GREENWASHING LITIGATION

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I. Types of Greenwashing Claims

A. "Recyclable"

Several lawsuits have challenged the labeling or promotion of particular products as being "recyclable." A few examples:

Smith v. Keurig Green Mountain, Inc., No. 4:18-cv-06690-HSG (N.D. Cal.), involved claims that Keurig recyclable K-Cup® single serving coffee pods were not recyclable as claimed. Keurig had, at considerable expense, re-engineered its coffee pods to be made of polypropylene ("PP"), a recyclable material. The plaintiff argued that, although PP is recyclable, few California recycling programs accepted single serving coffee pods. The case resulted in a nationwide settlement approved in early 2023.

Swartz v. Coca-Cola Co. et al., No. 3:21-cv-04643-JD (N.D. Cal.), *Duchimaza v. Niagara Bottling, LLC*, No. 21-cv-06434-PAE (S.D.N.Y.), and *Haggerty v. BlueTriton Brands, Inc. et al*., No. 3:21-cv-13904-ZNQ (D.N.J.), involved claims that "100% Recyclable" labels on polyethylene terephthalate ("PET") water bottles were false and misleading. The plaintiffs claimed variously that the PET water bottles can't be labeled as "100% recyclable" because a significant percentage of PET (not specifically in water bottles) is not recycled, because the labels and caps aren't recyclable, or because the labels and caps render the PET bottles non-recyclable. *Duchimaza* and *Haggerty* both were dismissed[1]; a ruling is pending on the defendants' consolidated motion to dismiss in *Swartz*.

Curtis v. 7-Eleven, Inc., No. 21-cv-6079 (N.D. Ill.), arises out of recyclability claims made on packages of 7-Eleven's "24/7" line of products, including foam cups, foam plates, party cups, and freezer bags.

B. "Sustainably Sourced"

GMO Free USA v. Aldi Inc., No. 2021 CA 001694 B (D.C. Super.) The complaint alleged that a supermarket chain labeled its Atlantic salmon as "sustainable," causing consumers to understand that the salmon was farmed in accordance with high environmental and animal welfare standards, but that the chain did not source

[1] *Duchimaza v. Niagara Bottling, LLC*, 619 F. Supp. 3d 395 (S.D.N.Y. 2022); *Haggerty v. BlueTriton Brands, Inc*., 2022 U.S. Dist. LEXIS 226691 (D.N.J. Dec. 16, 2022).

its salmon sustainably. The supermarket chain argued, in its motion to dismiss, that the word "sustainable" needed to be considered in the context of the adjacent "Best Aquaculture Practice Certified" graphic next to it. The trial court rejected this argument, concluding that "Defendant's emphasis on context and viewing the word 'sustainable' together with the BAP certification does not account for the fact that the reasonable consumer might not know the level of reputability of the BAP seal, or even what the BAP represents." *GMO Free USA v. Aldi Inc*., 2022 D.C. Super. LEXIS 1, *7 (D.C. Super. Feb. 16, 2022).

C. "Humanely Raised"

The complaint in *Ehlers v. Ben & Jerry's Homemade, Inc*., No. 2:19-cv-00194 (D. Vt.) alleged that Ben & Jerry's website and ice cream packaging represents that its products are "sourced exclusively from 'happy cows' on Vermont dairies that participate in a special, humane 'Caring Dairy' program," but that Ben & Jerry's only sources a portion of the milk used in its products are sourced from the Caring Dairy program, while the remainder comes from mass-production dairy operations.

D. "Carbon Neutral"

The complaint in *Berrin v. Delta Air Lines, Inc.*, No. 2:23-cv-04150 (C.D. Cal.), alleges that Delta Air Lines holds itself out as being "Carbon Neutral Since March 2020" based on the purchases of offsets, but argues that offsets are overstated and unverified and that true carbon neutrality must be based on reductions in carbon use, not offsets.

