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11

12 **UNITED STATES DISTRICT COURT**
13 **NORTHERN DISTRICT OF CALIFORNIA**

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

16 Plaintiffs,

17 v.

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

20 Defendants.
21

22 SIERRA CLUB,

23 Plaintiff,

24 v.

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

26 Defendants.
27
28

Consolidated Case No. 21-CV-04643-JD

**DEFENDANT NIAGARA BOTTLING,
LLC’S SUPPLEMENTAL
MEMORANDUM IN SUPPORT OF
CONSOLIDATED MOTION TO DISMISS**

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

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Cases

Ashcroft v. Iqbal, 556 U.S. 662 (2009) 1, 4

Davis v. HSBC Bank Nev., N.A., 691 F.3d 1152 (9th Cir. 2012) 2

Starr v. Baca, 652 F.3d 1202 (9th Cir. 2011) 1, 4

Other Authorities

Greenpeace, *Circular Claims Fall Flat: Comprehensive U.S. Survey of Plastic Recyclability*,
<https://www.greenpeace.org/usa/wp-content/uploads/2020/02/Greenpeace-Report-Circular-Claims-Fall-Flat.pdf> (last accessed Sept. 23, 2021) 2

Rules

Fed. R. Civ. P. 15(b)(2) 4

1 **I. PLAINTIFFS FAIL TO STATE A PLAUSIBLE CLAIM**

2 To overcome a motion to dismiss, a complaint “may not simply recite the elements of a cause of
3 action, but must contain sufficient allegations of underlying facts.” *Starr v. Baca*, 652 F.3d 1202, 1216
4 (9th Cir. 2011). Additionally, the factual allegations “must plausibly suggest an entitlement to relief.”
5 *Id.* “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw
6 the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556
7 U.S. 662, 678 (2009). “The plausibility standard is not akin to a probability requirement, but it asks for
8 more than a sheer possibility that a defendant has acted unlawfully.” *Id.* The Consolidated Complaint
9 (“CC”) does not contain allegations of fact sufficient to state a plausible claim against Niagara.¹ For this
10 reason alone, the CC must be dismissed.

11 As the CC explains, the clear plastic water bottles at issue are made of polyethylene terephthalate
12 (“PET”), with bottle caps made of polypropylene (“PP”) or high-density polyethylene (“HDPE”).² CC
13 ¶ 29. The labels are also made of PP. *Id.* The CC further acknowledges that “PET and HDPE are widely
14 considered to be the ‘most recyclable’ forms of plastic.” CC ¶ 42. The CC also concedes that at the 75
15 materials recovery facilities (“MRFs”) in California – more than 20% of the nation’s total MRFs – are
16 capable of processing PET bottles, HDPE or PP caps, and PP labels:

17 A typical MRF first sorts the plastic bottles based on color and, sometimes, size. At this
18 point, the plastic bottles, bottle caps and labels are comingled. Once sorted, the
19 comingled plastic is typically next shredded into smaller pieces and sent to a wash station.
20 During the washing phase, the comingled shredded plastic is separated via a sink float
21 separation tank, where the PET plastic, which is denser than water, sinks and the HDPE
22 and PP plastics, which are less dense than water, float. Finally the separated shredded
23 plastic is then processed into “clean flake” material or plastic resin for use in
24 manufacturing or assembling another item.

25 CC ¶ 41. Plaintiffs thus concede that the bottles, caps, and labels can all be processed and their respective

26 ¹ Niagara recognizes that aspects of this argument may pertain to defendants other than Niagara.
27 However, because the Court has required the three defendants to file a combined memorandum of no
28 more than 25 pages in support of their respective motions to dismiss, and because the three defendants
have differing views on which arguments to emphasize, Niagara was unable to present its full argument
in the combined memorandum. Due process requires that Niagara be allowed to make its argument to
the Court in support of its motion to dismiss, regardless of whether the other defendants prefer to
highlight different arguments. There has been no coordination of this memorandum with other
defendants.

² The caps on bottles sold by Niagara Bottling, LLC (“Niagara”) are made of HDPE.

1 resins (PET, HDPE, and PP) separated and processed for use in manufacturing new products – in other
2 words, that Niagara’s bottles are, in fact, 100% Recyclable.

3 Having made this concession, how do Plaintiffs purport to show that Niagara’s bottles are not
4 100% Recyclable? Through a series of inapt allegations that, tellingly, never address the recyclability
5 of plastic water bottles in California.

