill."[7] This history demonstrates that the EMCA is the more "particular or specific statute" on recyclable marketing, so that statute must "take precedence over [the] conflicting general statute[s]" on which Plaintiffs base their claims. *Spriesterbach v. Holland*, 215 Cal. App. 4th 255, 270 (2013); *Arterberry v. Cnty. of San Diego*, 182 Cal. App. 4th 1528, 1536 (2010). The Court should therefore dismiss the UCL, FAL, CLRA, fraud, and negligent misrepresentation claims as based on a "recyclable" definition that is inconsistent with the EMCA. *See* Compl. ¶¶ 84, 90, 100, 109, 117, 123.

B. Plaintiffs fail to sufficiently plead that BTB's "100% Recyclable" labeling was false or misleading.

1. Plaintiffs fail to plausibly allege facts showing BTB's products are not 100% recyclable.

Plaintiffs' conclusory allegations that BTB's Products are not "100% Recyclable" are based on generalized allegations about nationwide recycling practices that say nothing specific about BTB's products or recycling practices *in California*. Because Plaintiffs' factual allegations do not plausibly support a violation of California's definition of "recyclable," all their claims must be dismissed. *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 555.

California's adoption of the FTC's definition of "recyclable" requires Plaintiffs to plausibly allege that, for at least 60% of California consumers or communities in which BTB's products are sold, there are no "recycling facilities [] available" to collect, separate, or otherwise recover from the waste stream the materials in BTB's packaging. *See* 16 C.F.R. §§ 260.12(a), (b)(1). The Green

[6] *See* Chanoine Decl. Exhibit 3 at PDF p. 39, Legislative History (bill comments explain that a federal court struck the prior definition of "recyclable" as too vague).

[7] *See id.* at PDF p. 60 (explaining that qualification of "recyclable" claims would be required "to avoid consumer deception about any limited availability of recycling programs and collection sites").

Guides permit the use of the term "recyclable" on any packaging that "can be collected, separated, or otherwise recovered from the waste stream through an established recycling program for reuse or use in manufacturing or assembling another item." *Id.* § 260.12(a). The Green Guides allow the use of "recyclable" without restriction if "recycling facilities are available to a substantial majority [60%] of consumers or communities" where the item is sold. *Id.* § 260.12(b)(1). Below that threshold, the Green Guides require qualification of any "recyclable" claim, making clear that the accuracy of the claim is dependent on *facility availability*:

> Marketers should clearly and prominently qualify recyclable claims to the extent necessary to avoid deception about the availability of recycling programs and collection sites to consumers . . . . Marketers may always qualify recyclable claims by stating the percentage of consumers or communities that have access to facilities that recycle the item. Alternatively, marketers may use qualifications that vary in strength depending on facility availability.

Id. § 260.12(b).

Therefore, to assert a violation of California's definition of "recyclable," Plaintiffs must plead facts showing that, in at least 40% of the California communities in which BTB's products labeled "100% Recyclable" are sold, there are no established recycling programs to recover the bottles, caps, or labels from the waste stream. Plaintiffs fail to do so.

Ignoring that the definition of "recyclable" centers on the availability of recycling facilities, Plaintiffs rest their allegations on the capability of *existing* recycling facilities to convert the collected PET, HDPE, and PP/BOPP into new plastics. These allegations rely entirely on inferences drawn from public reports discussing general recycling practices in the United States. *See* Compl. ¶¶ 37-42 & n.5-6 (citing Greenpeace report and plasticpollutioncoalition.org blog). But each fails to plausibly indicate that BTB's bottles, caps, and labels are not collected by California's recycling programs. Plaintiffs theorize that, "[a]lthough the Products may be accepted for recycling by some curbside programs," MRFs allegedly lack the capacity to process the packaging into new plastics. Compl. ¶ 47. Plaintiffs allege that as of 2017, nationwide MRFs had limited capacity to process PET and HDPE and that contamination and processing issues further reduce the amount of PET and HDPE converted to new plastics. *Id.* ¶ 39. But they fail to allege that the 2017 data is still accurate, that it applies to *California* MRFs, or that the contamination and processing issues

