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12
13 **UNITED STATES DISTRICT COURT**
14 **NORTHERN DISTRICT OF CALIFORNIA**
15

16 GREENPEACE, INC.,
17 Plaintiff,
18 v.
19 WALMART, INC.,
20 Defendant.

Case No. 3:21-cv-00754-MMC
Assigned to Hon. Maxine M. Chesney

**PLAINTIFF GREENPEACE, INC.’S
OPPOSITION TO DEFENDANT
WALMART, INC.’S MOTION TO
DISMISS FIRST AMENDED CLASS
ACTION COMPLAINT**

Date: July 2, 2021
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TABLE OF AUTHORITIES

Cases

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20 *Beasley v. Lucky Stores, Inc.,*

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23 *Becerra v. Dr. pepper/Seven Up, Inc.,*

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17 *Hinojos v. Kohl’s Corp.*,

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24 *Johnson v. United Cont’l Holdings, Inc.*,

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I. INTRODUCTION

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2 “Simply stated: labels matter.” *Kwikset v. Superior Court*, 51 Cal. 4th 310, 328 (Cal. 2011).
3 Defendant Walmart, Inc. (“Walmart”) markets and sells single-use plastic products and packaging
4 that are labeled as recyclable, when such plastic is rarely, if ever, recycled. ECF No. 24 (“FAC”), ¶
5 1; *see also Smith v. Keurig Green Mt., Inc.*, 393 F. Supp. 3d 837 (N.D. Cal. 2019) (denying motion
6 to dismiss for mislabeling products as recyclable). The FAC seeks to remedy Walmart’s unlawful,
7 unfair, and fraudulent business practices with respect to the labeling, marketing, and sales of plastic
8 products or packaging that are: (A) made from plastics #3-7 or unidentified plastic; (B) sold under
9 Walmart’s own private label brands; and (C) labeled as “recyclable” (the “Products”). FAC, ¶ 2.
10 Plaintiff Greenpeace, Inc. (“Greenpeace”) is a non-profit public interest organization that works to
11 address plastic pollution and to ensure that the public is not misled by environmental marketing
12 claims. As a result of Walmart’s unlawful, unfair, and fraudulent business practices in connection
13 with labeling and selling the Products as recyclable, Walmart has frustrated Greenpeace’s mission
14 and has caused Greenpeace to spend money, staff time, and other organizational resources
15 investigating and combating Walmart’s misrepresentations.

16 Walmart seeks to dismiss the FAC on the following grounds: (1) Greenpeace’s claims under
17 California’s Unfair Competition (“UCL”), Business and Professions Code (“B&P”) § 17200, *et*
18 *seq.*, fail because it has not lost money or property as a result of Walmart’s alleged conduct; (2) the
19 FAC does not satisfy Federal Rules of Civil Procedure (“FRCP”) 8(a) or 9(b); and (3) Greenpeace
20 has not alleged an entitlement to injunctive relief. ECF No. 26 (“MTD”), at 1:12 – 2:5. Walmart’s
21 Motion to Dismiss fails with respect to each argument raised.

22 First, Walmart argues that Greenpeace has not “lost” anything because it is bringing this
23 case on behalf of the general public. MTD, at 2:13-15. Walmart is mistaken – Greenpeace is
24 bringing this case on its own behalf. FAC, ¶ 5. Upon suspecting Walmart’s misrepresentations,
25 Greenpeace spent thousands of dollars and extensive staff time to investigate Walmart’s labeling
26 claims, analyze and then publicize the results of that investigation, and urge Walmart to remove the
27 deceptive labels. FAC, ¶¶ 13-25. Surely, these costs qualify under governing law as money or
28

1 property lost as the result of Walmart’s unlawful, unfair, and fraudulent business practices, and
2 these allegations establish Greenpeace’s standing under the UCL.

3 Second, the FAC satisfies both FRCP 8(a) and FRCP 9(b). FRCP 8(a) requires a short and
4 plain statement of the claims showing that Greenpeace is entitled to relief. *Bell Atl. Corp. v.*
5 *Twombly*, 550 U.S. 544, 555 (2007). Under FRCP 9(b), a pleading must identify the who, what,
6 when, where, and how of the misconduct charged, as well as what is false or misleading about the
7 purportedly fraudulent statement, and why it is false. *Davidson v. Kimberly-Clark Corp.*, 899 F.3d
8 956, 964 (9th Cir. 2018). The purpose of the heightened pleading standard of FRCP 9(b) is to
9 provide a defendant with adequate notice to allow it to defend the allegations. *Kearns v. Ford*
10 *Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009). Here, the FAC puts Walmart on notice by
11 identifying four specific categories of Products by plastic type and labeling claim, by identifying
12 the specific misrepresentations for each category, and by detailing the reasons each of those
13 misrepresentations are unlawful, unfair, and fraudulent. FAC, ¶¶ 52-63, 76-95. And for good
14 measure, the FAC provides even more details as to Greenpeace’s purchase of particular Products
15 on a specific date at an identified Walmart location. FAC, ¶¶ 18-19. Notably, Greenpeace
16 provides much more detail than required since Walmart’s deceptive labeling is part of an extensive
17 and long-term advertising campaign. *See, e.g., In Re Tobacco II Cases*, 46 Cal. 4th 298, 328 (Cal.
18 2009); *Opperman v. Path, Inc.*, 84 F. Supp. 3d 962, 976-977 (N.D. Cal. 2015). Accordingly,
19 Greenpeace has given Walmart adequate notice to defend the charges against it.

