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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

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

Defendants.

Case No. 21-CV-04643-JD

DEFENDANT NIAGARA BOTTLING, LLC'S NOTICE OF MOTION AND MOTION TO DISMISS CLASS ACTION COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: January 13, 2022
Time: 10:00 a.m.
Courtroom: 11

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TO THE COURT, AND TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

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 of the above-entitled Court, located at 450 Golden Gate Ave., 19th Floor, San Francisco, California, Defendant Niagara Bottling, LLC ("Niagara") will and hereby does move this Court for an order dismissing the Complaint filed by Plaintiffs David Swartz, Cristina Salgado and Marcelo Muto ("Plaintiff") in the above-captioned action, in its entirety with prejudice.

This Motion is made pursuant to Rules 12(b)(6) and 12(b)(1) of the Federal Rules of Civil Procedure. Defendants seek dismissal of the Complaint, with prejudice, on the grounds that the Complaint fails to state a claim against Defendants upon which relief can be granted under Fed. R. Civ. P. 12(b)(6), and fails to allege facts sufficient to demonstrate that the Court has standing under Rule 12(b)(1).

This Motion is based upon the accompanying Memorandum of Points and Authorities, the Request for Judicial Notice and Application of Incorporation-By-Reference Doctrine ("RJN"), the Declaration of Creighton R. Magid, the files and evidence in this case, and such evidence and argument as may be proffered at the hearing of the Motion.

Respectfully submitted,

DATED: September 27, 2021

DORSEY & WHITNEY LLP

By: *<u>/s/ Kent J. Schmidt</u>*
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MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF ISSUES

1. Do Plaintiffs have Article III standing *vis-à-vis* Niagara when they (a) did not purchase Niagara products, (b) do not (and cannot) plead that the water bottles they purchased were not fully recycled, and (c) cannot plausibly be "deceived" by the label in the future?

2. Would a reasonable consumer understand "100% Recyclable" to mean "can be recycled" or "definitely will be recycled"?

3. Do Plaintiffs state a claim upon which relief may be granted when the "100% Recyclable" is both truthful and not plausibly misleading?

4. May Plaintiffs seek restitution or disgorgement when they have an adequate remedy at law?

INTRODUCTION

Niagara Bottling, LLC ("Niagara") sells bottled water in fully recyclable plastic bottles labeled, appropriately, as "100% Recyclable." Plaintiffs – only one of whom purchased bottled water – claim that the "100% Recyclable" statement on the water bottle is deceptive, arguing (1) that not everyone actually recycles plastic water bottles and (2) that the bottles' caps and labels, if separated from the bottles, may not always be recycled.

Plaintiffs' claims have no merit. First, Plaintiffs confuse "recyclable" with "will be recycled." The Complaint does not assert that the water bottles themselves cannot be recycled. (The Complaint asserts that the caps and labels cannot independently be recycled, but does not address the recyclability of the caps and bottles when affixed to the bottle.) Nor does the Complaint dispute that most, if not all, water bottles placed in the recycling stream are, in fact, recycled. Instead, the Complaint focuses on recycling rates for particular plastic resins (rather than plastic water bottles specifically), apparently taking issue with Americans' willingness to recycle. But the fact that not everyone recycles does not mean that the water bottles are not *recyclable* – that is, *capable* of being recycled – as defined by the U.S. Federal Trade Commission in its Guides for the Use of Environmental Marketing Claims ("Green Guides"). The notion that a consumer would understand Niagara's label as guaranteeing that every water bottle is recycled is simply implausible.

Plaintiffs' second argument is that, although the water bottles themselves are almost certain to be recycled, the bottle cap and plastic label are less likely to be recycled if they are *separated* from the bottle. That assertion, however, doesn't speak to whether the label is recyclable when it remains affixed to the bottle, or when the cap is replaced on the bottle prior to recycling. The Complaint is silent as to how often caps and labels end up in the recycling stream apart from bottles. Moreover, the Green Guides make plain that "incidental components" such as caps and labels do not affect a product's recyclability. In any event, a reasonable consumer is unlikely to conclude that "100% Recyclable" is a guarantee of recyclability even if the bottle is disassembled.

The Article III standing requirement presents another insurmountable challenge for Plaintiffs. The two Plaintiffs who never purchased Niagara bottled water can claim no injury. Christina Salgado, the sole Plaintiff to have purchased Niagara bottled water, cannot show that the Niagara bottles she purchased were not recycled – and therefore cannot show that she received exactly what she thought she was purchasing. A lack of Article III standing likewise precludes Plaintiffs from seeking injunctive relief, as there is no chance they will be "deceived" in the future. Also infirm are Plaintiffs' claims for damages. Because Ms. Salgado does not and cannot allege that any of her Niagara water bottles were not, in fact, fully recycled, she has no basis for claiming damages. Nor do Plaintiffs sufficiently or plausibly plead a basis for price premium damages. Plaintiffs' claims for equitable restitution or disgorgement, moreover, are barred because they have an adequate remedy at law.

