Gary T. Lafayette (SBN 88666)
glafayette@lkclaw.com
Brian H. Chun (SBN 215417)
bchun@lkclaw.com
LAFAYETTE & KUMAGAI LLP
1300 Clay Street, Suite 810
Oakland, California 94612
Telephone: (415) 357-4600
Facsimile: (415) 357-4605

Steven A. Zalesin (*Pro Hac Vice*)
sazalesin@pbwt.com
Jane Metcalf (*Pro Hac Vice*)
jmetcalf@pbwt.com
PATTERSON BELKNAP WEBB & TYLER LLP
1133 Avenue of the Americas
New York, New York 10036
Telephone: (212) 336-2110
Facsimile: (212) 336-2111

Attorneys for Defendant The Coca-Cola Company

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. 21-CV-04643-JD

DEFENDANT THE COCA-COLA COMPANY'S NOTICE OF MOTION AND MOTION TO DISMISS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Hearing Date: January 13, 2022

Time: 10:00 a.m.

Place: Courtroom 11, 19th Floor

Judge: Hon. James Donato

NOTICE OF MOTION AND MOTION

TO THE PLAINTIFFS AND THEIR ATTORNEYS OF RECORD IN THE ABOVE-CAPTIONED MATTER:

PLEASE TAKE NOTICE that on January 13, 2022, at 10:00 a.m., or as soon thereafter as the matter may be heard, in Courtroom 11 before Honorable James Donato of the Northern District of California, Defendant The Coca-Cola Company ("Coca-Cola") will and hereby does move the Court to partially dismiss Plaintiffs David Swartz, Cristina Salgado, and Marcelo Muto Complaint against it, in which Plaintiffs allege violations of the California Consumers Legal Remedies Act, Cal. Civ. Code § 1750, *et seq.*, the False Advertising Law, Cal. Bus. & Prof. Code § 17500, *et seq.*, the Unfair Competition Law, *Id.* § 17200, *et seq.*, the Environmental Marketing Claims Act, Cal. Bus. & Prof. Code § 17580, *et seq.*, as well as common law claims for fraud and negligent misrepresentation.

This motion is made pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) on the grounds set forth in the accompanying memorandum of points and authorities.

Dated: September 27, 2021

Respectfully submitted,

/s/ Gary T. Lafayette
Gary T. Lafayette (SBN 88666)
glafayette@lkclaw.com
Brian H. Chun (SBN 215417)
bchun@lkclaw.com
LAFAYETTE & KUMAGAI LLP
1300 Clay Street, Suite 810
Oakland, California 94612
Telephone: (415) 357-4600
Facsimile: (415) 357-4605

Steven A. Zalesin (*Pro Hac Vice*)
sazalesin@pbwt.com
Jane Metcalf (*Pro Hac Vice*)
jmetcalf@pbwt.com
PATTERSON BELKNAP WEBB & TYLER LLP
1133 Avenue of the Americas
New York, New York 10036
Telephone: (212) 336-2110

Facsimile: (212) 336-2111

Attorneys for Defendant The Coca-Cola Company

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

STATEMENT OF ISSUES

1. Would a reasonable consumer interpret "Recyclable" as a guarantee that a plastic bottle will definitely be repurposed into a new product?

2. Do Plaintiffs satisfy the standing requirements of Article III when (a) they do not and cannot allege that the product units they purchased failed to satisfy their expectations; and (b) they are at no risk of future injury or deception?

PRELIMINARY STATEMENT

In this putative class action, plaintiffs David Swartz, Marcelo Muto and Cristina Salgado claim that they were misled by the statement "100% Recyclable" on the labels of various bottled water products, including Coca-Cola's Dasani® Purified Water.[1] Notably, Plaintiffs acknowledge in their Complaint that Dasani bottles are made entirely of the "most recyclable" plastic available. Nevertheless, they claim that the "100% Recyclable" statement misled them in two ways. First, they vaguely allege that the statement caused them to believe that the caps and shrink-wrap labels affixed to the bottles were also made of recyclable materials, when in fact (according to Plaintiffs) they are not. Coca-Cola vigorously disputes this claim, but recognizes that it may raise fact issues not appropriate for resolution on the pleadings, so does not move to dismiss it at this time.

