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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.

SIERRA CLUB,

Plaintiff,

v.

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

Defendants.

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

DEFENDANTS' CONSOLIDATED NOTICE OF MOTION AND MOTION TO DISMISS FIRST AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES

Date: March 9, 2023
Time: 10:00 a.m.
Judge: Hon. James Donato
Courtroom: 11, 19th Floor

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

NOTICE OF MOTION AND MOTION

TO PLAINTIFFS AND THEIR COUNSEL OF RECORD, PLEASE TAKE NOTICE THAT on March 9, 2023, at 10:00 a.m., or as soon thereafter as counsel may be heard, in Courtroom 11 of the United States District Court for the Northern District of California, San Francisco Division, located at 450 Golden Gate Avenue, 19th Floor, San Francisco, California 94102, Defendants BlueTriton Brands, Inc. ("BTB"), the Coca-Cola Company ("Coca-Cola"), and Niagara Bottling, LLC ("Niagara") (collectively, "Defendants") hereby move pursuant to the Court's December 19, 2022 Minute Order (Dkt. No. 105) and pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) for an order dismissing these actions with prejudice on the grounds that Plaintiffs lack Article III standing and that they fail to state a claim.

Dated: January 9, 2023 By: /s/ *Dawn Sestito*

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

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STATEMENT OF ISSUES TO BE DECIDED

1. Have Plaintiffs sufficiently pleaded a violation of consumer protection laws based on a definition of "recyclable" consistent with the Federal Trade Commission's Green Guides definition, which the California legislature incorporated into the Business & Professions Code and that the Court relied on in its Dismissal Order?
2. Do Plaintiffs satisfy the standing requirements of Article III when they do not and cannot allege that the products they purchased failed to satisfy their expectations?
3. Do Plaintiffs have Article III standing to seek injunctive relief when they cannot plausibly be "deceived" by the label in the future?
4. Does an organizational plaintiff have standing when it was never deceived by the disputed statement, and it does not plead how the challenged marketing caused it to expend resources it otherwise would not have spent?
5. Have Plaintiffs improperly sought to amend their pleading to add a nationwide class with respect to defendant Niagara?

I. INTRODUCTION[1]

Plaintiffs' First Amended Consolidated Complaint ("FAC") repackages the same claims that this Court previously dismissed. As the Court has already held, "recyclable" means only that a bottle ***can be*** recycled, not that it necessarily ***will be***. Defendants' bottles are indeed "100% Recyclable" under that definition, and Plaintiffs have failed—after multiple attempts—plausibly to allege otherwise. This time, the Court should dismiss their claims for good.

First, the FAC still premises Plaintiffs' claims on the notion that "100% Recyclable" means that 100% of Defendants' bottles ***will be*** recycled—a theory already rejected by this Court and several others around the country. As this Court put it in its Dismissal Order, "[n]o reasonable consumer would understand '100% recyclable' to mean that the entire product will always be recycled." Dismissal Order at 2, Dkt. No. 99. Rather, "a reasonable consumer would understand that making an object recyclable is just the first step in the process of converting waste into reusable material, and not a guarantee that the process will be completed." *Id.* Yet Plaintiffs' unreasonable interpretation continues to pervade the FAC, which asserts that the products cannot be "100% Recyclable" because the products are not always recycled.

Second, Plaintiffs do not and cannot plausibly allege that Defendants' products fail to satisfy the correct definition of "100% Recyclable." As the Court recognized, the Federal Trade Commission's Green Guides establish that definition, providing that a product can be labeled "recyclable" so long as at least 60% of consumers or communities have access to facilities that are capable of recycling the primary package—exclusive of "minor, incidental components." Dismissal Order at 2 (quoting 16 C.F.R. § 260.12(b)(1)); *see also* 16 C.F.R. §§ 260.12(c), 260.3(b). Though Plaintiffs have attempted to salvage their claims by adding a handful of conclusory allegations regarding the bottles' caps and labels, none of these new allegations plausibly suggests that Defendants' products fail to meet the Green Guides definition. Not only are caps and labels "minor, incidental components" of the bottles that do not play a role in determining whether a product is "recyclable" under the Green Guides standard, but Plaintiffs' new assertions themselves

[1] Unless otherwise stated, all emphasis is added and citations and internal quotation marks are omitted.

fail plausibly to allege that the caps and labels are not recyclable. Indeed, the sources cited in the FAC contradict and undermine Plaintiffs' efforts to insinuate that caps and labels are not recyclable under the Green Guides definition.