Plaintiffs have no claim, no damages, and no standing for injunctive relief. The Complaint should be dismissed in its entirety as against Niagara.

STATEMENT OF FACTS

Three consumers have brought suit against three different distributors of bottled water, claiming that the "100% Recyclable" statement on the water bottles' labels are somehow misleading. Only one of the consumers – Cristina Salgado – purchased bottled water distributed by defendant Niagara Bottling, LLC ("Niagara"). (Compl. ¶¶ 65 – 67.) Although the Complaint makes several references to alleged efforts by "the plastic industry," "the petrochemical industry," and "[b]everage manufacturers, including Defendants" to "defraud" the public by "convinc[ing] the public that single-use plastics are not bad for the environment," (Compl. ¶¶ 50 – 60), there is not a single factual allegation of Niagara's involvement

in any such efforts.[1]

The bottles in which Niagara sells bottled water are, in fact, 100% recyclable, and the Complaint asserts no facts to the contrary. Niagara's bottles are made of polyethylene terephthalate ("PET"), with high-density polyethylene ("HDPE") caps. (Compl. ¶ 26.) Plaintiffs concede that PET and HDPE "are widely considered to be the 'most recyclable' forms of plastic." (Compl. ¶ 39.)

Notably, the Complaint does not include any factual allegations suggesting that Niagara's bottles are not, in fact, 100% recyclable. Instead, Plaintiffs assert that, *as a nation*, the United States lacks the capacity to recycle *all* products made of PET and HDPE. (Compl. ¶ 39.) Nothing in the Complaint suggests that the nation lacks the capacity to recycle 100% of PET water bottles or 100% of HDPE bottle caps. There are no allegations in the Complaint suggesting that the nation's recycling infrastructure is inadequate to recycle every single PET water bottle. Nor do Plaintiffs differentiate between products placed in the recycling stream and those that are not – or reference the percentage of products placed in the recycling stream that are actually recycled.

Indeed, the very source cited by Plaintiffs for their "capacity" statistics concludes that "there is sufficient likelihood that post-consumer PET waste collected by [materials recovery facilities] is recycled/reprocessed into plastic resin for manufacturing of new products in the U.S. *It is reasonable for U.S. consumers to believe that PET bottles and jugs that are collected by municipal systems will be recycled/reprocessed into a new product*."[2] The Complaint, furthermore, does not address recycling in *California*, Plaintiffs' home state and the focus of the putative class. Due in large part to the state's California Redemption Value ("CRV") beverage container redemption program, between 69% and 81% of PET containers (depending upon the year) are recycled in California.[3]

Plaintiffs' assertion that HDPE bottle caps are not recyclable "because they are too small to be

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[1] The assertion of an alleged "fraud" on the public appears to have no purpose in the Complaint other than to cast aspersions on Defendants, as it is not related to any of the asserted causes of action.

[2] 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. 23, 2021) at 21 (emphasis added). On a motion to dismiss, the Court may consider, in addition the the Complaint, materials incorporated by reference in the Complaint. *See, e.g., Davis v. HSBC Bank Nev., N.A.*, 691 F.3d 1152, 1159-60 (9th Cir. 2012).

[3] *See* CalRecycle, *Biannual Report of Beverage Container Sales, Returns, Redemption, and Recycling Rates* (May 10, 2021) ("*Biannual Report*"). (*See* Request for Judicial Notice ("RJN") ¶ 2, Exh. B.)

efficiently sorted and processed" (Compl. ¶ 42), even if assumed to be true, applies only to caps that are not affixed to bottles (since Plaintiffs concede that bottles are sufficiently large to be sorted and processed (Compl. ¶ 38)). When caps are affixed to the bottles, the Complaint concedes that the PET (from the bottles), the HDPE (from the caps) and PP (from the labels) all are separated by materials recovery facilities ("MRFs") and processed into either "clean flake" feedstock or plastic resin "for use in manufacturing or assembling another item." (Compl. ¶ 38.) The Complaint, tellingly, is silent as to the percentage of bottles that are recycled with the caps attached.