Second, Plaintiffs allege that the phrase "100% Recyclable" deceived them to think that the bottles not only ***could*** be, but definitely ***would*** be recycled into new products, so long as Plaintiffs dropped them in a recycling bin. Only later, Plaintiffs claim, did they discover that municipal recycling facilities sometimes collect more recyclable plastic than they can process. Plaintiffs assert that they would not have purchased Dasani water had they known of this limitation, and blame the "100% Recyclable" statement for their misapprehension. On this basis they purport to assert, on behalf of themselves and a putative class of California consumers, statutory claims under California's Consumer Legal Remedies Act ("CLRA"), False Advertising Law ("FAL"), Unfair Competition Law ("UCL") and Environmental Marketing Claims Act ("EMCA"), and common law claims for fraud and negligent misrepresentation.

[1] The first named plaintiff, Mr. Swartz, does not claim to have ever purchased Dasani bottled water or any other Coca-Cola product, and thus lacks standing to assert a claim against Coca-Cola. *See infra* Statement of Facts, Section C. Mr. Swartz has instead sued an unrelated beverage producer, BlueTriton, over that company's labeling of Arrowhead-branded bottled water. As set forth in Coca-Cola's accompanying Motion to Sever, Plaintiffs' counsel have improperly collapsed these unrelated claims into a single Complaint, and the Court should sever them in accordance with Fed. R. Civ. P. 21. Should the Court deny Coca-Cola's motion to sever, Coca-Cola will move to dismiss Mr. Swartz's claims against Coca-Cola (to the extent he purports to assert any) for lack of standing.

The Court should dismiss Plaintiffs' claims premised on this theory of liability, *i.e.*, that "100% Recyclable" means that every Dasani bottle will in fact be recycled into a new product. A "recyclable" material is one that can be recycled, and there is no dispute that Dasani bottles are made of such a material. Whether a given "recyclable" bottle is ultimately repurposed depends on numerous factors beyond Coca-Cola's control—including the capacity of the recycling facility that collects the item, the quantity of similar materials the facility collects during the same period, and the demand for those materials at that time. Reasonable consumers would not interpret the statement "100% Recyclable" as a guarantee regarding any one of these extrinsic factors, let alone as an assurance as to all of them. Accordingly, Plaintiffs' claims premised on this theory should be dismissed for failure to plausibly allege a misleading statement.

Even if the Court accepted Plaintiffs' outlandish interpretation of "100% Recyclable," they would lack Article III standing to pursue it, because they cannot allege that their purported misapprehension on this point gave rise to any concrete injury. Plaintiffs claim that Coca-Cola duped them into thinking that the Dasani bottles they purchased "could ***and would*** be recycled" once Plaintiffs "disposed of them in the recycling bin." Compl. ¶¶ 65-66 (emphasis added). But Plaintiffs do not allege that their expectations were not met with respect to the specific bottles they purchased. As Plaintiffs acknowledge, many Dasani bottles are in fact repurposed, and the ones Plaintiffs bought may have been among those. Plaintiffs' conjecture that *their* Dasani bottles *may* not have been reused is insufficient to confer Article III standing.

Finally, Plaintiffs lack standing to pursue injunctive relief based on this dubious theory of deception. A plaintiff seeking an injunction must plausibly allege that he or she would be at risk of imminent future injury without one. Here, Plaintiffs are at zero risk of future injury from the "100% Recyclable" statement on Dasani labels. Even if Plaintiffs were previously unaware of limitations on recycling capacity, they know about them now, and can remain informed about that subject through publicly available sources such as the ones they cite in their Complaint. The "100% Recyclable" statement on Dasani labels has no bearing on their access to this information.