E. Commitment to Sustainability

In *Earth Island Institute v. The Coca-Cola Co*., No. 2021 CA 001846 B (D.C. Super.), an environmental organization claimed that The Coca-Cola Company deceptively marketed itself as being committed to sustainability while being "the world's leading plastic waste producer, generating 2.9 million metric tons of plastic waste each year" and being "responsible for 200,000 tons of plastic pollution per year." The trial court dismissed the action, finding that the statements were either (1) vague and aspirational (for example, "Our planet matters. We act in ways to create a more sustainable and better shared future.") or (2) future, aspirational goals (for example, "Part of our sustainability plan is to help collect and recycle a bottle or can for every one we sell globally by 2030."). Additionally, the court held that EII could not bring the complaint under the D.C. Consumer Protection Procedures Act because the statements did not involve specific "goods or services." The matter is currently on appeal to the D.C. Court of Appeals.

By contrast, another D.C. Superior Court judge denied a motion to dismiss a similar complaint in *Earth Island Institute v. BlueTriton Brands*, No. 2021 CA 003027 B (D.C. Super.)

F. Natural/Organic/Non-GMO

Numerous cases have been filed alleging that products have been falsely labeled as being "all natural," "organic," or "non-GMO" These cases usually claim that the product is not "all natural," "organic," or "non-GMO" because traces of chemical pesticides, herbicides, or fertilizers (presumably "drift" from neighboring farms, residue on equipment that also processes conventionally-raised crops, or chemicals used as desiccants) are detectable in the products, *see, e.g., In re General Mills Glyphosate Litig.*, 2017 U.S. Dist. LEXIS 108469 (D. Minn. July 12, 2017), or because the product includes one or more synthetic or chemically-processed ingredients, usually as preservatives. *See, e.g., Munsell v. Colgate-Palmolive, Inc.*, 463 F. Supp. 3d 43 (D. Mass. 2020).

II. Standing to Seek Injunctive Relief

Most courts hold that a plaintiff who claims to have been misled by advertising or a product label is not likely to be mislead again – after all, the plaintiff, in the complaint, typically sets forth in detail every reason why the claim allegedly is misleading – and therefore cannot make the required showing that future harm is "sufficiently imminent and substantial." *See, e.g., Camasta v. Jos. A. Bank Clothiers, Inc.,* 761 F.3d 732, 741 (7th Cir. 2014) ("Since Camasta is now aware of JAB's sales practices, he is not likely to be harmed by the practices in the future. Without more than the speculative claim that he will be harmed by JAB, Camasta is not entitled to injunctive relief."); *Berni v. Barilla S.P.A.*, 964 F.3d 141, 147 (2d Cir. 2020) ("past purchasers of a consumer product who claim to be deceived by that product's packaging . . . have, at most, alleged a past harm. Such a past harm is of the kind that is commonly redressable at law through the award of damages, which, it should be noted, is what Plaintiffs primarily sought in their complaint.").[2]

Things are different in the Ninth Circuit. In *Davidson v. Kimberly Clark Corp.*, 889 F.3d 956, 967 (9th Cir. 2018), the Ninth Circuit, in a decision involving "flushable" wipes, held that a plaintiff may indeed have standing, despite being thoroughly familiar with a defendants' product, if that plaintiff alleges that she would want to purchase the product again in the future, but wouldn't be able to know whether the allegedly deceptive statement at issue was no longer false or misleading in the

[2] A plaintiff must have standing in order to assert a claim on behalf of a putative class, and cannot look to other members of the class in order to establish standing. *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 n.6 (2016) ("That a suit may be a class action adds nothing to the question of standing, for even named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong.") (cleaned up).

future. Although the Ninth Circuit made clear that its holding merely rejected an absolute bar *against* injunctive relief, rather than an entitlement *to* injunctive relief, *id*. at 970, and although the logic of *Davidson* suggests that it should not apply to products in which the truth of the challenged statement can be verified through publicly available information, *id*. at 971[3], many courts in the Ninth Circuit understand *Davidson* to mean that injunctive relief is always available as long as the plaintiff asserts in the complaint that she would like to purchase the product in the future. *See, e.g., Sinatro v. Welch Foods Inc*., 2023 U.S. Dist. LEXIS 89092, *3 (N.D. Cal. May 22, 2023) (plaintiff established standing to pursue injunctive relief by pleading that "in the future [he] will be unable to determine with confidence based on the labeling and/or other marketing materials, and without specialized knowledge, whether the Products truly contain 'No Preservatives' including any beyond citric or lactic acid"); *Milan v. Clif Bar & Co*., 489 F. Supp. 3d 1004, 1007 (N.D. Cal. 2020) (rejecting defendant's arguments that plaintiffs lacked standing because they now knew to look at the product label for total and added sugars, holding, "In effect, this is a rather cynical application of the old adage, 'fool me once, shame on you; fool me twice, shame on me.' The problem for Clif Bar is that plaintiffs have called into plausible question all of its health and nutrition representations, and have alleged that they 'will be unable to trust the representations on the Clif Products' absent an injunction."); *Smith v. Keurig Green Mt., Inc*., 393 F. Supp. 3d 837 (N.D. Cal. 2019) (even though plaintiff was fully aware of the degree to which single serving coffee pods were recyclable, the court found standing to seek injunctive relief because "MRFs [the facilities that sort recyclables] could evolve to be able to capture small plastics such as Pods").