Similarly, the Complaint's assertion that the PP labels[4] on the bottles are "unrecyclable" because they are made of "plastic film" confuses stand-alone plastic films with film labels attached to bottles. Whereas certain stand-alone plastic films may be difficult to process, on-bottle PP labels are readily processed by MRFs, as the Complaint acknowledges. (Compl. ¶ 38.) Likewise, although some MRFs, which process commingled materials ranging from paper to glass to metals to plastics, combine polypropylene with other plastics in #3 - #7 bales as alleged in the Complaint, the vast majority of water bottles recycled in California are separated by beverage container recycling centers across the state, which allows PP to be recycled separately and successfully.[5]

The Complaint's assertion that "[a]bout a third of the collected PET and HDPE material processed by MRFs" is landfilled or incinerated says nothing about the recyclability of Niagara water bottles. The blog post cited by the Complaint refers to a 2017 report published by NAPCOR for that statistic.[6] The NAPCOR report, however, makes clear that the imputed processing losses are the result of (1) statistical anomalies due to lighter per-bottle weights and (2) PET containers with "labels that are difficult-to-remove or separate from PET or that block autosort function; barrier layers added to PET to preserve product integrity and extend shelf-life; and metal integrated into PET packages, whether in closures, closure rings, can tops, or pump springs"[7] – none of which the Complaint alleges pertains to

[4] The Complaint refers to the labels as being made of "biaxially oriented polypropylene (BOPP)." BOPP is merely stretched polypropylene. *See* https://www.uprinting.com/blog/bopp/.

[5] *See Biannual Report;* CalRecycle, *Just the Facts,* https://www.calrecycle.ca.gov/bevcontainer/consumers/facts (last accessed Sept. 23, 2021). (RJN ¶ 3, Exh. D.)

[6] *See* Jan Dell, *Six Times More Plastic Waste is Burned in the U.S. Than is Recycled*, http://www.plasticpollutioncoalition.org/blog/2019/4/29/six-times-more-plastic-waste-is-burned-in-us-than-is-recycled (last accessed Sept. 23, 2021).

[7] *Id.* at 14.

Niagara bottles. That PET containers containing metal, barrier layers, and shrinksleeve labels may not end up as "clean flake" in no way suggests that Niagara bottles, which lack such characteristics, are less than fully recyclable.

Perhaps most important, the Complaint conflates "100% Recyclable" with "100% Recycled." As the Complaint concedes, the Federal Trade Commission's "Green Guides," upon which Plaintiffs extensively rely, provide that a product may properly be labeled as 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." (Compl. ¶ 45; 16 C.F.R. § 260.12(a) (emphasis added).) As the "Green Guides" make clear, whether a product is "recyclable" depends upon whether it *can be* recycled, not on whether consumers do, in fact, recycle every unit of the product sold.

ARGUMENT

To overcome a motion to dismiss, a complaint "may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts." *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). Additionally, the factual allegations "must plausibly suggest an entitlement to relief." *Id*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id*.

Because Plaintiffs' core claims here sound in fraud, Plaintiffs must also satisfy Rule 9(b)'s heightened pleading standard,[8] which requires allegations of "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). "The plaintiff must set forth what is false or misleading about a statement, and why it is false." *Id.* 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.*

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[8] *See Beecher v. Google N. Am. Inc.*, 2018 WL 4904914, at *1 (N.D. Cal. Oct. 9, 2018) ("claims under the UCL, FAL, and CLRA must meet the heightened pleading standards of Rule 9(b)"); *TransFresh*, 862 F. Supp. 2d at 1015 (dismissing greenwashing and UCL claims); *Neilson v. Union Bank of Calif., N.A.*, 290 F. Supp. 2d 1101, 1141 (C.D. Cal. 2003) ("It is well-established in the Ninth Circuit that both claims for fraud and negligent misrepresentation must meet Rule 9(b)'s particularity requirements.").

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I. PLAINTIFFS LACK ARTICLE III STANDING.

In order to pursue a claim in federal court, Plaintiffs must demonstrate standing to sue by establishing that they have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Plaintiffs, in their Complaint "must 'clearly . . . allege facts demonstrating' each element." *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 518 (1975) (ellipses in original)); *see also TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2200 (2021) ("To have Article III standing to sue in federal court, plaintiffs must demonstrate, among other things, that they suffered a concrete harm.").

A. Plaintiffs Swartz and Muto Lack Standing to Pursue Claims Against Niagara Because They Did Not Purchase Niagara Bottled Water.

"The overwhelming majority of courts have held that Article III standing for state law claims is necessarily lacking when no plaintiff is alleged to have purchased a product within the relevant state." *In re Packaged Seafoods Prods. Antitrust Litig.*, 242 F. Supp. 3d 1033, 1095 (S.D. Cal. 2017) (collecting cases). Only one of the Plaintiffs—Cristina Salgado—alleges she purchased a Niagara water bottle. (Compl. ¶ 6.) Plaintiffs Muto and Swartz, who did not purchase Niagara bottled water and cannot claim to have suffered no injury from Niagara bottled water, therefore lack of standing to pursue claims against Niagara. Their claims against Niagara must be dismissed as a matter of law.