STATEMENT OF FACTS[2]

A. The Recyclability of Dasani Bottles

Coca-Cola sells Dasani Purified Water in bottles made of 100% polyethylene terephthalate (PET), a form of plastic. Compl. ¶ 26. As Plaintiffs acknowledge, PET is "widely considered" to be one of the two "'most recyclable' forms of plastic." Compl. ¶ 39. Indeed, the Greenpeace report Plaintiffs rely upon in their Complaint (Compl. ¶ 39 n.5; *id.* ¶ 40 n.8) recognizes that PET "***can legitimately be claimed or labeled as recyclable***," because 100% of U.S. recycling facilities have the ability to process it. Greenpeace, *Circular Claims Fall Flat: Comprehensive U.S. Survey of Plastic Recyclability*, https://www.greenpeace.org/usa/wp-content/uploads/2020/02/Greenpeace-Report-Circular-Claims-Fall-Flat.pdf (last accessed Sept. 24, 2021 at 10). In California, every PET bottle placed in a recycling bin is picked up and taken to a Materials Recovery Facility ("MRF"). As of 2017, Plaintiffs allege, there were 75 such facilities in the State, and every one (*i.e.*, 100%) of them could process PET. Compl. ¶ 38.

In recognition of these facts, Coca-Cola labels Dasani bottles "100% Recyclable." Compl. ¶ 28. Given the widespread consensus that PET is the "most recyclable" plastic, other manufacturers of PET-bottled beverages do the same—a pattern that Plaintiffs attribute to a nefarious industry "scheme" rather than the uncontroversial nature of the statement. Compl. ¶ 61.

Coca-Cola's labeling of Dasani bottles is also consistent with the Federal Trade Commission's ("FTC") "Green Guides," which set forth the FTC's non-binding guidance for recycling-related claims on product labeling. The Green Guides provide that a product may be "marketed as recyclable" so long as it "***can be*** collected, separated, or otherwise recovered from

[2] All facts are taken from the Plaintiffs' Complaint and the materials incorporated by reference or cited therein, which are assumed to be true for purposes of this motion. *See Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005) (Courts may consider "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physical attached to the [plaintiff's] pleading" (internal quotation mark omitted)); *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003) (courts may "treat . . . document[s] [incorporated by reference] as part of the complaint, and thus may assume that its contents are true for purpose of a motion to dismiss[.]").

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) (emphasis added).

B. Plaintiffs' Allegations

Two of the Plaintiffs, Mr. Muto and Ms. Salgado, claim that they purchased Dasani Purified Water in part because of the "100% Recyclable" statement on the bottle. Compl. ¶¶ 65-66. Plaintiffs allege that they interpreted this statement to mean not only that the bottles were made of recyclable materials, but also as an assurance that the bottles would be "recycled into new bottles to be used again" once placed in a recycling bin. Compl. ¶ 62.

Only later, Plaintiffs claim, did they learn that there is no such guarantee. Instead, as Plaintiffs have allegedly come to understand, whether a bottle is reused is dependent on multiple factors, such as (i) the relevant recycling facility's capacity; (ii) the total volume of PET waste generated in that area and during that time period; (iii) "contamination and processing losses" that may occur during the recycling process; (iv) the international market for exported reusable plastic, which can itself be influenced by, *e.g.*, China's trade policies; and (v) the price of, and demand for, unused or "virgin" plastic. Compl. ¶¶ 39-41. Though they acknowledge that these economic and geopolitical forces are beyond Coca-Cola's control, Plaintiffs claim to have interpreted the "100% Recyclable" statement as a guarantee against all of them. Had they known about these potential impediments to the reuse of their bottles, Plaintiffs allege, they would not have purchased the products at the price they did.

Notably, Plaintiffs' Complaint does not allege what happened, or even probably happened, to the specific Dasani bottles that they deposited in the recycling bin. Plaintiffs acknowledge that they have access to recycling facilities that can process PET, and do not allege that PET waste in their area exceeds those facilities' capacity. Compl. ¶ 38. Although they cite a Greenpeace report to insinuate that their Dasani bottles stood roughly a 20 percent chance of reuse, that report pre-dated Plaintiffs' purchases by several years, and purported to assess recycling capacity on a ***nationwide*** basis rather than in Plaintiffs' community. Compl. ¶¶ 38-41. Plaintiffs have thus

alleged no facts to support their supposition that the bottles they purchased and placed in recycling bins were not repurposed for use in new products.

