SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

COMPLEX CIVIL LITIGATION

EARTH ISLAND INSTITUTE,

Plaintiff,

vs.

CRYSTAL GEYSER WATER COMPANY; THE CLOROX COMPANY; THE COCA-COLA COMPANY; PEPSICO, INC.; NESTLÉ USA, INC.; MARS, INCORPORATED; DANONE US, LLC; MONDELĒZ GLOBAL LLC; COLGATE PALMOLIVE COMPANY; THE PROCTER & GAMBLE COMPANY; and Does 1 THROUGH 25,

Defendants.
_____/

Case No. 20-CIV-01213
CLASS ACTION

Assigned for All Purposes to
Hon. V. Raymond Swope, Dept. 23

ORDER SUSTAINING DEMURRER AND OVERRULING DEMURRER TO PLANTIFF'S FIRST AMENDED COMPLAINT

The Demurrer of the of the collective Defendants PEPSICO, INC., THE CLOROX COMPANY, CRYSTAL GEYSER WATER COMPANY, COCA-COLA COMPANY, NESTLÉ USA, INC., DANONE US, LLC, COLGATE-PALMOLIVE COMPANY AND THE PROCTER & GAMBLE COMPANY came on for hearing on April 22, 2024 at 3:00 p.m. before Judge V. Raymond Swope in Department 23 of this

Court. Mark Molumphy, Esq. Tyson Redenbarger, Esq. and Deborah Sivas, Esq. appeared on behalf of Plaintiff Earth Island Institute;

Dawn Sestito, Esq. appeared on behalf of Defendant Colgate-Palmolive Company.

Rene Pierre Tatro, Esq. appeared on behalf of Defendant Crystal Geyser Company.

George L. Gigounas, Esq. and Isaella Neal, Esq. appeared on behalf of Defendant Danone North America via Zoom;

Perlette Michele Jura, Esq. and Emily Riff, Esq. (Zoom) appeared on behalf of Defendant Nestle USA, Inc.;

Andrew Santo Tulumello, Esq., Arianna Scaretti, Esq. (Zoom), Charles Boehler, Esq. (Zoom), Claire Chapla, Esq. (Zoom) and Chantalle Carles, Esq. (Zoom) appeared on behalf of Defendant Pepsico, Inc.;

Shannon Lankenau, Esq. and Mary Rose Alexander, Esq. (Zoom) appeared on behalf of Defendant The Clorox Company.;

Julie Simeone, Esq., Steven Zalesin, Esq. (Zoom), Ann Blum, Esq. (Zoom) and Gary Lafayette, Esq. appeared on behalf of Defendant The Coca-Cola Company.;

David Craig Kiernan, Esq. Craig Stewart, Esq. (Zoom) and Emily Knox, Esq. (Zoom) appeared on behalf of Defendant The Procter & Gamble Company.

Defendants appeared to contest the tentative ruling posted on April 19, 2024, which sustained the demurrer in part and overruled it in part. Following the arguments of counsel at the hearing on April 22, 2022, the Court took this matter under submission. After further consideration of the papers and arguments of counsel and GOOD CAUSE APPEARING,

The tentative ruling on Defendants' Demurrer to the First Amended Complaint (hereinafter "FAC") is adopted as the order of the Court, and is modified as follows:

Defendants Crystal Geyser Water Company, The Clorox Company, The Coca-Cola Company, PepsiCo, Inc., Nestlé USA, Inc., The Procter & Gamble Company, Colgate-Palmolive Company, and Danone US LLC (collectively, "Defendants") Demurrer to the first cause of action for violation of Business and Professions Code section 17200 is SUSTAINED, WITH LEAVE TO AMEND, for failure to plead facts sufficient. (Code Civ. Proc. § 430.10, subd. (e).)

All other grounds are OVERRULED. (Code Civ. Proc. § 430.10, subd. (b) & (e).)

As a threshold matter, on October 31, 2023, the Court granted Defendant The Coca-Cola Company's ("Coca Cola's") Application to File Under Seal Portions of Plaintiff's First Amended Complaint, requiring, "A copy of Plaintiff's First Amended Complaint with redactions to Paragraphs 120, 121, and 169 shall be filed on the public docket." (Order Granting Coca Cola's Application, issued Oct. 31, 2023, ¶ 2.) The Register of Actions does not reflect that the redacted First Amended Complaint was filed. Accordingly, within five days, Plaintiff SHALL publicly file and serve its "First Amended Complaint with redactions to Paragraphs 120, 121, and 169." (*Id.*)

FIRST CAUSE OF ACTION FOR VIOLATIONS OF UNFAIR COMPETITION LAW

For the first cause of action, the Court finds Plaintiff has not pled sufficient facts to allege UCL standing as Plaintiff has not pled actual reliance. (*Kwikset Corp. v. Sup. Ct.* (2011) 51 Cal.4th 310, 326–327; *Durell v. Sharp Healthcare* (2010) 183 Cal.App.4th 1350, 1363

("[W]e conclude the reasoning of *Tobacco II* applies equally to the 'unlawful' prong of the UCL when, as here, the predicate unlawfulness is misrepresentation and deception").)