Plaintiffs' FAC also retains other deficiencies of their original Complaint that the Court did not reach in its prior Dismissal Order. Specifically, they fail to adequately allege Article III standing because they have suffered no injury. They do not allege that their expectations about the bottles they purchased were not met, and they lack standing to seek injunctive relief because they have not alleged the requisite threat of prospective harm.

Despite the Court's warning that this "will likely be the last opportunity to amend," Dismissal Order at 3, Plaintiffs have failed to cure the deficiencies outlined in the Dismissal Order and Defendants' prior motion to dismiss. The Court should dismiss the FAC with prejudice.

II. RELEVANT FACTS

The background relevant to this motion is in large part described in Defendants' first consolidated motion to dismiss, First Consol. Mot. to Dismiss at 3–5[2], Dkt. No. 76, and the Court's November 18, 2022 Order granting that motion, Dismissal Order at 1. Defendants incorporate by reference Section III of their first motion to dismiss into this brief, First Consol. Mot. to Dismiss at 3–5, and address only new relevant facts from Plaintiffs' FAC here and *infra* Section IV.

Plaintiffs' initial Complaint posited that the "100% Recyclable" claim on Defendants' products was false because, although the products can be recycled, they are not always recycled in practice, due to Materials Recovery Facility ("MRF") capacity limitations and other issues. But the Court roundly rejected Plaintiffs' fanciful theory that "100% Recyclable" means that the ***entire*** product ***will be*** recycled. "No reasonable consumer," the Court found, "would understand '100% recyclable' to mean that the entire product will always be recycled . . . ." Dismissal Order at 2. The Court also ruled that Plaintiffs' will-be-recycled theory is "inconsistent with California and federal law," which establish uniform standards for claims such as "100% Recyclable." *Id.* As the Court explained:

[2] When referencing prior filings, page numbers reflect the internal pagination of the prior document.

> Unqualified recyclable claims are permissible if recycling facilities are available to at least 60% "of consumers or communities where the item is sold." [16 C.F.R.] § 260.12(b)(1). In other words, whether a product is properly labeled "recyclable" under the Green Guides depends on whether it is comprised of materials that can be recycled by existing recycling programs--not, as plaintiffs say, on whether the product is converted into reusable material.

Id. Because the Complaint did not allege that the products fell short of this standard, the Court dismissed it, subject to one last opportunity to amend "consistent with this order." *Id.* at 2–3.

Plaintiffs nevertheless continue to advance their failed theory, alleging in their FAC that Defendants' "100% Recyclable" labels are false because the entirety of Defendants' products are not ***actually recycled***. FAC ¶¶ 2, 57, 64. Though Plaintiffs have also thrown in a conclusory contention that the products do not satisfy the proper definition of "recyclable," their factual allegations do not support it. In fact, the FAC undermines their theory, alleging that consumers and communities in California have access to at least 75 MRFs that accept and/or process recyclable materials, including the materials Plaintiffs allege comprise Defendants' bottles, caps, and labels. *See id.* ¶¶ 41, 45, 47. And Plaintiffs still do not allege that any of Defendants' California consumers or communities—let alone more than 40% of them—lack access to "recycling facilities."

III. LEGAL STANDARD

To survive a Rule 12(b)(6) motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see also* Fed. R. Civ. P. 12(b)(6). While the Court must accept well-pleaded facts as true, it need not accept "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008). Instead, a complaint's allegations "must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).[3]

[3] Because all of Plaintiffs' claims here sound in fraud, Plaintiffs must also satisfy Rule 9(b)'s heightened pleading standard. *See Beecher v. Google N. Am. Inc.*, Case No. 18-cv-00753, 2018 WL 4904914, at *1 (N.D. Cal. Oct. 9, 2018) (UCL, FAL, and CLRA); *TransFresh Corp. v. Ganzerla & Assoc., Inc.*, 862 F. Supp. 2d 1009, 1014, 1017–18 (N.D. Cal. 2012) (Greenwashing and UCL); *Neilson v. Union Bank of Cal., N.A.*, 290 F. Supp. 2d 1101, 1141 (C.D. Cal. 2003) (fraud and negligent misrepresentation).

