IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STANLEY F. FROMPOVICZ d/b/a FAR AWAY SPRINGS, on behalf of himself and all others similarly situated Plaintiffs, v. NIAGARA BOTTLING, LLC, et al. Defendants.	CLASS ACTION COMPLAINT CIVIL ACTION No. 2:18-cv-00054-WB

DEFENDANTS' BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFFS' COMPLAINT

Defendants Ice River Springs Water Co. Inc., Crossroads Beverage Group and James J. Land, Jr.[1] (collectively "Movant Defendants") move to dismiss under Fed. R. Civ. P. 12(b)(1) and (6) as: (1) Plaintiff does not have standing to assert these claims as Plaintiff cannot establish an injury directly from Defendants alleged conduct as he is not a water bottler and has not sold any water since 2015 and (2) Plaintiff fails to state a claim as the Federal Food, Drug & Cosmetic Act, 21 U.S.C. c. 9 ("FDCA") does not provide for a private cause of action, the unfair competition claim is preempted by the FDCA and Plaintiff fails to state a claim for unfair competition as a matter of law.

I. STATEMENT OF FACTS

Plaintiff Stanley F. Frompovicz ("Plaintiff") commenced this action by Class Action Complaint (the "Complaint") alleging the following:

[1] James Land, Jr. is listed in the Complaint as James J. Land, Jr. d/b/a MC Resource Development a/k/a Pine Valley Farm Springs. Mr. Land vehemently disputes this characterization.

- First Claim- False Advertising Under Lanham Act, §43(a) (15 U.S.C. §1125(a) Against All Defendants; and

- Second Claim- Unfair Competition Under Pennsylvania Law Against All Defendants.

A true and correct copy of the Complaint is attached hereto as Exhibit "A". Plaintiff states in the Complaint that it does business as Far Away Springs, a fictitious trade name and identifies, develops and maintains spring water sites. (Exhibit "A," Complaint, ¶¶5, 12) Defendants Niagara Bottling, LLC, Ice River Springs Water Co. Inc. and Crossroads Beverage Group (collectively the "Bottlers") are in the business of bottling and selling water. (*Id.*, ¶7) The Bottlers purchase water from Pine Valley Springs ("Pine Valley"). (*Id.*) Plaintiff alleges that the sale of "spring water" by the Bottlers is misleadingly marketed, labelled, false and deceptive and that Pine Valley markets raw water to bottlers and others as "spring water", which is not in fact true spring water, but rather "well water". (*Id.* at ¶¶1, 7)[2]

II. ARGUMENT

A. Plaintiff fails to have standing such that this action must be dismissed.

The concept of standing is an integral part of "the constitutional limitation of federal court jurisdiction to actual cases or controversies." *Hagan v. United States*, 2002 WL 338882, at *4 (E.D. Pa. 2002) (*citing Simon v. Eastern KY Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976)). A motion to dismiss for want of standing implicates the court's subject matter jurisdiction and, is therefore appropriately brought under Federal Rule of Civil Procedure 12(b)(1). *Id.* (*citing Miller v. Hygrade Food Prods. Corp.*, 89 F. Supp. 2d 643, 646 (E.D. Pa. 2000)). "Absent Article III standing, a federal court does not have subject matter jurisdiction to address a plaintiff's claims and they must be dismissed." *Common Cause of PA v. Pennsylvania*,

[2] This statement is completely false and Pine Valley is a spring water source.

558 F.3d 249, 257 (3d Cir. 2009) (*citing Taliaferro v. Darby Twp. Zoning Bd.*, 458 F.3d 181, 188 5 (3d Cir. 2006)).

In order to have standing in class actions, the named plaintiff must have a case or controversy against each named defendant. As the United States Supreme Court explained in *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 40 n.20 (1976), 'even named plaintiffs who represent the 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 and which they purport to represent." *See also Kauffman v. Dreyfus Fund, Inc.*, 434 F.2d 727, 734 (3d Cir. 1970) ("[a] Plaintiff who is unable to secure standing for himself is certainly not in a position to 'fairly insure the adequate representation' of those alleged to be similarly situation.").

