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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

JOHN PELS,  
Plaintiff,  
v.  
KEURIG DR. PEPPER, INC.,  
Defendant.

Case No. [19-cv-03052-SI](#)

**ORDER RE: DEFENDANT'S MOTION  
TO DISMISS**

Re: Dkt. No. 24

On October 17, 2019, the Court heard argument on the motion by defendant Keurig Dr. Pepper, Inc. (“Keurig”) to dismiss this action with prejudice. Based on the papers submitted and arguments made, the Court hereby GRANTS the motion to dismiss, with leave to amend.

**BACKGROUND**

Defendant Keurig owns a variety of beverage families, including Peñafiel water, which is advertised and labeled as “mineral spring water,” the product at issue in this case.

On June 25, 2019 plaintiff John Pels filed an amended<sup>1</sup> class-action complaint<sup>2</sup> seeking to

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<sup>1</sup> Plaintiff filed an initial complaint on June 3, 2019 and an amended complaint on June 25, 2019. Dkt. No. 1. The amended complaint was filed in light of Keurig’s June 21, 2019 press release informing the public of the voluntary withdrawal of Peñafiel water from the market.

<sup>2</sup> The complaint alleges five claims: (1) California’s Consumers Legal Remedies Act (“CLRA”), (2) California’s Unfair Competition Law’s (“UCL”) Unlawful Prong, (3) California’s UCL’s Unfair Prong, (4) California’s False Advertising Law (FAL), and (5) unjust enrichment. The first four claims are limited to a class of California consumers while the fifth claim encompasses a nationwide class. Dkt. No. 11 ¶ 29. The complaint details a variety of health issues associated with arsenic consumption but does not allege plaintiff or class members suffered any health issues after consuming Peñafiel Water. *Id.* ¶ 18.

1 represent “all United States consumers who purchased any Peñafiel beverage that exceeded  
2 permitted arsenic levels within the applicable statute(s) of limitations.” Dkt. No. 11 ¶ 29. The  
3 complaint defines “permitted arsenic levels” as no more than 10 ppb (the current FDA standard for  
4 bottled water). *Id.* ¶ 19. Plaintiff alleges Peñafiel water has contained more than 10 ppb arsenic  
5 since at least 2009, when New Jersey regulators found arsenic levels exceeding FDA limits in  
6 Peñafiel water. Dkt. No. 11 ¶¶ 3, 21. In addition, the FDA issued import alerts for Peñafiel water  
7 in 2015 and again in 2018 because of improper arsenic levels. *Id.* ¶ 22. The complaint also  
8 highlights an April 2019 ConsumerReports.com article in which sampled Peñafiel water contained  
9 17 ppb arsenic. *Id.*

10 On June 21, 2019, Keurig issued a press release announcing the withdrawal of Peñafiel  
11 water “due to violative levels of arsenic.” Dkt. No. 11 ¶ 25. Prior to issuing the statement, Keurig  
12 hired an independent laboratory to test Peñafiel water for arsenic. *Id.* The lab concluded Peñafiel  
13 water exceeded the FDA standard of 10 ppb. *Id.* The June 2019 announcement also stated Keurig  
14 recently installed “enhanced filtration systems” at the facilities producing Peñafiel water and the  
15 product now meets FDA standards for arsenic. *Id.* Keurig also offered all consumers who bought  
16 Peñafiel water a full refund for the Peñafiel water still in their possession. *Id.*

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18 **LEGAL STANDARD**

19 **I. Rule 12(b)(1)**

20 Federal Rule of Civil Procedure 12(b)(1) allows a party to challenge a federal court’s  
21 jurisdiction over the subject matter of the complaint. If the plaintiff lacks standing under Article III  
22 of the U.S. Constitution, then the court lacks subject matter jurisdiction, and the case must be  
23 dismissed. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 101-02 (1998). The party invoking  
24 federal jurisdiction, here the plaintiff, bears the burden of establishing subject matter jurisdiction.  
25 See *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994) (internal citations  
26 omitted). A complaint will be dismissed if, looking at the complaint as a whole, it lacks federal  
27 jurisdiction either “facially” or “factually.” *Thornhill Publ’g Co., Inc. v. General Tel. & Elecs.*  
28 *Corp.*, 594 F.2d 730, 733 (9th Cir. 1979); *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th