6 Plaintiffs first allege that “United States domestic MRFs only have the capacity to process”
7 22.5% of *all* post-consumer PET and 12% of *all* post-consumer HDPE. CC ¶ 42. This allegation is
8 meaningless for a number of reasons. PET and HDPE are used in a wide variety of products, not just
9 water bottles. Plaintiffs do not assert that there is insufficient capacity to recycle all water bottles.
10 Moreover, since not all plastic products are placed in the recycling stream, nothing in this allegation
11 suggests that MRFs lack the capacity to process all post-consumer PET and HDPE that consumers seek
12 to recycle – or that MRFs lack the capacity to process every single water bottle that consumer place in a
13 blue bin or take to a redemption center. Indeed, the very source Plaintiffs cite for their statistics
14 concludes that “there is sufficient likelihood that post-consumer PET waste collected by [materials
15 recovery facilities] is recycled/reprocessed into plastic resin for manufacturing of new products in the
16 U.S. *It is reasonable for U.S. consumers to believe that PET bottles and jugs that are collected by
17 municipal systems will be recycled/reprocessed into a new product.*”³

18 Plaintiffs next allege that “[a]bout a third of the collected PET and HDPE material processed by
19 MRFs” is landfilled or incinerated. This statistic, too, is meaningless, as it pertains to all PET and HDPE
20 products – including takeout food containers, pipes, and snowboards. The CC says nothing about
21 whether any PET water bottles or HDPE caps are landfilled or incinerated.

22 Equally impertinent is Plaintiffs’ allegation that PP when combined with lower value resins such
23 as polyvinyl chloride, low-density polyethylene, and polystyrene to form a #3-#7 mixed bale⁴, faces
24

25 ³ Greenpeace, *Circular Claims Fall Flat: Comprehensive U.S. Survey of Plastic Recyclability*,
26 [https://www.greenpeace.org/usa/wp-content/uploads/2020/02/Greenpeace-Report-Circular-Claims-
27 Fall-Flat.pdf](https://www.greenpeace.org/usa/wp-content/uploads/2020/02/Greenpeace-Report-Circular-Claims-Fall-Flat.pdf) (last accessed Sept. 23, 2021) at 21 (emphasis added). On a motion to dismiss, the Court
28 may consider, in addition the Complaint, materials incorporated by reference in the Complaint. *See*,
e.g., *Davis v. HSBC Bank Nev., N.A.*, 691 F.3d 1152, 1159-60 (9th Cir. 2012).

⁴ The numbers refer to resin identification codes: #3 for PVC, #4 for LDPE, #5 for PP, #6 for PS,
and #7 for a grab bag of rarely recycled plastics.

1 “minimal demand.” CC ¶ 43. There is nothing in the CC to suggest, however, that PP from the labels
2 on Niagara’s water bottles ends up in #3-#7 bales. Indeed, the CC says the opposite: that PP from water
3 bottle labels is shredded, “separated via a sink float separation tank,” and “then processed into ‘clean
4 flake’ material or plastic resin for use in manufacturing or assembling another item.” CC ¶ 41.⁵

5 Equally unavailing is Plaintiffs’ wholly unsupported assertion that recycling facilities “cannot
6 afford” to process PP “because there are almost no buyers.” CC ¶ 44. By saying that “there are almost
7 no buyers,” Plaintiffs implicitly concede that *some* buyers exist, and conveniently fail to mention the
8 markets in which those buyers are active and the volume of their purchases. Plaintiffs also fail to
9 distinguish between the market for PP generally and the market for shredded or flaked PP – highlighting
10 the inconsistency between this allegation and Plaintiffs’ acknowledgment that shredded PP water bottle
11 labels are “processed into ‘clean flake’ material or plastic resin for use in manufacturing or assembling
12 another item.” CC ¶ 41.

13 Finally, Plaintiffs assert that HDPE or PP bottle caps are not recyclable “because they are too
14 small to be efficiently sorted and processed.” CC ¶ 45. Even if assumed to be true, this assertion applies
15 only to caps that are not affixed to bottles when they arrive at the MRF. When caps are affixed to the
16 bottles, Plaintiffs concede that the caps, along with the bottles, are processed by MRFs into either “clean
17 flake” feedstock or plastic resin “for use in manufacturing or assembling another item.” CC ¶ 41.
18 Because the CC acknowledges that caps are fully recyclable so long as they are affixed to the bottle, this
19 allegation says nothing about the recyclability of Niagara’s water bottles.

20 It is also worth noting that the CC does not address recycling in *California*. The state’s California
21 Redemption Value (“CRV”) beverage container redemption program provides financial incentives to
22 both consumers and recycling operations to recycle beverage containers, including water bottles, yet
23 Plaintiffs wholly ignore the effect of this program on the percentage of plastic water bottles recycled in
24 California.

25 In short, Plaintiffs merely assert that Niagara’s water bottles are not 100% Recyclable, yet offer
26 no plausible allegations to support that claim. To the contrary, Plaintiffs acknowledge that PET and
27

28 ⁵ Indeed, Plaintiffs cannot plausibly claim that finely shredded PP label material could end up in a
1200 pound #3 - #7 bale.