exist for BTB's bottles, which contain water and thus cannot be assumed to contain contaminates that other plastic containers might. Relying on the Greenpeace report, Plaintiffs assert that PP and BOPP plastics are generally too expensive to recycle in the United States due to limited demand. *Id.* ¶¶ 40-41. But Plaintiffs say nothing about the capabilities of *California* MRFs and never allege that Defendants' PP or BOPP labels are among the materials that those MRFs decline to recycle. *Id.* ¶ 40 & n.8-9 (citing Greenpeace report).[8] Plaintiffs concede that 75 of the nation's 365 MRFs are in California. *Id.* ¶ 38. And Plaintiffs allege that MRFs generally utilize float tanks to separate HDPE and PP from PET plastics, conceding that MRFs are capable of removing all three types of plastics from the waste stream. *Id.* ¶ 38. The alleged lack of market demand for PP and BOPP plastics does not mean MRFs cannot or do not process those materials.

The Green Guides do not require recyclability claims to be backed by a pledge that recycling facilities will convert every gram of recyclable material into recycled plastics. Nor do they suggest that recycling facilities are not "available" if collected plastics are not actually recycled due to contamination, loss, or lack of a buyer for the recycled plastics. Because Plaintiffs do not plausibly allege that 60% of consumers of BTB's products lack access to recycling facilities that collect and process bottles, caps, and labels, Plaintiffs fail to support a plausible inference that the "100% Recyclable" claim deviates from California's "recyclable" definition. *See Twombly*, 550 U.S. at 556.

2. Plaintiffs impermissibly lump Defendants' products together.

Plaintiffs barely allege anything specific to the lone BTB product purchased by a single plaintiff, instead impermissibly lumping all of Defendants' products together. Rule 9(b) "ensures that allegations of fraud are specific enough to give defendants notice of the particular misconduct . . . to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985). The rule "does not allow a complaint to merely lump multiple defendants together but 'require[s] plaintiffs to differentiate their allegations when suing more than one defendant . . . and

[8] *See* Chanoine Decl. Exhibit 1 at 10-12, Greenpeace Report (survey pertains to processing rates of PP "tubs," "containers," and "coffee pods").

inform each defendant separately of the allegations surrounding his alleged participation in the fraud.'"[9] *Swartz v. KPMG LLP*, 476 F.3d 756, 764-765 (9th Cir. 2007).

Allegations that do not differentiate between the alleged fraudulent acts of multiple defendants thus do not meet Rule 9(b)'s heightened standards and should be dismissed. The Complaint fails to plead anything specific about *any* of the particular products at issue. Instead, it makes blanket statements about *all* of Defendants' various products, alleging in conclusory terms that all of the "100% Recyclable" statements are false.[10] *See, e.g.*, Compl. ¶ 47. And contrary to Plaintiffs' allegation that "Defendants" have launched the "Every Bottle Back" initiative to market their products as "100% Recyclable," Compl. ¶ 54, they do not allege that BTB itself participated in or was affiliated with that initiative.[11] Under Rule 9(b), Plaintiffs cannot rely on these broad-brush, conclusory statements to allege that BTB's "100% Recyclable" statements were false or misleading. *Swartz*, 476 F.3d at 764.

