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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

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

Plaintiffs,

v.

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

Defendants.

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

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS SECOND AMENDED CONSOLIDATED COMPLAINT

Hon. James Donato

DATE: December 7, 2023
TIME: 10:00 a.m.
CTRM: 11, 19th Floor

SIERRA CLUB,

Plaintiff,

v.

THE COCA-COLA COMPANY and BLUETRITON BRANDS, INC.,

Defendants.

Case No.: 3:21-cv-04644-JD

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I. INTRODUCTION

Plaintiffs' Second Amended Consolidated Complaint ("SACC") introduces independent survey allegations showing that reasonable consumers expect that plastic bottles labeled as "100% Recyclable" are more recyclable than bottles that are labeled as merely "Recyclable." Indeed, more than ***90%*** of consumers surveyed understood that "100% Recyclable" meant that the Products' caps and labels can be recycled. Further, ***86.7%*** of consumers surveyed understood it to mean that the ***entirety*** of the Product ***can actually be recycled*** through established recycling programs if it is properly disposed of in a recycling bin—not merely that it is theoretically possible to recycle the entire Product. However, both points are false because a substantial majority of consumers do not have access to established programs that ***can*** actually recycle: (1) the caps and labels; and (2) the entirety (i.e., "100%") of the Products. These allegations represent a complete claim of consumer deception.

Defendants' motion argues primarily that Plaintiffs have not corrected the pleading deficiencies that the Court identified in its July 27 Order. Specifically, they contend that Plaintiffs have not substantially altered their allegations regarding plastic bottle recycling in California. But this argument misses the mark. There are two key components of a consumer deception claim. *Naimi v. Starbucks Corp. (Naimi I)*, 798 F. App'x 67, 69 (9th Cir. 2019). The first is how reasonable consumers actually understand a claim—i.e., what does the claim mean. *Id.* The second is facts to establish that the conveyed meaning is false or has a tendency to mislead. *Id.* The Court's July 27 Order was focused on the second component. For example, regarding the "100%" language, this Court dismissed the claim because there were no allegations in "the FAC [to] demonstrate that it is impossible to recycle the caps and labels" to show that the claim was false. ECF 115 at 6–7. But that holding was without the aid of the new survey allegations to clarify exactly how consumers understand the claim "100% Recyclable." Plaintiffs' new allegations clarify that consumers interpret "100% Recyclable" to mean that the caps and labels are capable of actually being recycled by existing programs in California, not simply that it may be theoretically possible to recycle them in some instances. Given this clarification, Plaintiffs' existing allegations that the caps and labels ***cannot be*** recycled by existing recycling programs in California establishes that Defendants' claim is misleading. Plaintiffs now need not allege that it is impossible to recycle the caps and labels because consumers do not interpret the claim based on possibility or

impossibility. After all, "[w]hat matters [in a consumer deception case] is how consumers actually behave—how they perceive advertising and how they make decisions." *Bell v. Publix Super Mkts., Inc.*, 982 F.3d 468, 481 (7th Cir. 2020)).[1] The same holds true with respect to the other deficiencies the Court identified; Plaintiffs' survey allegations clarify consumer interpretation and thus set the boundaries of what Plaintiffs need to allege to show consumers were deceived.

Defendants also argue that Plaintiffs' survey allegations cannot revive their claims. However, Plaintiffs' amendment mirrors *Naimi*, where the Ninth Circuit held that the introduction of survey allegations in an amended complaint that clarified how reasonable consumers actually understood a claim was sufficient basis to reverse the dismissal of a consumer deception claim. 798 F. App'x at 69. Further, the plaintiff's claims were plausible where they alleged that what consumers actually understood was not true. *Id.* The same holds true here, and Defendants' motion should be denied.

II. FACTUAL ALLEGATIONS

A. Plaintiffs' Survey Confirms That Reasonable Consumers Understand "100% Recyclable" to Mean That the Entirety of the Product (Including the Labels and Caps) Can Actually Be Recycled By Existing Recycling Programs.

Plaintiffs engaged an independent firm to conduct a survey of California consumers as to their understanding of the claim "100% Recyclable" on Defendants' Products; each respondent reported purchasing bottled water in the last 6 months. SACC ¶¶ 6–7, 43–53. A staggering ***90.4%*** of respondents who viewed an example of Defendants' packaging believed that the claim meant that the labels are recyclable. *Id.* ¶¶ 44–47. A further ***91.7%*** believed it meant that the caps were recyclable. *Id.* ¶ 48. Further, ***86.7%*** of respondents believed the claim meant that the ***entire product,*** including the bottle, label and cap, ***could actually be recycled through established programs in the state of California*** if it is properly disposed of in a recycling bin. *Id.* ¶ 49. And, when shown identical Products bearing the claim "Recyclable"

[1] Plaintiffs' theory of deception has been implicitly endorsed by 16 attorneys general, including the California Attorney General, who issued a joint comment letter to the FTC in which, *inter alia*, they specifically referenced this litigation and explained that the term "Recyclable" turns on whether consumers can actually cause products to be recycled as a practical matter by existing programs, not whether it is theoretically possible or impossible to recycle the material. *See* SAC ¶ 7; Joint Comment Letter to the FTC, States of California, Connecticut, Delaware, Illinois, Maryland, Michigan, Minnesota, New Jersey, New Mexico, New York, Oregon, Rhode Island, Wisconsin, Commonwealths of Massachusetts and Pennsylvania, and the District of Columbia (April 24, 2023), https://www.doj.state.wi.us/sites/default/files/news-media/Comments%20to%20FTC%20re%20Green%20Guides%204.24.23.pdf.

or "100% Recyclable," ***61.6%*** of respondents believed that the Products labeled "100% Recyclable" were "more capable of being completely recycled" than Products simply labeled "Recyclable." *Id.* ¶¶ 50–53.