20 Third, Greenpeace has alleged facts showing that it has a right to injunctive relief. FAC, ¶¶
21 4, 25, 68, 72, 82, 93. Walmart’s arguments to the contrary ignore those allegations. Absent such
22 relief from this Court, Walmart will continue to misrepresent the Products as recyclable in violation
23 of California law, thereby forcing Greenpeace to continue to divert its resources to counter
24 Walmart’s deception.

25 II. LEGAL BACKGROUND

26 The Legislature of California has declared “it is the public policy of the state that
27 environmental marketing claims, whether explicit or implied, should be substantiated by competent
28 and reliable evidence to prevent deceiving or misleading consumers about the environmental

1 impact of plastic products.” Cal. Pub. Res. Code § 42355.5. The policy is based on the
2 Legislature’s finding that “littered plastic products have caused and continue to cause significant
3 environmental harm and have burdened local governments with significant environmental cleanup
4 costs.” *Id.* § 42355; FAC, ¶ 32.

5 The Environmental Marketing Claims Act (“EMCA”), B&P § 17580.5, makes it “unlawful
6 for any person to make any untruthful, deceptive, or misleading environmental marketing claim,
7 whether explicit or implied.” Pursuant to that section, the term “environmental marketing claim”
8 includes any claim contained in the Guides for use of Environmental Marketing Claims published
9 by the FTC (the “Green Guides”). *Id.*; *see also* 16 C.F.R. § 260.1, *et seq.*

10 Under the Green Guides, “[i]t is deceptive to misrepresent, directly or by implication, that a
11 product or package is recyclable. A product or package shall not be marketed as recyclable unless
12 it can be collected, separated, or otherwise recovered from the waste stream through an established
13 recycling program for reuse or use in manufacturing or assembling another item.” 16 C.F.R. §
14 260.12(a). This definition encompasses the three prongs of recyclability that are commonly used in
15 the solid waste industry: (1) accessibility of recycling programs (“through an established recycling
16 program”); (2) sortability for recovery (“collected, separated, or otherwise recovered from the
17 waste stream”); and (3) end markets (“for reuse or use in manufacturing or assembling another
18 item”). FAC, ¶ 34. The California Public Resources Code similarly defines recycling as “the
19 process of collecting, sorting, cleansing, treating, and reconstituting materials that would otherwise
20 become solid waste, and returning them to the economic mainstream in the form of raw material for
21 new, reused, or reconstituted products which meet the quality standards necessary to be used in the
22 marketplace.” Cal. Pub. Res. Code § 40180; FAC, ¶ 34.

23 These definitions are consistent with reasonable consumer expectations. FAC, ¶ 35. For
24 instance, the dictionary defines the term “recycle” as: (1) convert (waste) into reusable material, (2)
25 return (material) to a previous stage in a cyclic process, or (3) use again. Oxford Dictionary,
26 Oxford University Press 2020. Walmart has published its own Recycling Playbook that defines
27 recyclability in a similar manner. The Playbook defines recyclability as a system of stages: (1)
28 Collection; (2) Sortation; (3) Processing; (4) End-Market; and (5) Recycling Rate. FAC, ¶ 36.

1 Thus, Walmart’s own interpretation of recyclability requires access to recycling programs,
2 sortability, and end markets. *Id.*

3 As reflected in the Green Guides’ language and regulatory history, the FTC does not
4 consider a product to be recyclable unless it is actually recycled in practice. For instance, the
5 Green Guides provide that: (1) “[i]f any component significantly limits the ability to recycle the
6 item, any recyclable claim would be deceptive;” and (2) “an item that is made from recyclable
7 material, but, because of its shape, size, or some other attribute, is not accepted in recycling
8 programs, should not be marketed as recyclable.” 16 C.F.R. §§ 260.12(a) and (d); *see also id.*, §
9 260.12(d), Examples 2 and 6. The Green Guides provide an example that specifically addresses
10 theoretical recyclability regarding environmental marketing claims:

11 A trash bag is labeled “recyclable” without qualification. Because trash bags
12 ordinarily are not separated from other trash at the landfill or incinerator for
13 recycling, they are highly unlikely to be used again for any purpose. Even if the
14 bag is technically capable of being recycled, the claim is deceptive since it asserts
15 an environmental benefit where no meaningful benefit exists.