C. Reasonable consumers would not interpret "100% Recyclable" to mean the bottles are *always* recycled.

Plaintiffs not only seek to rewrite California law, but plain English as well. Plaintiffs' claims all stem from their own invented definition of "recyclable": not that a plastic bottle *can be* recycled but that it *will be* recycled. That fanciful interpretation contradicts the word's plain meaning, reasonable consumers' understanding of it, and federal guidelines for its use in advertising. In other words, even if Plaintiffs sufficiently alleged that "100% Recyclable" does not comply with the Green Guides, Plaintiffs must also plead, for all their claims, that the "100% Recyclable" claim is "likely to mislead" or "likely to deceive" reasonable consumers. *See Colgan*

[9] A plaintiff may only use collective allegations to describe the actions of multiple defendants where defendants "are alleged to have engaged in precisely the same conduct." *United States v. United Healthcare Ins. Co.*, 848 F.3d 1161, 1184 (9th Cir. 2016). That is not the case here.

[10] Coca-Cola's forthcoming Motion to Sever Claims highlights how Defendants' products, transactions, and companies differ.

[11] Chanoine Decl. Exhibit 2, *Every Bottle Back*, American Beverage Association, https://www.innovationnaturally.org/plastic/.

v. Leatherman Tool Grp., Inc., 135 Cal. App. 4th 663, 680 (2006); *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 508 (2003); *Ebner v. Fresh, Inc.*, 838 F.3d 958, 965 (9th Cir. 2016).[12]

This "reasonable consumer" test requires Plaintiffs to plead not only their *own* belief that they were misled, but "a probability that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled." *People ex rel. Dep't of Motor Vehicles v. Cars 4 Causes*, 139 Cal. App. 4th 1006, 1016 (2006); *Hadley v. Kellogg Sales Co.*, 243 F. Supp. 3d 1074, 1094 (N.D. Cal. 2017). It is not enough to plead that 100% Recyclable "might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner." *Lavie*, 105 Cal. App. 4th at 508. Nor is it enough to plead that the three named Plaintiffs shared the same interpretation. *See id.*; *see also Moore*, 4 F.4th 874, 881-85 (9th Cir. 2021).

Courts regularly dismiss claims where, as here, plaintiffs fail to plead any basis for concluding that a *significant portion* of consumers—not just "some" consumers—would understand the statements to mean what Plaintiffs suggest. *Becerra v. Dr Pepper/Seven Up, Inc.*, 945 F.3d 1225, 1230 (9th Cir. 2019). *See*, *e.g.*, *Moore v. Trader Joe's Co.*, 4 F.4th at 881-85 (reasonable consumer would not understand phrase "100% New Zealand Manuka Honey" to promise product contained only manuka pollen); *Becerra*, 945 F.3d at 1228-31 ("[N]o reasonable consumer would believe that the word 'diet' in a soft drink's brand name promises weight loss or healthy weight management" rather than "fewer calories"); *Carrea v. Dreyer's Grand Ice Cream, Inc.*, 475 F. App'x 113, 115 (9th Cir. 2012) (reasonable consumer would not believe that ice cream is healthier than others solely because of "Original" and "Classic" descriptors); *Forouzesh v. Starbucks Corp.*, 2016 WL 4443203, at *3 (C.D. Cal. Aug. 19, 2016) (reasonable consumer would know that iced tea contains ice); *Nowrouzi v. Maker's Mark Distillery, Inc.*, 2015 WL 4523551, at *7 (S.D. Cal. July 27, 2015) (reasonable consumer would not think "handmade" meant no

[12] *Ebner*, 838 F.3d at 965 (CLRA, UCL, and FAL); *Freeman v. Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995) (fraud); *Girard v. Toyota Motor Sales, U.S.A., Inc.*, 316 Fed. App'x. 561, 562 (9th Cir. 2008) ("justifiable reliance" element of negligent misrepresentation same as "reasonable consumer" standard); *Hill v. Roll Intern. Corp.*, 195 Cal. App. 4th 1295, 1304 (2011) (EMCA must satisfy reasonable consumer test "as expressed in the FTC guides and as used in our state's consumer laws").

equipment or automated process used to manufacture whiskey); *Red v. Kraft Foods, Inc.*, 2012 WL 5504011, at *3 (C.D. Cal. Oct. 25, 2012) (reasonable consumer would "be familiar with the fact of life that a cracker is not composed of primarily fresh vegetables").

