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Majority Opinion >

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

Dezzi Rae Marshall v. Red Lobster Management LLC, et al.

LA CV21-04786 JAK (MARx)

December 18, 2023, Filed

December 18, 2023, Decided

Attorneys Present for Plaintiffs: Not Present.

Attorneys Present for Defendants: Not Present.

JOHN A. KRONSTADT, UNITED STATES DISTRICT JUDGE.

JOHN A. KRONSTADT

CIVIL MINUTES GENERAL

Proceedings: (IN CHAMBERS) ORDER RE DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT (DKT. 21)

I. Introduction

On June 11, 2021, Dezzi Rae Marshall ("Marshall" or "Plaintiff") brought this putative class action against Red Lobster Management LLC, Red Lobster Seafood Co., LLC, Red Lobster Restaurants LLC and Red Lobster Hospitality LLC. Dkt. 1. On September 20, 2021, Plaintiff filed a First Amended Complaint (the "FAC"), which is the operative one. Dkt. 18. The FAC names only Red Lobster Management LLC and Red Lobster Hospitality

LLC (collectively, "Red Lobster" or "Defendants") as defendants. *Id.* The FAC advances the following causes of action:

1. Unfair and Deceptive Acts and Practices in Violation of the California Consumer Legal Remedies Act ("CLRA"), *Cal. Civ. Code §§ 1750-85* ;
2. Violation of the California False Advertising Law ("FAL"), *Cal. Bus. & Prof. Code §§ 17500 et seq.*; and
3. Violation of the California Unfair Competition Law ("UCL"), *Cal. Bus. & Prof. Code §§ 17200-10* .

Id. ¶¶ 87-113.

The FAC seeks declaratory and injunctive relief, compensatory damages and punitive damages. *Id.* at 35-36.

On November 4, 2021, Defendants filed a Motion to Dismiss the FAC pursuant to Fed. R. Civ. P. 12(b)(6) (the "Motion"). Dkt. 21. On December 20, 2021, Plaintiff filed an opposition to the Motion (the "Opposition"). Dkt. 25. On February 7, 2022, Defendants filed a reply in support of the Motion (the "Reply"). Dkt. 26.

In accordance with Local Rule 7-15, a determination was made that the Motion could be decided without oral argument, and it was taken under submission on May 19, 2022. Dkt. 29. For the reasons stated in this Order, the Motion is **DENIED**.

II. Factual Background

A. The Parties

The FAC alleges that Defendant Red Lobster Management LLC is a Florida limited-liability company whose principal place of business is in Florida. Dkt. 18 ¶ 19. It alleges that Red Lobster Hospitality LLC is a Florida limited-liability company whose principal place of business is in Florida. *Id.* ¶ 20. The FAC alleges that Defendants are part of Red Lobster, a restaurant chain that markets and sells products throughout the United States, including California. *Id.* ¶¶ 17, 28. It alleges that Red Lobster Hospitality LLC is involved in Red Lobster's restaurants and sales and that Red Lobster Management LLC is involved in Red Lobster's "Seafood with Standards" campaign and marketing. *Id.* ¶¶ 19-20.

The FAC alleges that Plaintiff is a citizen of California and a resident of Los Angeles County. *Id.* ¶ 22. It alleges that, on January 4, 2020, Plaintiff purchased Defendants' "Family Feast," "Lobster Lover's Dream" and "Ultimate Feast" items, each of which contained Defendants' Maine lobster and/or shrimp products, at its location located at 27524 The Old Road, Magic Mountain Parkway, Valencia, California. *Id.* ¶ 23. The FAC alleges that, in making her purchases, Plaintiff saw, relied upon and reasonably believed [*2] representations made on the menu about Red Lobster's commitment to sustainability. *Id.* ¶ 24. It alleges that Plaintiff would not have made her purchases had she known that Red Lobster's product sourcing was not sustainable. *Id.* ¶ 25.

B. Red Lobster's Sustainability Representations

The FAC alleges that Red Lobster has deceptively marketed and sold its Maine lobster and shrimp products

(the "Products") by making false claims that the Products were sourced with sustainability in accordance with high environmental and welfare standards. *Id.* at 2. It alleges that Red Lobster's conduct is intended to attract a growing market of consumers who are seeking sustainably-sourced seafood products. *Id.* ¶¶ 2-4. It alleges that these consumers are concerned about the environmental, animal welfare and public health effects of seafood production and, who are willing to pay more for seafood products that are sustainably sourced. *Id.* ¶¶ 2-3.

The FAC alleges that Red Lobster has falsely advertised the purported sustainability of their Products in several ways. *First*, it alleges that Red Lobster makes prominent marketing claims on its restaurant menu that the Products are sustainable. *Id.* ¶ 4. It alleges, for example, that the cover of Red Lobster's menu includes the representations "SEAFOOD WITH STANDARDS" and "Traceable. Sustainable. Responsible." *Id.* ¶ 4. *Second*, it alleges that on the inside of Red Lobster's menu, these representations are repeated along with the statement that "[t]hese are more than just words on our menu—it's our promise that all of the seafood we serve is sourced to the highest standards." *Id.* ¶ 5. The FAC provides the following photographs of these alleged representations (the "Sustainability Representations"):



See *id.* ¶¶ 4-5.