1 Cir. 2004) (“A Rule 12(b)(1) jurisdictional attack may be facial or factual.”).

2 When the complaint is challenged for lack of subject matter jurisdiction on its face, all  
3 material allegations in the complaint will be taken as true and construed in the light most favorable  
4 to the plaintiff. *NL Indus. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). In deciding a Rule 12(b)(1)  
5 motion which mounts a factual attack on jurisdiction, “no presumptive truthfulness attaches to  
6 plaintiff’s allegations, and the existence of disputed material facts will not preclude the trial court  
7 from evaluating for itself the merits of jurisdictional claims. Moreover, the plaintiff will have the  
8 burden of proof that jurisdiction does in fact exist.” *Mortensen v. First Fed. Sav. & Loan Ass’n*, 549  
9 F.2d 884, 891 (3d Cir. 1977). “In resolving a Rule 12(b)(1) factual attack on jurisdiction, the district  
10 court may review evidence beyond the complaint without converting the motion to dismiss into a  
11 motion for summary judgment.” *In re Digimarc Corp. Derivative Litigation*, 549 F.3d 1223, 1236  
12 (9th Cir. 2008) (citation and internal brackets omitted).

13  
14 **II. Rule 12(b)(6)**

15 A complaint must contain “a short and plain statement of the claim showing that the pleader  
16 is entitled to relief,” Fed. R. Civ. Pro. 8(a)(2), and a complaint that fails to do so is subject to  
17 dismissal pursuant to Rule 12(b)(6). To survive a Rule 12(b)(6) motion to dismiss, the plaintiff  
18 must allege “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v.*  
19 *Twombly*, 550 U.S. 544, 570 (2007). This “facial plausibility” standard requires the plaintiff to  
20 allege facts that amount to “more than a sheer possibility that a Defendant has acted unlawfully.”  
21 *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). While courts do not require “heightened fact pleading of  
22 specifics,” the plaintiff must allege facts sufficient to “raise a right to relief above the speculative  
23 level.” *Twombly*, 550 U.S. at 544, 555. “A pleading that offers ‘labels and conclusions’ or ‘a  
24 formulaic recitation of the elements of a cause of action will not do.’” *Iqbal*, 556 U.S. at 678  
25 (quoting *Twombly*, 550 U.S. at 555). “While legal conclusions can provide the framework of a  
26 complaint, they must be supported by factual allegations.” *Id.* In reviewing a Rule 12(b)(6) motion,  
27 courts must accept as true all facts alleged in the complaint, drawing all reasonable inferences in  
28 plaintiff’s favor. *See Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987).

1 **DISCUSSION**

2 Defendant moves to dismiss the complaint on several grounds, including (1) that plaintiff  
3 lacks Article III standing and (2) that plaintiff fails to state a claim on which relief can be granted.  
4 The Court finds that the amended complaint does not sufficiently allege facts to establish standing  
5 to bring this suit, and therefore finds it unnecessary discuss defendant’s 12(b)(6) arguments.

6 To establish standing, the plaintiff must show: “(1) he or she has suffered an injury in fact  
7 that is concrete and particularized, and actual or imminent; (2) the injury is fairly traceable to the  
8 challenged conduct; and (3) the injury is likely to be redressed by a favorable court decision.”  
9 *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1225 (9th Cir. 2008). A  
10 concrete injury is one that is “distinct and palpable . . . as opposed to merely abstract.” *Schmier v.*  
11 *United States Court of Appeals*, 279 F.3d 817, 821 (9th Cir. 2009). Claims brought under  
12 California's CLRA, UCL, or FAL must satisfy federal standing requirements under Article III as  
13 well. *See Birdsong v. Apple*, 590 F.3d 955, n.4 (9th Cir. 2009) (citing *Cantrell v. City of Long Beach*,  
14 241 F.3d 674, 683 (9th Cir. 2001) (holding that a party asserting state law claims in federal court  
15 “must meet the stricter federal standing requirements of Article III.”).

16 Keurig argues the amended complaint fails to plead sufficient allegations for Article III  
17 standing. First, Keurig argues the amended complaint does not allege a particularized injury. Dkt.  
18 No. 24 at 16–19 (Mot. to Dismiss). Keurig also argues plaintiff lacks standing because the statute  
19 plaintiff alleges Peñafiel violates, 21 C.F.R. §165, does not apply to Peñafiel water. Further, Keurig  
20 argues the amended complaint fails to plead standing for injunctive relief. *Id.* at 21–22.

21  
22 **A. Does §165 Apply to Peñafiel?**

23 If §165 does not apply to Peñafiel water, then Peñafiel does not violate FDA standards either  
24 in terms of content or labeling; and as such, plaintiff has not alleged a violation to assert and does  
25 not have standing.