Plaintiff's citation to *Steroid Hormone Product Cases* (2010) 181 Cal.App.4th 145, 159 and *Medrazo v. Honda of North Hollywood* (2012) 205 Cal.App.4th 1, 12 for the proposition that actual reliance is not required for unlawful claim are distinguishable. (Opp., filed Jan. 2, 2024, p. 8:5-17.) First, *Steroid Hormone Product Cases* predates *Kwikset.* (See *Figy v. Amy's Kitchen, Inc.* (N.D. Cal., Nov. 25, 2013, No. CV 13-03816 SI) 2013 WL 6169503, at *3, fn. 2.) Second, the Fourth District addressed and corrected its holding in *Medrazo.*

> We agree that in stating that reliance was not required in a UCL action premised on a fraud theory, we went too far in *Medrazo*: when a consumer's theory is that the defendant "engaged in misrepresentations and deceived consumers" (*Kwikset*, supra, 51 Cal.4th at p. 326, fn. 9), the consumer needs to show reliance. (See *Durell v. Sharp Healthcare* (2010) 183 Cal.App.4th 1350, 1363, [the reliance requirement "applies equally to the 'unlawful' prong of the UCL when ... the predicate unlawfulness is misrepresentation and deception."].)

(*Veera v. Banana Republic, LLC* (2016) 6 Cal.App.5th 907, 919 (emphasis added).)

Plaintiff's contention that Defendants violated the EMCA is not supported by any allegation it requested any information from Defendants. (See Opp., supra, at p. 7:23 – 8:5. See also MPA, filed Oct. 14, 2022, at p. 26:17-18 ("Earth Island also does not allege that it ever requested substantiating records from any Defendant—much less all Defendants—before filing this litigation"). "Information and documentation maintained pursuant to this section shall be furnished to any member of the public upon request."

(Bus. & Prof. Code, § 17580, subd. (b).) This action is distinguishable from *Animal Legal Defense Fund v. LT Napa Partners LLC* where Plaintiff never requested the underlying materials. (Compare *Animal Legal Defense Fund v. LT Napa Partners LLC*, (2015) 234 Cal.App.4th 1270, 1279–128; with Opp., supra, at p. 13:6-15.) It is axiomatic for Plaintiff to assert an "unlawful" or "unfair" claim based on this statute where it does not allege it requested the substantiating materials under this statute.

The Court finds Plaintiff's contention it is a competitor of Defendants is contradicted by its allegation "Defendants gain an unlawful and unfair advantage over competitors, whose advertising and labeling must comply with the EMCA, the Green Guides, and the legislatively declared policy of Cal. Pub. Res. Code § 42355.5." (FAC, ¶ 267. Contra Opp., supra, at p. 12:1-23. See Reply, filed Feb. 1, 2024, p. 19:19-20.)

SECOND CAUSE OF ACTION FOR PUBLIC NUISANCE.

For the second cause of action for public nuisance, the Court finds Plaintiff has cured the defects. (*City and County of San Francisco v. Purdue Pharma L.P.* (N.D. Cal. 2020) 491 F.Supp.3d 610, 675–676.) Defendants' arguments involve questions of fact that are not suitable for resolution on demurrer.

Causation Has Been Adequately Pled.

Defendants contend that Plaintiff's FAC fails to adequately allege causation. This Court disagrees. Plaintiffs appear to have cured the defects regarding causation. (See Opp., supra, at p. 17:1 – 20:21.)