C. Red Lobster's Product Sourcing

The FAC alleges that, despite the Sustainability Representations, Red Lobster's Products are not sustainably sourced. With respect to Red Lobster's Maine lobster products, the FAC alleges they are sourced from the Gulf of Maine lobster fishery, which the United States District Court for the District of Columbia determined was violating the Endangered Species Act. *Id.* ¶¶ 35-36. The FAC further alleges that the Marine Stewardship Council suspended its sustainability certification of the Gulf of Maine lobster fishery following a finding that the fishing gear being employed at the fishery posed legitimate risk to North American right whales. *Id.* ¶¶ 37. The FAC also alleges that the fishery is considered a Category I fishery by the National Marine Fisheries Service ("NMFS"), meaning that it has "frequent incidental mortality and serious injury of marine mammals." *Id.* ¶¶ 38-39. The FAC accordingly alleges that this fishery, from which Red Lobster sources its Maine lobster, has used "environmentally destructive practices that threaten endangered populations of North American right whales." *Id.* ¶ 40.

With respect to Red Lobster's shrimp products, the FAC alleges that they are sourced from Indonesia, Vietnam, India and China. *Id.* ¶ 41. It alleges that industrial shrimp farms in those countries engage [*3] in environmentally destructive practices, poor reporting of environmental data and standards and overuse of antibiotics. *See id.* ¶¶ 41-59. The FAC further alleges that Red Lobster's shrimp suppliers use inhumane practices including routine eyestalk ablation, a practice in which the eyestalk gland of female shrimps is crushed, burned or cut off, without painkillers, in order to increase reproduction. *Id.* ¶ 9. The FAC alleges that, due to these sources' harmful environmental impacts and overuse of antibiotics, Monterey Bay Aquarium's Seafood Watch advises that customers seeking sustainable seafood should not choose shrimp products from Indonesia, Vietnam, India and China. *Id.* ¶¶ 8, 48.

D. Alleged Injury to Consumers

Based on the foregoing allegations, the FAC alleges that Red Lobster's Products are made from lobster and shrimp sourced from suppliers whose practices are environmentally destructive and inhumane. *Id.* ¶ 60. It then alleges that Red Lobster's Sustainability Representations -- which allegedly represent to consumers that the Products are sourced in accordance with the highest environmental and animal welfare standards -- are "false, deceptive and misleading." *Id.* It alleges that the Representations are material and likely to deceive the public. *Id.* ¶¶ 61-62.

The FAC also alleges that consumers who dine at Red Lobster lack the information necessary to discover whether the Products are in fact sustainable, and may reasonably rely on the Sustainability Representations. *Id.* ¶ 10. It alleges that Red Lobster intends for consumers to rely on the Sustainability Representations, calling them "a promise" and "more than words." *Id.* ¶ 11, 68. It further alleges that consumers -- including Plaintiff and class members -- did and do, in fact, rely on the representations, and that reasonable consumers who see them would expect that the Products are sourced sustainably, in accordance with the highest environmental and animal welfare standards, and have no negative environmental impact. *Id.* ¶¶ 6, 11, 25, 30. The FAC alleges that the result of Red Lobster's purported deception is the ability to sell a greater volume of the Products at higher prices and to take away market share from competitors, thereby increasing its own sales and profits. *Id.* ¶ 12.

The FAC alleges that, despite the Representations, Red Lobster knows that its Products were falsely and

deceptively marketed because, for example, it has continued to source its Products from certain suppliers even after learning that they were found to be in violation of the Endangered Species Act. *Id.* ¶¶ 65-66. It alleges that Red Lobster is profiting from this conduct. *Id.* ¶ 71.

III. Analysis

A. Article III Standing

1. Legal Standards

Because federal courts are courts of limited jurisdiction, "[a] federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears." *Stock W., Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989) (citing *Cal. ex rel. Younger v. Andrus*, 608 F.2d 1247, 1249 (9th Cir. 1979)). If a plaintiff lacks standing under Article III, an action must be dismissed for lack of subject matter jurisdiction. [*4] See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 109-10, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998); accord *Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011).

"[T]o satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)). When a plaintiff seeks injunctive relief, establishing standing under Article III also requires a showing of "real or immediate threat that the plaintiff will be wronged again -- a 'likelihood of substantial and immediate irreparable injury.'" *City of L.A. v. Lyons*, 461 U.S. 95, 111, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 502, 94 S. Ct. 669, 38 L. Ed. 2d 674 (1974)).

A defendant contesting subject matter jurisdiction may do so through a motion to dismiss brought pursuant to Fed. R. Civ. P. 12(b)(1). See, e.g., *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039-40 (9th Cir. 2003). In general, a jurisdictional challenge may be fact-based or one that relies on the face of the complaint. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). The latter "asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." *Id.* In assessing a facial challenge, a court must accept the allegations of the complaint as true and construe them in favor of the party asserting jurisdiction. *Warth v. Seldin*, 422 U.S. 490, 501, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975).

2. Application

Defendants argue that Plaintiff does not have standing to seek injunctive relief because the FAC fails sufficiently to allege a risk of future harm that is "certainly impending." Dkt. 21 at 29 (quoting *Hanna v. Walmart Inc.*, No. 20-CV-1075-MCS, [2020 BL 490863], 2020 U.S. Dist. LEXIS 237505, [2020 BL 490863], 2020 WL 7345680, at *7 (C.D. Cal. Nov. 4, 2020)). Plaintiff contends that Defendants' argument is foreclosed by *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956 (9th Cir. 2018). Dkt. 25 at 28-30.