26 FDA standards define “bottled water” as “water . . . with no added ingredients.” 21 C.F.R.  
27 § 165.110(a)(1). Keurig argues these FDA standards do not apply to Peñafiel water because Peñafiel  
28 contains carbon dioxide (i.e. an ingredient) and urges this Court to dismiss plaintiff’s claims with

1 prejudice. Dkt. No. 24 at 24 (Mot. to Dismiss) (“Peñafiel Water had added carbonation (carbon  
2 dioxide) to make it bubbly like a soda water.”); Dkt. No. 45 at 8 (Reply to Mot. to Dismiss)  
3 (“Peñafiel Water has an ‘added ingredient’: carbonation.”).

4 In response, plaintiff cites FDA guidance from 1995 interpreting 21 C.F.R. § 165.110. Dkt.  
5 No. 34 at 16–17. The guidance concludes that all bottled water described by a “standard of  
6 identity”—such as “spring water” or “mineral water”—is governed by § 165.110, even if other terms  
7 are included, i.e., “carbonated mineral spring water.” *Id.* In its reply, Keurig cites a recent Supreme  
8 Court case narrowing the circumstances in which courts give deference to agency interpretations of  
9 statutes. Dkt. No. 45 at 6 (Reply to Mot. to Dismiss), citing *Kisor v. Wilke*, 139 S.Ct. 2400, 2415-  
10 18 (2019) (narrowing *Auer v. Robbins*, 519 U.S. 452, 117 S. Ct. 905 (1997) and *Bowles v. Seminole*  
11 *Rock & Sand Co.*, 325 U.S. 410 (1945)). According to *Kisor*, a court should not give deference to  
12 an agency’s interpretation of its own standards unless those standards are “genuinely ambiguous.[]”  
13 139 S.Ct. at 2415-2416 (“[D]. If genuinely ambiguous, the statute may only be construed using the  
14 agency’s interpretation if the interpretation is reasonable. *Id.* at 2416.

15 The Court finds §165 genuinely ambiguous and applies to Peñafiel water. The statute  
16 describes bottled water as well as providing specific definitions of “mineral water”  
17 (165.110(a)(2)(ii)) and “spring water” (165.110(a)(2)(vi)). The statute states in relevant part:

- 18 (1) Description. Bottled water is water that is intended for human consumption and  
19 that is sealed in bottles or other containers with no added ingredients except that  
20 it may optionally contain safe and suitable antimicrobial agents. Fluoride may be  
21 optionally added within the limitations established in 165.110(b)(4)(ii). Bottled  
22 water may be used as an ingredient in beverages (e.g., diluted juices, flavored  
23 bottled waters). *It does not include those food ingredients that are declared in*  
*ingredient labeling as "water," "carbonated water," "disinfected water," "filtered*  
*water," "seltzer water," "soda water," "sparkling water," and "tonic water."* The  
24 processing and bottling of bottled water shall comply with applicable regulations  
25 in part 129 of this chapter.
- 26 (2) Nomenclature. The name of the food is “bottled water,” “drinking water,” or  
27 alternatively one or more of the following terms as appropriate:
- 28 \*\*\*(iii) The name of water containing not less than 250 parts per million (ppm)  
total solids coming from a source tapped at one or more bore holes or springs,  
originating from a geologically and physically protected underground water  
source, may be “mineral water” ...

1           \*\*\*(v) The name of water that, after treatment and possible replacement of  
2 carbon dioxide, contains the same amount of carbon dioxide from the source that  
it had at emergence from the source may be “sparkling bottled water.”

3           \*\*\*(vi) The name of water derived from an underground formation from which  
4 water flows naturally to the surface of the earth may be “spring water.”...

5 165.110(a). Defendant’s product is labeled “mineral spring water.” Under these circumstances, the  
6 agency’s interpretation is most helpful:

7           ...Products or ingredients described by a terms that is defined by the standard of  
8 identity (e.g., “spring water”) or with a term that makes a claim about the water (e.g.,  
9 “natural water”) are standardized waters and must comply with § 165.110 whether  
10 carbonation has been added or not. Although the terms to describe the water  
11 ingredient in a product may sometimes be used in combination with a term that is not  
included under the standards (e.g. “carbonated spring water” or “filtered natural  
water”), the product or the water ingredient in the product must comply with the  
bottled water standards because a claim is being made concerning the value of the  
water.... Dkt. 34, at 16-17.

12 Since the statute itself is ambiguous as to how the definition of “mineral water” or “spring water” is  
13 impacted by the addition of carbonation, this guidance is both persuasive and helpful. As such, the  
14 statute clearly does apply to the Peñafiel mineral spring water.