Moreover, this is exactly how Defendants intend consumers to understand their "100% Recyclable" claim. The Every Bottle Back marketing campaign website sponsored by Coca-Cola, the American Beverage Association, and other beverage manufacturers explains that the "100% Recyclable" claim means that "[w]e've made our plastic bottles to be 100% recyclable, ***including the caps.***" *Id.* ¶ 89 (emphasis added). In other words, the purpose of the "100% Recyclable" claim is to communicate to consumers that the entirety of the bottles are recyclable, including incidental components. The survey and Defendants' marketing show that "100% Recyclable" is an enhanced claim of recyclability.

B. Plaintiffs' Second Amended Consolidated Complaint.

Defendants manufacture various brands of bottled water. *Id.* ¶¶ 28–30. Defendants uniformly represent that their Products are "100% Recyclable." *Id.* ¶¶ 33. Reasonable consumers understand "100% Recyclable" to mean that the entirety of the Product is comprised of material that is recyclable, including incidental components such as caps and labels. *Id.* ¶¶ 4, 43–53. Further, reasonable consumers understand that "100% Recyclable" means that the entirety of the Product, ***including*** the label and cap, can ***actually be*** recycled by existing recycling programs if it is properly disposed of in a recycling bin. *Id.*

However, Defendants' "100% Recyclable" claim is false because: (1) recycling facilities in California cannot recycle Defendants' polypropylene ("PP") and high-density polyethylene ("HDPE") bottle caps, (2) recycling facilities in California cannot recycle the biaxially oriented polypropylene ("BOPP") plastic labels on the bottles, and (3), on average, 28% of each bottle sent to recycling facilities in California cannot be processed due primarily to contamination in the waste stream and instead ends up in landfills or burned. *Id*. ¶¶ 5, 57–74. Defendants fail to inform consumers about these facts and other facts about the Products' true recyclability. *Id.* ¶ 5.

Plaintiffs provide detailed allegations regarding PET bottle recycling facilities in California and their operations. *Id.* ¶¶ 55–74. Specifically, Plaintiffs allege that major plastic water bottle reclamation plants in California, including plants in Riverside and Turlock, which are typical of reclamation facilities in California, cannot recycle and instead dispose of Defendants' plastic caps and labels. *Id.* ¶¶ 67–74. Further, Plaintiffs allege and provide multiple sources confirming that, on average, 28% of each plastic

bottle that is sent for recycling in California, is not recycled because certain portions are unrecyclable (e.g., caps and labels) and certain portions are contaminated or lost due to processing inefficiencies. *Id.* ¶¶ 69–70. Defendants' products are, thus, not "100% Recyclable" as reasonable consumers understand that phrase. Indeed, there is not a single facility in California that can recycle 100% of the Products. *Id.* ¶ 4.

1. Plaintiffs Allege That Defendants' Labels Are Not Recyclable in California.

The Products' labels are made from BOPP and/or other forms of PP film. *Id.* ¶ 32. Plastic film, regardless of whether it is made from BOPP, PP, or LDPE, cannot be sorted and shredded into plastic flake material by established recycling programs in California. *Id.* ¶ 62. Indeed, pure plastic film, such as plastic bags, are rejected by 73 out of 75 MRFs in California. *Id.*

California's infrastructure for recycling plastic bottles consists of two stages: first, bottles are collected and sorted by MRFs, then, they are processed by PET bottle reclaimers. *Id.* at ¶ 65. Although plastic bottles are accepted by MRFs with the labels on, like other forms of plastic film, the bottles' labels cannot be recycled. *Id.* ¶ 63. At the two largest plants in California, the bottles are washed and all contaminants are removed. *Id.* ¶¶ 68–72. As part of that process, the bottles undergo a pre-wash stage where the labels are stripped and disposed of as refuse. *Id.* ¶¶ 68, 71. The Riverside and Turlock plant are typical of reclamation facilities and account for more than 40% of the PET bottle recycling in California. Thus, necessarily, less than a substantial majority (60%) of consumers have access to plastic label recycling in California.

2. Plaintiffs Allege That Defendants' Caps Are Not Recyclable in California.

The Products' bottle caps are made of PP or HDPE plastic. *Id.* ¶ 32. During the sorting and hauling process, the caps of the bottles are removed. *Id.* ¶ 63, 69, 70. Consumers are frequently instructed to dispose of the bottles with the caps removed. *Id.* ¶ 66. Alternatively, they pop off when the recycling is compressed at various stages of the recycling process. *Id.* ¶ 65.

If the caps are not removed by the MRFs, reclaimers remove the caps and treat them as refuse. *Id.* ¶ 70. Indeed, Leon Farhnik, the former CEO of the Riverside reclamation plant, explains "[f]rom the time it starts till it ends, as a resin—as a material—you lose about 30% of it in ***caps***, in labels, in dirt. And we end up with only 70% of what we get in." *Id.* (emphasis added). As explained above, the Riverside plant is typical of reclamation plants in California during the class period, which all use similar equipment. *Id.*

¶ 72. Thus, necessarily, less than a substantial majority (60%) of consumers have access to plastic cap recycling in California.

3. Plaintiffs Allege That, on Average, 28% of Each Bottle Cannot Be Recycled by Established Recycling Programs in California, Even When Properly Disposed of in a Recycling Bin.