III. Substantive Issues

A. The Reasonable Consumer Test

Most jurisdictions evaluate claims of consumer deception under the "reasonable consumer test." *See, e.g., Williams v. Gerber Prod. Co*., 552 F.3d 934, 938 (9th Cir. 2008) ("The false or misleading advertising and unfair business practices claim must be evaluated from the vantage of a reasonable consumer . . . [and] prohibit not only advertising which is false, but also advertising which, although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the

[3] In *Davidson*, the Ninth Circuit made a point of noting that the plaintiff alleged in her complaint that, if Kimberly-Clark's packaging remained the same, she would have "no way of determining whether the representation 'flushable' is in fact true." *Davidson*, 889 F.3d at 971. The court then emphasized that "Davidson's alleged harm is her inability to rely on the validity of the information advertised on Kimberly-Clark's wipes despite her desire to purchase truly flushable wipes." *Id*. Some courts have picked up on this. *See, e.g., Kenney v. Fruit of the Earth, Inc*., 2023 U.S. Dist. LEXIS 90019, *7 (S.D. Cal. Apr. 3, 2023) ("Unlike the consumer in Davidson who could not tell whether future packages of wipes were truly flushable or not, Kenney does not need the company to change its labeling to learn the truth about the product. She can determine the product's ingredients prior to purchase simply by looking at the back of the bottle which states that the sunscreen contains 5% zinc oxide and 4% octocrylene.").

public."); *Beardsall v. CVS Pharm., Inc*., 953 F.3d 969, 973 (7th Cir. 2020) ("The 'reasonable consumer' standard 'requires a probability that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, would be misled.'") (quoting *Ebner v. Fresh, Inc*., 838 F.3d 958, 965 (9th Cir. 2016)); *Mantikas v. Kellogg Co*., 910 F.3d 633, 636 (2d Cir. 2018) ("To state a claim for false advertising or deceptive business practices under New York or California law, a plaintiff must plausibly allege that the deceptive conduct was 'likely to mislead a reasonable consumer acting reasonably under the circumstances.'") (quoting *Fink v. Time Warner Cable*, 714 F.3d 739, 741 (2d Cir. 2013)). The challenged statement must be considered in context. *See, e.g., Bell v. Publix Super Mkts., Inc*., 982 F.3d 468, 477 (7th Cir. 2020) (deceptive labeling claims under the ICFA "should take into account all the information available to consumers and the context in which that information is provided and used."); *Mantikas*, 910 F.3d at 636 ("In determining whether a reasonable consumer would have been misled by a particular advertisement, context is crucial.").

B. The FTC "Green Guides"

In 1992, the U.S. Federal Trade Commission published its "Guides for the Use of Environmental Marketing Claims," 16 C.F.R. Part 260, better known as the "Green Guides," and revised them in 1996, 1998, and 2010. (Further revisions are underway but have not yet been published.) The Green Guides set forth the FTC's administrative interpretation of the Federal Trade Commission Act, 15 U.S.C. § 45, and is intended to help marketers avoid deceptive environmental claims under Section 5 of the FTC Act. In promulgating the Green Guides, the FTC has relied on consumer surveys, and considers the industry guidance to reflect "how reasonable consumers likely interpret" various types of environmental marketing claims. Because the Green Guides are intended as industry guidance and reflect the FTC's administrative interpretation of the FTC Act, the Green Guides do not themselves have the force of law. That is, except in California, where the California Environmental Marketing Claims Act makes it "unlawful for any person to make any untruthful, deceptive, or misleading environmental marketing claim, whether explicit or implied" and provides that "[f]or the purpose of this section, 'environmental marketing claim' shall include any claim contained in the 'Guides for the Use of Environmental Marketing Claims' published by the Federal Trade Commission." Cal. Bus. and Prof. Code § 17580.5.