Here, Plaintiffs allege no plausible facts to suggest that a reasonable consumer would believe that a "recyclable" product "must, if discarded into a recycling bin, be . . . processed for reuse or use in manufacturing another item" or that "100% Recyclable" means the entirety of the packaging could *and would* be recycled once deposited in a recycling bin. Compl. ¶¶ 37, 67. Plaintiffs' theory is that "100% Recyclable" guarantees that the complex industrial process of recycling plastic material will forever and always recover exactly 100% of the plastic from a "100% Recyclable" bottle. By that logic, a reasonable consumer would have to believe that every gram of plastic in every recyclable bottle will be recycled even if an MRF's equipment breaks down, if its customers stop purchasing recycled material, if some of the plastic accidentally becomes contaminated, or in the event of countless other possible industrial or economic disruptions. *See Moore*, 4 F.4th at 883 ("A reasonable consumer would not understand Trader Joe's label here as promising something that is impossible to find."). And Plaintiffs' definition defies the dictionary definition[13] of "recyclable," which means "able to be recycled." *Rugg v. Johnson & Johnson*, 2018 WL 3023493, at *3 (N.D. Cal. June 18, 2018) (dismissing "hypoallergenic" labeling claim where dictionary definition conflicted with plaintiff's unreasonable interpretation); *Punian v. Gillette Co.*, 2016 WL 1029607, at *7 (N.D. Cal. Mar. 15, 2016) (considering "guarantee" dictionary definition in dismissing claims under reasonable consumer test).

And even if the FTC's Green Guides did not control the definition of recyclable, *supra* pp.5-6, they remain persuasive guidance on how reasonable consumers understand the term "recyclable." The FTC specifically intended to give guidance to marketers to avoid practices that "likely mislead[] reasonable consumers." The FTC relied on consumer survey data to make determinations "based on how consumers reasonably interpret claims" and considered the views of consumers with a range of sophistication when fashioning the Green Guides.[14] As the Green Guides recognize, a product

[13] *See* Chanoine Decl. Exhibit 5, Cambridge Dictionary.
[14] Chanoine Decl. Exhibit 4 at 24, FTC, *The Green Guides: Statement of Basis and Purpose*.

is recyclable if it "*can be* collected, separated, or otherwise recovered from the waste stream through an established recycling program for reuse or use in manufacturing or assembling another item." 16 C.F.R. § 260.12(a). The Green Guides identify only one requirement for using an unqualified "recyclable" label on a product: that "recycling facilities are available" to at least 60% "of consumers or communities where the item is sold." *Id.* § 260.12(b)(1).

Because Plaintiffs fail to show that a significant portion of reasonable consumers could have been confused by "100% Recyclable" the same way they were, they fail to state any claim. *Becerra*, 945 F.3d at 1230; *Newton v. Kraft Heinz Foods Co.*, 2018 WL 11235517, at *9 (E.D.N.Y. Dec. 18, 2018) (dismissing "natural" claim as "so inconsistent with current federal law, that it fails to comport with reality").

D. Additional, claims-specific arguments warrant dismissal.

1. Environmental-Marketing Statute (EMCA)

No Private Right of Action. Plaintiffs' standalone EMCA claim fails because that statute does not create a private right of action. A private party can only bring a civil action arising from statute if "the Legislature [has] clearly manifest[ed] an intent to create a private cause of action." *Lu v. Hawaiian Gardens Casino, Inc.*, 50 Cal. 4th 592, 604 (2010). Where the Business and Professions Code does not explicitly create a private right of action, private plaintiffs cannot bring a direct cause of action for a violation of the statute even if other language implies a possible private right of action. *See Mayron v. Google LLC*, 54 Cal. App. 5th 566, 571-72 (2020). Here, the legislature did not draft a "clear, understandable, [and] unmistakable," private right of action into the EMCA. *See Lu*, 50 Cal. 4th at 596.