Including the labels and caps, on average, 28% of each plastic water bottle sent for recycling in California is discarded as refuse. *Id.* ¶¶ 5, 73, 80. This 28% consists of unrecyclable BOPP labels and plastic caps. *See id.* ¶ 70. Additionally, a significant portion of each bottle is lost due to inefficiencies in the recycling process and contamination. *Id.* ¶¶ 68–69.

Plaintiffs cite the Green Peace report which includes national numbers confirming that, on average, 28% of PET bottle material is lost when it is recycled. *Id.* ¶ 61 n.5. This is corroborated by an article by Jan Dell, a recycling expert, who confirms that a third of PET plastic water bottle material is lost when it is recycled. *Id.* ¶ 69. This number is also consistent with the number reported by Leon Farhnik. *Id.* ¶¶ 5, 70. California consumers do not have access to any recycling programs that can actually recycle the entirety (i.e., "100%") of the Products.

C. The Green Guides Embrace a Definition of "Recyclability" Based on Whether Products Are *Actually* Recycled by Recycling Programs.

The Green Guides define recyclability as follows:

> 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 for reuse or use in manufacturing or assembling another item***."

16 C.F.R. § 260.12(a) (emphasis added). It is not enough for a product to be theoretically recyclable. The product must be recovered for reuse by an ***established*** recycling program. The facility cannot accept and discard the material. Finally, programs that can ***actually recycle*** the Product must be available to a substantial majority of consumers where the Product is sold. *Id.* § 260.12(b)(1).

The FTC has further elaborated that acceptance by a recycling program does not equate to being "Recyclable" if the product is accepted but ultimately discarded:

> To make a non-deceptive unqualified claim, a marketer should substantiate that a substantial majority of consumers or communities have access to facilities that will ***actually recycle***, not accept and ultimately discard, the product. As part of this analysis, a marketer should not assume that consumers or communities have access to a particular recycling program merely because the program will accept a product.

FTC Green Guides Statement of Basis and Purpose at 174–75 (emphasis added). In other words, whether a substantial majority of consumers have access to established recycling programs that can actually recycle the labels, the caps, and 100% of the product is the key inquiry for determining whether or not the bottles are "100% Recyclable." They do not, which renders the claim false.

III. LEGAL STANDARD

To survive a motion to dismiss under Rule 12(b)(6), a complaint need only plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is plausible on its face "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.* "In determining whether sufficient facts are stated such that the claim is plausible, the court must presume all factual allegations are true and draw all reasonable inferences in favor of Plaintiff." *Theranos, Inc. v. Fuisz Pharma LLC*, 876 F. Supp. 2d 1123, 1136 (N.D. Cal. 2012) (*citing Twombly*, 550 U.S. at 570; *Iqbal*, 556 U.S. at 678; *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir.1987)). Any existing ambiguities must be resolved in favor of the pleading. *Walling v. Beverly Enters.*, 476 F.2d 393, 396 (9th Cir.1973).

IV. ARGUMENT

A. Plaintiffs Adequately Plead That Defendants' "100% Recyclable" Claim Is Likely to Deceive a Significant Portion of Reasonable Consumers.

Whether a representation is deceptive so as to mislead a reasonable consumer is normally a question of fact incapable of resolution on a motion to dismiss. *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938–39 (9th Cir. 2008); *Organic Consumers Ass'n v. Sanderson Farms, Inc.*, 284 F. Supp. 3d 1005, 1014–15 (N.D. Cal. 2018) (denying a motion to dismiss on plausibility grounds and explaining that "[w]hether a business practice is deceptive is generally a question of fact that requires weighing of evidence from both sides" and that courts grant motions to dismiss under the reasonable consumer test only in rare situations in which the facts alleged in the complaint "compel the conclusion as a matter of law that consumers are not likely to be deceived").

Here, Plaintiffs' deception claims are plausible. First, consumers, such as Plaintiffs, saw the claim

"100% Recyclable" on the front of the Product and reasonably understood it to mean that the entirety of the Product was recyclable and thus, could actually be recycled in its entirety through established programs if it was properly disposed of in a recycling bin. *Id.* ¶¶ 113–115. However, those consumers were deceived because, on average, 28% of each bottle is not recycled by established recycling programs, including the labels and the caps. *Id.* ¶¶ 5, 69–72, 81. Thus, the Product is not "100% Recyclable." *Id.* ¶ 5. Defendants' fail to properly inform consumers about the true recyclability of its Products. *Id.*

Plaintiffs conducted a consumer survey to confirm how reasonable consumers understand Defendants' claims, which is the gold standard for demonstrating consumer perception. *Kraft, Inc. v. F.T.C.*, 970 F.2d 311, 318 (7th Cir. 1992) ("The most convincing extrinsic evidence is a survey of what consumers thought upon reading the advertisement in question . . . .") (Internal quotation marks omitted). Plaintiffs' survey supports the plausibility of their claims and confirms that reasonable consumers expect that water bottles labeled as "100% Recyclable" actually can be recycled in their entirety by existing programs in California, including the labels and the caps. SACC ¶¶ 43–49. Indeed, 86.7% of consumers surveyed interpreted the label in this manner. *Id.* ¶ 49.