> Causation is an essential element of a public nuisance claim. A plaintiff must establish a "connecting element" or a "causative link" between the

> defendant's conduct and the threatened harm. (*In re Firearm Cases* (2005) 126 Cal.App.4th 959, 988; see CACI No. 2020.) "Public nuisance liability 'does not hinge on whether the defendant owns, possesses or controls the property, nor on whether he is in a position to abate the nuisance; the critical question is *whether the defendant created or assisted in the creation of the nuisance.*' " (*Melton v. Boustred* (2010) 183 Cal.App.4th 521, 542, italics added; see *Wade v. Campbell* (1962) 200 Cal.App.2d 54, 59 [animal odors "created by the manner in which defendants operated their dairy" constituted a public nuisance].) Causation may consist of either "(a) an act; or [¶] (b) a failure to act under circumstances in which the actor is under a duty to take positive action to prevent or abate the interference with the public interest or the invasion of the public interest." (Rest.2d. Torts, § 824; see *Birke v. Oakwood Worldwide* (2009) 169 Cal.App.4th 1540, 1552 (*Birke*) [same].) A plaintiff must show the defendant's conduct was a "substantial factor" in causing the alleged harm. (Birke, at p. 1548; CACI No. 2020.)

(*Citizens for Odor Nuisance Abatement v. City of San Diego* (2017) 8 Cal.App.5th 350, 359 (original emphasis, footnote omitted).)

> Whether liability is based upon nuisance or negligence, the scope of that liability has been similarly measured: It extends to damage which is proximately or legally caused by the defendant's conduct, not to damage suffered as a proximate result of the independent intervening acts of others. As early as 1905, the principle had been established in California that liability in nuisance is limited by Civil Code section 3333 to " 'the amount which will compensate for all the detriment proximately caused thereby.' " (*Coats v. Atchison etc. Ry. Co.* (1905) 1 Cal.App. 441, 444.) Whether tortious conduct is charged as a nuisance or as negligence, our Supreme Court has also recognized that it is still only "liability to others for damages proximately caused by it" for which a party may be liable in nuisance. (*Vasquez v. Alameda* (1958) 49 Cal.2d 674, 676.) Thus, "Nothing would have been added by terming the claimed negligence a 'nuisance.' Damages in 'nuisance' or negligence are similarly measured." (*Dufour v. Henry J. Kaiser Co.* (1963) 215 Cal.App.2d 26, 29-30.)

(*Martinez v. Pacific Bell* (1990) 225 Cal.App.3d 1557, 1565–1566 (finding if there was a nuisance here [with the pay telephone], it was not the proximate cause of the robbery).)

Further,

> " 'Proximate cause involves two elements.' [Citation.] 'One is cause in fact. An act is a cause in fact if it is a necessary antecedent of an event.' [Citation.] ... [¶] By contrast, the second element focuses on public policy considerations. Because the purported causes of an event may be

> traced back to the dawn of humanity, the law has imposed additional 'limitations on liability other than simple causality.' [Citation.] 'These additional limitations are related not only to the degree of connection between the conduct and the injury, but also with public policy.' [Citation.] Thus, 'proximate cause' "is ordinarily concerned, not with the fact of causation, but with the various considerations of policy that limit an actor's responsibility for the consequences of his conduct." ' " (*Ferguson v. Lieff, Cabraser, Heimann & Bernstein* (2003) 30 Cal.4th 1037, 1045.) "[T]here is no bright line demarcating a legally sufficient proximate cause from one that is too remote. Ordinarily the question will be for the [fact finder], though in some instances undisputed evidence may reveal a cause so remote that a court may properly decide that no rational trier of fact could find the needed nexus." (*People v. Roberts* (1992) 2 Cal.4th 271, 320, fn. 11.)

(*People v. ConAgra Grocery Products Co.* (2017) 17 Cal.App.5th 51, 104.)

> Although a finding of causation may not be based on mere speculation or conjecture, such finding may be predicated on reasonable inferences drawn from circumstantial evidence." (*Smith v. Lockheed Propulsion Co.* (1967) 247 Cal.App.2d 774, 780.) Direct proof of each link in a chain of causation is not required. "[C]ircumstantial evidence of sufficient substantiality" from which reasonable inferences can be drawn will support a finding of causation in fact. (*Ibid.*) "Causation may in many instances be inferred from evidence that does not itself constitute direct evidence of reliance on an individual basis." (*State ex rel. Wilson v. Superior Court* (2014) 227 Cal.App.4th 579 (*Wilson*).) "Just as factors such as the magnitude and temporal proximity of the unlawful conduct might evidence or negate the existence of fraud, so too might many of the same factors influence the extent to which an inference of causation is appropriate." (*Id.* at p. 605.)

(*City of Modesto v. Dow Chemical Co.* (2018) 19 Cal.App.5th 130, 153–154.)

Here, Plaintiff alleges, in pertinent part, to demonstrate causation:

> Defendants' marketing, advertising, promotional material and instructions for how to dispose of their products, including on their websites, uniformly represent that their products are recyclable.