Davidson arose in the context of a plaintiff's claim that the defendant had falsely advertised the "flushable"

nature of its personal cleansing wipes. *Davidson*, 889 F.3d at 961 . The plaintiff maintained that she had standing to pursue injunctive relief because she sought to continue purchasing the defendant's wipes but, going forward, had no reliable way of determining whether the wipes were flushable. *Id.* at 971. The Ninth Circuit concluded that these allegations were sufficient to establish standing to seek injunctive relief. *Id.* at 972. It held that for plaintiffs in consumer fraud cases, "the threat of future harm may be the consumer's plausible allegations that she will be unable to rely on the product's advertising or labeling in the future, and so will not purchase the product although she would like to." *Id.* at 969-70. It then concluded that "a previously deceived consumer may have standing to seek an injunction against false advertising or labeling, even though the consumer now knows or suspects that the advertising was false at the time of the original purchase." *Id.* at 969.

The FAC alleges that Plaintiff "wishes to be able to continue purchasing the Products and, therefore, [*5] wishes to see them truthfully and sustainably sourced in accordance with the highest environmental and animal welfare standards." Dkt. 18 ¶ 27. It further alleges that consumers, including Plaintiff, "lack the information and scientific knowledge necessary to determine whether the Products are in fact 'sustainable' " and as a result "must and do rely on Red Lobster to report honestly whether the lobster and shrimp used in the Products are sourced from suppliers that use environmentally destructive and inhumane practices." *Id.* ¶¶ 63-64. These allegations, which establish Plaintiff's "inability to rely on the validity of the information advertised [by Red Lobster] despite her desire to purchase [sustainable Products]," align Plaintiff's basis for standing with that of the plaintiff in *Davidson* . 889 F. 3d at 971 .

The allegations in the FAC are also sufficient to distinguish this case from other consumer fraud actions in which the fraud was more self-evident and in which the consumer who brought litigation would not be misled in the future. *See, e.g., Cordes v. Boulder Brands USA, Inc.*, No. 18-CV-6534 PSG, [2018 BL 481733], 2018 U.S. Dist. LEXIS 217534 , [2018 BL 481733], 2018 WL 6714323 , at *4 (C.D. Cal. Oct. 17, 2018) ("[N]ow that Plaintiff is on notice about potential underfilling, he could easily determine the number of pretzels in each package before making a future purchase by simply reading the back panel . . . [o]r, he could feel the bag."); *Matic v. United States Nutrition, Inc.*, No. 18-CV9592-PSGX, [2019 BL 291342], 2019 U.S. Dist. LEXIS 131576 , [2019 BL 291342], 2019 WL 3084335 , at *8 (C.D. Cal. Mar. 27, 2019) ("Plaintiff is now aware that he can find out how much protein powder is in Defendant's containers by simply looking at the label."). The allegations in the FAC are different. They are sufficient to show that Plaintiff, a layperson without any alleged expertise in environmental science or sustainability processes, would be unable to verify and rely on Red Lobster's Sustainability Representations going forward. *See Olmos v. T. Marzetti Co.*, No. 21-CV-3159-JAK, 2022 U.S. Dist. LEXIS 236205 , 2022 WL 18358950 , at *6 (C.D. Cal. Oct. 11, 2022).

A court is "required at this stage of the proceedings to presume the truth of [plaintiffs'] allegations and to construe all of the allegations in [their] favor." *Davidson*, 889 F.3d at 971 . Accordingly, under these standards, the FAC includes sufficient allegations that Plaintiff "faces an imminent or actual threat of future harm" due to the alleged false advertising by Defendants, *i.e.*, that Plaintiff is "unable to rely on [Defendants'] representations of [their] product in deciding whether or not she should purchase the product in the future." *Id.* at 971-72.

For the foregoing reasons, Plaintiff has standing to pursue injunctive relief, and the Motion is DENIED as to this

issue.

B. Fed. R. Civ. P. 12(b)(6)

1. Legal Standards

Fed. R. Civ. P. 8(a) provides that a "pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." The pleading that states a claim must state facts sufficient to show that a claim for relief is plausible on its face. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). A complaint need not include detailed factual allegations but must provide more than a "formulaic recitation of the elements of a cause of action." *Id.* at 555. "The plausibility standard is not [*6] akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (internal quotation marks and citations omitted).

Pursuant to Fed. R. Civ. P. 12(b)(6), a party may bring a motion to dismiss a cause of action that fails to state a claim. It is appropriate to grant such a motion only where the complaint lacks a cognizable legal theory or sufficient facts to support one. *See Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). In considering a motion to dismiss, the allegations in the challenged complaint are deemed true and must be construed in the light most favorable to the non-moving party. *See Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). However, a court need not "accept as true allegations that contradict matters properly subject to judicial notice or by exhibit. Nor is the court required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (citing *Sprewell*, 266 F.3d at 988).

If a motion to dismiss is granted, the court should "freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2). Although this policy is to be applied "with extreme liberality," *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001), allowing leave to amend is inappropriate in circumstances where litigants have failed to cure previously identified deficiencies, or where an amendment would be futile. *See Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962); *Allen v. City of Beverly Hills*, 911 F.2d 367, 374 (9th Cir. 1990).

C. Application

Defendants present several arguments to support their contention that the FAC fails to state a claim for violations of the FAL, CLRA or UCL. Dkt. 21 at 13. *First*, Defendants argue that the FAC fails to satisfy the pleading standings of Fed. R. Civ. P. 9(b). *Id.* at 13-18. *Second*, Defendants argue that the allegations in the FAC fail to meet the "reasonable consumer" test. *Id.* at 18-25. *Third*, Defendants argue that the statements that are challenged by the FAC are not actionable. *Id.* at 26-28. *Fourth*, Defendants argue that the FAC fails to state a claim under the "unlawful" and "unfair" prongs of the UCL. *Id.* at 28. *Finally*, Defendants argue that the prayer for punitive damages in the FAC should be stricken. *Id.* at 30-31.

