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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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.	Lead Case No. 3:21-cv-04643-JD **DEFENDANTS' REPLY IN SUPPORT OF CONSOLIDATED MOTION TO DISMISS SECOND AMENDED COMPLAINT** Date: December 7, 2023 Time: 10:00 a.m. Judge: Hon. James Donato Courtroom: 11, 19th Floor
SIERRA CLUB, Plaintiff, v. THE COCA-COLA COMPANY and BLUETRITON BRANDS, INC., Defendants.	Case No. 3:21-cv-04644-JD

Plaintiffs have now had three chances to allege facts supporting their claim that Defendants' water bottles are not "recyclable" as defined in the Green Guides. Each time, Plaintiffs have failed. This was fatal to their first two complaints, and is fatal to their Second Amended Complaint ("SAC").

In their Opposition, Plaintiffs tacitly acknowledge that they are unable to fix this defect, and have given up trying. They admit that the Court dismissed their First Amended Complaint ("FAC") because they failed to plead facts suggesting that Defendants' bottles, including caps and labels, could not be recycled by existing recycling facilities in California. Opposition to Motion Dismiss [Dkt. 120] ("Opposition") at 1. Plaintiffs further concede that they have not fixed this defect. *Id*. Instead, Plaintiffs urge the Court to exempt them from pleading this essential element of their claims, on the grounds that they have added some vague allegations about a consumer survey. According to Plaintiffs, their survey establishes that some consumers interpret "recyclable" to mean something other than the Green Guides definition, so that Plaintiffs now need not allege that existing facilities are incapable of recycling the caps and labels. *Id*.

Unfortunately for Plaintiffs, it does not work that way. As this Court has recognized, the Green Guides definition of "recyclable" has the force of law in California, and Plaintiffs must allege that Defendants' products deviate from it. That requires, among other things, a plausible allegation that Defendants' products cannot be recycled at facilities available to a substantial majority of California consumers. A survey cannot replace the Green Guides definition. The SAC should be dismissed, but this time with prejudice.

I. PLAINTIFFS' OPPOSITION POINTS TO NOTHING IN THE SAC SUGGESTING THAT DEFENDANTS' "100% RECYCLABLE" CLAIMS ARE MISLEADING.

As this Court has previously held, Defendants' water bottles may properly be labeled as "100% Recyclable" so long as at least 60% of consumers or communities have access to facilities that are capable of recycling them, exclusive of "minor, incidental components." FAC Dismissal

Order [Dkt. 115] at 2 (quoting 16 C.F.R. § 260.12(b)(1)); *see also* 16 C.F.R. §§ 260.12(c), 260.3(b). What matters is that the products "***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); *see also* Opposition at 16 (emphasizing the same words). As the Court has held, the FTC's Green Guides definition reflects the common understanding of the word "recyclable" as meaning "capable of being recycled." *See* FAC Dismissal Order [Dkt. 115] at 5. Additionally, as the Court held, that *some* bottles or caps or labels are not recycled due to contamination or recyclers' economic choices does not change the calculus, as these factors are both beyond Defendants' control and do not make the bottles any less *capable* of being recycled. *Id*. at 6–7. In its July 27, 2023 Order, the Court observed that "nothing in the FAC demonstrates that it is impossible to recycle the caps and labels, or that any component of defendants' bottles cannot be 'collected, separated, or otherwise recovered from the waste stream' in California, which is the pertinent question under the Green Guides." *Id*. Despite having another bite at the apple, Plaintiffs merely repeat the same insufficient allegations in their SAC.

II. PLAINTIFFS' SURVEY RESULTS CANNOT REPLACE THE GREEN GUIDES STANDARD FOR RECYCLABLE CLAIMS NOR CAN IT FIX PLAINTIFFS' FAILURE TO SATISFY THOSE STANDARDS.

Having admitted that they cannot state a claim using the operative definition of "100% Recyclable," Plaintiffs urge the Court to apply an entirely different one, which they claim to have developed from the results of a methodologically infirm consumer survey.[1] Plaintiffs argue that their survey results show that consumers interpret "100% Recyclable" to mean "that the entire product, including bottle, label and cap, w[ill] actually be recycled by facilities in the state of California if it is properly disposed of in a recycling bin," SAC ¶ 6, and that the Court should

[1] In addition, Plaintiffs' survey is meaningless because it forces respondents to focus on label claims and to contemplate interpretations that may never have occurred to them during real-world purchases. *See* SAC ¶¶ 44–53; *In re Elysium Health ChromaDex Litig.*, No. 17-cv-7394, 2022 U.S. Dist. LEXIS 25063, *40 (S.D.N.Y. Feb. 11, 2020) (describing "focalism" as "a phenomenon that causes consumers to pay more attention to a product attribute than they would during the purchasing process.").

therefore treat this as the operative definition of "recyclable" rather than the one the California legislature adopted. Opposition at 1.