1 HDPE are “the ‘most recyclable’ forms of plastic,” CC ¶ 42; cite a report concluding that “[i]t is
 2 reasonable for U.S. consumers to believe that PET bottles and jugs that are collected by municipal
 3 systems will be recycled/reprocessed into a new product, CC ¶ 42 and n. 2, *supra*; and concede that PET
 4 water bottles, HDPE caps, and PP labels are shredded, separated, and “processed into ‘clean flake’
 5 material or plastic resin for use in manufacturing or assembling another item.” CC ¶ 41.

6 Because the CC fails to “contain sufficient allegations of underlying facts” sufficient to support
 7 the claim that the 100% Recyclable statements on Niagara’s water bottles are false or deceptive, *Starr*,
 8 652 F.3d at 1216, and because the CC does not “plead[] factual content that allows the court to draw the
 9 reasonable inference that the defendant is liable for the misconduct alleged,” *Ashcroft*, 556 U.S. at 678,
 10 Plaintiffs fail to state a plausible claim against Niagara. The CAC must therefore be dismissed.

11 **II. PLAINTIFFS FAIL TO ALLEGE ANY FACTS SUGGESTING THAT NIAGARA**
 12 **PARTICIPATED IN ANY INDUSTRY-WIDE FRAUD**

13 Plaintiffs assert, variously, that “the plastic industry” (CC ¶ 54), “the petrochemical industry”
 14 (CC ¶ 60), “Cola-Cola and the American Beverage Association” (CC ¶ 58) and “Defendants” have
 15 defrauded the public by promoting the “myth” that plastic can be recycled. These assertions do not
 16 appear related to any of Plaintiffs’ causes of action, but apparently are part of an effort to smear Niagara
 17 and the other defendants. There is not a single allegation in the CC indicating that Niagara had any
 18 involvement whatsoever in a coordinated strategy “to convince the public that single-use plastics are not
 19 bad for the environment.” CC ¶ 58. Because Plaintiffs have no support for such an assertion, Niagara
 20 respectfully moves the Court to strike such allegations to the extent that they refer generally to
 21 “Defendants” or otherwise seek to implicate Niagara.

22 **III. PLAINTIFFS IMPROPERLY SEEK TO EXPAND THE PUTATIVE CLASS**
 23 **WITHOUT SEEKING LEAVE TO AMEND**

24 The Court, by order dated March 8, 2022, allowed Plaintiffs to file a “consolidated complaint”
 25 combining allegations in *David Swartz, et al. v. The Coca-Cola Company, et al.* and *Sierra Club v. The*
 26 *Coca-Cola Company* into a single complaint. Plaintiffs availed themselves of this opportunity to expand
 27 the putative class from a California class to a national class with respect to Niagara. *Compare* Compl.
 28 ¶ 70 with CC ¶ 91. Plaintiffs may not unilaterally amend their complaint to expand the scope of the
 putative class, however. Fed. R. Civ. P. 15(b)(2) makes clear that, after 21 days has elapsed from the

1 date of a responsive pleading or motion, including one made pursuant to Rule 12(b), “a party may amend
2 its pleading only with the opposing party’s written consent or the court’s leave.” Niagara filed its Motion
3 to Dismiss on September 27, 2021. The 21 day period elapsed on October 18, 2021. Plaintiffs filed the
4 CC on March 24, 2022, without Niagara’s written consent and without leave of court. Plaintiffs have
5 not moved the Court for leave to amend. The five-page supplemental briefing permitted by the Court is
6 insufficient, when combined with issues on the merits, to address Plaintiffs’ proposed amendment to
7 assert claims on behalf of a national class. Accordingly, Niagara moves the Court to strike Plaintiffs’
8 assertion of a national class against Niagara. Should Plaintiffs seek leave of Court to file an amended
9 complaint, Niagara respectfully requests an opportunity to submit an opposition memorandum.

10 **CONCLUSION**

11 For the reasons set forth above, Niagara respectfully requests that the Court dismiss the
12 Consolidated Complaint, with prejudice and without leave to amend.

13 Respectfully submitted,

14
15 DATED: April 22, 2022

DORSEY & WHITNEY LLP

17 By: /s/ Kent J. Schmidt

18 KENT J. SCHMIDT
19 CREIGHTON R. MAGID
(admitted *pro hac vice*)

20 Attorneys for Defendants NIAGARA
21 BOTTLING, LLC
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CERTIFICATE OF SERVICE

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

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

**DEFENDANT NIAGARA BOTTLING, LLC'S SUPPLEMENTAL MEMORANDUM IN
SUPPORT OF CONSOLIDATED MOTION TO DISMISS**

I hereby certify that on April 22, 2022, I electronically filed the foregoing document with the Clerk of the Court for the United States District Court for the Northern District of California by using the court's CM/ECF system.

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

Dated: April 22, 2022

DORSEY & WHITNEY LLP

By: /s/ Kent J. Schmidt
Kent J. Schmidt