15  
16           **B. Particularized Injury**

17           An injury is particularized when it affects the plaintiff in “a personal and individual way.”  
18 *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 n.1 (1992). Because Keurig raises facial challenges to  
19 plaintiff’s standing, the Court “[a]ccept[s] the [plaintiff’s] allegations as true and draw[s] all  
20 reasonable inferences in the [plaintiff’s] favor.” *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir.  
21 2014). However, the plaintiff’s alleged injury must be supported by more than conclusory  
22 statements unsupported by specific facts. *Barnes v. Marriott Hotel Servs.*, No. 15-cv-01409-HRL,  
23 2017 U.S. Dist. LEXIS 22588, at \*20–21 (N.D. Cal. Feb. 16, 2017).

24           Keurig argues plaintiff has failed to plead particularized injury in two ways: (1) plaintiff fails  
25 to allege *he* tested the Peñafiel water he purchased for arsenic—relying instead on Consumer  
26 Reports’ and Keurig’s testing, and (2) plaintiff fails to plead the Peñafiel water *he* purchased  
27 contained violative levels of arsenic. Dkt. No. 24 at 17 (Mot. to Dismiss). Defendant’s first  
28 argument fails. Keurig cites three cases in support thereof: *Gaminde v. Lang Pharma Nutrition*,

1 *Inc.*, 2019 WL 1338724 (N.D.N.Y. Mar. 25, 2019); *Wallace v. ConAgra Foods, Inc.*, 747 F.3d 1025  
 2 (8th. Cir. 2014); and *Doss v. General Mills, Inc.*, No. 36 (S.D. Fla filed Jun. 14, 2019). *Id.* at 17–  
 3 18. All are distinguishable.<sup>3</sup>

4 However, plaintiff has failed to plead a particularized injury by failing to plead the water *he*  
 5 purchased contained violative arsenic levels. In his opposition, plaintiff argues “[p]laintiff has  
 6 alleged that *all* Peñafiel mineral spring water during the Class Period was contaminated with  
 7 arsenic” because all Peñafiel water comes from the same source. Dkt. No. 34 at 15 (emphasis in  
 8 original) (Opp’n to Mot. to Dismiss). But nowhere in the complaint, including ¶ 5 to which plaintiff  
 9 cites, does he make such a straightforward allegation. Further, plaintiff does not specify when or  
 10 where he allegedly purchased Peñafiel.

11 The Court therefore dismisses the amended complaint, without prejudice, for lack of  
 12 standing for failure to plead a particularized injury.

13  
 14 **C. Standing for Injunctive Relief**

15 To successfully plead injunctive relief the threat of injury must be “actual and imminent, not  
 16 conjectural or hypothetical.” *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009).

17 Here, plaintiff alleges he will resume purchasing the products in the future if Keurig adheres  
 18 to proper standards and therefore falls into the second category—seeking injunctive relief out of  
 19 fear that defendant will falsely label Peñafiel in the future. Dkt. No. 11 ¶ 11. However, defendant  
 20 is no longer selling Peñafiel water in the United States. Therefore, there is no injunctive relief to be  
 21 had. During oral argument, plaintiff urged the Court not to dismiss the injunctive relief claim and  
 22 “address it later.” Transcript 26:5. However, this is precisely the type of hypothetical injury that is  
 23 fatal to a claim for injunctive relief.

24  
 25 \_\_\_\_\_  
 26 <sup>3</sup> In *Gaminde*, the plaintiffs relied solely on one USDA study that only tested two bottles of  
 27 CVS’s Krill Oil. 2019 WL 1338724, at \*2. Here, plaintiff relies on a Consumer Reports article and  
 28 Keurig’s own testing. Dkt. No. 11 ¶¶ 23, 25. In *Wallace*, the plaintiffs only alleged that some of  
 the products sold by defendant were mislabeled. 747 F.3d at 1030–31. Here, plaintiff alleges that  
 all Peñafiel Water fails to comply with FDA standards. Dkt. No. 11 ¶ 5. In *Doss*, the defendant  
 violated a regulation promulgated by a consumer protection group, not a federal agency. No. 36,  
 slip op. at 3. Here, defendant allegedly violated a federal standard promulgated by the FDA. Dkt.  
 No. 11 ¶ 19.

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The Court therefore GRANTS defendant’s motion to dismiss plaintiff’s requested injunctive relief with prejudice.

**CONCLUSION<sup>4</sup>**

For the reasons stated above, the Court hereby GRANTS defendant’s motion to dismiss. Specifically, the Court GRANTS the motion to dismiss for lack of standing without prejudice. Further, the Court GRANTS the motion to dismiss plaintiff’s request for injunctive relief with prejudice. **If plaintiff chooses to file an amended complaint, it must be filed on or before December 6, 2019.**

**IT IS SO ORDERED.**

Dated: November 7, 2019



\_\_\_\_\_  
SUSAN ILLSTON  
United States District Judge

<sup>4</sup> The Court also GRANTS the parties’ requests for judicial notice. Dkt. Nos. 25, 36, 46.