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

IV. ARGUMENT

A. Plaintiffs still fail to plead that Defendants' "100% Recyclable" labeling is false or misleading.

At the threshold, the Court dismissed Plaintiffs' prior Complaint for failure to "plausibly allege that defendants' representations deviate from the commonly understood meaning of recyclable or the Green Guides definition." Dismissal Order at 3. The FAC does nothing to cure this deficiency. Plaintiffs now allege that "recyclable" means "comprised of material that ***can be*** recycled by existing recycling programs in California," FAC ¶ 2, but many of the allegations in the FAC continue to peddle the same theory this Court has already rejected: that "100% Recyclable" means that a product ***will be*** recycled. The FAC repeatedly posits that Defendants' products are not "100% Recyclable" because they purportedly ***sometimes*** "end up in landfills or burned" and because ***some*** California recycling programs "do not recycle" certain plastic components that they collect. *Id.* ¶¶ 2, 57, 64. This theory is no more viable than it was the first time around because reasonable consumers still would not have that understanding. The Court should reject this theory for a second (and final) time.

Nor does Plaintiffs' FAC add any new allegations that plausibly establish that Defendants' products are not "recyclable" under the "commonly understood" meaning or the Green Guides standard. As the Court noted in its dismissal order, a "recyclable" product under California and federal law is one that "can be collected, separated, or otherwise recovered from the waste stream through an established recycling program for reuse or use in manufacturing or assembling another item." Dismissal Order at 2 (quoting 16 C.F.R. § 260.12(a)). The Court also held that the Green Guides expressly permit the use of unqualified recyclable claims—like "100% Recyclable"—when recycling facilities are available to at least 60% "of consumers or communities where the item is sold." *Id.* (quoting 16 C.F.R. § 260.12(b)(1)). Summarizing these two provisions, the Court

explained that "whether a product is properly labeled 'recyclable' under the Green Guides depends on whether it is comprised of materials that ***can be*** recycled by existing recycling programs." *Id.*

No new allegations in the FAC plausibly suggest that Defendants fail to meet the Green Guides standards. Plaintiffs expressly admit that California MRFs accept bottles made of PET—the same type of plastic Plaintiffs allege Defendants' bottles are made of. FAC ¶¶ 27 ("[Defendants'] bottles are made of polyethylene terephthalate (PET, #1 plastic)."), 47 ("MRFs accept PET plastic bottles . . . ."). Although Plaintiffs allege that "at least 28% of the total plastic material in the bottles" is supposedly not processed by MRFs (something they alleged with even less specificity than in the prior consolidated complaint, Consol. Compl. ¶ 4, Dkt. No. 74), this ignores the Court's prior holding that "[n]o reasonable consumer would understand '100% recyclable' to mean that the entire product will always be recycled." Dismissal Order at 2.

Perhaps for this reason, Plaintiffs' FAC places more emphasis on the caps and labels affixed to the bottles, which Plaintiffs contend are not "recyclable" by California facilities. Plaintiffs' gambit fails both as a matter of law and because the FAC does not plausibly allege that the caps and labels are not, in fact, recycled.

