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July 31, 2024

VIA ECF

Honorable Nelson Stephen Román, U.S.D.J.
U.S. District Court for the Southern District of New York
300 Quarropas Street, Courtroom 218
White Plains, NY 10601

Re: *Lurenz v. The Coca-Cola Company*, No. 7:22-cv-10941-NSR
Request for Pre-Motion Conference for Anticipated Motion to Dismiss Second Amended Complaint

Dear Judge Román:

Defendants The Coca-Cola Company and The Simply Orange Juice Company (collectively, "Coca-Cola") intend to move to dismiss the above-referenced Second Amended Class Action Complaint ("SAC") pursuant to Federal Rules of Civil Procedure 8(a), 9(b), 12(b)(1), and 12(b)(6). Pursuant to Part 3.A.ii of the Court's Individual Practices in Civil Cases, we write to request a pre-motion conference regarding Coca-Cola's intended motion to dismiss.

After three chances to plead a viable claim for relief—and even with "the benefit of a court ruling with respect to the deficiencies of its pleading" (Dkt. 41 at 8)—Plaintiff still cannot state a plausible claim for relief. Plaintiff challenges Coca-Cola's Simply® juice drinks (the "Products") for representing that they are "100% Pure," "All Natural," and "made simply" with "all-natural ingredients" when they allegedly contain trace amounts of per- and polyfluoralkyl substances ("PFAS"). *See* SAC ¶¶ 1-2, 5-6. In dismissing Plaintiff's First Amended Complaint, the Court agreed with Coca-Cola that Plaintiff's allegations were fatally deficient. *See* Dkt. 41. Nothing about the SAC changes that conclusion.

Despite the Court's caution that Plaintiff "must plead sufficient facts 'to make it plausible that [he] did indeed suffer the sort of injury that would entitle [him] to relief,'" (Dkt. 41 at 9), the most recent version of Plaintiff's complaint contains allegations that are even *vaguer* than those in the dismissed FAC. Instead of purportedly "address[ing] this Court's concerns" (SAC ¶ 68), Plaintiff's new allegations about "confirmatory testing" raise more questions than they answer. Even setting aside that Plaintiff fails to state a claim under Rule 12(b)(6), Plaintiff cannot demonstrate he has standing because the SAC still "impermissibly . . . ask[s] the Court to infer an injury for him[.]" Dkt. 41 at 7. The Court should dismiss Plaintiff's SAC in its entirety and ***without*** leave to amend.

I. Plaintiff Still Lacks Article III Standing to Pursue His Claims

As the Court already observed, plaintiffs "must plead enough facts to make it plausible

that they did indeed suffer the sort of injury that would entitle them to relief." Dkt. 41 at 4 (quoting *Maddox v. Bank of New York Mellon Tr. Co., N.A.*, 19 F.4th 58, 65-66 (2d Cir. 2021)). But Plaintiff's garbled-together allegations about testing—all of which purportedly occurred in 2023 and 2024 (SAC ¶¶ 57, 65, 68-69)—do not pass muster because they fail to "plausibly allege any injury with respect to the Products Plaintiff himself purchased" ***before*** initiating this case in December 2022. *See* Dkt. 41 at 5; *see, e.g.*, *Wallace v. ConAgra Foods, Inc.*, 747 F.3d 1025, 1030 (8th Cir. 2014); *Gaminde v. Lang Pharma Nutrition, Inc.*, No. 1:18-cv-300, 2019 U.S. Dist. LEXIS 48595, at *6 (N.D.N.Y. Mar. 25, 2019).

Plaintiff summarily claims that "testing in July 2024" of a handful of Products allegedly included two Products that Plaintiff "actually purchased." SAC ¶¶ 68-69. But it is impossible to tell when Plaintiff purchased those Products (or any Product at issue), much less confirm whether he purchased them prior to filing his Complaint over one-and-a-half years ago. At most, it remains "only *likely* [P]laintiff *might* have purchased mislabeled products" prior to filing his first complaint, which does not—and cannot—establish standing. *See* Dkt. 41 at 7 (emphasis added). Further, Plaintiff provides no allegations that he "regularly made purchases" of those Products. *See id.* In short, Plaintiff still cannot show a concrete economic harm required to establish Article III standing. *See, e.g.*, *Onaka v. Shiseido Ams. Corp.*, No. 21-cv-10665, 2024 U.S. Dist. LEXIS 50613, at *8-11 (S.D.N.Y. Mar. 19, 2024) (dismissing PFAS case relying on commissioned testing because "the critical piece of information—when exactly [the plaintiff] purchased each particular piece of makeup Plaintiffs tested—continues to be absent from the FAC"); *Hicks v. L'Oréal U.S.A., Inc.*, 2023 U.S. Dist. LEXIS 176565, at *24-25 (S.D.N.Y. Sep. 30, 2023) (similar).

Nor do Plaintiff's revised allegations distinguish his claims from similar cases where plaintiffs failed to adequately establish standing in the context of consumer products allegedly containing trace chemicals. *See, e.g.*, *In re Johnson & Johnson Talcum Powder*, 903 F.3d 278, 287, 290 (3d Cir. 2018); *In re Fruit Juice Prods.*, 831 F. Supp. 2d 507, 512 (D. Mass. 2011). Finally, as a past purchaser, Plaintiff lacks Article III standing to seek injunctive relief. *See Berni v. Barilla S.p.A.*, 964 F.3d 141, 147 (2d Cir. 2020).