B. Plaintiff Salgado Lacks Standing Because She Cannot Establish Injury.

Even though Plaintiff Salgado alleges that she purchased Niagara water bottles, she, too, fails to satisfy Article III's standing requirement because she does not (and cannot) allege any injury. Salgado alleges that she believed that the bottles "could and would be recycled," but that she was deprived of the benefit of the bargain because some percentage of PET products (not specifically water bottles) are not recycled in some parts of the United States. (Compl. ¶¶ 41 – 42, 66.)

The insurmountable problem for Salgado is that she does not assert – and cannot assert – that the Niagara water bottles *she* purchased and allegedly placed in a curbside recycling bin were not recycled. Without allegations of fact establishing that *her* Niagara water bottles were not recycled, Salgado cannot claim that she was denied the benefit of any bargain: if the water bottles she purchased were, in fact,

recycled, Salgado received exactly the product she believed she was buying. As the Supreme Court has said, "No concrete harm, no standing." *See TransUnion*, 141 S. Ct. at 2200.

Courts have repeatedly found a lack of standing to assert labeling claims where plaintiffs have failed to establish that the label was false or misleading with respect to the *particular* product the plaintiff purchased. *See, e.g., Wallace v. ConAgra Foods, Inc.,* 747 F.3d 1025, 1031 (8th Cir. 2014) (purchasers of "100% kosher" hot dogs lacked standing to sue based on the fact that *some* of the defendant's products were tainted with non-kosher meat because 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."); *Pels v. Keurig Dr. Pepper, Inc*., No. 19-CV-03052-SI, 2019 U.S. Dist. LEXIS 194909, at *11 (N.D. Cal. Nov. 7, 2019) (plaintiff lacked standing because he "fail[ed] to plead the water *he* purchased contained violative arsenic levels") (emphasis in original); *Phan v. Sargento Foods, Inc.*, No. 20-CV-09251-EMC, 2021 U.S. Dist. LEXIS 103629, at *12 (N.D. Cal. June 2, 2021) (plaintiff lacked standing to bring suit over a "no antibiotics" label despite alleging that a "systemic" manufacturing problem had tainted some products with antibiotics because he could not allege that *he* "purchased one of these products containing antibiotics") (emphasis added); *Doss v. General Mills, Inc*., 816 F. Appx. 312 (11th Cir. 2020) (plaintiff lacked standing to pursue claims relating to glyphosate in Cheerios because she "has not alleged that *she* purchased any boxes of Cheerios that contained any glyphosate"—just that some Cheerios tested did) (emphasis added).

Niagara water bottles may not be recycled; because she cannot show that the bottles *she* purchased were not recycled, she cannot establish injury and therefore cannot establish standing. Further, because Plaintiff Salgado has no means of demonstrating that *her* bottles were not recycled, she cannot amend her Complaint to cure this deficiency. Because amendment would be futile, the Complaint should be dismissed with prejudice with respect to Niagara. *See Reddy v. Litton Indus*., 912 F.2d 291, 296 (9th Cir. 1990) (leave to amend need not be granted where amendment would be futile).

C. Plaintiffs Lack Standing to Seek Injunctive Relief.

To establish standing for injunctive relief, Plaintiffs must show that the risk of future injury "must be certainly impending to constitute injury in fact." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409

(2013) (quoting *Whitmore v. Arkansas,* 495 U.S. 149, 158 (1990)). The Supreme Court has made clear that "'[a]llegations of possible future injury' are not sufficient." *Id*. at 409 (quoting *Whitmore,* 495 U.S. at 158). Plaintiffs, moreover, "cannot rely on speculation about 'the unfettered choices made by independent actors not before the courts.'" *Id*. at 414 n. 5 (quoting *Lujan*, 504 U.S. at 562).

In their Complaint, Plaintiffs allege that the notion that the majority of plastic can be recycled is a "myth" and that recycling will "never be economical." (Compl. ¶ 50.) Plaintiffs can hardly claim that they will continue to be "deceived" by the 100% Recyclable statements on Niagara water bottles when, as the Complaint demonstrates, they are fully familiar with the alleged shortcomings of the recycling ecosystem and, furthermore, maintain that plastic bottles will *never* be recyclable.

Plaintiffs attempt to evade this problem by asserting that "design and composition of the Products may change over time." (Compl. ¶ 69.) This makes no difference, however, because Plaintiffs have posited that a large percentage of plastic bottles will *never* be recyclable. (Compl. ¶ 50.) Furthermore, Plaintiffs base their claims not on the bottles themselves, but on the alleged lack of *capacity* and *capability* within the nation's recycling infrastructure. Plaintiffs, having established their keen interest in recycling statistics, are in an excellent position to monitor any changes in the nation's (or California's) recycling systems. Plaintiffs, moreover, cannot look to the possibility of changes in the recycling infrastructure; as the Court in *Clapper* made clear, Plaintiffs "cannot rely on speculation about 'the unfettered choices made by independent actors not before the courts'" to establish standing.