Under the Green Guides standard for "recyclability," these "minor, incidental components" are irrelevant because the Green Guides expressly permit unqualified recycling claims—like "100% Recyclable"—even when "minor incidental components" are not recyclable. 16 C.F.R. §§ 260.12(c), 260.3(b). Plaintiffs concede this. *See* FAC ¶ 60 ("A product does not need to be recyclable in its entirety to be labeled as 'recyclable.' In other words, it is acceptable to label a plastic bottle as 'recyclable' if it is less than '100% Recyclable.'" (citing 16 C.F.R. § 260.12(c)). Bottle caps and labels are "minor, incidental components" under the Green Guides. As another court recently found in dismissing a complaint about allegedly misleading "100% Recyclable" labeling, bottle caps are clearly "minor, incidental components" because the Green Guides explicitly identify them as such an example. *Duchimaza v. Niagara Bottling, LLC*, Case No. 21 Civ. 6434, 2022 WL 3139898, at *10–*11 (S.D.N.Y. Aug. 5, 2022) (plastic water bottle manufacturer was "clearly correct" in asserting that bottle caps were "minor, incidental components" under 16 C.F.R. § 260.3(b)); 16 C.F.R. § 260.3(b) ("Because the bottle cap is a minor,

incidental component of the package, the claim is not deceptive."). The court in *Duchimaza* found that labels were also "minor, incidental components" because, under dictionary definitions of "minor" and "incidental," the labels do "not contribute" to the bottles' "functionality," are "thin to the point of being two-dimensional," are "completely removable," and, "[r]elative to the bottle[s], the label[s] [are] patently inferior in size, degree and importance." *Duchimaza*, 2022 WL 3139898, at *10–*11. Thus, in dismissing the complaint in full, the *Duchimaza* court correctly held that neither the bottle caps nor labels count toward the determination of whether a bottled water product is truly "100% Recyclable." *Id.* The same principle controls here.

The Green Guides' narrow exception providing that "minor, incidental components" may count against recyclability if they "significantly limit[] the ability to recycle the product" overall, FAC ¶ 61 (quoting 16 C.F.R. § 260.12(d)); *see also* 16 C.F.R. § 260.3(b), does not apply here. As Plaintiffs concede, Defendants' PET bottles are indeed accepted and processed by MRFs, and the caps and labels do not impede this process: Plaintiffs' cited video[4] reveals that MRFs do accept, process, and bale PET bottles with the labels intact, FAC ¶ 2 n.3, and Plaintiffs also allege that the labels are simply washed off of the bottles at California PET reclamation plants, *id.* ¶¶ 52, 55. Having failed to allege that Defendants' caps and labels pose any "significant[] limit[ation]" to the recyclability of Defendants' products, Plaintiffs cannot salvage their claims with a contention—undermined by their own citations—that these "minor, incidental components" are not recyclable.

Moreover, even if this Court were to consider Plaintiffs' contention, the allegations in the FAC do not plausibly support it. Plaintiffs concede that PP caps and BOPP labels "are collected by MRFs in California" and are "frequently collected in California." *Id.* ¶ 45. The FAC references a video about a PET reclaimer—that is, not a MRF, but rather a facility dedicated to producing PET pellets from sorted bales ***purchased from a MRF***—in which an interviewee roughly estimates that only 70% of the incoming bales (by weight) ends up as PET pellets. *Id.* ¶¶ 2 and n.3, 51, 54. Although Plaintiffs use this statement to imply that caps and labels are discarded as refuse, the

[4] A court may consider materials referenced in the complaint without converting a motion to dismiss into a motion for summary judgment. *See, e.g.*, *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

statement says nothing of the sort. The only plausible meaning of the statement is that 30% of the incoming bales are not PET and therefore cannot be used to make PET resin. Nowhere does the video suggest that HDPE or PP caps, aluminum caps,[5] or BOPP labels are discarded. In fact, the video cited in the FAC shows labels being carefully separated from the PET bottles and placed in a label-only drum. *Id.* ¶ 2 n.3. Although on a motion to dismiss the Court cannot look to the company's own website to learn why there is a specific step for removing and collecting labels—and labels only—before the PET bottles themselves are ground into PET flake, the Court can fully determine that such sequestration renders implausible Plaintiffs' unsupported assertion that the labels are "disposed of as refuse." *Id.* ¶ 59.