Whatever Plaintiffs' survey purports to show, it has no bearing on the definition of "recyclable" that applies to their claims. As this Court has repeatedly held, the FTC's Green Guides, which the California legislature has incorporated into California law, provide that labeling a product as recyclable is not misleading if the product ***can be*** recycled by existing recycling programs serving a substantial majority of the population. *See* FAC Dismissal Order [Dkt. 115] at 5; 16 C.F.R. § 260.12(a); Cal. Bus. & Prof. Code § 17580.5(b)(1).[2] The Court has also held that, under the Green Guides—and, therefore, under California law—caps and labels are "minor, incidental components" that do not render a recyclability claim misleading. *Id*. at 6.[3]

Plaintiffs now claim that a consumer survey can somehow change the California legislature's adoption of the Green Guides standard, but they provide no legal support or case law supporting that proposition. *Naimi v. Starbucks Corp*., 798 F. App'x 67 (9th Cir. 2019), does not, as Plaintiffs would have it, suggest that a consumer survey may alter an existing legal standard. Rather, *Naimi* merely holds that a survey may establish an implied representation *where the representation* (or, as in *Naimi,* a product name) *has no established meaning*. By contrast, the Green Guides are clear as to what constitutes a non-misleading claim of recyclability. Equally inapt is *Bell v. Publix Super Mkts., Inc*., 982 F.3d 468 (7th Cir. 2020), which Plaintiffs cited in their opposition to Defendants' motion to dismiss the FAC —a motion the Court granted. The issue in *Bell* was whether a standard of identity for "grated cheese" preempted claims that a label promising "100% Grated Parmesan Cheese" was deceptive when up to 9 percent of the product

[2] The FTC's Green Guides Statement of Basis and Purpose, cited by Plaintiffs, does not suggest otherwise. The Statement merely says that not everything accepted by recycling programs can be considered recyclable. As Plaintiffs concede, this merely means that whether established programs "***can*** actually recycle" a product "is the key inquiry." Opposition at 6. To the extent the Green Guides standard and the Statement of Basis and Purpose conflict, the plain language of 16 C.F.R. § 260.12 would govern—not commentary that is not in the C.F.R. or incorporated into California law.

[3] In a footnote, Plaintiffs refer to a letter sent by certain state attorneys general to the FTC in connection with the agency's decennial regulatory review of the Green Guides. Opposition at 2, n. 1. The comments in the letter urge a ***change*** in the law, and do not represent the law as it stands. It is also the FTC—rather than state attorneys general—who enacted the Green Guides, and so their opinion is irrelevant to this inquiry.

was not cheese. The court held that there was no preemption, because the standard of identity was *silent* as to any terms other than "grated cheese." By contrast, as this Court has held, the Green Guides are *explicit* as to what may be labeled "recyclable," and explicitly exclude consideration of "minor, incidental components" such as caps and labels in determining a product's recyclability.[4] *See* FAC Dismissal Order [Dkt. 115] at 6 (citing 12 C.F.R. § 260.3(b)); *see also Duchimaza v. Niagara Bottling, LLC*, 619 F. Supp. 3d 395, 415 (S.D.N.Y. 2022) (finding caps and labels to be minor, incidental components in analyzing "100% Recyclable" claim).

Plaintiffs' other cases are equally inapposite, and the Court did not find them persuasive when Plaintiffs cited them in prior rounds of briefing. *Smith v. Keurig Green Mtn., Inc.*, 393 F. Supp. 837 (N.D. Cal. 2019), involved the allegation that single-serving coffee pods were *too small to be recycled* by existing facilities and therefore *could not* be recycled, even though they were made of a widely-accepted resin. *Id*. at 842. Similarly, the court in *Hanscom v. Reynolds Consumer Prods. Inc*., No. 21-cv-03434, 2002 U.S. Dist. LEXIS 34057 (N.D. Cal. Jan. 21, 2022), *granted* the defendant's motion to dismiss, and in any event concerned an entirely different product (trash bags) that *cannot* be recycled at existing facilities. The SAC, by contrast, contains no plausible allegations that PET bottles, caps and labels cannot be recycled by existing facilities. Critically to Plaintiffs' survey-related allegations, neither *Smith* nor *Hanscom* involved any survey.