1. Whether the FAC Meets the Heightened Pleading Standards of Fed. R. Civ. P. 9(b)

Fed. R. Civ. P. 9(b) provides that, with respect to claims of fraud, a complaint must state "the circumstances constituting the fraud or mistake . . . with particularity." Stating with particularity requires the plaintiff to articulate "the who, what, when, where, and how of the misconduct charged." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097 , 1106 (9th Cir. 2003). As the Ninth Circuit has also explained:

Rule 9(b) serves three purposes: (1) to provide defendants with adequate notice to allow them to defend the charge and deter plaintiffs from the filing of complaints "as a pretext for the discovery of unknown wrongs"; (2) to protect those whose reputation would be harmed as a result of being subject to fraud [*7] charges; and (3) to "prohibit [] plaintiff[s] from unilaterally imposing upon the court, the parties and society enormous social and economic costs absent some factual basis."

Kearns v. Ford Motor Co., 567 F.3d 1120 , 1125 (9th Cir. 2009) (quoting *In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399 , 1405 (9th Cir.1996)). Claims asserted under California's consumer protection statutes, including the FAL, CLRA and UCL, which are based on fraud, are subject to Rule 9(b) . *Id.*; *Williams v. Apple, Inc.*, 449 F. Supp. 3d 892 , 910-911 (2020).

Defendant argues that Plaintiff's claims are not sufficiently alleged under the standards of Rule 9(b) because the FAC fails to plead specific facts establishing when the misleading statements occurred, what those statements were, who made the statements and how the statements were misleading. Dkt. 21 at 14. Plaintiff argues that it is not clear that Rule 9(b) applies, but contends that its standards are satisfied by the allegations in the FAC. Dkt. 25 at 21-25.

Plaintiff's claims are subject to Rule 9(b) . As Plaintiff recognizes (Dkt. 21 at 22), the Ninth Circuit has adopted the narrow exception that "Rule 9(b) requirements may not even be necessary" where a complaint alleges violations of the FAL, CLRA or UCL through "mere negligence." *Moore v. Mars Petcare US, Inc.*, 966 F.3d 1007 , 1019 n.11 (9th Cir. 2020). However, the FAC does not allege that Defendants engaged in negligence. *See generally* Dkt. 18. Instead, it alleges that Defendants violated the FAL, CLRA and UCL by "inten[tionally]" engaging in "false," "misleading," "fraudulent" and "deceptive" conduct. *See, e.g., id.* ¶¶ 11, 91, 98-99, 104, 106-07. Therefore, because the FAC alleges that Defendants' acts were more than "mere negligence," the exception in *Moore* does not apply, and Rule 9(b) applies to Plaintiff's FAL, CLRA and UCL claims.

The allegations of the FAC satisfy Rule 9(b) . *First*, the FAC alleges that the "who" are Defendants Red Lobster Hospitality LLC and Red Lobster Management LLC. *Id.* ¶¶ 19-20. It alleges that Defendants are part of Red Lobster, which "created and/or authorized the false and deceptive marketing of the Products" by "mak[ing] prominent marketing claims on its restaurant menu that the Products are sustainable." *Id.* ¶¶ 4, 21. It further alleges that both Defendants played a role in Red Lobster's allegedly deceptive practices because Red Lobster Management LLC was "involved in Red Lobster's 'Seafood with Standards' campaign and marketing" and Red Lobster Hospitality LLC was "involved in Red Lobster's restaurants and sales." *Id.* ¶¶ 19-20. Therefore, the FAC adequately " 'identif[ies] the role of [each] defendant[] in the alleged fraudulent scheme.' " *Swartz v. KPMG LLP*, 476 F.3d 756 , 765 (9th Cir. 2007) (quoting *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531 , 541 (9th Cir. 1989)).

Second, the FAC alleges that the "when" and "where" is January 4, 2020, at Defendants' Red Lobster restaurant at 27524 The Old Road, Magic Mountain Parkway, Valencia, California. Dkt. 18 ¶ 23. The FAC

alleges that, on this date, Plaintiff visited Red Lobster, and purchased three different items involving the Products. *Id.* The FAC further alleges that, in purchasing the items on that date, Plaintiff saw, relied upon and reasonably believed Red Lobster's Sustainability Representations and that Plaintiff [*8] would not have made her purchases had she known that Red Lobster's Products were not sustainably sourced. *Id.* ¶¶ 24-26.² Because the FAC alleges an exact date and location on which Plaintiff was allegedly deceived by Defendants' fraudulent conduct, it is distinguishable from the cases cited by Defendants in which the complaints offered merely "conclusory allegations that a plaintiff was 'exposed' to the allegedly misleading statement 'within the class period.'" Dkt. 21 at 14 (citing *Beasley v. Lucky Stores, Inc.*, 400 F. Supp. 3d 942, 955 (N.D. Cal. 2019); *Beasley v. Conagra Brands, Inc.*, 374 F. Supp. 3d 869, 882 (N.D. Cal. 2019); *Yumul v. Smart Balance*, 733 F. Supp. 2d 1117, 1124 (C.D. Cal. 2010)). Moreover, although Defendants argue that the FAC fails to specify when the Sustainability Representations that Plaintiff observed "first appeared on a Red Lobster menu, and whether they remained consistent throughout the class period" (Dkt. 21 at 15), Rule 9(b) does not require a plaintiff to plead such facts that are "peculiarly within the opposing party's knowledge" (*Nayab v. Cap. One Bank (USA), N.A.*, 942 F.3d 480 (9th Cir. 2019)). Therefore, the FAC adequately establishes "when and where [the alleged misrepresentations] occurred." *Vess*, 317 F.3d at 1107 .

