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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.

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

DEFENDANTS BLUETRITON BRANDS, INC. AND THE COCA-COLA COMPANY'S SUPPLEMENTAL BRIEF IN SUPPORT OF CONSOLIDATED MOTION TO DISMISS

Date: June 30, 2022
Time: 10:00 a.m.
Judge: Hon. James Donato
Courtroom: 11, 19th Floor

NOTICE OF MOTION AND MOTION

TO PLAINTIFFS AND THEIR COUNSEL OF RECORD, PLEASE TAKE NOTICE THAT on June 30, 2022, 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 Ave., 19th Floor, San Francisco, California 94102, Defendants BlueTriton Brands, Inc. ("BTB") and the Coca-Cola Company ("Coca-Cola") hereby move pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) for an order dismissing this action on the grounds that Plaintiff Sierra Club lacks Article III standing and that it fails to state a claim.[1]

[1] BTB and Coca-Cola file this Supplemental Brief pursuant to the Court's instruction. March 8, 2022 Minute Order (Dkt. No. 68) (permitting each Defendant a 5-page supplemental brief); Transcript of Status Conference at 8:24–9:19, *Swartz et al. v. Coca-Cola Co. et al.* (No. 3:21-cv-04643-JD) (permitting BTB and Coca-Cola to include argument on "discrete standing issue" under Article III and California law in their supplemental briefing).

Dated: April 22, 2022 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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INTRODUCTION

Plaintiff Sierra Club does not like single-use plastic bottles. It wants a more robust market for recycled plastics and more recycling infrastructure. And it would prefer a narrower definition of "recyclable" than the one used by the Federal Trade Commission. These are legitimate positions for the environmental organization to take. But they are only that: positions. Not causes of action, grounds for a suit, or evidence of injury. Defendants BTB and Coca-Cola ("Defendants")[2] have inflicted no harm on Sierra Club, so it lacks Article III standing to bring its claims. 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 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.

STATEMENT OF ISSUES TO BE DECIDED

1. Does an organizational plaintiff have standing when it does not plead how the challenged marketing caused it to expend resources it otherwise would not have spent?
2. Can a plaintiff vindicate purported violations of the EMCA and FTC guidance when it did not believe the truth of the statement and thus suffered no injury as a result of that belief?

STATEMENT OF RELEVANT FACTS[3]

This lawsuit is one of several lawsuits challenging the phrase "100% Recyclable" on Defendants' consumer products. Plaintiff Sierra Club is dedicated to "educat[ing] and enlist[ing] humanity to protect and restore the quality of the natural and human environment, and to use all lawful means to carry out those objectives." Consolidated Amended Complaint ("CAC") ¶ 10. Defendants, as sellers of recyclable water bottles, also seek to protect the quality of the natural and human environment.

[2] Niagara Bottling, LLC ("Niagara") is also a defendant in this multi-plaintiff consolidated action, but Sierra Club asserts no claim against Niagara.

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

Sierra Club alleges: (1) false advertising under California Business and Professions Code section 17500, *et seq.* ("FAL"); and (2) unfair, unlawful, and deceptive trade practices under California Business and Professions Code section 17200, *et seq.* ("UCL"). Defendants move to dismiss both claims for lack of standing. Defendants also incorporate by reference the motion to dismiss that they filed with co-defendant Niagara Bottling, LLC as an additional independent basis for dismissal of Sierra Club's claims.

ARGUMENT

I. Plaintiff Sierra Club lacks Article III standing to pursue its claims.

A. Sierra Club lacks organizational standing.

Federal courts have no jurisdiction over claims where, as here, a plaintiff fails to allege that it suffered an injury caused by the defendants' conduct. *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1302 (2017) (constitutional standing requires plaintiff to "show an injury in fact"). 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*, 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, Sierra Club pleads insufficient facts to support its conclusory allegation that Defendants "frustrated [its] organizational mission." CAC ¶¶ 21, 72; *see Project Sentinel v. Evergreen Ridge Apartments*, 40 F. Supp. 2d 1136, 1139 (N.D. Cal. 1999) (no standing where complaint alleged "nothing more than a setback to the organization's abstract social interest").

And Sierra Club likewise fails to allege "concrete details regarding the significant resources that . . . have been and will continue to be diverted *as a result of Defendants' practices*." *Jimenez*, 2017 WL 2423186, at *12. Organizations must plead not just that they have spent money or time on a particular issue but also how they have "*alter[ed]* their resource allocation to combat the challenged practices." *Friends of the Earth*, 992 F.3d at 942. Sierra Club fails to meet this standard.

Sierra Club alleges that it spent resources to support recycling-related legislation. CAC ¶¶ 73–84. But it did not support those bills—which, as characterized by Sierra Club, "prohibits false recycling claims" (SB 343) and "supports the use of reusable bottles" (AB 962), CAC ¶ 73—*because* of Defendants' "100% Recyclable" labels. Sierra Club surely would have supported these bills even absent Defendants' labels, as this is *precisely* the kind of activity Sierra Club has engaged in for 130 years: It is "dedicated to the . . . preservation of the environment, including . . . ending the use of single-use plastics and combatting false and misleading environmental claims on consumer goods." *Id.* ¶ 10. Sierra Club insists that its advocacy for these bills was "merely to fight back against the misperceptions and confusion" allegedly caused by Defendants' labels. *Id.* ¶ 84. But these efforts—a single tweet and a single article referencing Defendants' products—constitute the very environmental education and advocacy that is, indeed, Sierra Club's "business as usual" as alleged in the CAC.