Standing under the Lanham Act[3] extends only to plaintiffs whose interests "fall within the zone of interests protected by the law invoked." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388, 188 L. Ed. 2d 392 (2014) (internal citations omitted). In the *Lexmark*, the Supreme Court explained:

> to come within the zone of interests in a suit for false advertising under § 1125(a), a plaintiff must allege an injury to a commercial interest in reputation or sales. A consumer who is hoodwinked into purchasing a disappointing product may well have an injury-in-fact cognizable under Article III, but he cannot invoke the

[3] Section 43(a) of the Lanham Act states:

> (1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—
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> (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a).

> protection of the Lanham Act—a conclusion reached by every Circuit to consider the question. *See Colligan v. Activities Club of N. Y., Ltd.*, 442 F.2d 686, 691–692 (C.A.2 1971); *Serbin v. Ziebart Int'l Corp.*, 11 F.3d 1163, 1177 (C.A.3 1993); *Made in the USA Foundation v. Phillips Foods, Inc.*, 365 F.3d 278, 281 (C.A.4 2004); *Procter & Gamble Co.*, 242 F.3d, at 563–564; *Barrus v. Sylvania*, 55 F.3d 468, 470 (C.A.9 1995); *Phoenix of Broward*, 489 F.3d, at 1170. Even a business misled by a supplier into purchasing an inferior product is, like consumers generally, not under the Act's aegis.

Id. at 1390. Additionally, the Court explained that "a statutory cause of action is limited to plaintiffs whose injuries are proximately caused by violations of the statute" and "a plaintiff suing under § 1125(a) ordinarily must show economic or reputational injury flowing **directly from** the deception wrought by the defendant's advertising; and that that occurs when deception of consumers causes them to withhold trade from the plaintiff." 134 S. Ct. at 1391 (emphasis added). As the Supreme Court explained, this requirement ensures that the scope of Lanham Act liability does not balloon beyond what Congress intended, as it limits application of the statute to circumstances in which the "harm" the plaintiff has alleged bears "a sufficiently close connection to the conduct the statute prohibits." *Lexmark*, 134 S. Ct. at 1388-90.

In *Lexmark*, the Supreme Court ultimately concluded that the plaintiff had sufficiently alleged a direct commercial injury under the standard the court was articulating because the plaintiff identified a reasonably specific loss in sales -- "10,000" units -- and plausibly connected that loss to the defendant's alleged "false advertising." *Id.* at 1394. Since the *Lexmark* decision, district courts, including courts in the Eastern District of Pennsylvania, have held that the Lanham Act requires a plaintiff to plead both a specific, identifiable commercial injury and facts sufficient to plausibly connect that injury to the alleged violations of the statute. *See Reese v. Pook & Pook, LLC*, 158 F. Supp. 3d 271, 287-88 (E.D. Pa. 2016) (dismissing a Lanham Act false advertising claim arising out of article about plaintiff where plaintiff alleged "no direct injury arising from the publication of the Article against which the Lanham Act was designed to

protect); *Wall & Associates, Inc. v. Better Business Bureau of Central Virginia, Inc.*, 685 F. App'x 277 (4th Cir. 2017) (affirming dismissal of a Lanham Act claim where the plaintiff did "not identify a single consumer who withheld or canceled business with it or pointed to a particular quantum of diverted sales or loss of goodwill and reputation resulting directly from reliance on any false or misleading representations by [d]efendants."); *Black Diamond Land Mgmt. LLC v. Twin Pines Coal Inc.*, —— Fed. App'x ——, 2017 WL 3635178, at *3 (11th Cir. Aug. 24, 2017) (affirming dismissal of Lanham Act claim where plaintiff alleged that it " 'will continue to be damaged by [d]efendants' false statements,' " but did not "provide any factual support for how or why such an injury to a commercial interest has or will occur");

Here, Plaintiff has not alleged a single fact showing an injury to his commercial interest in reputation or sale.[4] Plaintiff has not identified a single customer who withheld business as a consequence of Defendants' statements. Nor has Plaintiff alleged any specific facts linking a general downturn in its business to the timing of Defendants' statements. To the contrary, all Plaintiff states is that customers pay a premium for spring water, which simply means that Plaintiff is also being paid a premium. Therefore, Plaintiff does not have standing to assert a claim under the Lanham Act.