Third, the FAC alleges that the "what" is Defendants' allegedly false and deceptive statements on its menu regarding the sustainable sourcing of the Products. Dkt. 18 at 2. These statements include "Seafood with Standards" and "Traceable. Sustainable. Responsible." as well as Defendants' statement that "[t]hese are more than just words on our menu--it's our promise that all of the seafood we serve is sourced to the highest standards." *Id.* ¶¶ 4-5. The FAC further alleges that the "how" is the allegation that these statements are false and misleading because they cause reasonable customers to believe that the Products "are sourced sustainably in accordance with the highest environmental and animal welfare Standards" when they are actually "sourced from suppliers that use environmentally destructive and inhumane practices." *Id.* ¶¶ 6, 60. In support of these general allegations, the FAC offers specific allegations about the sources of Defendants' Products; the practices employed by those sources; the certifications and categorizations of the sources by relevant environmental organizations; and other information about the overall positioning of the Products with respect to sustainability and animal welfare. *See id.* ¶¶ 35-59. These allegations are "specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged." *Semegen v. Weidner*, 780 F.2d 727 (9th Cir. 1985).

For the foregoing reasons, the FAC meets the heightened pleading standards of Rule 9(b) , and the Motion is **DENIED** as to this issue.

2. Whether the FAC Fails the Reasonable Consumer Test

It is undisputed that Plaintiff's claims are governed by the "reasonable consumer" test. *See* Dkt. 21 at 18; Dkt. 25 at 13. To prevail on these claims, Plaintiff "must show that members of the public are likely to be deceived." *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008) (internal quotation marks and citation omitted). "This requires more than a mere possibility that [the Sustainability [*9] Representations] 'might conceivably be misunderstood by some few consumers viewing [them] in an unreasonable manner.'" *Ebner v. Fresh, Inc.*, 838 F.3d 958, 965 (9th Cir. 2016) (quoting *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 508, 129 Cal. Rptr. 2d 486 (2003)). "Rather, 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, could be misled." *Id.* (internal quotation marks and citation omitted). However, a plaintiff need not show that the challenged representation is false. A representation that "although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public," also can be actionable. *Williams*, 552 F.3d at 938 (internal quotation marks and citation omitted). The reasonable consumer standard raises questions of fact that are appropriate for resolution on a motion to dismiss only in "rare situation[s]." *Id.* at 939.

The allegations in the FAC satisfy the "reasonable consumer" test at the pleading stage. The FAC contains adequate allegations that, if proven, would establish that Red Lobster's Sustainability Representations induce reliance by reasonable customers. The FAC alleges that "[c]onsumers lack the information and scientific knowledge necessary to determine whether the Products are in fact 'sustainable' or sourced to the 'highest standards' and to know or to ascertain the true quality of the Products." Dkt. 18 ¶ 63. It then alleges that reasonable consumers "must and do rely on Red Lobster to report honestly whether ... the Products are sourced from suppliers that use environmentally destructive and inhumane practices." *Id.* ¶ 64. The FAC further alleges that "Red Lobster intends for consumers to rely on its representations" by assuring them that its representations are "more than just words on a menu" and instead a "promise" on which consumers can rely. *Id.* ¶ 68.

In this context, the FAC then alleges that a reasonable consumer who relies on Red Lobster's representations would be deceived by them. It alleges that the representations "convey to a reasonable consumer that the Products are made from lobster and shrimp sourced in accordance with the highest environmental and animal welfare standards." *Id.* ¶ 30. Despite these representations, the FAC alleges that the Products are not sourced in accordance with the highest standards, but instead are sourced from suppliers whose practices are environmentally destructive and harmful to at least one population of whales. *See id.* ¶¶ 35-59. Accordingly, the allegations in the FAC, which are accepted as true, are sufficient to establish that "members of the public are likely to be deceived" by Red Lobster's Sustainability Representations because they would induce reasonable customers to have the inaccurate belief that the Products are sustainably sourced. *Williams*, 552 F.3d at 934 (internal quotation marks and citation omitted). In support of this conclusion, the FAC offers additional allegations based on survey research and Federal Trade Commission ("FTC") guidelines. Dkt. 18 ¶¶ 31-34. For these reasons, [*10] the FAC has sufficient allegations to satisfy the "reasonable consumer" test.

Defendants contend that the FAC fails to satisfy the "reasonable consumer" test for three reasons. *First*, they argue that Plaintiff unduly focuses on the Sustainability Representations contained in Red Lobster's menus when those representations invite Red Lobster customers to "learn more about [Red Lobster's] commitments at www.redlobster.com/SeaFoodWithStandards." *Id.* ¶ 5; *see* Dkt. 21 at 20. Defendants argue that any reasonable consumer would accept that invitation by visiting Red Lobster's website. Dkt. 21 at 20-21. Defendants provide no information about the contents of the website that would be material to such a consumer. Therefore, this argument is unpersuasive given that the allegations of the FAC are deemed true, and Defendants do not adequately explain how a consumer visit to the website would clarify or correct the allegedly deceptive information on the Red Lobster's instore menu. Furthermore, Defendants have not shown, based on the allegations of the FAC, that a reasonable consumer would be expected to visit the website. As the Ninth Circuit has recognized, a reasonable consumer cannot be expected to cross-check information

contained on the front of a product package against additional information on the side of the package. *Williams*, 552 F.3d at 939 ; *see also Schneider v. Chipotle Mexican Grill, Inc.*, 328 F.R.D. 520 , 532 (N.D. Cal. 2018) ("It would not be reasonable to expect a consumer to search for disclaimers on a website to clarify a purported misrepresentation on in-store signage."). The only case on which Defendants rely, *Moore v. Trader Joe's Co.*, 4 F.4th 874 (9th Cir. July 15, 2021), does not warrant a different outcome at this stage of the proceedings because it did not charge a reasonable consumer with considering any information beyond "contextual inferences from the product itself." *Moore*, 4 F.4th at 883 ; *see* Dkt. 21 at 20-21.