Contrary to what Defendants argue, Plaintiffs' theory of deception is in accord with the Green Guides and California law. The Green Guides provide that a Product may not be labeled as recyclable unless it "can be collected, separated, or otherwise recovered from the waste stream through an established recycling program for reuse or use in manufacturing or assembling another item." 16 C.F.R. § 260.12(a). A Product that is labeled as "100% Recyclable," reasonably must be recyclable in its entirety—100% of the Product must be "collected, separated, or otherwise recovered from the waste stream through an established recycling program for reuse." Additionally, each part of the bottle must be recyclable as defined by the Green Guides.

Also contrary to Defendants' arguments, Plaintiffs do not suggest that consumers understand "100% Recyclable" to be a guarantee that the Products actually will be recycled in their entirety all of the time. ECF No. 119 at 3. Rather, Plaintiffs allege that Defendants' claims are false because a "substantial majority" of consumers do not have access to recycling facilities ***that actually can recycle 100% of the Product***. The "substantial majority" standard provides marketers with reasonable leeway to account for the volatile nature of recycling. It requires that recycling facilities that actually can recycle the product be

available to 60% of consumers at any given time. § 260.12(b)(1) ("If recycling facilities are available to less than a substantial majority [defined as at least 60%] of consumers or communities where the item is sold, marketers should qualify all recyclable claims."). This standard is intended to provide reasonable assurances to consumers that the Product actually can be recycled most of the time. If, for example, 30% of recycling facilities in California were temporarily unable to recycle an otherwise recyclable item, that would not be a violation of the Green Guides. Here, where Defendants have represented that their products are "100% Recyclable," the products should be "100% Recyclable" to a substantial majority of consumers. That is, at any given time, 60% or more of consumers should have access to recycling facilities that actually can recycle 100% of the Products. Defendants fail to meet that standard because Plaintiffs allege that no facilities in California are capable of recycling 100% of the Products, and on average, 28% of each product cannot be recycled by reclamation facilities in California. SACC ¶ 4. Plaintiffs also allege that the Products are not "100% Recyclable" because the caps and labels independently fail to meet the definition of recyclable.

Although Plaintiffs use "will" and "would" in their complaint on some occasions, such as in alleging that "reasonable consumers understand that '100% Recyclable' means that the entirety of the Product, including the label and cap, ***will*** actually be recycled if it is properly disposed of in a recycling bin," SACC ¶ 4, this is not to suggest that consumers interpret a recycling guarantee. Rather, Plaintiffs use those terms to indicate that recycling programs' ***capabilities*** to recycle a material are ***actual***, and not ***theoretical***—i.e., that established recycling facilities ***will actually be able to recycle*** the material in question. The FTC similarly uses "will" language to emphasize that the "can be recycled" standard is an actual and not a theoretical capability. For example, it states that "To make a non-deceptive unqualified [recyclable] claim, a marketer should substantiate that a substantial majority of consumers or communities have access to facilities that ***will actually recycle***, not accept and ultimately discard, the product." FTC Green Guides Statement of Basis and Purpose at 174–75 (emphasis added).

Courts have routinely found similar allegations sufficient to plead actionable consumer deception claims. *See, e.g.*, *Smith v. Keurig Green Mt., Inc. ("Smith I")*, 393 F. Supp. 3d 837, 842 (N.D. Cal. 2019) (denying motion to dismiss where the plaintiff alleged that the defendant sold its single-use plastic PP coffee pods with a "recyclable" claim even through the pods could not be recycled by existing recycling

programs due to their size); *Hanscom v. Reynolds Consumer Products Inc.*, No. 21-cv-03434-JSW, 2022 U.S. Dist. LEXIS 34057, at *9 (N.D. Cal. Oct. 1, 2021) (denying motion to dismiss where the plaintiff alleged that the "Recycling" claim on defendant's trash bags falsely communicated to reasonable consumers that the products were suitable for municipal recycling and were themselves recyclable).

In addition to numerous cases in this District holding that similar false recycling claims are actionable, Plaintiffs' claims parallel the *Bell* case. 982 F.3d at 468. In *Bell*, the plaintiffs alleged that claiming "100% Grated Parmesan Cheese" on a product that included ingredients other than parmesan cheese, was misleading. *Id.* at 473. The defendants argued that an FDA-issued Standard of Identity authorized them to label their product "Grated Parmesan," despite containing fillers. *Id.* at 483. However, the regulations were silent on the use of "100%." *Id*. The defendants argued that the plaintiffs were attempting to impose a definition of "Grated Parmesan" that was inconsistent with federal law. *Id*. The Seventh Circuit disagreed, holding that the voluntary addition of "100%," which was not authorized by the regulations, was deceptive and not preempted where it made the claim "100% Grated Parmesan" misleading. *Id.* at 484. The district court also held that the claims were implausible because the product was shelf stable. The plaintiffs offered survey evidence confirming that consumers believed that a product labeled as "100% Grated Parmesan" would actually be only parmesan cheese. *Id.* at 480. The Seventh Circuit ruled that disregarding the survey evidence was improper and where "a plaintiff's interpretation of a challenged statement is not facially illogical, implausible, or fanciful, then a court may not conclude that it is nondeceptive as a matter of law." *Id.* at 493 (Kanne, J., concurring).