Nor can Plaintiffs claim standing to seek injunctive relief by incanting certain phrases found in the Ninth Circuit's opinion in *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956 (9th Cir. 2017) ("*Davidson II*"). Not only is it insufficient merely to offer "formulaic recitation," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007), but nothing in *Davidson II* suggests that a mere assertion of interest in purchasing a defendant's product in the future suffices to establish standing for injunctive relief.

In *Davidson II*, the Ninth Circuit held that "a previously deceived consumer *may* have standing to seek injunctive relief" in certain circumstances, such as when it would be impossible for the consumer to know if the alleged defect in the product had been remedied. *Davidson II*, 889 F.3d at 970 (emphasis added). In that case, for example, the plaintiff alleged that the defendant's "flushable wipes" were not, in fact, flushable, yet claimed that she was interested in buying the wipes in the future if they became

flushable. *Id*. at 971. Because the plaintiff would have no way of knowing whether the defendant had changed the composition of the wipes to make them flushable, the Ninth Circuit concluded that the plaintiff had standing to seek injunctive relief. *Id*.

The factors present in *Davidson II* are wholly absent here. Plaintiffs claim that the "100% Recyclable" claim is misleading not because of the composition of the water bottles, but rather because either (a) consumers do not recycle the bottles or (b) incidental components of the bottles are not always recyclable due to inadequacies in the nation's recycling infrastructure. The only real solution, according to Plaintiffs, is for everyone to use reusable bottles. (*See* Compl. ¶ 4 ("reusable bottles are the only truly sustainable choice").) There is no risk that Plaintiffs will be deceived in the future, and therefore, no standing to seek injunctive relief, because Plaintiffs claim that plastic water bottles can *never* be 100% Recyclable (*See* Compl. ¶ 4); with that belief, they cannot be "deceived" by the 100% Recyclable label in the future. Unlike *Davidson II*, where the plaintiff had no way of knowing whether the flushable wipes had been reformulated to make them flushable, Plaintiffs here are fully aware both of the composition of plastic water bottles and of the capabilities of the recycling system – and therefore cannot plausibly claim that they will be "deceived" by the 100% Recyclable label in the future. *See, e.g., Cimoli v. Alacer Corp.*, No. 5:20-07838-BLF, 2021 U.S. Dist. LEXIS 123625 (N.D. Cal. July 1, 2021) (dismissing injunctive relief claims because plaintiff's ability to "determine the Product's dosages by consulting the back labels" meant that "Plaintiff cannot plausibly allege that he faces a real or immediate threat of similar, future harm"); *Jackson v. General Mills, Inc.*, No. 18cv2634-LAB (BGS), 2020 U.S. Dist. LEXIS 157898 (S.D. Cal. Aug. 28, 2020) ("where a plaintiff learns information during litigation that enables her to evaluate product claims and make appropriate purchasing decisions going forward, an injunction would serve no meaningful purpose"); *Yothers v. JFC Int'l, Inc.*, No. 20-cv-01657-RS, 2020 U.S. Dist. LEXIS 156470 (N.D. Cal. May 14, 2020) (having learned over the course of litigation that most wasabi products in North America do not contain wasabi, plaintiffs lacked standing to seek injunctive relief; they could "simply read the packaging, before purchasing, and make an informed decision"); *Joslin v. Clif Bar & Co.*, No. 4:18-cv-04941-JSW, 2019 U.S. Dist. LEXIS 192100 (N.D. Cal. Aug. 26, 2019) (based on knowledge gained in litigation, plaintiffs could not "possibly be deceived in the future" and thus lacked standing to seek injunctive relief).

1 Plaintiffs cannot avoid this result merely be making the assertion that "design and composition
2 of the Products may change over time." (Compl. ¶ 69.) Not only is this assertion insufficient to show
3 the requisite "certainly impending" injury, *Clapper*, 568 U.S. at 409, but it constitutes precisely the kind
4 of "[a]llegations of possible future injury" that numerous cases have deemed inadequate to confer
5 Article III standing for purposes of seeking injunctive relief. *See, e.g., Clapper*, 568 U.S. at 409;
6 *Whitmore*, 495 U.S. at 158. Additionally, because Plaintiffs base their claim on some consumers'
7 unwillingness to recycle and on claimed inadequacies of the recycling system, the possibility of some
8 unspecified future change to the bottles would have no effect absent significant changes to consumer
9 behavior and infrastructure. Such "speculation about 'the unfettered choices made by independent actors
10 not before the courts'" is insufficient to establish standing. *Clapper*, 568 U.S. at 414 n. 5. Because
11 Plaintiffs are in no danger of being "misled" in the future by the "100% Recyclable" claim, they lack
12 Article III standing to pursue injunctive relief.