The Green Guides set forth the FTC's views on general environmental benefit claims, carbon offsets, compostable claims, degradable claims, ozone-safe and ozone-friendly claims, recyclable claims, recycled content claims, renewable materials claims, and other claims, and provides examples of what the FTC considers to be allowable claims and deceptive claims. With respect to "recyclable" claims, the Green Guides provide that sellers can provide unqualified claims of recyclability if (a) the entire product, excepting "minor, incidental components," is truly recyclable and

(b) if "recycling facilities are available to a substantial majority of consumers or communities where the item is sold," with "substantial majority" meaning "at least 60 percent." If the product is less than fully recyclable, or if facilities for recycling the product do not exist for at least 60 percent of the product's consumers, then the claim is to be qualified. The Green Guides call for more stringent qualifications as the availability of recycling facilities accepting the product fall.

Courts have reached wildly different interpretations of the Green Guides, particularly with respect to recyclability claims. The court in *Swartz v. Coca-Cola Co*., 2022 U.S. Dist. LEXIS 209641, *4 (N.D. Cal. Nov. 18, 2022), looked to whether PET bottles *could* be recycled, not whether they *were* being recycled, noting that "[t]he Green Guides permit marketing a product as 'recyclable' if the product '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.'" (quoting 16 C.F.R. § 260.12(a)). Similarly, *Duchimaza v. Niagara Bottling, LLC*, 619 F. Supp. 3d 395, 413 (S.D.N.Y. 2022), held that "the focus of the Green Guides is on the availability of recycling facilities, not the incidence of recycling." Plaintiffs, however, continue to point to other language in the Green Guides that emphasize the availability of recycling facilities that will accept the product, such as Example 2 to 16 C.F.R. § 260.12 ("Unless recycling facilities for this container are available to a substantial majority of consumers or communities, the manufacturer should qualify the claim to disclose the limited availability of recycling programs."). *See also* 63 Fed. Reg. 84, 24242 (May 1, 1998) ("EPA stated that claims of recyclability need to be qualified as recommended in the guides because there is no real benefit to consumers in being informed that a product or package is technically recyclable if a program is not available enabling them to recycle the material after use.").

Curtis took a different approach to the Green Guides. Ignoring that the FTC at least attempted to reflect how "reasonable consumers" view various environmental marketing claims based on consumer surveys, the court instead focused on whether reasonable consumers would be *familiar* with the Green Guides. The court commented that "[i]t is not clear how useful those Green Guides are when evaluating the views of a reasonable consumer at a convenience store. Your average consumer at 7-Eleven probably doesn't have the FTC's policy statements at his or her fingertips when picking up a bag of foam plates for the backyard BBQ," *Curtis v. 7-Eleven, Inc*., 2022 U.S. Dist. LEXIS 164850, *44 (Sept. 13, 2022), and, proving that the court either was familiar with popular culture or had a college student living at home, concluded, "People buying red party cups at 7-Eleven are more likely to be thinking about beer pong than the FTC's consumer guidelines." *Id*.

C. Legislative Action

In 2021, California enacted Senate Bill 343, which will prohibit, as early as 2024, the use of recyclability claims (including the "chasing arrows" symbol) on any product that fail to meet stringent criteria, including the requirements that the product is made of a material and in a shape and size that is actually collected by recycling programs in jurisdictions where at least 60 percent of California's population resides and is actually sorted into recycling streams by at least 60 percent of California's recycling programs. The law requires entities that represent a product as being recyclable, or who direct consumers to recycle the product, to maintain records supporting the representation. The law directs CalRecycle to determine which materials meet the statute's definition of recyclability – a process that is ongoing – and adds enforcement teeth: violations are subject to fines and up to 6 months of imprisonment.

Several states, including Maine, Oregon, California, Colorado, New Jersey, and Washington, have enacted "extended producer responsibility" laws. These laws generally attempt to shift the financial burden of recycling materials such as cardboard and plastics from municipalities to producers.