Defendants argue that Plaintiffs cannot resurrect their claims through the introduction of allegations regarding a consumer survey. ECF No. 119 at 9. However, Plaintiffs' introduction of survey allegations parallels *Naimi I*. 798 F. App'x at 69. In *Naimi I*, the plaintiffs alleged that Starbucks had deceptively labeled their "Doubleshot Espresso" canned coffee product. *Id.* They alleged that it conveyed to reasonable consumers that the products contained two shots of espresso. *Id.* The testing of the caffeine content of the products, which was alleged to be a proxy for the espresso content, revealed that there was only 120mg of caffeine in the "Doubleshot" product. *Id.* By comparison, the plaintiffs alleged that two shots of espresso brewed at a Starbucks's cafe has, on average, 136.3 mg of caffeine. *Id.* The district court was highly skeptical of the plaintiff's claims, ruling that it was implausible that consumers would believe

that a canned coffee beverage sold in convenience stores would literally contain two shots of espresso. *Naimi v. Starbucks Corp. (Naimi II)*, No. LACV 17-6484-VAP (GJSx), 2018 U.S. Dist. LEXIS 243214, at *17–18 (C.D. Cal. Feb. 28, 2018). The court also held that the plaintiffs' pleadings were factually insufficient to support a plausible inference that the products did not actually contain two shots of espresso. *Id.* In response to the district court's order granting Starbuck's first motion to dismiss, the plaintiffs filed an amended complaint with allegations regarding a consumer survey that confirmed that reasonable consumers understood "Doubleshot Espresso" to mean that the product contains two shots of espresso. *Naimi v. Starbucks Corp. (Naimi III)*, No. LACV 17-6484-VAP (GJSx), 2018 U.S. Dist. LEXIS 110398, at *13 (C.D. Cal. June 27, 2018). The district court dismissed again, holding that the plaintiffs' claims were still implausible. *Id.* at *34. The Ninth Circuit reversed, holding that the plaintiffs' allegations were factually sufficient and that the survey, which showed that 89% of consumers believed the "Doubleshot" product literally contained two shots of espresso, had to be credited as true at the pleadings stage, and was sufficient to show that the claim had the tendency to deceive reasonable consumers. *Naimi I*, 798 F. App'x at 69.

Defendants cite several cases but each of them can be distinguished. In *Cleveland v. Campbell Soup Co.*, No. 21-cv-06002-JD, 2022 U.S. Dist. LEXIS 229833, at *1 (N.D. Cal. Dec. 21, 2022), the plaintiffs alleged that the claim "0g Sugars" on Pepperidge Farm Goldfish brand crackers had a tendency to mislead consumers that the product was "healthy" and a reduced-calorie snack choice. The complaint alluded to "studies and surveys" that suggested that sugar was one of the key markers that consumers considered when determining the healthiness of a food item. *Id.* at *5. However, this Court noted that, like *Becerra v. Dr Pepper/Seven Up Inc.*, 945 F.3d 1225, 1230–31 (9th Cir. 2019), it was not clear from the pleadings, what questions the survey contained. *Id.* And the survey did not directly ask the respondents about the defendants' packaging or claims. *Id.*, *see also Becerra*, 945 F.3d at 1230–31 ("[I]t is difficult to tell what questions the survey asked to reach its conclusions, but it appears to have asked four questions to gauge consumer expectations of diet soft drinks related to one's weight."). By contrast here, Plaintiffs' consumer survey allegations directly quote questions that consumers answered regarding an example of

Defendants' packaging.[2]

Defendants also cite *Reflex Media, Inc. v. Luxy Ltd.*, No. 2:20-cv-00423-RGK-KS, 2021 U.S. Dist. LEXIS 227437, at *3–4 (C.D. Cal. Nov. 24, 2021). However, that was not a consumer fraud case. *Id.* Rather, it was an action seeking to invalidate a trademark by showing that it was generic. *Id*. The Court held that the survey results directly contradicted the legal standard for making that determination because the trademarks in question were specific and distinguishable from other websites. *Id.* at *4–5. Here, as explained *supra*, the results ***cannot*** contradict the legal standard because the ***only*** legal question is how do reasonable consumers actually interpret and understand a label. *Bell*, 982 F.3d at 481 ("What matters here is how consumers actually behave—how they perceive advertising and how they make decisions.). Plaintiffs' survey provides that answer. Moreover, the survey results comport with the Green Guides, how Defendants intend consumers to understand their claims, express FTC guidance on how the Green Guides should be interpreted, and the California Attorney General's joint comment letter to the FTC.

Finally, Defendants argue that Plaintiffs' survey employed leading questions and forced respondents to consider questions that they would not have otherwise contemplated. ECF No. 119 at 9–10. Defendants cite *McGinity v. Proctor & Gamble Co.*, 69 F.4th 1093, 1099 (9th Cir. 2023) to support their argument, but even if their criticism were true, which Plaintiffs dispute, nothing in that case stands for the proposition that a plaintiff cannot ask consumers such questions in a survey. Indeed, the problem with the survey in *McGinity* was that it did not show the product's back label, which contained language that clarified the defendants' ambiguous front-label representation, and thus was not helpful to resolving the question at issue there regarding the disclaimer. *Id.* at 1095. Here there is no disclaimer issue, and despite the problems with the specific survey in *McGinity*, the Ninth Circuit took pains to note that "[a]lthough the particular survey proved noninformative in the context of this case . . . consumer surveys may well be relevant and helpful in other cases." *Id.* at 1099. This is one of those "other cases." In any event, Defendants' criticisms regarding Plaintiffs' survey are all evidentiary in nature, and thus,

[2] In *Becerra*, the results of the survey showed that only 12.5% of respondents believed that a drink labeled "Diet" would help a person lose weight as the plaintiffs alleged in that case. 945 F.3d at 1231. In other words, even accepting the survey as true, the survey in *Becerra* confirmed that few consumers were deceived by the defendant's labeling. Here, by contrast, Plaintiffs' survey shows consensus regarding how consumers interpret Defendants' claims and that the vast majority were deceived. *See*, *e.g.*, SAC ¶¶ 43–53 (showing that more than 90% of consumer believed that Defendants' cap and labels are recyclable after viewing an example of packaging with the "100% Recyclable" claim).