13 **II. THE COMPLAINT FAILS TO STATE AN ACTIONABLE CLAIM.**

14 **A. Plaintiffs Fail to State a Plausible Consumer Deception Claim.**

15 UCL, FAL and CLRA claims based on an allegedly misleading product label are governed by
16 the "reasonable consumer" standard, which requires a plaintiff to "show that members of the public are
17 likely to be deceived" by the label. *See Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008)
18 (quoting *Freeman v. Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995)). This showing requires "more than a
19 mere possibility that [a] label might conceivably be misunderstood by some few consumers viewing it
20 in an unreasonable manner." *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496 (2003) (citation
21 omitted); *see also Robie v. Trader Joe's Co.*, No. 20-CV-07355-JSW, 2021 WL 2548960 at *4 (N.D.
22 Cal. June 14, 2021). "Rather, the reasonable consumer standard requires a probability that a significant
23 portion of the general consuming public or of targeted consumers, acting reasonably in the
24 circumstances, could be misled." *Id.* (citation omitted). A court may determine whether a label is likely
25 to mislead a reasonable consumer on a motion to dismiss based on a review of the label. *Brown v.*
26 *Starbucks Corp.*, No. 18cv2286 JM (WVG), 2019 U.S. Dist. LEXIS 33211 (S.D. Cal. Mar. 1, 2019).

27 Plaintiffs do not plausibly allege that the "100% Recyclable" statement is false or likely to
28 mislead a reasonable consumer. The Complaint itself acknowledges that Niagara water bottles are, in

fact, fully recyclable. (Compl. ¶ 38.) The gist of Plaintiffs' claims appears to be that the statement is misleading because not all water bottles are actually recycled, or, alternatively, that caps and labels, if separated from the bottles, may not always be recycled. As a matter of law, no reasonable consumer would understand "100% Recyclable" to mean what Plaintiffs claim it means.

Plaintiffs conflate consumers' *willingness to recycle* with *recyclability of the product*. There are no allegations in the Complaint suggesting that a Niagara bottle cannot be completely recycled or that recycling capacity is inadequate to handle every *water bottle* placed by a consumer in the recycling stream. No reasonable consumer would understand "100% Recyclable" to mean that 100% of consumers actually recycle the bottles – only that the bottles, when placed in the recycling stream, are fully recyclable. This is consistent with the Green Guides, which make clear that "recyclable" refers only to the *ability* to be recycled—not whether the product actually *is* recycled. *See* 16 C.F.R. § 260.12(a).

Second, there is nothing in the Complaint suggesting that less than 100% of the PET and HDPE *actually put into the recycling stream* is recycled. Indeed, the Greenpeace report cited by Plaintiffs says PET bottles "have sufficient domestic municipal collection and reprocessing capacity to provide consumers with reasonable assurance that a collected item will be recycled into another product." (RJN ¶ 1, Exh. A.) The "contamination and processing losses" referenced in the Complaint pertain to products *other than* the type of PET bottle distributed by Niagara. Nothing in the Complaint points to any Niagara water bottles (or even similar water bottles) not being recycled once placed in the recycling stream.

B. Niagara's Compliance with the Green Guides Bars Plaintiffs' EMCA Claim.

Plaintiffs purport to bring their Fifth Cause of Action pursuant to the Environmental Marketing Claims Act, Cal. Bus. & Prof. Code §§ 17580 *et seq*. ("EMCA"). The EMCA, however, contains a "safe harbor" provision that provides a complete defense for statements that comport with the FTC's "Green Guides." *See* Cal. Bus. & Prof. Code §§ 17580.5(b) ("It shall be a defense to any suit or complaint brought under this section that the person's environmental marketing claims conform to the standards or are consistent with the examples contained in the "Guides for the Use of Environmental Marketing Claims" published by the Federal Trade Commission."); *Hill v. Roll Int'l Corp*., 195 Cal. App. 4th 1295, 1303 (2011) (the EMCA retained the Green Guides' "safe harbor" feature by providing that conformity with the Green Guides is a defense).

As noted above, the Green Guides specifically provide that a product may properly be labeled as 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." *See* 16 C.F.R. § 260.12(a) (emphasis added). The Green Guides further provide that "[m]arketers can make unqualified recyclable claims for a product or package if the entire product or package, *excluding minor incidental components*, is recyclable." *See* 16 C.F.R. § 260.12(c) (emphasis added). The Green Guides specifically identify bottle caps as such "minor, incidental components." *See* Example 2 to 16 C.F.R. § 260.03 ("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.").