Where, as here, a specific legal standard exists for a label claim, consumer surveys cannot vary the legal standard or give plaintiffs a means of circumventing the standard. *See, e.g.*, *Cel-Tech Comm'ns, Inc. v. Los Angeles Cellular Tel. Co*., 20 Cal. 4th 163, 182 (1999) ("If the Legislature has permitted certain conduct or considered a situation and concluded no action should lie, courts may not override that determination. When specific legislation provides a 'safe harbor,' plaintiffs may not use the general unfair competition law to assault that harbor.").

[4] There is no merit to Plaintiffs' suggestion that "100% Recyclable" somehow differs from "Recyclable." The Green Guides refer to an *entire* product, excluding "minor, incidental components." *See* 16 C.F.R. § 260.12(a) ("A *product or package* should not be marketed as recyclable unless it can be collected, separated, or otherwise recovered from the waste stream through an established recycling program . . . .") (emphasis added). There is no plausible distinction between the claims.

Nothing in Plaintiff's alleged survey changes the fact that, in the absence of plausible allegations that existing recycling programs cannot recycle Defendants' water bottles, Plaintiffs cannot state a claim.

Unsurprisingly, Plaintiffs' Opposition does not explain how the survey results, even if accepted as true, fix the core problem the Court has twice identified: that Plaintiffs fail to allege any facts suggesting that recycling programs serving 60% of Californians ***cannot*** recycle Defendants' bottles, including the caps and labels.[5]

III. PLAINTIFFS REHASH THE SAME ALLEGATIONS THIS COURT ALREADY FOUND DEFICIENT.

In addition to arguing that they should be exempt from alleging that the products deviate from the Green Guides definition of "recyclable," Plaintiffs simply repeat the allegations that the Court has previously found deficient. As the Court has previously held, the central issue is whether Defendants' products "can be recycled" not that they "will actually be recycled, as plaintiffs would have it." *See* Order Re Motion to Dismiss Compl. [Dkt. 99] at 2; FAC Dismissal Order [Dkt. 115] at 5 ("recyclable" means capable of being recycled); *see also* SAC ¶ 54 ("recyclable" means "can be recycled"); 16 C.F.R. § 260.12(a) ("recyclable" means "can be collected, separated, or otherwise recovered from the waste stream through an established recycling program"). Ignoring that distinction, Plaintiffs repeat their allegation that an unknown number of caps *not attached to bottles* (either because consumers discard them or because some allegedly "pop off" during transport) sometimes fall through disk screens at MRFs and become refuse. SAC ¶ 65. But the SAC does not plausibly allege that the caps prevent the bottles from being recycled—or that the caps themselves cannot be recycled when affixed to the bottles.

[5] Plaintiffs also argue that statements on the American Beverage Association ("ABA") and Every Bottle Back ("EBB") websites somehow lend credence to their argument that the Green Guides standards should be replaced. Plaintiffs, however, do not allege that the named plaintiffs even read or relied on any these statements, or that all Defendants participated in, let alone directed, the EBB initiative, making the allegations insufficient under Rules 8 and 9(b). *See Praxis Project v. Coca-Cola Co.*, No. 2017 CA 004801 B, 2019 D.C. Super. LEXIS 17, *35 (D.C. Oct. 1, 2019) (holding that defendant could not be liable for conduct of others when plaintiff failed to allege that defendant had an "equal right to control" the manner in which the ABA operated).

Similarly, Plaintiffs repeat their allegation that the labels "are made of similar materials as plastic bags [that are] not accepted by MRFs in California." SAC ¶¶ 62 – 63. That labels are comprised of "similar materials" to bags (which, unlike labels, are large and flimsy) in no way suggests that the labels themselves are not recyclable.

Plaintiffs also repeat their allegation that 30% of the weight of PET bales arriving from MRFs[6] at one particular reclaimer[7] is not ultimately processed. But the SAC remains silent as to how much of this 30% is comprised of labels and caps (as opposed to "dirt" and other contamination), how much of the remaining 70% is comprised of labels and caps, or why any labels and caps are not recycled. As the Court has previously held, whether the caps are recycled is irrelevant to Plaintiffs' claims; the pertinent question is whether the caps *can be* recycled. FAC Dismissal Order [Dkt. 115] at 5.