Second, Defendants argue that Red Lobster's Sustainability Representations are not deceptive in light of Merriam-Webster's definition of "sustainable," which refers to whether a resource is used "so that the resource is not depleted or permanently damaged." Dkt. 21 at 21 (quoting *Merriam-Webster*, www.merriam-webster.com/dictionary/sustainability (last visited on December 5, 2023)). However, because the FAC alleges that Red Lobster's Products are sourced through systems that are "environmentally destructive" (Dkt. 18 ¶ 7), it adequately alleges that Red Lobster's Products are not sustainable even under the Merriam-Webster definition. Therefore, even if that definition were applied, based on the allegations of the FAC, a reasonable customer could be deceived by the Sustainability Representations. Moreover, the alleged misrepresentations are not limited to guarantees of sustainability. For example, it is alleged that Red Lobster not only represents that the Products are sustainable, but "that all of the seafood [it] serve[s] is sourced to the highest standards." *Id.* ¶ 5. Therefore, because the Products could be sustainably sourced and simultaneously not sourced to the highest [*11] standards, a reasonable consumer could be deceived by Red Lobster's Sustainability Representations independent of the apparent "sustainability" of the Products.

Third, Defendants argue that the consumer surveys offered in support of the FAC's "reasonable consumer" allegations have irregularities and nuances making them "untethered from the actual facts and circumstances of the disputed deceptive statements." Dkt. 21 at 22; *see id.* at 23-24. Defendants then argue that these surveys "cannot establish how a 'reasonable consumer' would interpret the challenged language." *Id.* at 22. This argument is unpersuasive both because the allegations of the FAC are deemed true, and if all references to consumer surveys were excluded, the FAC already offers a sufficient basis for why a reasonable consumer would be deceived by Defendants' alleged misrepresentations. *See* Dkt. 18 ¶¶ 60-71. The cases on which Defendants rely stand for the proposition that consumer surveys cannot, "on [their] own," prop up arguments that are otherwise unconvincing or implausible. *See Becerra v. Dr Pepper/Seven Up, Inc.*, 945 F.3d 1225 , 1231 (9th Cir. 2019) ("The survey cannot, on its own, salvage Becerra's claim."); *Tucker v. Post Consumer Brands, LLC*, No. 19-CV-03993-YGR, [2020 BL 150257], 2020 U.S. Dist. LEXIS 71090 , [2020 BL 150257], 2020 WL 1929368 , at *5 (N.D. Cal. Apr. 21, 2020) ("[T]he consumer survey described in the amended complaint cannot, on its own, satisfy the reasonable consumer test."); *Hawyuan Yu v. Dr Pepper Snapple Grp., Inc.*, No. 18-CV-06664-BLF, [2020 BL 386002], 2020 U.S. Dist. LEXIS 185322 , [2020 BL 386002], 2020 WL 5910071 , at *5 (N.D. Cal. Oct. 6, 2020) ("[A]dding surveys cannot alone salvage implausible claims."); *Clark v. Westbrae Nat., Inc.*, No. 20-CV-03221-JSC, [2021 BL 150907], 2021 U.S. Dist. LEXIS 78703 , [2021 BL 150907], 2021 WL 1580827 , at *3 (N.D. Cal. Apr. 22, 2021) ("[T]he survey does not shift the prevailing reasonable understanding of what reasonable consumers [would] understand." (internal quotations and citation omitted)). Defendants' similarly styled criticisms of the FTC guidelines referenced in the FAC (Dkt. 21 at 24-25; *see* Dkt. 18 ¶ 31) fail to move the needle for the same reason: because the FAC puts forth those guidelines as

support, not foundation, for an already reasonable theory of consumer deception.

For the foregoing reasons, because the allegations of the FAC are sufficient to satisfy the reasonable consumer test, the Motion is **DENIED** as to this issue.

3. Whether the Challenged Statements Are Actionable

"[G]eneralized, vague, and unspecific assertions[] constitute[e] mere 'puffery' upon which a reasonable consumer could not rely," and thus are not actionable under the UCL, FAL or CLRA. *Glen Holly Entm't, Inc. v. Tektronix Inc.*, 343 F.3d 1000 , 1015 (9th Cir. 2003). "The common theme that seems to run through cases considering puffery in a variety of contexts is that consumer reliance will be induced by specific rather than general assertions." *Cook, Perkiss, and Liehe, Inc. v. Northern California Collection Service Inc.*, 911 F.2d 242 , 246 (9th Cir. 1990); *see also Newcal Indus., Inc. v. Ikon Office Solution*, 513 F.3d 1038 , 1053 (9th Cir. 2008) ("A statement is considered puffery if the claim is extremely unlikely to induce consumer reliance. Ultimately, the difference between a statement of fact and mere puffery rests in the specificity or generality of the claim."); *Haskell v. Time, Inc.*, 857 F. Supp. 1392 , 1399 (E.D. Cal. 1994) ("The distinguishing characteristics of puffery are [*12] vague, highly subjective claims as opposed to specific, detailed factual assertions."). Consequently, factual representations are actionable, while advertisements that amount to mere puffery are not. *Cook*, 911 F.2d at 246 .