C. Parallel Claims

Plaintiffs Muto and Salgado have teamed up with others asserting similar but distinct grievances. The third named Plaintiff, David Swartz, does not claim to have ever purchased Dasani products, but contends that competing beverage producer BlueTriton misled him by labeling its Arrowhead brand bottled water as "100% Recyclable." Plaintiff Salgado, meanwhile, asserts claims not only against Coca-Cola but also against Niagara Bottling LLC, for placing a "100% Recyclable" statement on its bottled water product. Plaintiffs' counsel has rolled these separate claims against unrelated parties into a single Complaint, in violation of Fed. R. Civ. P. 20.[3]

Moments after filing this case, Plaintiffs' counsel also filed a separate action on behalf of Sierra Club, the environmental organization, against two of the three defendants named here. That Complaint is largely a cut-and-paste of this one, with the notable exception that Sierra Club does not claim to have been deceived by any of these labeling statements. Instead, it contends that the "100% Recyclable" statement sowed such widespread confusion that Sierra Club had to divert resources from its other programs to set the record straight. As set forth in Coca-Cola's motion to dismiss the Sierra Club action, that allegation is insufficient to confer Article III or UCL standing.

ARGUMENT

To avoid dismissal under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation and internal quotation marks omitted). Although a court must accept the concrete factual allegations in a complaint as true, Rule 8 "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Id.* at 678-79. Accordingly, a court "need not accept . . . conclusory allegations" or allegations "contradicted by documents

[3] Plaintiffs' improper joinder of unrelated defendants is addressed in Coca-Cola's separate Motion to Sever, filed contemporaneously herewith.

referred to in the complaint." *Colony Cove Props., LLC v. City of Carson*, 640 F.3d 948, 955 (9th Cir. 2011). The same adequacy standard applies to Plaintiffs' allegations concerning subject matter jurisdiction. *Phillips v. Apple Inc.*, No. 15-CV-04879-LHK, 2016 WL 1579693, at *3 (N.D. Cal. Apr. 19, 2016) (dismissing FAL and UCL claims for lack of standing).

Here, the Court should dismiss Plaintiffs' claims to the extent they are premised on the assertion that "100% Recyclable" means that a bottle will necessarily be repurposed for future use. That theory is at odds with plain English and common sense. What is more, Plaintiffs lack standing to pursue it, because they do not allege that the statement has injured them in the past or is likely to do so in the future.

Where, as here, a Complaint purports to set forth multiple theories of liability, the Court may dismiss the action to the extent it is premised on any theory that is not "plausible on its face." *See, e.g., Cross v. California Dep't of Food & Agric.*, No. 18-CV-01302-DAD-JLT, 2020 WL 803847, at *2 (E.D. Cal. Feb. 18, 2020) (considering Rule 12(b)(6) motion to dismiss claims "to the extent they are based on" a certain theory). Because Plaintiffs have failed to discharge their burden at the pleading stage, the Court should grant Coca-Cola's motion to dismiss.

I. Plaintiffs' Interpretation of "100% Recyclable" Is Implausible

Plaintiffs' strained interpretation of "100% Recyclable" is insufficient, as a matter of law, to survive a motion to dismiss. The word "recyclable" conveys only that a product ***can be*** recycled. No reasonable consumer would interpret it as a guarantee that the product ***will be*** recycled and reused. Courts routinely dismiss claims premised on unreasonable interpretations of product labels, and this Court should do so here.

To state a claim under the UCL, FAL, CLRA or EMCA, a plaintiff must allege that the defendant's labeling or advertising is misleading from the "vantage point of a reasonable consumer." *Reid v. Johnson & Johnson*, 780 F.3d 952, 958 (9th Cir. 2015) (internal quotation marks omitted); *see also Jou v. Kimberly-Clark Corp.*, No. C-13-03075 JSC, 2013 WL 6491158, at *5 (N.D. Cal. Dec. 10, 2013) (applying "reasonable consumer" standard to EMCA claim).