Similarly, Plaintiffs' new allegations that "only 2 out of the 75 MRFs in California accept plastic bags" and that "there are no MRFs in California that accept plastic wrap," *id.* ¶ 46, are patently meaningless. Plastic ***bags*** and plastic ***wrap***—which can gum up the works of a MRF—are nothing like a label on a PET bottle. Indeed, the FAC describes the post-MRF Riverside and Peninsula PET reclamation plants as removing labels, *id.* ¶¶ 52, 55, and the video Plaintiffs reference in the FAC shows bales of PET bottles received from MRFs with the labels intact, *id.* ¶ 2 and n.3. In order to produce the depicted bales, MRFs would have to accept—and do accept—BOPP labels for recycling.

In short, although Plaintiffs seek to change the focus of their action from bottles to caps and labels, nothing in the FAC plausibly alleges that the caps and labels are not recyclable—or that they are anything other than "minor, incidental components" under the Green Guides standard.

B. <u>The consumer Plaintiffs lack Article III standing to pursue their claims.</u>

Plaintiffs Muto, Salgado, and Swartz lack standing to pursue their "100% Recyclable" claims because they cannot demonstrate an injury in fact and they do not plausibly allege the requisite risk of future injury to pursue injunctive relief. To pursue a claim in federal court, Plaintiffs must demonstrate standing to sue by establishing that they have "(1) suffered an injury in

[5] *See* video referenced at FAC ¶ 2 n.3; *see also id.* ¶ 52.

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*, 578 U.S. 330, 338 (2016).

1. Plaintiffs do not allege that the "100% Recyclable" statement caused them any injury.

Though Plaintiffs suggest that water bottles are not generally recycled, they do not allege that the bottles ***they*** purchased were not ultimately recycled. This renders their alleged injury a hypothetical one at best. Article III standing requires Plaintiffs to show that "they suffered a distinct and palpable injury as a result of the alleged unlawful or unfair conduct." *Birdsong v. Apple, Inc.*, 590 F.3d 955, 960 (9th Cir. 2009).

Plaintiffs acknowledge that the plastics they allege make up Defendants' products—PET, PP, and BOPP—are "collected" (even "frequently") and "accept[ed]" by MRFs in California. FAC ¶¶ 45, 47. But Plaintiffs make no allegations regarding the recycling rates for plastic water bottles, as opposed to all PET, PP, and BOPP products. Though Plaintiffs make one allegation concerning the recycling rate of the caps and labels at one recycling facility, FAC ¶ 54, they do not, and cannot, allege that ***their*** water bottles were not recycled—meaning that there is no evidence that Plaintiffs received anything less than that for which they paid. Mere supposition that the bottles they purchased might not have been recycled is too "conjectural [and] hypothetical" to give rise to Article III standing. *Birdsong*, 590 F.3d at 960. Courts have consistently declined to entertain false-labeling claims by plaintiffs who might have been, but were not necessarily, deprived of the benefit of their bargain. *E.g., Wallace v. ConAgra Foods, Inc.*, 747 F.3d 1025, 1031 (8th Cir. 2014) (dismissing complaint for lack of Article III standing when it was "pure speculation to say the particular packages [of "100% kosher hot dogs] sold to the [plaintiffs] were tainted by non-kosher beef," and "quite plausible" that plaintiffs purchased "*exactly what was promised*: a higher quality, kosher meat product"); *Phan v. Sargento Foods, Inc.*, Case No. 20-cv-09251, 2021 WL 2224260, at *4 (N.D. Cal. June 2, 2021) (similar); *Pels v. Keurig Dr. Pepper, Inc.*, Case No. 19-cv-03052, 2019 WL 5813422, at *4–*5 (N.D. Cal. Nov. 7, 2019) (similar). The result must be the same here.