Defendants argue that the Sustainability Representations, even if deceptive, are not actionable because they constitute "mere puffery." Dkt. 21 at 26-28. Plaintiff contends that the representations are not puffery because they are specific, factual and objectively verifiable. Dkt. 25 at 25-26.

The alleged Sustainability Representations cannot be deemed mere puffery at this stage of the proceedings. As noted, the FAC alleges that the representations appear in the context of a "promise" by Red Lobster that its representations are "more than just words on the menu." Dkt. 18 ¶ 5. The representations go on to claim, specifically, that Red Lobster's Products are "sustainable" and "sourced to the highest standards." *Id.* ¶¶ 4-5. Each of these statements is a "specific factual assertion which could be established or disproved through discovery." *Annunziato v. eMachines, Inc.*, 402 F. Supp. 2d 1133 , 1140-41 (C.D. Cal. 2005). The representation that the Products are "sourced to the highest standards" (Dkt. 18 ¶ 5) is a fact that is clear, capable of verification and capable of inducing consumer reliance. *See, e.g., Zeiger v. WellPet LLC*, 304 F. Supp. 3d 837 , 851 (N.D. Cal. 2018) (claim that product suppliers "adhere to the highest standards" is not puffery); *L.A. Taxi Coop, Inc. v. Uber Techs.*, 114 F. Supp. 3d 852 , 861 (N.D. Cal. 2015) (claim that the defendant sets "the strictest safety standards possible" is not puffery); *Annunziato*, 402 F. Supp. 2d at 1140 (claim that product employs "most stringent quality control tests" is not puffery). With respect to the representation that the Products are "sustainable," although sustainability can be measured in different ways, this alleged representation is fact-based. *See, e.g., White v. Kroger Co.*, No. 21-CV-08004-RS, [2022 BL 102629], 2022 U.S. Dist. LEXIS 54273 , [2022 BL 102629], 2022 WL 888657 , at *1-2 (N.D. Cal. Mar. 25, 2022) (claim that product is "reef friendly" is not puffery); *Beyer v. Symantec Corp.*, 333 F. Supp. 3d 966 , 977 (N.D. Cal. 2018) (claim that software is "industry leading" is not puffery).

For the foregoing reasons, because the challenged statements are actionable and not mere puffery, the Motion is **DENIED** as to this issue.

4. Whether the FAC States a Claim under the UCL

The UCL prohibits "any unlawful, unfair or fraudulent business act or practice." Cal. Bus. & Prof. Code § 17200 . "Each prong of the UCL is a separate and distinct theory of liability," with the "unlawful," "unfair," and "fraudulent" prongs each offering "an independent basis for relief." *Kearns v. Ford Motor Co.*, 567 F.3d 1120 , 1127 (9th Cir. 2009).

The FAC alleges that Defendants have violated all three prongs of the UCL. Dkt. 18 ¶ 104; *see id.* ¶¶ 105-08. Moreover, it is undisputed that the FAC relies on the same conduct -- Defendants' alleged violations of the CLRA and FAL -- for all three prongs. Dkt. 21 at 28; Dkt. 25 at 27. Defendants argue that because the FAC's claims under the CLRA and FAL are not adequately alleged, its claims under the UCL's "unlawful" and "unfair" prongs necessarily fail. Dkt. 21 at 28. Plaintiff responds that because the FAC sufficiently pleads unlawful conduct under the CLRA and FAL, its "unlawful" and "unfair" UCL claims are sufficiently alleged. Dkt. 25 at 27.

As noted, [*13] the FAC meets the heightened pleading standards of Rule 9(b) , satisfies the reasonable consumer test and concerns appropriately actionable statements. Defendants do not contest any other aspects of the FAC's CLRA and FAL claims. Therefore, because it has been determined that the CLRA and FAL claims are sufficiently alleged, the challenge to the UCL claim fails. *See, e.g., Lorentzen v. Kroger Co.*, 532 F. Supp. 3d 901 , 911 (C.D. Cal. 2021) ("[A]s Plaintiff's allegations are tied to asserted violations of the FAL and CLRA (which survive under both Rule 12(b)(6) and Rule 9(b) as discussed supra), both of her UCL claims also survive.").

For the foregoing reasons, the Motion is **DENIED** as to this issue.

5. Whether the FAC States a Prayer for Punitive Damages

Defendants argue that Plaintiff's prayer for punitive damages should be dismissed because the FAC does not allege a plausible factual support for such relief. Dkt. 21 at 30. Plaintiff disagrees. Dkt. 25 at 30.