Failure to allege a "plausible misunderstanding" of the disputed statement is grounds for dismissal at the pleadings stage. *Becerra v. Dr. Pepper/Seven Up, Inc.*, 945 F.3d 1225, 1229 (9th Cir. 2019). In *Becerra*, the Ninth Circuit affirmed the dismissal of a complaint that alleged that, by designating its product a "diet" soft drink, defendant misled consumers to believe that the beverage "w[ould] assist in weight loss or healthy weight management." *Id.* at 1229. The court ruled that reasonable consumers understand "diet" in that context to refer only to calorie content, and that plaintiffs accordingly had failed plausibly to allege that the "diet" label was misleading. *Id.*; *see also Carrea v. Dreyer's Grand Ice Cream, Inc.*, 475 F. App'x 113, 115 (9th Cir. 2012) (deeming it "implausible that a reasonable consumer would interpret 'Original Sundae Cone,' 'Original Vanilla,' and 'Classic,' to imply that [defendant's ice cream] is more wholesome or nutritious than competing products").

Here too, Plaintiffs' theory of deception flunks the "plausibility" test. The definition of "recyclable" is "capable of being recycled." *See Recyclable*, Oxford English Dictionary (3d ed. 2009). The Greenpeace report that Plaintiffs cite embraces this definition, acknowledging that Dasani water bottles are made of the "most recyclable plastic" available. Yet Plaintiffs insist that they understood "100% Recyclable" as an assurance that their Dasani bottles necessarily "would be recycled if [they] placed [the bottles] in a recycling bin." Compl. ¶¶ 65-66. That alleged interpretation ignores common English usage. Reasonable consumers understand that a "recyclable" item may not, in fact, be recycled—just as an "edible" item may not be eaten, or a "combustible" item may not ignite. Plaintiffs cannot clear the plausibility threshold by interpreting words in a manner contrary to their "common definition and understanding." *Cheslow v. Ghirardelli Chocolate Co.*, 445 F. Supp. 3d 8, 17 (N.D. Cal. 2020) (dismissing complaint premised on interpretation of "white" on a confectionery product as guaranteeing "white chocolate.").

Plaintiffs' interpretation of "100% Recyclable" also defies common sense. Plaintiffs claim that they felt deceived by the statement when they learned of a Greenpeace report that PET waste in the United States sometimes outstrips recycling facilities' processing capacity. But even if

Plaintiffs were previously unaware of the limitations outlined in the Greenpeace report, their alleged interpretation of "100% Recyclable" as an assurance that such limitations could ***never*** occur was unreasonable. Reasonable consumers understand that the process of repurposing plastic requires some combination of appropriate equipment and trained personnel—finite resources beyond Coca-Cola's control. And even laying aside the issue of recycling facilities' capacity, it is self-evident that any number of other external factors could prevent a given Dasani bottle from being repurposed. The sanitation truck could be involved in an accident; the sanitation workers' union could go on strike; or, as Plaintiffs note, there could be "contamination [or] processing losses" at the recycling facility. Compl. ¶ 39. Courts routinely reject interpretations, such as the one Plaintiffs advance here, that ignore the everyday "fact[s] of life." *Red v. Kraft Foods, Inc.*, CV 10-1028-GW, 2012 WL 5504011, at *3 (C.D. Cal. Oct. 25, 2012) (dismissing complaint targeting "Made with Real Vegetables" label on box of crackers because reasonable consumers know "the fact of life that a cracker is not composed of primarily fresh vegetables"); *see also Jessani v. Monini N.A., Inc.*, 744 Fed. App'x 18, 19 (2d Cir. Dec. 3, 2018) (affirming dismissal of a claim relating to truffle-flavored olive oil, on the grounds that reasonable consumers would not expect a "mass produced, modestly priced olive oil" to be made with real truffles).

Plaintiffs also allege, in conclusory fashion, that the disputed statement violates FTC's "Green Guides," which reflect the agency's non-binding guidance on recyclability claims. Compl. ¶¶ 43-49. In point of fact, the FTC, like everyone else, defines a "recyclable" item as one 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." 16 C.F.R. § 260.12(a) (emphasis added). The Green Guides also provide that "unqualified recyclable claims" may be used on a product label so long as appropriate recycling facilities are "available to a substantial majority"—defined as at least 60%—of Americans. *Id.* § 260.12(b)(1). As Plaintiffs

do not dispute, PET recycling facilities are available to all Americans, including them.[4] Plaintiffs' claims based on their faulty definition of "100% Recyclable" must be dismissed.