> However, Defendants are aware that many of their products are not actually recyclable and yet have not undertaken any effort to notify consumers of the problem. Defendants' failure to disclose that products

> are not recyclable is an omission of fact that is material to consumers' buying habits and Defendants exploit customers through their deceptive claims of recyclability.

(FAC, ¶¶ 240, 241. See Opp. at p. 5:1-4, 19:11-13 (arguing causation and citing to ¶¶ 240, 241).) For these reasons, the defects on pleading causation have been cured in the FAC.

Whether Defendants Promoted a Product for Hazardous Use Has Been Adequately Pled.

Defendants claim that Plaintiff's FAC fails to allege that Defendants promoted a product for hazardous use. This contention again stems from a ruling in *County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, where the Court of Appeal developed the following legal standard:

> Liability is not based merely on production of a product or failure to warn. Instead, liability is premised on defendants' promotion of lead paint for interior use with knowledge of the hazard that such use would create. This conduct is distinct from and far more egregious than simply producing a defective product or failing to warn of a defective product; indeed, it is quite similar to instructing the purchaser to use the product in a hazardous manner, which Modesto found could create nuisance liability.

(*Id.* at 309; see also *People v. ConAgra Grocery Products Co.* (2017) 17 Cal.App.5th 51, 101–104.) The alleged basis for liability was found to be the affirmative promotion of lead paint for interior use, not their mere manufacture and distribution of lead paint or their failure to warn of its hazards. (*Id.* at 309–310.) Thus, all that is required is that the defendant must have promoted a product with the requisite knowledge of the hazard that such a product could create, and the instruction to use the product in a hazardous manner.

Here, Plaintiff alleges that Defendants knew of the difficulty or even impossibility of recycling the plastic in their products. FAC, ¶¶ 89–107. Moreover, Plaintiff alleges that Defendants, through their marketing and labeling, encourage consumers to send used plastic containers to recycling facilities. (*Id.* at ¶¶ 89–107, 130–141.) For the sake of sufficiency of the pleadings, this set of facts is comparable to promoting lead paint for interior use despite its health hazards, and instructing dry cleaners to dump solvents into the sewers without consideration of those solvents' impact upon the municipal sewer system. (See *County of Santa Clara, supra*, 137 Cal.App.4th at 309; *City of Modesto Redevelopment Agency v. Superior Court* (2004) 119 Cal.App.4th 28, 41–42.) In all three situations, the defendants knew of some sort of public hazard associated with their product, and encouraged the use of that product in a manner that contributed to the public hazard. That plastic is legal to use as a packaging material does not mean that it cannot be used in a hazardous manner. For example, dry cleaning solvents are not outlawed in their entirety. They simply cannot be dumped into a sink, and thus, into a city's municipal sewer system. Should a solvent manufacturer advertise their solvent as being safe to dump into a sink, the Court of Appeal held that could give rise to public nuisance liability. This Court sees little difference between the solvent-dumping action and the instant plastic-recycling case, because Plaintiff has alleged consumers are being instructed to dispose of their product in a manner that contributes to a public hazard.

In their Reply brief, Defendants contend that,

> Earth Island is a private entity suing based on alleged special injuries, not a public entity suing in a representative capacity on behalf of the public. This distinction matters: The court in *County of Santa Clara* disallowed a private entity from bringing a nuisance claim for damages for its own alleged special injuries, regardless of whether it alleged promotion for a hazardous use, reasoning that a non-representative

> nuisance claim "is much more like a products liability cause of action because it is, at its core, an action for *damages for injuries caused to plaintiffs' property by a product.*" (137 Cal.App.4th at 313 [emphasis in original].)

(Reply, supra, at p. 12:17-24.) However, this is distinguishable where "[t]he narrow question we must resolve is whether, in addition to a cause of action for public nuisance seeking abatement and products liability causes of action seeking damages, they may also pursue a public nuisance cause of action seeking damages." (*County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 313.

Here, Plaintiff seeks, inter alia, abatement. (FAC, p. 89:24-25.) .) To the extent Plaintiff also seeks monetary damages (see FAC, ¶¶ 284 – 288), "[a] general demurrer does not lie to only part of a cause of action." (Weil & Brown, Cal. Prac. Guide: Civ. Proc. Before Trial (Rutter, Jun. 2023 Update) ¶ 7:42.2.)

For the foregoing reasons, Defendants' Demurrer to Plaintiff's First Amended Complaint is SUSTAINED IN PART and OVERRULED IN PART.

IT IS SO ORDERED.

DATED: JUL 11 2024

HONORABLE V. RAYMOND SWOPE
JUDGE OF THE SUPERIOR COURT