District courts have reached different outcomes as to the pleading standards that apply when considering the legal sufficiency of a prayer for punitive damages on a motion to dismiss. *Compare Kelley v. Corr. Corp. of Am.* , 750 F. Supp. 2d 1132 , 1147-48 (E.D. Cal. 2010) ("dismissing" punitive damages from complaint), *and Danielson v. Wells Fargo Bank*, No. CV-11-5927 PSG, 2011 U.S. Dist. LEXIS 110090 , [2011 BL 406623], 2011 WL 4480849 , at *3 (C.D. Cal. Sept. 26, 2011) ("The Ninth Circuit has implicitly authorized the use of a 12(b)(6) motion to challenge a prayer for damages precluded by law."), *with Hennighan v. Insphere Ins. Sols., Inc.*, No. 13-CV-00638-JST, [2013 BL 110441], 2013 U.S. Dist. LEXIS 58888 , [2013 BL 110441], 2013 WL 1758934 , at *6 (N.D. Cal. Apr. 24, 2013) ("This Court is not persuaded that *Twombly* and *Iqbal* apply to claims for punitive damages."), *Putini v. Blair Corp.*, No. 09-CV-2729, [2010 BL 98495], 2010 U.S. Dist. LEXIS 42923 , [2010 BL 98495], 2010 WL 1797019 , at *2-3 (S.D. Cal. May 3, 2010) (declining to extend *Iqbal* to punitive damages claims); *Lion Raisins, Inc. v. Conn. Indem. Co.*, No. 03-CV-6744-OWW, [2006 BL 135020], 2006 U.S. Dist. LEXIS 11155 , [2006 BL 135020], 2006 WL 509536 , at *17 (E.D. Cal. Mar. 2, 2006) (heightened standard should not be applied on a motion to dismiss and is more appropriate at summary judgment and trial stages), *and Villareal v. City of Indio*, No. CV-16-00141-JAK, 2016 WL 6678010 , at *10 (C.D. Cal. June 20, 2016) ("Although these allegations are sparse, little purpose would be served by assessing this issue in detail

at this stage of the proceedings.").

Regardless of the appropriate standard at the pleading stage, "a corporate entity cannot commit willful and malicious conduct; instead, 'the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.'" *In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, 313 F. Supp. 3d 1113 , 1147 (N.D. Cal. 2018) (quoting Cal. Civ. Code § 3294(b)). Thus, to state a prayer for punitive damages, Plaintiff must allege that "an officer, director, or managing agent of Defendant[] committed an act of oppression, fraud, or malice." *Id.* at 1148.

Although the allegations are sparse, neither party nor judicial efficiency would be served by addressing this issue at this stage of the proceedings. The FAC alleges that Defendants were respectively involved in Red Lobster's "restaurants and sales" and sustainability "campaign and marketing." Dkt. 18 ¶¶ 19-20. The FAC further alleges that Red Lobster, collectively, has engaged in fraudulent conduct by issuing false and deceptive [*14] misrepresentations about the supposed sustainability of its Products. *Id.* ¶¶ 11-12, 14-15, 104. "These allegations ... plausibly suggest a calculated plan to injure Plaintiffs, which could not have occurred absent advance knowledge, authorization, or ratification by an officer, director, or managing agent of the Defendant[s]." *Rees v. PNC Bank, N.A.*, 308 F.R.D. 266 , 275 (N.D. Cal. 2015); *see also Anaya v. Machines de Triage et Broyage*, No. 18-CV-01731-DMR, [2019 BL 29062], 2019 U.S. Dist. LEXIS 14316 , [2019 BL 29062], 2019 WL 359421 , at *5 (N.D. Cal. Jan. 29, 2019) ("Plaintiffs may meet the standard for pleading punitive damages against corporate employers by showing that the harm alleged could not have occurred in the absence of authorization or ratification by corporate employer.").

This issue can be considered later in this action through a motion, which is based on the evidence, if any, that is developed as to the claimed basis for punitive damages. Because the discovery as to these issues will overlap substantially with discovery on the merits of the underlying claims, it will not be unduly burdensome to defer a determination; provided, however, this is without prejudice to presenting the issue of undue burden in connection with a specific discovery dispute.

For the foregoing reasons, because the prayer for punitive damages is sufficient, the Motion is DENIED as to this issue.

IV. Conclusion

For the reasons stated in this Order, the Motion is **DENIED**. Defendants shall file an answer to the FAC within 30 days of the issuance of this Order.

IT IS SO ORDERED.

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Plaintiff has also filed three Notices of Decision. On February 22, 2022, Plaintiff filed a Notice of Decision regarding *GMO Free USA v. ALDI, Inc.*, No. 2021-CA-1694-B, *2022 D.C. Super. LEXIS 1* , *2022 WL*

✕ Marshall v. Red Lobster Mgmt. LLC, No. LA CV21-04786 JAK (MARx), 2023 BL 474213, 2023 Us Dist Lexis 231871 (C.D. Cal. Dec. 18, 2023), Court Opinion

554486 (D.C. Super. Feb. 16, 2022). Dkt. 27. On May 19, 2022, Plaintiff filed a Notice of Decision regarding Jessica Rawson v. ALDI, Inc., No. 21-CV-2811, [2022 BL 170243], 2022 U.S. Dist. LEXIS 88511 , [2022 BL 170243], 2022 WL 1556395 (N.D. Ill. May 17, 2022). Dkt. 30. On August 25, 2022, Plaintiff filed a Notice of Decision regarding Spindel v. Gortons, Inc., No. 22-CV-10599-PBS, 2022 U.S. Dist. LEXIS 151713 , 2022 WL 3648823 (D. Mass. Aug. 24, 2022). Dkt. 31.

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Defendants argue that the allegations in the FAC are inadequate, in part, because they fail to specify whether January 4, 2020 was the "first time [Plaintiff] saw the representations." Dkt. 21 at 15. However, Defendants have not presented a sufficient basis as to why this would be material to the specificity of the allegations in the FAC. *Id.* Even if Plaintiff had previously visited another Red Lobster location and observed the Sustainability Representations at that time, because the FAC alleges that Plaintiff specifically saw and relied upon the Sustainability Representations that were present on the menu on the date that she visited in January (Dkt. 18 ¶¶ 23-26), it is not clear at the pleading stage why such potential earlier visits would have affected Plaintiff's knowledge at the time that she allegedly elected to purchase Defendants' Products.