II. Plaintiffs Lack Standing to Pursue Their "100% Recyclable" Claims

Even if their claims were predicated on a reasonable interpretation of "100% Recyclable," Plaintiffs would lack standing to pursue them, because they cannot show that the products they purchased failed to meet their expectations. Moreover, because the statement puts Plaintiffs at no risk of ***future*** injury, they lack standing to pursue injunctive relief.

A. Plaintiffs Do Not Allege That the "100% Recyclable" Statement Caused Them Any Injury

Article III standing requires Plaintiffs to show that "they suffered a distinct and palpable injury as a result of the alleged unlawful or unfair conduct." *Birdsong v. Apple, Inc.*, 590 F.3d 955, 960 (9th Cir. 2009). "The requisite injury must be an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id.* (internal quotation mark omitted).

Here, Plaintiffs allege that the "100% Recyclable" statement led them to believe that their Dasani bottles would be "recycled into new bottles to be used again" once placed in the recycling bin. Compl. ¶ 62. They claim that this deception caused them injury, because they would not have paid as much for the products if they had known the bottles would not be reused. But Plaintiffs' own allegations show that their bottles may, in fact, have been reused, such that Plaintiffs received the benefit of their bargain. Relying on the Greenpeace report, Plaintiffs allege only that, as of 2017, some U.S. recycling facilities collected more PET plastic than they could

[4] The notion that "recyclable" means "will be recycled" is also inconsistent with California law. The California Beverage Container Recycling and Litter Reduction Act, Cal. Pub. Res. Code, § 14500 *et seq.*, for instance, requires beverage manufacturers, including Coca-Cola, to affix a "Redemption Value" statement to each container it sells. The statute's stated purpose is "to encourage large-scale recycling of used beverage containers through a program of financial incentives." *Californians Against Waste v. Dep't of Conservation*, 104 Cal. App. 4th 317, 319 (Cal. Ct. App. 2002) (citing Cal. Pub. Res. Code § 14501). There is no requirement, in that statute or elsewhere, that every single beverage container actually be recycled in order for the statement to appear.

process for reuse. From there, they speculate that the facilities in their area may have failed to process the Dasani bottles that they put out with their recycling in 2021. Such supposition that the products they purchased ***might*** not have met their expectations is too "conjectural [and] hypothetical" to give rise to Article III standing. *Birdsong*, 590 F.3d at 960.

Courts have consistently declined to entertain false labeling claims by plaintiffs who might have been, but were not necessarily, deprived of the benefit of their bargain. In *Wallace v. ConAgra Foods, Inc.*, 747 F.3d 1025 (8th Cir. 2014), the plaintiffs complained that they had purchased the defendant's "100% kosher" hot dogs, only to learn later that some of the defendant's products were tainted with non-kosher meat. The court dismissed the complaint for lack of Article III standing, reasoning that it was "pure speculation to say the particular packages sold to the [plaintiffs] were tainted by non-kosher beef, while it [wa]s quite plausible [defendant] sold the [plaintiffs] exactly what was promised: a higher quality, kosher meat product." *Id.* at 1031. Similarly, the court in *Phan v. Sargento Foods, Inc.*, No. 20-CV-09251-EMC, 2021 WL 2224260, at *4 (N.D. Cal. June 2, 2021), found that the plaintiff lacked standing to bring suit over a "No Antibiotics" label on a cheese product, where he contended that a "systemic problem" at the defendant's plant had tainted some units with antibiotics. Absent an allegation that Plaintiff "actually purchased one of the products containing antibiotics," the court found, he could not demonstrate that he had suffered any injury from purchasing the product. *Id.*; *see also Pels v. Keurig Dr. Pepper, Inc*. No. 19-CV-03052-SI, 2019 WL 5813422, at *4-5 (N.D. Cal. Nov. 7, 2019) (dismissing claims for failure to plead a particularized injury where plaintiff did not allege that he himself purchased water with dangerous arsenic levels); *Myers-Armstrong v. Actavis Totowa, LLC*, No. C 08-04741 WHA, 2009 WL 1082026, at *4 (N.D. Cal. Apr. 22, 2009) (allegation that the defendant's products "came from a source of uncertain quality" not sufficient to confer standing).