Failure to Allege EMCA Violation. Plaintiffs' allegations that BTB's packaging can be separated from the waste stream meets the Green Guides' definition—meaning the claim can be dismissed on that basis alone. Conforming to the Green Guides is a safe harbor under the EMCA.[15] Cal. Bus. & Prof. Code § 17580.5. BTB accurately describes its products as "100% Recyclable"

[15] Plaintiffs fail to plead BTB's lack of compliance with the Green Guides, but their allegations establish that the safe harbor is met. *Lovejoy v. Bank of Am., N.A.*, 2013 WL 3360898, at *6 (N.D. Cal. July 3, 2013) ("[A] motion to dismiss may be granted based upon an affirmative defense . . . if affirmative defense is apparent on the face of the complaint.").

because they "*can be* collected, separated, or otherwise recovered from the waste stream through an established recycling program for reuse or use in manufacturing or assembling another item," 16 C.F.R. § 260.12(a), and because "recycling facilities are *available* to a substantial majority of consumers or communities" where those products are sold, *id.* § 260.12(b)(1).

The Greenpeace report Plaintiffs cite found that all MRFs accept PET and HDPE—materials that Plaintiffs allege Defendants' bottles are made of—and that those materials can "be [l]abeled as 'Recyclable' per FTC Green Guides." *See supra* n.8. Plaintiffs also admit that MRFs are widely available in California and that MRFs collect and separate from the waste stream all three types of plastics allegedly in BTB's packaging: PET, HDPE, and PP. Compl. ¶ 38. These allegations show that the safe harbor applies. Cal. Bus. & Prof. Code § 17580.5(b).

No Violation of Sec. 260.3. These allegations also render implausible Plaintiffs' suggestion that BTB violates Section 260.3 of the Green Guides, which asks that any environmental marketing statement state whether it refers to the "product, the product's packaging, a service, or just to a portion of the product, package, or service." Compl. ¶ 48. Not only are all parts of BTB's bottles "recyclable," but the Green Guides also allow BTB to label its products as "recyclable" even if "minor, incidental" components like bottle caps or labels are not recyclable. *See* 16 C.F.R. § 260.3(b) ("In general, if the environmental attribute applies to all but minor, incidental components of a product or package, the marketer need not qualify the claim to identify that fact."). While Plaintiffs assert that BTB's bottle caps and label are not "incidental components" and are not recyclable (a legal conclusion the Court need not accept as true, *Twombly*, 550 U.S. at 555), the Green Guides and Plaintiffs' allegations contradict both claims. Plaintiffs acknowledge that the plastics used to make Defendants' bottle caps and labels are recyclable, albeit with further "processing." Compl. ¶ 40. And the Green Guides cite bottle caps as examples of a "minor, incidental component." C.F.R. § 260.3(b) ("Example 2: A soft drink bottle is labeled 'recycled.' The bottle is made entirely from recycled materials, but the bottle cap is not. Because the bottle cap is a minor, incidental component of the package, the claim is not deceptive.").

No Violation of Sec. 260.2. In passing, Plaintiffs also claim—without any supporting allegations—that BTB violated Section 260.2 of the Green Guides, which requires "marketers" to

"ensure that all reasonable interpretations of their claims are truthful, not misleading, and supported by a reasonable basis before they make the claims." 16 C.F.R. § 260.2. They cite a similar section under California law, Cal. Bus. & Prof. Code § 17580(a), requiring maintenance of documents supporting the validity of certain environmental representations. *First*, Plaintiffs lack standing: they fail to explain how a violation of either provision pertaining to BTB's internal documentation actually *injured* them. *Lujan*, 504 U.S. 555, 560-61 (1992). Plaintiffs' purchasing decisions are unrelated to BTB's compliance or noncompliance with recordkeeping obligations. *Second*, Plaintiffs offer no facts to support their conclusory assertion that BTB lacks information about the recyclability of its products or failed to maintain the requisite documentation. Compl. ¶¶ 49 (conclusory allegation that "Defendants do not possess information sufficient to support their claims"), 117 (pleading "[o]n information and belief" that Defendants violate Section 17580(a) because they "have not maintained in written form in their records information and documentation supporting the validity of the ["100% Recyclable"] representation. . . ."). The Court need not accept such conclusory assertions as true. *Twombly*, 550 U.S. at 555.