The Complaint does not assert that Niagara water bottles cannot be recycled. Indeed, the Complaint concedes that "PET and HDPE are widely considered to be the 'most recyclable' forms of plastic" and that PET water bottles, HDPE labels, and PP labels are "processed into 'clean flake' material or plastic resin for use in manufacturing or assembling another item." (Compl. ¶¶ 38 – 39.) Even if the Court were to credit Plaintiffs' claim that U.S. domestic MRFs only have the capacity to process 22.5% of total post-consumer PET and 12% of total post-consumer HDPE (which it should not, for the reasons explained above), neither statistic suggests that the U.S., and California in particular, lacks the capacity to recycle every single PET water bottle and HDPE bottle cap returned by consumers for recycling. More pertinently, nothing in the Complaint alleges that Niagara water bottles cannot 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"– the standard for a valid claim of recyclability under the Green Guides. Even if Plaintiffs' claims regarding the bottle caps and labels had merit – and they do not – the caps and labels constitute "minor, incidental components" that do not render the bottles' recyclability claim misleading under the Green Guides. Because the "100% Recyclable" statement on Niagara water bottle labels "conform[s] to the standards" set forth in the Green Guides, the labels are not actionable under the EMCA pursuant to section 17580.5(b)'s safe harbor.

C. Plaintiffs Fail to Allege a Plausible Damages Claim.

To assert an FAL, CLRA, or UCL claim in a mislabeling case, a consumer must allege (1) that

1 she would not have purchased the product absent the representation and (2) that she paid more for the
2 product because of the deceptive label than the value received. *Hinojos v. Kohl's Corp.*, 718 F.3d 1098,
3 1104 (9th Cir. 2013). The Complaint merely asserts that Plaintiffs "suffered damages" and paid a "price
4 premium." (Compl. ¶ 115.) But "bare recitation of the word 'premium' does not adequately allege a
5 cognizable injury." *Naimi v. Starbucks Corp.*, 798 F. App'x 67, 70 (9th Cir. 2019). The Complaint is
6 wholly devoid of the "necessary factual details concerning the alleged price premium. *Id.* Even if the
7 Court were to credit all possible inferences in Plaintiffs' favor and conclude that the bottles' labels or
8 caps were not recyclable, all but a tiny fraction of the bottles would still be recyclable. It is simply
9 implausible that the difference between a bottle being 100% recyclable and being *nearly* 100%
10 recyclable would result in a price premium. *See, e.g.*, *Babaian v. Dunkin' Brands Grp. Inc.*, No. LACV
11 17-4890-VAP (MRWx), 2018 U.S. Dist. LEXIS 98673, at *17 (C.D. Cal. June 12, 2018) (dismissing
12 claims of misleading labeling where plaintiff "failed to assert facts sufficient to fulfill his requirement
13 to allege plausibly that misleading or 'false information about the product … caused the product to be
14 sold at a higher price'" (quoting *Davidson v. Kimberly-Clark Corp.*, 873 F.3d 1103, 1112 (9th Cir. 2017))
15 and noting that a "consumer's subjective willingness to pay is not a functional indicator of the objective
16 market effects of the purported misrepresentation."); *Saavedra v. Eli Lilly & Co.*, No. 2:12-cv-9366-
17 SVW (MANx), 2014 U.S. Dist. LEXIS 179088, at *5 (C.D. Cal. Dec. 18, 2014) ("The Court has found
18 no case holding that a consumer may recover based on consumers' willingness to pay irrespective of
19 what would happen in a functioning market"); *Izquierdo v. Mondelez Int'l, Inc.*, No. 16-cv-04697 (CM),
20 2016 U.S. Dist. LEXIS 149795, *18 (S.D.N.Y. Oct. 26, 2016) ("Simply because Plaintiffs here recite
21 the word 'premium' multiple times in their Complaint does not make Plaintiffs' injury any more
22 cognizable."). Plaintiffs' bare allegations of a "price premium" are similarly deficient.

23 **D. The Absence of a Pre-Lawsuit Demand Precludes CLRA Damages.**

24 The CLRA requires a plaintiff to make a demand on defendants at least thirty days prior to the
25 commencement of an action for damages. Cal. Civ. Code § 1782(a). Plaintiffs concede that they failed
26 to do so but argue (contrary to the statute) that the filing of the Complaint itself satisfies this requirement.
27 (Compl. ¶ 86.)

28 The "clear intent of the [CLRA's notice provision] is to provide and facilitate *precomplaint*

settlements of consumer actions wherever possible and to establish a limited period during which such settlement may be accomplished." *Outboard Marine Corp. v. Superior Court*, 52 Cal. App. 3d 30, 40 (1975) (superseded by statute on other grounds). Filing a Complaint before sending a CLRA demand letter does not satisfy section 1782(a). Cal. Civ. Code § 1782(b), in turn, provides that "[n]o action for damages may be maintained under Section 1780" unless the defendant has an opportunity to resolve the matter prior to the filing of the complaint. Because Plaintiffs offered no such opportunity, the cannot seek damages under the CLRA.