II. Plaintiff's Testing Allegations Still Are Insufficiently Pled

Plaintiff's entire case rests on "independent testing" purportedly demonstrating the presence of PFAS in the Product. But despite his third attempt, Plaintiff still fails to allege sufficient factual detail about the testing methodology to distinguish this case from other cases where such bare-bones allegations regarding testing were insufficient. *Hicks*, 2024 U.S. Dist. LEXIS 176565, at *25 (observing that "critical details are lacking as to" the plaintiffs' commissioned testing); *Myers v. Wakefern Food Corp.*, No. 20-cv-8470-NSR, 2022 U.S. Dist. LEXIS 35981, at *13-14 (S.D.N.Y. Mar. 1, 2022); *Santiful v. Wegmans Food Mkts., Inc.*, No. 20-cv-2933-NSR, 2022 U.S. Dist. LEXIS 15994, at *15 (S.D.N.Y. Jan. 28, 2022); *Turnipseed v. Simply Orange Juice Co.*, No. 20-cv-8677-NSR, 2022 U.S. Dist. LEXIS 38823, at *14 (S.D.N.Y. Mar. 4, 2022).

III. All of Plaintiff's Claims Still Fail Because He Has Not Plausibly Alleged That a Reasonable Consumer Would Be Misled

Even if the Court finds Plaintiff's testing allegations are now sufficient to establish standing (they are not), Plaintiff's claims still fail as a matter of law because he fails to assert a plausible theory of deception. Under Plaintiff's continued telling, the Products' representations that they are "100% Pure" and "All Natural" juice drinks that are "made simply" with "all-natural ingredients" convey to consumers that they are free from artificial ***ingredients*** like PFAS.

But no reasonable consumer would understand PFAS—a substance that is not intentionally added to the Product—to be an ingredient. *See Richburg v. ConAgra Brands, Inc.*, No. 22-cv-2420, 2023 U.S. Dist. LEXIS 21137, at *23 (as a matter of law, reasonable consumer would not interpret "only real ingredients" to mean free of PFAS); *Axon v. Citrus World, Inc.*, 354 F. Supp. 3d 170, 173 (E.D.N.Y. 2018), *aff'd sub nom., Axon v. Florida's Nat. Growers, Inc.,* 813 F. App'x 701 (2d Cir. 2020) (orange juice containing herbicide glyphosate not mislabeled as "all natural" because glyphosate is not an ingredient added to the product). In fact, FDA exempts migratory substances like PFAS from the mandated ingredient list on food products. *See Richburg*, 2023 U.S. Dist. LEXIS 21137, at *22-23 (citing 21 C.F.R. § 101.100(a)(3)(iii)).

IV. Plaintiff's Omissions-Based Claims Still Fail Because They Are Preempted, and He Has Not Plausibly Alleged Knowledge

Because FDA exempts migratory substances like PFAS from inclusion on an ingredient list, Plaintiff's attempt to impose liability for failing to include such a disclosure is expressly preempted under the Nutrition Labeling & Education Act. *See* 21 U.S.C. § 343-1(a)(2). In addition, Plaintiff has failed to plausibly allege that Coca-Cola was aware of the presence of PFAS in the Products, which dooms his omissions-based fraud and consumer protection claims. *Harris v. Pfizer Inc.*, 586 F. Supp. 3d 231, 241, 244 (S.D.N.Y. 2022).

V. In Addition to the Above, the Claims Still Fail on Other, Independent Grounds

Plaintiff's GBL claims fail because Plaintiff has not shown how failing to disclose the alleged presence of trace amounts of PFAS that did not cause any health effects is material. *See Herrington v. Johnson & Johnson Consumer Cos.*, No. 09-cv-1597, 2010 U.S. Dist. LEXIS 90505, at *29 (N.D. Cal. Sep. 1, 2010). Plaintiff's AML claim fails because there is no private right of action under § 199-a of the AML, which Plaintiff appears to recognize. *See* SAC ¶ 196; *Steele v. Wegmans Food Mkts.*, 472 F. Sup. 3d 47 (S.D.N.Y. 2020) (explaining that the AML is "administered by a Commissioner who investigates and may sue for penalties" and "[n]o private civil actions can be inferred"). Even so, Plaintiff fails to adequately allege the Product is "adulterated" or "misbranded" within the meaning of the law. Plaintiff's negligence per se claim fails for many reasons, including, but not limited to, because the claim is barred by the economic loss doctrine. *Black Radio Network, Inc. v. NYNEX Corp.*, No. 96-cv-4138, 2000 WL 64874, at *3 (S.D.N.Y. Jan. 25, 2000); *Vitolo v. Dow Corning Corp.*, 234 A.D.2d 326, 363 (N.Y. App. Div. 2nd Dept. 1996) (applying ELR to negligence per se claim). Finally, the unjust enrichment claim is merely duplicative of Plaintiff's other claims. *Warren v. Coca-Cola Co.*, No. 22-cv-6907, 2023 U.S. Dist. LEXIS 70494, at *24 (S.D.N.Y. Apr. 21, 2023).

Sincerely,

ALSTON & BIRD LLP

Attorney for The Coca-Cola Company and The Simply Orange Juice Company