The SAC is entirely silent as to whether the labels *can be* recycled by existing facilities, which is all that matters under the Green Guides and the Court's dismissal orders.

VI. PLAINTIFFS' ATTEMPT TO SHIFT THE BURDEN TO PLEAD A PLAUSIBLE CLAIM ONTO DEFENDANTS IS WITHOUT MERIT.

In its Order dismissing Plaintiffs' First Amended Complaint ("FAC"), the Court properly held that, under the Green Guides, Defendants' recyclability claims are not actionable so long as their bottles "***can be*** collected, separated, or otherwise recovered from the waste stream" in California. FAC Dismissal Order [Dkt. 115] at 7 (citing 16 C.F.R. § 260.12(a)) (emphasis added). The Court also observed that, to the extent that the FAC could be understood to say that not all caps and labels are recycled, the FAC said nothing about whether the facilities ***can*** collect, separate, or otherwise recover caps and labels, but only that "economic, processing, and contamination issues" prevented facilities and programs from doing so. *Id*. Plaintiffs now seek to

[6] By acknowledging that the bales arrive at the reclaimers from MRFs with the caps and labels intact, the SAC belies its assertion that MRFs don't recycle caps and labels.

[7] Although Plaintiffs seek to imply that the two plants referenced in the SAC represent a significant share of post-MRF processing in California, the SAC only says that they have significant "capacity." SAC ¶ 71.

turn the Court's conclusion—that there was no plausible basis for holding Defendants responsible for "circumstances totally unrelated to defendants' conduct," *id*.—on its head by claiming that it Defendants have the burden of labeling their products to account for every change in what the Court accurately described as "volatile circumstances." *Id*. There is no basis for Plaintiffs' assertion.

Defendants' recyclability claims are permissible under the Green Guides because California recycling programs ***can*** collect, separate, or otherwise recover caps and labels. Whether particular MRFs or reclaimers, for their own individual reasons, ***choose*** not to recycle caps and labels, is, as the Court has noted, irrelevant to that question. Although the SAC asserts that not all caps and labels are recycled, nothing in the SAC suggests that fewer less than 60% of Californians have access to programs that ***can*** recycle caps and labels. The burden remains on Plaintiffs to demonstrate that the labels are false and misleading—a burden that Plaintiffs have failed to meet.

V. THERE ARE NO GROUNDS FOR FURTHER AMENDMENT.

In a clear sign that Plaintiffs recognize that the SAC has not cured the flaws the Court identified in the FAC, Plaintiffs ask the Court for leave to file a *fourth* complaint in this action if it grants Defendants' motion to dismiss. The Court should deny leave to amend because further amendment would be futile.

The Court clearly identified the fundamental problem with Plaintiffs' claims in its most recent dismissal order: Plaintiffs failed plausibly to allege that recycling facilities and programs in California were incapable of recycling bottles and caps. In the SAC, Plaintiffs wholly ignored the Court's directive and did not add a single additional allegation concerning the ability of recycling facilities to recycle caps and labels. Instead, Plaintiffs embarked on an ill-fated attempt to change the legal hurdle they face through a survey. The absence of plausible factual allegations that led the Court to dismiss the FAC remains in the SAC. Plaintiffs have now had

three chances to provide such facts, and have failed to do so. In its Order dismissing the FAC, the Court warned Plaintiffs that the SAC "will likely be the final opportunity to amend." FAC Dismissal Order [Dkt. 115] at 7. This case has dragged on for too long. The SAC should be dismissed with prejudice.

Dated: November 3, 2023

Respectfully submitted,

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***Pursuant to Civ. L.R. 5-1(i)(3), the electronic signatory has obtained approval from this signatory.*

ATTESTATION OF FILING

Pursuant to Civil Local Rule 5-1(i)(3), I hereby attest that all other signatories listed, and on behalf of whom this filing is submitted, concur in the filing's content and have authorized the filing.

Dated: November 3, 2023

Respectfully submitted,

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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 Lead Case Number 3:21-cv-04643-JD

DEFENDANTS' REPLY IN SUPPORT OF CONSOLIDATED MOTION TO DISMISS SECOND AMENDED COMPLAINT

I hereby certify that on November 3, 2023, 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: November 3, 2023

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