inappropriate for the court to determine on a motion to dismiss. *Naimi*, 798 F. App'x at 69 ("Plaintiffs were not required to allege additional details concerning the contents and reliability of the survey in order for the allegations concerning the survey's results to be credited as true at the motion-to-dismiss stage.") *Jones v. Johnson*, 781 F.2d 769, 722 n.1 (9th Cir. 1986) ("[A]ny weighing of evidence is inappropriate on a 12(b)(6) motion."); *Shalikar v. Asahi Beer U.S.A.*, No. LA CV17-02713 JAK (JPRx), 2017 U.S. Dist. LEXIS 221388, at *18 (C.D. Cal. Oct. 16, 2017) (rejecting arguments attacking survey methodology on motion to dismiss).

B. Plaintiffs' Factual Allegations Exceed the Requirements of Rule 8.

"[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'" *Twombly*, 550 U.S. at 556; *accord In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1057 (9th Cir. 2008) (finding that trial court's "incredulity" was not a proper ground for granting a motion to dismiss and faulting the court for being "unwilling to accept" allegations as true). Plaintiffs' allegations well exceed the plausibility standard of the Federal Rules. Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." "[A] complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations." *Twombly*, 550 U.S. at 548. "Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true." *Id.* Plaintiffs far exceed this requirement.[3]

Plaintiffs allege that Defendants represent to consumers that the Products are "100% Recyclable." SACC ¶¶ 1, 33. Plaintiffs further allege that reasonable consumers understand this to mean that (1) the entirety of the Product is recyclable and (2) the entirety of the Product, including the label and cap, can actually be recycled if it is properly disposed of in a recycling bin. *Id.* ¶ 4. They allege that an independent consumer survey confirms that this is how reasonable consumers understand the "100% Recyclable" claim. *Id.* ¶¶ 6, 43–53. Finally, they allege that the Products are not "100% Recyclable" because, on average, recycling facilities in California discard 28% of each bottle, including the labels and caps. *Id.* ¶¶ 5, 69–72,

[3] Defendant does not currently argue, nor has this Court ever held, that Plaintiffs' complaint fails to satisfy Rule 9(b)'s particularity requirements. Plaintiffs previously briefed this issue and explained the "Who," "What," "Where," "When" and "How" of their claims in their Opposition to Defendants' First Motion to Dismiss Plaintiffs' Consolidated Complaint. ECF No. 78 at 13–15.

81. This alone is a short statement of facts that, if true, would raise a right to relief beyond the speculative level.

However, Plaintiffs have gone much further than the minimum requirements of the Federal Rules. Plaintiffs describe the process for recycling bottles from start to finish. *Id.* ¶¶ 55–72. They provide detailed allegations regarding how PET plastic bottle reclaimers in California process PET bottles. *Id.* ¶¶ 67–72. Plaintiffs describe the practices of two factories that they allege are typical of recycling plants in California, and represent more than 40% of the total volume of PET bottle recycling in California. *Id*. They allege that these plants strip and dispose of the labels from the bottles, dispose of the caps, and are only able to recycle, on average, 72% of each bottle. *Id.* ¶¶ 68–72. Accepting these facts as true, and drawing all inferences in Plaintiffs' favor, this necessarily means that less than 60% of consumers in California have access to recycling facilities that can actually recycle 100% of the Products. Further, the labels and caps independently fail to meet the Green Guides definition of recyclable because a substantial majority of consumers do not have access to cap and label recycling.

This Court, in its order on Defendants' prior motion to dismiss explained that, even "spotting Plaintiffs every benefit of the doubt," Plaintiffs' allegations were factually insufficient to show that "recycling facilities that ***accept*** the bottle caps and labels are not 'available to a substantial majority (defined as 60%) of the consumers or communities where the item is sold.'" ECF 115 at 6 (emphasis added). However, as Plaintiffs' new survey allegations clarify, Reasonable consumers do not understand "100% Recyclable" to mean that the caps and labels are merely ***accepted*** by recycling programs. Instead, they interpret the term to mean that the caps and labels ***actually can be recycled*** by existing programs in California. SACC ¶¶ 43–53. Thus, Plaintiffs allegations that a substantial majority of recycling programs in California cannot actually recycle the labels and caps and that no programs can recycle the entirety of the Products regardless of whether they accept the caps and labels are sufficient to establish that consumers are deceived. *Id.* ¶¶ 4–5, 55–72. Indeed, regardless of whether the caps and labels are accepted, they are ultimately disposed of, not recycled, *id.* ¶¶ 65–72, which, as the new survey shows, is contrary to consumer expectations based on the label claim, *id.* ¶¶ 43–53. Accordingly, Plaintiffs need not plead that recycling facilities do not accept the labels and caps because mere acceptance is not how Plaintiffs' survey shows

that consumers understand the claim 100% Recyclable. Put simply, Plaintiffs' new survey cures this pleading deficiency.