IV. Damages Issues

Proving injury in "greenwashing" and labeling lawsuits has caused problems for plaintiffs. *See, e.g., Doss v. General Mills, Inc*., 816 Fed. Appx. 312 (11th Cir. 2020) (plaintiff, who claimed that she was misled by labeling to believe that Cheerios are "wholesome," but discovered that some Cheerios may contain glyphosate, lacked standing because she "has not alleged that she purchased any boxes of Cheerios that contained any glyphosate"); *Greenpeace, Inc. v. Walmart Inc*., 2022 U.S. Dist. LEXIS 34046, *2-3 (N.D. Cal. Feb. 3, 2022) (dismissing for lack of Article III standing environmental organization's claim that Walmart "label[ed] the Products as recyclable without substantiating whether the Products are actually recyclable" because the complaint lacked "particularized allegations of fact" supporting the "conclusory assertion that Greenpeace 'will continue to spend money, staff time and other organizational resources to combat [Walmart's] unsubstantiated representations that the Products are recyclable'").

The plaintiff bar has responded by developing a "price premium" theory based on "conjoint analysis." This theory posits that every purchaser of the challenged product overpaid because the allegedly misleading statement allowed the seller to charge more for the product than it otherwise would have. To support a claimed "price premium," plaintiffs hire a "survey expert" to perform a "conjoint analysis." Conjoint analysis involves fielding a survey that forces respondents to make trade-offs amongst a group of product attributes. By asking survey respondents to choose among many different sets of trade-offs, conjoint analysis, when properly

performed, may identify the relative importance of the various attributes. *See* Bryan K. Orme, *Getting Started with Conjoint Analysis: Strategies for Product Design and Pricing Research* (4th ed. 2020). The plaintiff bar's preferred "survey experts" go beyond this accepted practice and purport to determine the exact amount that consumers are willing to pay for a particular attribute – for example, 15 cents per product. That amount is then multiplied by the number of products sold.

There are a number of problems with conjoint analysis. First, the survey methodology employed by plaintiffs' preferred "experts" in greenwashing and similar consumer claims is often shoddy. Second, conjoint analysis is designed to determine the relative importance of various attributes, not to place a specific value on those attributes, as even the leading proponents of conjoint analysis will attest. Third, conjoint analysis becomes less reliable beyond a certain number of attributes. Fourth, conjoint analysis addresses only the demand side of the equation – that is, what consumers supposedly would be willing to pay for a particular attribute. This, however, ignores supply side factors. *See, e.g., Zakaria v. Gerber Prods. Co*., 755 Fed. Appx. 623, 624 - 625 (9th Cir. 2018) (affirming decertification of class because expert's "conjoint analysis was inadequate for measuring class-wide damages" in that the analysis "showed only how much consumers subjectively valued [the label at issue], not what had occurred to the actual market price of [the product] with or without the label"); *In re GM LLC Ignition Switch Litig*., 427 F. Supp. 3d 374, 387 (S.D.N.Y. 2019) (price premium analysis is properly rejected when it focuses on "consumers' willingness to pay irrespective of what would happen in a functioning market (i.e., what could be called sellers' willingness to sell)") (quoting *Saavedra v. Eli Lilly & Co*, 2014 U.S. Dist. LEXIS 179088, *14 (N.D. Cal. Dec. 18, 2014)); *In re NJOY Consumer Class Action Litig*., 120 F. Supp. 3d 1050, 1119 (C.D. Cal. 2015) (plaintiff's expert "does not dispute that both his conjoint and direct method analyses provide only a model for testing what a consumer is willing to pay, without considering other factors in a functioning marketplace. His method therefore does not address the fair market value of NJOY's e-cigarettes absent the misrepresentations and omissions.").

Although the "price premium" theory represents a misuse of conjoint analysis and ignores the supply side of pricing analysis, most courts have embraced it as an "accepted" approach. *See, e.g., Hadley v. Kellogg Sales Co*., 324 F. Supp. 3d 1084, 1103 - 06 (N.D. Cal. 2018); *Milan v. Clif Bar & Co*., 340 F.R.D. 591, 601 (N.D. Cal. 2021).

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