16 16 C.F.R. § 260.3(c), Example 2; *see also* 57 Fed. Reg. 157, 36365 (August 13, 1992). And, in
17 promulgating the current recycling definition, FTC clarified that “[f]or a product to be called
18 ‘recyclable,’ there must be an established recycling program, municipal or private, through which
19 the product *will be* converted into, or used in, another product or package.” *See* 63 Fed. Reg. 84,
20 24247 (May 1, 1998) (emphasis added). *See, e.g., Smith*, 393 F. Supp. 3d at 846 (*citing* 16 C.F.R. §
21 260.12(d)) (“the Green Guides state that if a product is rendered non-recyclable because of its size
22 or components—even if the product’s composite materials are recyclable—then labeling the
23 product as recyclable would constitute deceptive marketing.”).

24 The FTC has also recognized that facilities may accept Products for recycling even though
25 they end up in a landfill because of pressure from local authorities to meet solid waste diversion
26 goals. FAC, ¶ 54. In promulgating the most recent version of the Green Guides, the FTC stated
27 (under the heading “Packages Collected for Public Policy Reasons but Not Recycled”), “The
28 Commission agrees that unqualified recyclable claims for categories of products that municipal
recycling programs collect, but do not actually recycle, may be deceptive. To make a non-
deceptive unqualified claim, a marketer should substantiate that a substantial majority of consumers

1 or communities have access to facilities that will actually recycle, not accept and ultimately
2 discard, the product. As part of this analysis, a marketer should not assume that consumers or
3 communities have access to a particular recycling program merely because the program will accept
4 a product.”¹ *Id.*

5 The FTC’s focus on whether an item is likely to be recycled (as opposed to being
6 theoretically recyclable) also makes sense from a consumer and environmental standpoint. As the
7 FTC has stated, “while a product may be technically recyclable, if a program is not available
8 allowing consumers to recycle the product, there is no real value to consumers.” 63 Fed. Reg. 84,
9 24243 (May 1, 1998).

10 The Green Guides also provide specific examples of recycling claims that the FTC
11 considers deceptive, as well as examples of ways in which marketers can qualify those claims.²
12 Compliance with the examples provided by the FTC qualifies as a defense to a claim under the
13 EMCA. B&P § 17580.5(b). As an initial matter, the Green Guides require that any qualifications
14 must be “clear and prominent,” in “plain language and sufficiently large type,” and placed in “close
15 proximity to the qualified claim.” 16 C.F.R. § 260.3(a). Under the Green Guides, a marketer may
16 make an unqualified recyclable claim if a substantial majority of consumers or communities have
17 access to recycling facilities for that item. 16 C.F.R. § 260.12(b)(1). A “substantial majority”
18 means at least 60 percent of consumers or communities where the item is sold. *Id.* Absent such
19 evidence, marketers are required to use qualifications that vary in strength depending on the degree
20 of consumer access to recycling for an item. *Id.*, § 260.12(b)(2). For instance, if recycling
21 facilities are available to slightly less than 60 percent of consumers or communities, the Green
22 Guides recommend that a marketer should qualify the recyclable claim by stating “this product may
23 not be recyclable in your area,” or “recycling facilities for this product may not exist in your area.”
24 *Id.* If recycling facilities are available only to a few consumers, the Green Guides recommend that

25
26 ¹ FED. TRADE COMM’N, The Green Guides Statement of Basis and Purpose, (2012) available at:
27 [https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-issues-revised-green-](https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-issues-revised-green-guides/greenguidesstatement.pdf)
28 [guides/greenguidesstatement.pdf](https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-issues-revised-green-guides/greenguidesstatement.pdf) (referenced in 77 Fed. Reg. 197, 62122 (Oct. 11, 2012)), at pp.
174-175.

² The examples in the Green Guides are specifically provided by the FTC as its “views on how
reasonable consumers likely interpret certain claims.” 16 C.F.R. § 260.1(d).