Here, it is especially apparent that Plaintiff does not have standing to assert a claim against the Defendants as he is not in competition with them. Plaintiff does not allege in his Complaint that he is in the business of selling water. Indeed, Plaintiff would be judicially estopped from making such an assertion. *See Montrose Med. Grp. Participating Sav. Plan v.*

[4] While Plaintiff makes conclusory allegations that Defendants' increased sales hindered its sales (See Exhibit "A", ¶45), under *Iqbal* and *Twombly*, a plaintiff is not permitted to do what Plaintiff is seeking here – to use a barebones pleading as a gateway to discovery in order to determine whether it might have a claim. Rather, a plaintiff is required to plead, in the first instance, sufficient "factual content" to permit "the court to draw the reasonable inference" that the requirements for establishing the cause of action will be met. *Iqbal*, 556 U.S. at 678. Only then are the "doors of discovery" "unlock[ed]." *Id*. at 678-79.

Bulger, 243 F.3d 773, 779 (3d Cir.2001)("When properly invoked, judicial estoppel bars a litigant from asserting a position that is inconsistent with one he or she previously took before a court or agency.") Plaintiff has asserted in a verified complaint in *Frompovicz v. Pennsylvania Department of Environmental Protection, et al.*, Case 5:17-cv-02790-JFL in the Eastern District of Pennsylvania (the "DEP Litigation") that he was ordered by the DEP to cease water shipments on June 18, 2015. (See Exhibit "B," ¶132)[5] Plaintiff has not sold water since that date. (See Exhibit "B," ¶¶148-149)[6] Therefore, Plaintiff is not in competition with Defendant James Land and cannot have been injured by Defendants. *See Lexmark*, 134 S. Ct. at 1392 (explaining where the "plaintiff . . . does not compete with the defendant," it will be especially difficult to establish the requisite "proximate causation.").

Moreover, it is undisputable that Plaintiff is not in the bottling business. (See Exhibit "A," at ¶¶5, 12 and Exhibit "B," ¶1) Therefore, the Complaint must be dismissed. *See Joint Stock Society Case N. Am., Inc*., 266 F.3d 164 (3d Cir. 2001) (no standing where company's vodka had been sold only outside of the United States and plaintiff had no sales within the country); *Natural*

[5] A true and correct copy of the Complaint in the DEP Litigation is attached hereto as Exhibit "B". *See Zahn v. Transamerica Corp.*, 162 F.2d 36, 50 (3d Cir. 1947)(explaining the Court may take judicial notice of pleadings in other cases). In Paragraph 120 of the Complaint in the DEP Litigation, Plaintiff states he was notified on June 12, 2015 that the lab employed by the FAS had reported to the DEP that a positive coliform and e coliform result had been found in a sample. (Exhibit "B") It was a result of the e-coli that the June 28, 2018 Field Order was issued.

[6] In the DEP Litigation, Plaintiff takes the contrary position that DEP's unfair treatment has caused his losses. In response to a Motion to Dismiss the Complaint in the DEP Litigation, a true and correct copy of which is attached hereto as Exhibit "C", Plaintiff states that he had a written contract to supply water to both Niagara bottling facilities "and would continue to do so, in the absence of the arbitrary and capricious actions of the [DEP] Defendants." (See Exhibit "C" at p. 5) He also states "the heavy handed actions of [the DEP Defendants] was the proximate cause that FAS lost the Ice River contract to Pine Valley." (Exhibit "C, p.15, Paragraph No. 3) Thus, Plaintiff has admitted that the reason he is not providing water to these customers is because of actions of the DEP and not because of allegedly "misleadingly marketed, labeled and sold" spring water. Additionally, Plaintiff asserts in the DEP Litigation that Defendant Ice River Springs Water Co. Inc has been purchasing its water supply from another spring source (Fort Franklin) and not Pine Valley since October of 2016 (See Exhibit "B" at ¶¶ 152, 198), yet makes directly contradictory allegations in this Complaint.