E. Plaintiffs' Industry-Wide Fraud Assertions Do Not Satisfy Rule 9(b).

Plaintiffs assert, variously, that "the plastic industry" (Compl. ¶ 50), "the petrochemical industry" (*id*. at ¶ 56), "Cola-Cola and the American Beverage Association" (*id*. at ¶ 54) and "Defendants" have defrauded the public by promoting the "myth" that plastic can be recycled. These assertions do not appear related to any of Plaintiffs' causes of action. To the extent that Plaintiffs intend more than merely casting all distributors of plastic products in a bad light, the Court must dismiss any purported cause of action against Niagara arising from such general allegations.

Rule 9(b) requires that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Rule 9(b) thus "demands that the circumstances constituting the alleged fraud 'be specific enough to give defendants notice of the particular misconduct . . . so that they can defend against the charge and not just deny that they have done anything wrong.'" *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009) (quoting *Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2011)). To meet this standard, a "complaint must 'identify the who, what, when, where, and how of the misconduct charged, as well as what is false or misleading about the purportedly fraudulent statement, and why it is false.'" *Salameh v. Tarsadia Hotel*, 726 F.3d 1124, 1133 (9th Cir. 2013). Plaintiffs allege no facts connecting Niagara to the alleged fraud on the public.

Plaintiffs' "group pleading" does not satisfy Rule 9. *See Destfino v. Kennedy*, No. CV-F-08-1269 LJO DLB, 2008 U.S. Dist. LEXIS 109691, *21-*22 (E.D. Cal. Nov. 3, 2008) (dismissing complaint for lack of sufficient particularity where "plaintiffs group all defendants in one category and state they engaged in all fraudulent conduct, which is stated in general language"); *Gavaldon v. StanChart Sec. Int'l*, No. 16cv590-LAB (MDD), 2018 U.S. Dist. LEXIS 49802, *15 - *16 (S.D. Cal. Mar. 26, 2018)

(complaint failed to state a claim where it "[did] not adequately identify which of the two defendants is responsible for each action"); *Nguyen v. Wells Fargo Bank, N.A.*, 749 F. Supp. 2d 1022, 1036 (N.D. Cal. 2010) (dismissing fraud claims where complaint failed to specify which defendant allegedly concealed facts). Because Plaintiffs fail to identify any actions undertaken by Niagara in furtherance of the alleged fraud on the public, any claims against Niagara in connection with the alleged fraud must be dismissed.

F. Plaintiffs Cannot Seek Equitable Relief Under the UCL.

Plaintiffs assert a UCL claim seeking recovery of "lost money and/or property as a result of such deceptive and/or unlawful trade practices" (*id.* at ¶ 131). However, "the traditional principles governing equitable remedies in federal courts, including the requisite inadequacy of legal remedies, apply when a party requests restitution under the UCL." *Sonner v. Premier Nutrition Corp.*, 971 F.3d 834, 844 (9th Cir. 2020). Plaintiffs may not seek restitution or disgorgement under the UCL because they have an adequate remedy at law. Specifically, Plaintiffs seek a "price premium" with respect to virtually all of their legal claims (Compl. ¶¶ 95, 106, 115) and allege that they will amend their Complaint to seek price premium damages in connection with their CLRA claim (Compl. ¶ 86). These are all legal claims that, while deficient for reasons discussed above, provide adequate legal remedies and bar Plaintiffs from also seeking the same "price premium" in connection with their UCL claim (Compl. ¶ 131). *See Nacarino v. Chobani*, No, 20-cv-07437-EMC, 2021 U.S. Dist. LEXIS 149153, *36 (N.D. Cal. Aug. 9, 2021) (plaintiff "fail[ed] to allege any specific facts—e.g., that she would receive less compensation via damages than restitution—showing that damages under the CLRA are necessarily inadequate or incomplete"); *Anderson v. Apple Inc.*, 500 F. Supp. 3d 993, 1009 (N.D. Cal. 2020) (same). That Plaintiffs' legal claims also fail for other reasons does not mean legal remedies are inadequate. *See Nacarino*, 2021 U.S. Dist. LEXIS 149153 at *37.

CONCLUSION

For the reasons set forth above, the Court should grant this Motion.

Respectfully submitted,

DATED: September 27, 2021

DORSEY & WHITNEY LLP

By: */s/ Kent J. Schmidt*
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CERTIFICATE OF SERVICE

All Case Participants are registered for the USDC CM/ECF System

David Swartz et al v. The Coca-Cola Company Inc.
Northern District of California Case Number 21-cv-04643-JD

DEFENDANT NIAGARA BOTTLING, LLC'S NOTICE OF MOTION AND MOTION TO DISMISS CLASS ACTION COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

I hereby certify that on September 27, 2021, I electronically filed the foregoing document with the Clerk of the Court for the United States District Court for the Northern District of California by using the court's CM/ECF system.

Participants in the case who are registered CM/ECF users will be automatically served by the CM/ECF system.

Dated: September 27, 2021

DORSEY & WHITNEY LLP

By: */s/ Kent J. Schmidt*
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