The result can be no different here. As in *Wallace*, it is "quite plausible" Plaintiffs got exactly what they hoped for: Dasani water bottles that were ultimately repurposed for reuse in

another product. Their contention to the contrary is "entirely speculative." Even if Plaintiffs could satisfy Article III by showing that their bottles ***probably*** were not reused (and they cannot), their allegations would not suffice. The Greenpeace report on which they rely refers to nationwide shortfalls in PET waste recycling capacity in 2017. It does not suggest that Plaintiffs' local recycling facilities faced similar shortfalls at the time they deposited their bottles in 2020 and 2021. Accordingly, Plaintiffs lack standing to pursue their claims based upon their implausible interpretation of "100% Recyclable."

B. Plaintiffs Lack Standing to Seek Injunctive Relief

Finally, Plaintiffs lack standing to seek an injunction based on this theory of deception, because they cannot plausibly allege that the "100% Recyclable" statement places them at any risk of future injury. To obtain an injunction, a plaintiff must show that, absent such relief, he faces a "real or immediate threat that [he] will be again wronged in a similar way." *Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983). In the Ninth Circuit, a "previously deceived consumer" can show a risk of such injury if their "[k]nowledge that the advertisement or label was false in the past does not equate to knowledge that it will remain false in the future," such that they remain at risk of confusion unless an injunction is issued. *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 969 (9th Cir. 2018). By contrast, a plaintiff's mere wish to purchase a "properly labeled" product does not confer standing to enjoin a disputed label claim. *In re Coca-Cola Prod. Mktg. & Sales Prac. Litig. (No. II)*, No. 20-15742, 2021 WL 3878654, at *2 (9th Cir. Aug. 31, 2021). An "abstract interest in compliance with labeling requirements is insufficient, standing alone, to establish Article III standing." *Id*.

Plaintiffs here are at no risk of imminent injury from the "100% Recyclable" statement. Though they claim to have been unaware that outside forces could prevent their "recyclable" Dasani water bottles from being reused, Plaintiffs acknowledge that they are now wise to that possibility. And if Plaintiffs wish to determine "in the future" whether the Dasani products meet their expansive definition of "recyclable," they do not need an injunction to do so. In Plaintiffs'

view, "recyclability" turns on the capacity of U.S. recycling facilities, a subject that they are free to research through publicly available sources such as the ones cited in their Complaint. Coca-Cola's labeling of Dasani bottled water has no bearing on Plaintiffs' access to that information. But as to the characteristics of Dasani water or its packaging—the only subject on which the product label is a reliable source—Plaintiffs are at no risk of future confusion. They therefore lack standing to seek injunctive relief.

CONCLUSION

Plaintiffs' allegation that the "100% Recyclable" statement on Dasani bottled water led them to believe the bottles would necessarily be repurposed for future use is utterly implausible. And Plaintiffs lack standing to pursue this claim in any event. To the extent it is predicated on this theory, the Complaint should be dismissed.

Dated: September 27, 2021

Respectfully submitted,

/s/ Gary T. Lafayette

Gary T. Lafayette (SBN 88666)
glafayette@lkclaw.com
Brian H. Chun (SBN 215417)
bchun@lkclaw.com
LAFAYETTE & KUMAGAI LLP
1300 Clay Street, Suite 810
Oakland, California 94612
Telephone: (415) 357-4600
Facsimile: (415) 357-4605

Steven A. Zalesin (*Pro Hac Vice*)
sazalesin@pbwt.com
Jane Metcalf (*Pro Hac Vice*)
jmetcalf@pbwt.com
PATTERSON BELKNAP WEBB & TYLER LLP
1133 Avenue of the Americas
New York, New York 10036
Telephone: (212) 336-2110
Facsimile: (212) 336-2111

Attorneys for Defendant The Coca-Cola Company