2. Plaintiffs lack standing to pursue injunctive relief.

Plaintiffs also lack standing to pursue injunctive relief because they fail to allege the requisite future risk of injury. To establish standing to seek injunctive relief, a plaintiff must show that the threat of future injury is "actual and imminent, not conjectural or hypothetical." *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 967 (9th Cir. 2018). "Where standing is premised entirely on the threat of repeated injury, a plaintiff must show a sufficient likelihood that he will again be wronged in a similar way." *Id.* The Ninth Circuit, in *Davidson*, rejected the argument "that injunctive relief is ***never*** available for a consumer who learns after purchasing a product that the label is false." *Davidson*, 889 F.3d at 970. But the court did not hold that injunctive relief is always available to a plaintiff who alleges an interest in purchasing the product at issue in the future. Rather, the Ninth Circuit held that standing to seek injunctive relief ***could*** exist if a plaintiff made "***plausible*** allegations that she will be unable to rely on the product's advertising or labeling in the future, and so will not purchase the product although she would like to," or "***plausible*** allegations that she might purchase the product in the future, despite the fact it was once marred by false advertising or labeling, as she may reasonably, but incorrectly, assume the product was improved." *Id.* at 969–70.

Plaintiffs say they "continue to desire to purchase water in bottles that are '100% Recyclable,'" hypothesize that either recycling technology or the products in question could change over time, and make the conclusory assertion that they are "likely to be repeatedly misled by Defendants' conduct" in the absence of an injunction. FAC ¶ 100. Plaintiffs' own allegations in the FAC, however, render this assertion implausible. Plaintiffs make clear their belief that now and in the foreseeable future no PET water bottle—and certainly ***no*** PET water bottle with a HDPE or PP cap and a BOPP label—is 100% recyclable. Plaintiffs' allegations regarding the state of recycling, moreover, make it clear that any hypothetical changes to the state of recycling in the United States that might bear on the recyclability of water bottles will be far in the future and that, as persons apparently quite knowledgeable about recycling, they would know if future changes in

recycling infrastructure rendered plastic water bottles 100% recyclable by their definition. Plaintiffs therefore lack standing to seek injunctive relief.[6]

C. Sierra Club lacks Article III standing to proceed.

BTB and Coca-Cola have inflicted no harm on Sierra Club, so Sierra Club lacks Article III standing to bring its claims. For an organization like Sierra Club to plead an injury in fact, it must "demonstrate: (1) frustration of its organizational mission; and (2) diversion of its resources to combat the particular [conduct] in question." *Smith v. Pac. Props. & Dev. Corp.*, 358 F.3d 1097, 1105 (9th Cir. 2004). To establish Article III standing, an organization must show that a defendant's conduct does "more than offend the priorities and principles of the organization"—it must show that the conduct results "in an actual impediment to the organization's real-world efforts." *Jimenez v. Tsai*, Case No. 5:16-cv-04434, 2017 WL 2423186, at *11 (N.D. Cal. June 5, 2017). And plaintiffs can establish organizational standing only by demonstrating that they "expended additional resources that they would not otherwise have expended, and in ways that they would not have expended them," not when they merely go about their "business as usual." *Friends of the Earth v. Sanderson Farms, Inc.*, 992 F.3d 939, 942 (9th Cir. 2021).

Here, Plaintiff Sierra Club proffers legitimate positions for an environmental organization to take: wanting a more robust market for recycled plastics, more recycling infrastructure, and a narrower definition of "recyclable" than the Green Guides apply. But these are merely policy positions, rather than causes of action, grounds for a suit, or evidence of injury. Sierra Club also lacks standing to bring its state-law claims because of a key legal flaw: The law at issue allows standing only for harm caused when consumers believe false statements to be true. But Sierra Club

[6] *See, e.g.*, *Hanscom v. Reynolds Consumer Prods. LLC*, Case No. 21-cv-03434, 2022 WL 591466, *4–*5 (N.D. Cal. Jan. 21, 2022) (plaintiff lacked standing to pursue injunctive relief because her alleged interest in future purchases of recycling bags was undermined by allegations that recycling processes were "designed to work without such bags"); *see also Haggerty v. Bluetriton Brands, Inc.*, Case No. 21-13904, 2022 WL 17733677, at *5 (D.N.J. Dec. 16, 2022) (plaintiff lacked standing to seek injunctive relief on "100% Recyclable" claims because whether she would repurchase defendant's products was "a matter of pure speculation," and claims that she could not purchase products again because of distrust of defendant's labeling lacked "the necessary imminency and d[id] not result in a substantial risk of harm sufficient to generate an independent injury").

never believed Defendants' "100% Recyclable" statements were true, so it never suffered any harm as a result of a belief it never held. Because Sierra Club lacks standing, the Court must dismiss its claims. The Court should dismiss Sierra Club's claims for lack of standing for these reasons as detailed further in BTB and Coca-Cola's prior supplemental briefing. Defs. Coca-Cola and BTB's Suppl. Br. First Consol. Mot. to Dismiss, Dkt. No. 77.