Answers, Inc. v. Smithkline Beecham Corp., 529 F.3d 1325 (11th Cir. 2008) (where plaintiff had no existing sales in the marketplace, the injury claimed is far too remote to satisfy the proximate cause requirement); *Maine Springs, LLC v. Nestlé Waters N. Am., Inc.*, No. 2:14-CV-00321-GZS, 2015 WL 1241571, at *6 (D. Me. Mar. 18, 2015) ("plans of eventually marketing and selling bottled water are too speculative to constitute an injury-in-fact for its Lanham Act claim").

B. The Complaint should be dismissed for failure to state a claim.

i. Legal Standard Under Rule 12(b)(6)

A Rule 12(b)(6) motion tests the sufficiency of a complaint to state a legally cognizable claim. *Avellino v. Herron*, 991 F. Supp. 722 (E.D. Pa. 1997)(Robreno, J.). Although the court must review the allegations of the complaint in a light most favorable to the plaintiff (*Markowitz v. Northeast Land Co.*, 906 F.2d 100 (3d Cir. 1990)), it "need not accept as true unsupported conclusions and unwarranted inferences" cast as factual allegations. *Doug Grant, Inc. v. Greate Bay Casino Corp.*, 232 F.3d 173, 174 (3d Cir. 2000), *cert. denied*, 532 U.S. 1038 (2001).

Although the Court must accept all facts alleged as true and draw all reasonable conclusions arising from those facts in favor of plaintiffs, *Allegheny General Hospital v. Phillip Morris*, 228 F.3d 429, 434-35 (3d Cir. 2000), "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Rather, "[f]actual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true (even if doubtful in fact)." *Id.* at 555. This requires "either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory." *Haspel v.*

State Farm Mutual Auto. Ins. Co., 241 Fed. Appx. 837, 839 (3d Cir. 2007) (unpublished), quoting *Twombly*, 550 U.S. at 562; *accord*, *Nolan v. Duffy Connors LLP*, 542 F. Supp. 2d 429, 431 (E.D. Pa. 2008)(Dalzell, J.).

"Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), citing *Twombly*, 550 U.S. at 555); *Phillips v. County of Allegheny*, 515 F.3d 224, 232 (3d Cir. 2008) ("We caution that without some factual allegation in the complaint, a claimant cannot satisfy the requirement that he or she provide not only 'fair notice,' but also the 'grounds' on which the claim rests."), citing *Twombly*, 550 U.S. at 556 n.3. To survive a motion to dismiss, a plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678, citing *Twombly*, 550 U.S. at 556. Here, Plaintiff has failed to state a claim against Movant Defendants as to all counts of the Complaint and therefore the Complaint must be dismissed in its entirety as against Movant Defendants.

ii. There is no private cause of action under the FDCA.

Plaintiff is claiming that the water bottle labels are misleading for one reason, i.e. the water from Pine Valley is not properly classified as "spring water". (See Exhibit "A," Complaint, ¶¶ 29-41) However, FDA regulations specifically define the term "spring water". 21 C.F.R. § 165.110(a)(2)(vi).[7] Therefore, Plaintiff's Complaint requires a direct enforcement of the FDCA

[7] Here, FDA regulations specifically define the term "spring water" as follows:

> The name of water derived from an underground formation from which water flows naturally to the surface of the earth may be "spring water." Spring water shall be collected only at the spring or through a bore hole tapping the underground formation feeding the spring. There shall be a natural force causing the water to flow to the surface through a natural orifice. The location of the spring shall be identified. Spring water collected with the use of an external force shall be from the same underground stratum as the spring, as shown by a measurable hydraulic connection using a hydrogeologically valid method between the bore hole and the natural spring, and shall have all the physical

and the FDCA does not provide for a private cause of action. *See Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 349 at n.4 (emphasis added) ("[t]he FDCA leaves no doubt that it is the Federal Government rather than private litigants who are authorized to file suit for noncompliance with [FDCA regulations]…."); [8] *Braintree Labs., Inc. v. Nephro-Tech, Inc.*, 1997 WL 94237 at *6 (D.Kan. Feb.26, 1997) ("[E]very federal court that has addressed the question has held that the FDCA does not create a private right action to enforce or restrain violations of its provisions."). The FDA has the sole responsibility for enforcing the FDCA and its regulations.2 21 C.F.R. § 7.1 (2009). Indeed, the FDCA specifically provides:

> Except as provided in subsection (b) of this section[9], all such proceedings for the enforcement, or to restrain violations, of this chapter shall be by and in the name of the United States.