Moreover, the FTC makes clear that acceptance and disposal of material does not satisfy its definition of "Recyclable." In promulgating the most recent version of the Green Guides, the FTC stated (under the heading "Packages Collected for Public Policy Reasons but Not Recycled"), "[t]he Commission agrees that unqualified recyclable claims for categories of products that municipal recycling programs collect, but do not actually recycle, may be deceptive. To make a non-deceptive unqualified claim, a marketer should substantiate that a substantial majority of consumers or communities have access to facilities that will actually recycle, ***not accept and ultimately discard,*** the product. As part of this analysis, a marketer should not assume that consumers or communities have access to a particular recycling program merely because the program will accept a product." The California Public Resources Code similarly defines recycling as "the process of collecting, sorting, cleansing, treating, and reconstituting materials that would otherwise become solid waste, and returning them to the economic mainstream in the form of raw material for new, reused, or reconstituted products which meet the quality standards necessary to be used in the marketplace." Cal. Pub. Res. Code § 40180.

Smith is instructive. In that case, the plaintiffs alleged that the defendants' coffee pods were falsely and deceptively labeled as recyclable. 393 F. Supp. 3d at 842. The pods were made of a PP plastic that ***is accepted*** by MRFs in California. *Id.* at 842 ("the purportedly 'recyclable' Pods are made from Polypropylene (#5) plastic—a material currently accepted for recycling in approximately 61% of U.S. communities"). However, in practice, recycling facilities did not recycle the products because the equipment used by MRFs was not capable of sorting the plastic pods. *Id.* at 842. The Court in *Smith*, consistent with the Green Guides, held that the claim was actionable and had the tendency to deceive consumers because, even though PP is accepted for recycling, the pods were not actually being recycled by recycling facilities. *Id.* at 847. After clearing the motion to dismiss, Judge Gilliam certified a class of purchasers of the products. *Smith v. Keurig Green Mt., Inc. ("Smith II")*, No. 18-cv-06690-HSG, 2020 U.S. Dist. LEXIS 172826, at *35 (N.D. Cal. Sep. 21, 2020).

C. Plaintiffs' Survey Establishes That Reasonable Consumers Understand 100% Recyclable to Mean That the Products Are Fully "Recyclable," Including Incidental Components.

Throughout their motion, Defendants turn a blind eye to how the "100%" language affects their recyclable claim. *See*, *e.g.*, ECF No. 119 at 4. They argue that the "incidental component exception" allows them to make an unqualified "recyclable claim" even if minor components of the product, such as the cap and label, cannot be recycled. *Id.* However, this case is not about whether Defendants can rightfully label their Products as "Recyclable," rather, it is about the claim "***100%*** Recyclable." Indeed, even if the Court agrees that Defendants are allowed to make an unqualified "Recyclable" claim, the language "100%" is not expressly permitted by the Green Guides and, where it makes a claim of recyclability misleading, it is prohibited. *See* 16 C.F.R. § 260.2 ("Marketers must ensure that all reasonable interpretations of their claims are truthful, not misleading, and supported by a reasonable basis before they make the claims."). As Plaintiffs' consumer survey shows, "100% Recyclable" means something more than just the term "Recyclable", i.e., it is an ***enhanced*** claim of recyclability. Consumers expect that a water bottle labeled "100% Recyclable" can be recycled ***in its entirety***, including its incidental components. SACC ¶¶ 6, 43–53. Put simply, Defendants voluntarily adopted language that was designed to disclaim and negate the incidental component exception; thus, it does not save them here.

Further, Plaintiffs' survey results are consistent with statements in Defendants' marketing, which explain that, as opposed to other products that are less than 100% recyclable, the entirety of the Products, ***including*** minor incidental components are recyclable. The "Every Bottle Back" website that Coca-Cola launched states this exactly: "We are carefully designing [our plastic bottles] to be 100% recyclable – ***even the caps***." *Id.* ¶ 88.

Moreover, *Bell*, discussed *supra*, is on point. In *Bell*, the FDA regulations permitted a product to be labeled as "Grated Parmesan" even when it included some non-parmesan ingredients that helped to make it shelf stable. 982 F.3d at 483. The FDA regulations were silent on the use of the language "100%." *Id*. However, the Seventh Circuit held that the addition of the "100%" language made the otherwise authorized "Grated Parmesan" claim deceptive. *Id.* The defendants could not hide behind the legal exception that authorized them to add filler ingredients into the Product after they added "100%" language that contradicted and disclaimed the exception.

Defendants also cite *Duchimaza v. Niagara Bottling, LLC*, 21 Civ. 6434 (PAE), 2022 U.S. Dist. LEXIS 139837, at *27 (S.D.N.Y. Aug. 5, 2022) once again. ECF No. 119 at 10. However, the plaintiff in that case did not have survey allegations regarding how consumers interpret the "100%" language, did not raise the *Bell* case, nor did it argue that the "100%" language contradicts the incidental component exception. The court in *Duchimaza* mostly ignored the nuance of how the addition of the language "100%" affected the viability of the plaintiffs' claims. *See Duchimaza v*, 619 F. Supp. 3d at 414–15. Given Plaintiffs new survey allegations directly about the "100%" term, that is not possible here.

D. Consistent With Federal Law, Plaintiffs' Survey Establishes That Reasonable Consumers Understand "100% Recyclable" to Mean that the Products Actually Can Be Recycled by Established Programs.