2. Fraud, Deceit, and/or Misrepresentation Claim

Plaintiffs' fraud, deceit, and/or misrepresentation claim fails because Plaintiffs do not specify the state law governing the claim and do not allege scienter or an intent to defraud.

Rule 8 violation. Plaintiffs violate Rule 8 because they do not say which state law governs their fraud claim. Rule 8 requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The common-law claim flouts this standard: neither BTB nor the Court can evaluate whether Plaintiffs are entitled to relief under an unspecified law. *See In re Ditropan XL Antitrust Litig.*, 529 F. Supp. 2d 1098, 1101 (N.D. Cal. 2007) ("[U]nless and until [the plaintiff] clarifies under what state law it is moving, neither Defendants nor the Court can address whether the claim or claims have been adequately plead."). The Court should dismiss the fraud claim on this basis alone. *See id.*

No Scienter. Plaintiffs also fail to plead "knowledge of falsity (or 'scienter')" and an "intent to defraud." *Neilson v. Union Bank of Cal., N.A.*, 290 F. Supp. 2d 1101, 1140-1141 (C.D. Cal. 2003). Conclusory allegations that BTB had actual knowledge or deliberately disregarded that the

"100% Recyclable" statements were false are not enough under Rule 9(b). Compl. ¶ 100. *See id.*; *Ketab Corp. v. Mesriani Law Grp.*, 2015 WL 2085523, at *5 (C.D. Cal. May 5, 2015).

3. Negligent Misrepresentation

Plaintiffs' negligent-misrepresentation claim fails because they allege a purely economic loss, *i.e.*, they would have paid less for BTB's product absent the alleged misrepresentation, Compl. ¶¶ 65-67. "The economic loss rule generally allows plaintiffs to seek remedies for negligence only where they experience 'physical injury to person or property, and not for purely economic losses.'" *Swearingen v. Santa Cruz Nat., Inc.*, 2016 WL 4382544, at *10 (N.D. Cal. Aug. 17, 2016). Absent any alleged "form of physical harm," this Court should "invoke the economic loss doctrine to bar [Plaintiffs'] negligent misrepresentation[]." *Quiroz v. Sabatino Truffles New York, LLC*, 2017 WL 8223648, at *6 (C.D. Cal. Sept. 18, 2017).

4. UCL Claim

Where a "UCL claim is derivative of the other claims in the [Complaint] that the Court dismisses . . . [the] derivative UCL claim must also be dismissed." *Arena Rest. & Lounge LLC v. S. Glazer's Wine & Spirits, LLC*, 2018 WL 1805516, at *13 (N.D. Cal. Apr. 16, 2018). Plaintiffs derive their "unlawful" claim on purported violations of the Green Guides, California's EMCA, the CLRA, and the FAL. Compl. ¶ 126. The Court should dismiss the UCL "unlawful" claim.[16]

VI. CONCLUSION

For the foregoing reasons, the Court should grant BTB's motion to dismiss with prejudice.

Dated: September 27, 2021

O'MELVENY & MYERS LLP

By: /s/ *Dawn Sestito*

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[16] Because Plaintiffs Muto and Salgado did not buy BTB products their claims should be dismissed. If BTB's forthcoming motion to sever is denied, BTB will move to dismiss their claims for lack of Article III standing. *Lujan v. Defenders of Wildlife*, 504 U.S. at 560-61.