21 U.S.C. §337(a). Congress has clearly manifested its unequivocal intent that private plaintiffs be prohibited from bringing civil suits to enforce or restrain alleged violations of the FDCA. That prohibition bars Plaintiff from pursuing his claims in this Court.

While in *POM Wonderful LLC v. Coca-Cola Co.*, 134 S.Ct. 2228 (2014) the Supreme Court held a Lanham Act claim that challenges labels regulated by the FDCA as misleading when defendant was in compliance with the FDCA is not prohibited, the Court did not hold that

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> properties, before treatment, and be of the same composition and quality, as the water that flows naturally to the surface of the earth. If spring water is collected with the use of an external force, water must continue to flow naturally to the surface of the earth through the spring's natural orifice. Plants shall demonstrate, on request, to appropriate regulatory officials, using a hydrogeologically valid method, that an appropriate hydraulic connection exists between the natural orifice of the spring and the bore hole.

21 C.F.R. § 165.110(a)(2)(vi).

[8] Prior to the FDCA's enactment, Congress "considered and rejected a version [of the Act] which would have allowed a private right of action for damages." *Bailey v. Johnson*, 48 F.3d 965, 968 (6th Cir. 1995).

[9]Subsection (b) authorizes a State to "bring in its own name and within its jurisdiction proceedings for the civil enforcement, or to restrain violations, of [various FDCA sections with respect to a food] located in the State," but does not permit private lawsuits to enforce the FDCA.

the Lanham Act could be used to enforce the FDCA and determine whether the water is "spring water", which is the dispute here.[10] Further, state law claims based on allegations that a defendant violated the FDCA are preempted. *Markland v. Insys Therapeutics, Inc.*, 3:16-CV-997-J-34PDB, 2017 WL 4102300, at *8 (M.D. Fla. Sept. 15, 2017) (citing inter alia *Elliott v. Sandoz, Inc.*, Case No. 2:16-cv-861-RDP, 2016 WL 4398407, at *6 (N.D. Ala. Aug. 18, 2016) (claim preempted because "although . . . couched . .. under a negligence standard, granting relief would essentially hold Defendant liable for not following federal law and regulations"); *Blankenship v. Medtronic, Inc.*, 6 F. Supp. 3d 979, 991 (E.D. Mo. 2014) ("While plaintiff couches her claim as a state negligence claim, this claim is, in substance, a claim for violating the FDCA."); *Fulgenzi v. Pliva, Inc.*, 711 F.3d 578, 586 (6th Cir. 2013) (state tort suits impliedly preempted because the FDCA excludes a private right of action).

"In pre-emption cases, the question is whether state law is pre-empted by a federal statute, or in some instances, a federal agency action." *POM Wonderful LLC v. Coca-Cola Co.*, 134 S.Ct. 2228 (2014). Congress specifically "empower[ed] the [FDA] to (a) protect the public health by ensuring that 'foods are safe, wholesome, sanitary, and properly labeled,' 21 U.S.C. §393(b)(2)(A); (b) promulgate regulations pursuant to this authority; and (c) enforce its regulations through administrative proceedings[,] [*s*]*ee* 21 C.F.R. §7.1 *et seq.*" *Hughes v. Ester C Co.*, 99 F. Supp. 3d 278, 281 (E.D.N.Y. 2015). "One of the FDA's crucial tools in its regulatory

[10] Plaintiff's claims are based on the assumption that Pine Valley is not selling spring water, however, the FDA has conducted inspections of Pine Valley and already determined the source to have met the definition of spring water. A true and correct copy of an inspection report is attached here as Exhibit "D". *See Pryor v. Nat'l Collegiate Athletic Ass'n*, 288 F.3d 548, 560 (3d Cir.2002); *see also, U.S. Express Lines, Ltd. v. Higgins*, 281 F .3d382, 388 (3d Cir.2002) (holding that "[a]lthough a district court may not consider matters extraneous to the pleadings, a document integral to or explicitly relied upon in the complaint may be considered without converting the motion to dismiss in one for summary judgment.") The inspection report evidences that the FDA has determined that "the firm operates as a natural spring water supplier" and that the FDA's water quality analysis confirmed that "the well water from the boreholes and the spring water shared the same chemical and physical properties". (See Exhibit "D")