D. Plaintiffs improperly seek to add a national class with respect to Niagara.

Although Plaintiffs originally sought to assert claims against all three defendants on behalf of a California-only class, Compl. ¶ 70, Dkt. No. 1, Plaintiffs first attempted to use the Court's directive to file a consolidated complaint combining the allegations in the Swartz and Sierra Club complaints as a pretext for an unauthorized expansion of the class to a *national* class with respect to defendant Niagara. Consol. Compl. ¶ 91. Niagara noted the impropriety of this maneuver in its October 20, 2022 letter to the Court regarding a discovery dispute, Def. Niagara's Disc. Dispute Letter, Dkt. No. 97, pointing out that, since more than twenty-one days had passed from the filing of Defendants' Rule 12 motion, leave was required to amend the complaint to add non-California parties and new claims. *See* Fed. R. Civ. P. 15(a)(2). New claims asserted in an amended complaint without leave to amend are to be dismissed or stricken. *See, e.g., DeLeon v. Wells Fargo Bank, N.A.*, Case No. 10-cv-01390, 2010 WL 4285006, at *3 (N.D. Cal. Oct. 22, 2010); *Andrew W. v. Menlo Park City Sch. Dist.*, Case No. C-10-0292, 2010 WL 3001216, at *2 (N.D. Cal. July 29, 2010). The Court directed Plaintiffs to file a ***consolidated*** complaint, but did not grant leave to ***amend*** in any respect.

Plaintiffs now try again to assert claims against Niagara on behalf of a national class in the FAC. The Court, in its Dismissal Order, while allowing Plaintiffs to file an amended complaint, was clear that "[t]he amended complaint must be consistent with this order and may not add any new claims or parties without the Court's prior approval." Dismissal Order at 3. Adding non-California parties is in clear violation of that directive.

The claims on behalf of a putative national class must be dismissed in any event. To bring claims under California law on behalf of a nationwide class, due process requires a showing that California law does not conflict with the law of another jurisdiction that has an interest in the case.

Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 821–22 (1985). Additionally, a plaintiff may not bring claims on behalf of a national class "unless he can establish that 'California law applies to all putative class members.'" *Freedline v. O Organics*, Case No. 19-cv-01945, 2020 WL 6290352, at *2 (N.D. Cal. Oct. 27, 2020) (quoting *Razuki v. Nationstar Mortg., LLC*, Case No. 18-cv-03343, 2020 WL 1478374, at *3 (N.D. Cal. Mar. 26, 2020)). There are no such allegations in the FAC, requiring that the assertion of a nationwide class be dismissed or stricken. *See, e.g., In re Graphics Processing Units Antitrust Litig.,* 527 F. Supp. 2d 1011, 1028 (N.D. Cal. 2007).

V. LEAVE TO AMEND SHOULD NOT BE GRANTED

The Court should not grant leave to amend because Plaintiffs have had multiple opportunities to amend, the Court specifically warned in its Dismissal Order that this will likely be the last opportunity to amend, and amendment would be futile. *See Cannara v. Nemeth*, 467 F. Supp. 3d 877, 884 (N.D. Cal. 2020), *aff'd*, 21 F.4th 1169 (9th Cir. 2021) (dismissing without leave to amend because "Plaintiffs have already amended their complaint once, and further amendment will not be likely to adduce [sufficient] facts"). There are no additional facts Plaintiffs could allege to state a claim—the Court should thus deem amendment futile and dismiss without leave to amend.

VI. CONCLUSION

For the foregoing reasons, the Court should grant Defendants' consolidated motion to dismiss Plaintiffs' FAC with prejudice.

Dated: January 9, 2023

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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: January 9, 2023

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