Plaintiffs allege, *inter alia*, that reasonable consumers understand that "100% Recyclable" means that the entirety of the Product, including the label and cap, can be recycled by established recycling programs. SACC ¶¶ 4, 6, 43–53. Plaintiffs further plead that this is false because a substantial majority of consumers do not have access to recycling programs that actually can recycle the caps, labels, and entirety of the bottles. *Id.* ¶¶ 4–5. Defendants argue that, pursuant to the Court's July 27 Order, Plaintiffs were required to plead that it is "impossible to recycle the Products' caps and labels" but have failed to do so. ECF No. 119 at 6. However, the Court's July 27 Order was made without Plaintiffs' survey allegations that show how reasonable consumers actually understand Defendants' representation. Plaintiffs have provided allegations showing that "100% Recyclable" does not mean theoretically or technically recyclable and that instead, consumers expect that the entirety of the Products can ***actually*** be recycled by ***established programs***. SACC ¶ 49. These allegations must be accepted as true. *Naimi I*, 798 F. App'x at 69 (holding that the plaintiffs' amended complaint which included survey allegations that clarified how reasonable consumers actually understand Defendant's claims "must be accepted as true"); *Shalikar*, 2017 U.S. Dist. LEXIS 221388, at *18 (same). In light of Plaintiffs' survey, it is unnecessary for them to plead that it is technically impossible to recycle the caps and labels.

This is confirmed by § 260.12(a) of the Green Guides, which states that a product is properly labeled as recyclable when "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." (Emphasis added.) The word "can" must be read in conjunction with the language "through an established

program for reuse." It is not enough that a product ***theoretically*** can be recycled; it must be capable of actually being recycled ***through an established recycling program*** (i.e., a non-theoretical program). Indeed, the FTC explicitly adopted this standard when it interpreted in § 260.12(a) in FTC Green Guides Statement of Basis and Purpose: "[t]o make a non-deceptive unqualified claim, a marketer should substantiate that a substantial majority of consumers or communities have access to facilities ***that will actually recycle***, not accept and ultimately discard, the product." (Emphasis added.) In sum, a material is recyclable only if established programs will actually be able to recycle the product in question.

Put another way, "impossibility" under the Green Guides is dependent on what a substantial majority of established recycling programs actually do. A strictly theoretical definition of recyclability would render the "substantial majority" language in the Green Guides void, which violates first principles of statutory construction. *See* C.F.R. § 260.12(b) ("When recycling facilities are available to a substantial majority of consumers or communities where the item is sold, marketers can make unqualified recyclable claims. The term 'substantial majority,' as used in this context, means at least 60 percent"). If section 260.12(a) is interpreted to be a purely theoretical standard, then the question of whether recycling would be binary, either programs are 100% available to all consumers because the products are theoretically recyclable or they are 0% available to customers because it is impossible to recycle the products. The Green Guides clearly do not endorse a binary standard because the substantial majority standard contemplates situations where a Product can be technically recyclable, but only 45% of consumers have access to facilities that actually recycle the item. In that case, despite the fact it is theoretically possible to recycle the item, a marketer could not make a recyclable claim.

Here, Plaintiffs have met this "impossibility" standard because they have pled that label and cap recycling is not available to a substantial majority of consumers in California. SACC ¶ 5. Further, they plead that a substantial majority of consumers do not have access to recycling facilities that are capable of recycling 100% of the bottles because reclamation facilities dispose, on average, 28% of each bottle. *Id.* Indeed, Plaintiffs far exceed the substantial majority standard because they allege that there are no facilities capable of recycling 100% of the bottles. *Id.* ¶ 4.

Finally, the ABA and Coca-Cola's own marketing for the "Every Bottle Back" initiative provides numerous statements showing that Defendants intend "100% Recyclable" to mean that the Products are

actually being recycled. The website states "[w]e've made our plastic bottles to be 100% recyclable, including the caps." *Id.* ¶ 89. Additionally, it states beverage makers are "[w]ork[ing] together to leverage our packaging to remind consumers that our bottles are 100% recyclable and can be remade into new bottles. *Id.* ¶ 90. Beverage companies will begin introducing voluntary messaging on packages in late 2020." *Id.* The "Every Bottle Back" website shows that the "100% Recyclable" is intended to convey that the Products are being made into new Products, not that the Products might be recycled.

E. California Law and the Green Guides Place the Burden on Defendants to Make Sure That There Are Established Programs for the Products.

Plaintiffs note that, in the July 27 Order, the Court "mention[ed]" its concern about holding Defendants responsible because much of what Plaintiffs allege about recycling itself is "tied to forces and circumstances well beyond defendants' control." ECF 115 at 7. With respect, Defendants' labeling, which is what Plaintiffs' claims challenge, is ***completely within Defendants' own control***. A green claim such as "100% Recyclable" is something that benefits marketers by increasing the appeal of a product. As such, if marketers decide to make a "Recyclable" claim, California law and the Green Guides expressly place the responsibility on the marketers to ensure that the claim is truthful. *See*, *e.g.*, 16 C.F.R. § 260.2 ("Marketers must ensure that all reasonable interpretations of their claims are truthful, not misleading, and supported by a reasonable basis before they make the claims."). In doing so, they must take the state of recycling as it is, not how they might like it to be. Thus, if, as here, established recycling programs in California are not actually capable of recycling 100% of a Product, then marketers cannot claim the product is "100% Recyclable" even though they exercise no control over the recycling process itself. As the Supreme Court has long-recognized, "It is not difficult to choose statements, designs, and devices which will not deceive." *See United States v. Ninety-Five Barrels More or Less Alleged Apple Cider Vinegar*, 265 U.S. 438, 443 (1924)). Defendants should have chosen a marketing claim here that would not deceive. Instead, they made misleading claims. They can be held liable for those claims.

F. The Court Should Grant Leave to Amend.

It is well-established that "leave to amend should be granted unless the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986). Absent a

determination that amendment would be completely futile, Plaintiffs request leave to amend their Complaint to address any deficiencies that the Court identifies in its order on this motion.

V. CONCLUSION

For the reasons set forth above, the Court should deny Defendants' motion to dismiss in full.

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