effort is the standard of identity." *Nemphos v. Nestle Waters N. Am., Inc.*, 775 F.3d 616, 623 (4th Cir. 2015) (*citing* 21 U.S.C. §341). "A standard of identity specifies the defining characteristics of a given food," "regulat[ing] the ingredients of a food and its representation in interstate commerce" to ensure "that consumers 'will get what they may reasonably expect to receive.'" *Id.* at 621, 622 (citation omitted). The FDA—and the FDA alone—is authorized to establish "'a reasonable definition and standard of identity'" for foods like bottled water, *id.* at 620 (*quoting* 21 U.S.C. §341), and to enforce that standard by declaring "misbranded" any food product represented to be a given food if it fails to conform to that FDA-prescribed standard, *id.* at 621 (*quoting* 21 U.S.C. §343(g)).

In *In re PepsiCo Bottled Water*, 588 F. Supp. 2d 527 (S.D.N.Y. 2008) plaintiffs alleged that Pepsi misled consumers by deceptively suggesting that its *Aquafina* bottled water was from a mountain source and failing to disclose that the actual source of its *Aquafina* water was a municipal water source. *Id*. at 529. The Court dismissed the case as the FDA had specifically considered bottled water marketing and advertising, suggesting that a product comes from a spring when it does not: "Here the standard of identity for purified water does not require the disclosure of source information, and therefore plaintiffs' state law claims seeking to impose liability on these grounds are expressly preempted." *Id*. at 538. In dismissing the complaint, the Court stated: "Where federal requirements address the subject matter that is being challenged through state law claims, such state law claims are preempted to the extent they do not impose identical requirements.... Accordingly, any state law claims premised on a misrepresentation about the source of purified water are preempted." *Id.* Likewise, the FDA has specifically considered the meaning of spring water and therefore, this claim should be preempted.

iii. Plaintiff's claim for unfair competition must be dismissed.

It is well-settled that the common law cause of action for unfair competition in Pennsylvania mirrors the Lanham Act's section 43(a) cause of action for unfair competition, except that under state law there is no requirement that the goods traveled through interstate commerce. *R.J. Ants, Inc. v. Marinelli Enters., LLC*, 771 F. Supp. 2d 475, 489 (E.D. Pa. 2011); *Louis Vuitton Malletier & Oakley, Inc. v. Veit*, 211 F. Supp. 2d 567, 582 (E.D. Pa. 2002), amended (June 28, 2002) (citing *Haymond v. Lundy*, No. Civ.A. 99-5048, 2001 WL 15956, at *2 (E.D.Pa. Jan.5, 2001); *Gideons Int'l Inc. v. Gideon 300 Ministries, Inc.*, 94 F.Supp.2d 566, 580 (E.D.Pa.1999)); *see also Fisons Horticulture, Inc. v. Vigoro Indus.*, 30 F.3d 466, 472 (3d Cir. 1994)(explaining the test for common law trademark infringement and unfair competition is essentially the same as the test for infringement and unfair competition under the Lanham Act). Therefore, the claim should be dismissed against all Defendants as a result of Plaintiff's failure to plead an injury.

Moreover, in order to state a claim for unfair competition under Pennsylvania law, a plaintiff must allege that it is in competition with the defendant - "that is, that the plaintiff and the defendant "supply[ ] similar goods or services." *Giordano v. Claudio*, 714 F.Supp.2d 508, 523 (E.D. Pa. 2010) (citing *Granite State Ins. Co. v. Aamco Transmissions, Inc.*, 57 F.3d 316, 319 (3d Cir.1995)). Here, as discussed above Plaintiff is clearly not in competition with the Bottlers, who are the very customers he seeks, or in competition period as he is not currently selling water. Therefore, this claim must be dismissed against the Bottlers.

III. CONCLUSION

For all the foregoing reasons, Movant Defendants respectfully request that this Motion be granted and the Complaint dismissed.

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