Moreover, Sierra Club has not suffered an Article III injury because it has not shown that it *affirmatively diverted* resources because of Defendants' labels. *See Friends of the Earth*, 992 F.3d at 942; *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1040 (9th Cir. 2015) (organizational standing hinges on whether a plaintiff "*changed [its] behavior*" and "expended *additional* resources that [it] would not otherwise have expended, and in ways that [it] would not have expended them"); *Jimenez*, 2017 WL 2423186, at *12 (dismissing complaint for failing to allege that "work in connection with this action went above or beyond [plaintiff's] typical work efforts in the community"). To hold otherwise would permit a plaintiff to manufacture an Article III injury by "artfully defining its organizational purpose and engaging in perfunctory advocacy

efforts before filing a complaint." *Faith Action for Cmty. Equity v. Hawaii*, 2014 WL 1691622, at *7 (D. Haw. Apr. 28, 2014).[4]

B. Sierra Club lacks standing to pursue injunctive relief.

Sierra Club has not alleged any potential for future injury and so has no right to injunctive relief—the only relief it seeks aside from legal costs and attorneys' fees. *See* CAC at 46–47; *see also Hanscom v. Reynolds Consumer Prods. LLC*, 2022 WL 591466, at *4–5 (N.D. Cal. Jan. 21, 2022) (dismissing injunctive relief claim for lack of Article III standing when plaintiff failed to sufficiently allege a future risk of injury based on repurchasing bags featuring allegedly misleading "Recycling" labels). Prospective injunctive relief requires a plaintiff to demonstrate, in part, that it will suffer irreparable injury if the injunction is not granted. *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). Here, Sierra Club has not alleged how injunctive relief would redress its supposed injury of "diverted resources." *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) ("[I]t must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."); *see also Greenpeace, Inc. v. Walmart Inc.*, 2022 WL 591451, at *1–2 (N.D. Cal. Feb. 3, 2022) (holding conclusory allegations of continued expenditures to combat allegedly mislabeled "recyclable" products, without "particularized allegations of fact," were insufficient to establish organizational plaintiff's standing to seek injunctive relief). Even if the Court were to grant the relief Sierra Club seeks—removal of the "100% Recyclable" labels—Sierra Club would continue to expend resources to combat single-use plastics, so the redress would not cure Sierra Club's alleged injury.

II. Sierra Club's UCL and FAL claims (Counts II and V) fail for lack of statutory standing.

Sierra Club lacks UCL and FAL[5] standing because it fails to "(1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., *economic injury*, and

[4] *See also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013) (plaintiffs "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending"); *Sierra Club v. Morton*, 405 U.S. 727, 738–40 (1972) (commitment to environmental causes cannot confer standing to challenge development project).

(2) show that that economic injury was the result of, i.e., *caused by*, the unfair business practice or false advertising." *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 321–22 (2011).

First, Sierra Club's allegation that it diverted resources "to counter Defendants' false and misleading recyclability representations," CAC ¶ 19, does not constitute an economic injury sufficient to confer UCL or FAL standing. To base organizational UCL or FAL standing on mere "diversion of resources" ignores Proposition 64's ban on "shakedown lawsuits" and impermissibly expands the scope of the UCL and FAL. *See Kwikset*, 51 Cal. 4th at 317; *Cal. Med. Ass'n v. Aetna Health of Cal. Inc.*, 63 Cal. App. 5th 660, 668 (2021) (ban on representational standing for UCL claims would be moot if "any organization acting consistently with its mission to help its members through legislative, legal and regulatory advocacy could claim standing based on its efforts to address its members' injuries"). Thus, Sierra Club's assertion that it diverted resources consistent with its mission is insufficient to confer statutory standing under the UCL or FAL.

Second, Sierra Club cannot allege that Defendants' marketing claims caused its purported injury because it cannot allege that it relied on the *truth* of "Defendants' false and misleading recyclability representations." *See* CAC ¶ 19. To show that an economic injury was "caused by" a challenged practice, Sierra Club must allege actual reliance on the challenged statement "for its truth and accuracy"—that is, Sierra Club must allege not only that the challenged statements are false, but that it *believed* those statements to be true. *Greenpeace, Inc. v. Walmart Inc.*, 2021 WL 4267536, at *1–2 (N.D. Cal. Sept. 20, 2021). Sierra Club's CAC demonstrates the opposite. The court in *Greenpeace* dismissed a nearly identical claim because Greenpeace had not alleged that it diverted resources *as a result* of its *belief* that Walmart's plastic products were truly recyclable. *Id.* at *2. For this same reason, Sierra Club's claims must be dismissed.

[5] Sierra Club impermissibly added an FAL claim without seeking leave from the Court. "When a plaintiff amends a complaint by adding new claims without first seeking leave, a court may dismiss those new claims for failure to state a claim." *Mohamed v. Cnty. of Sacramento*, 2017 WL 772145, at *4 (E.D. Cal. Feb. 28, 2017). Here, the Court allowed Plaintiffs to "file a consolidated complaint," but Plaintiffs exceeded the scope of that amendment. Dkt. No. 68. The Court should therefore dismiss and/or strike Sierra Club's FAL claim.

Dated: April 22, 2022

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.*

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: April 22, 2022

By: /s/ *Dawn Sestito*

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