1 a marketer should qualify its recyclable claim by stating “this product is recyclable only in a few
2 communities that have appropriate recycling facilities.” *Id.*

3 The Green Guides explicitly identify qualifications that may be misleading or deceptive to a
4 reasonable consumer. For instance, a “check locally” disclaimer is presumptively deceptive. *See*
5 16 C.F.R. § 260.12, Example 4. The FTC made this determination based on a survey it conducted
6 in which it determined that “there was no statistical difference” between a consumer’s perception
7 of an unqualified recyclable claim and a “check locally” disclaimer. *See* 63 Fed. Reg. 84, 24244
8 (May 1, 1998). Accordingly, the FTC concluded that a “check locally” disclaimer is deceptive
9 because it does not “adequately disclose the limited availability of recycling programs,” and
10 removed the disclaimer as an example of a permissible qualification. *See* 16 C.F.R. § 260.12,
11 Example 4; 63 Fed. Reg. 84, 24244 (May 1, 1998). Finally, underscoring the notion that actual and
12 not theoretical recyclability is what matters, the FTC states that “marketers may always qualify
13 recyclable claims by stating the percentage of consumers or communities that have access to
14 facilities *that recycle the item.*” 16 C.F.R. § 260.12(b)(2) (emphasis added).

15 **III. FACTS**

16 All of the following facts are presumed true for purposes of the MTD. *See Ashcroft v.*
17 *Iqbal*, 556 U.S. 662, 678 (2009). Walmart advertises, markets, and sells the Products as recyclable.
18 FAC, ¶ 2. Walmart uses the alleged recyclability of the Products as a means of marketing itself as
19 an environmentally responsible company by, for instance, announcing a sustainability goal of
20 achieving 100% recyclable, reusable, or compostable packaging for the Products by 2025. *Id.*, ¶
21 50. However, the Products cannot be recycled because consumers do not have access to recycling
22 programs that accept the Products, the Products cannot be separated or recovered from the general
23 waste stream and sorted into correct material bales for recovery, and there are no end markets to
24 reuse to Products or convert the Products into a material that can be reused or used in
25 manufacturing or assembling another item. *Id.*, ¶ 2.

26 Greenpeace is a non-profit public interest organization that works to combat plastic
27 pollution and other environmental harms, to protect California coasts from harms related to plastic
28 pollution, and to ensure that consumers are not misled by environmental marketing claims. *Id.*, ¶ 5.

1 Greenpeace was formed in 1971 as a global, independent campaigning organization that uses
2 peaceful protest and creative communication to expose global environmental problems and
3 promote solutions that are essential to a green and peaceful future. *Id.*, ¶ 6.

4 In August 2019, Greenpeace hired a recycling consultant for its Truth in Recycling Labels
5 initiative to determine whether Walmart was misrepresenting the recyclability of its Products. *Id.*,
6 ¶ 16. Greenpeace paid the consultant \$25,000 for her work. *Id.* On October 6, 2019, as part of the
7 work for Greenpeace under the contract, the consultant visited one of Walmart's stores in Rancho
8 Santa Margarita, California and took numerous photographs of specific Product labels that included
9 examples of misrepresentations with respect to the recyclability of the Products. *Id.*, ¶ 18. Shortly
10 thereafter, the consultant prepared a 20-page PowerPoint report for Greenpeace that described
11 Walmart's deceptive recycling representations. *Id.* ¶ 19. Due to Walmart's egregious labeling
12 practices, the consultant devoted 15% of her time to investigate Walmart. *Id.*, ¶ 16. Greenpeace's
13 staff then diverted resources from other projects to further investigate Walmart based on the report
14 prepared by the consultant. *Id.*, ¶ 19.

15 Based on the consultant's work and the time spent by Greenpeace's staff members
16 investigating the representations on Walmart's Products, Greenpeace determined that Walmart
17 should be included in its Truth in Recyclable Labels initiative. *Id.*, 20. That project seeks to ensure
18 that corporate marketing efforts aimed at representing the recyclability of products and packaging
19 to consumers are accurate and legal. *Id.*, ¶ 15. But for Greenpeace's investigation of Walmart's
20 labels and discovery of Walmart's deceptive conduct, Greenpeace would not have included
21 Walmart in its Truth in Recyclable Labels initiative and would have instead focused its time on
22 other projects, including Greenpeace's other projects related to plastic pollution. *Id.*, ¶ 20.
23 Greenpeace's continued investigation revealed that Walmart had an extensive and long-term
24 campaign misrepresenting the recyclability of the Products in California, including at most of its
25 320 California locations. *Id.*, ¶¶ 21, 29.

26 After determining that Walmart's labels misrepresented the recyclability of the Products,
27 Greenpeace published a report in February 2020 titled "Circular Claims Fall Flat," which surveyed
28 plastic waste collection, sortation, and reprocessing in the United States. *Id.*, ¶ 22. The survey

1 directly evaluated Walmart’s recyclability labels and Walmart’s packaging design guides for
2 recyclability. *Id.* Greenpeace then spent additional money, staff time, and organizational resources
3 to inform Walmart of its false and misleading recycling representations and to request that Walmart
4 stop mislabeling its Products. *Id.*, ¶ 23.

5 Walmart’s frustration of Greenpeace’s mission forced Greenpeace to spend money, staff
6 time, and other organizational resources investigating Walmart and pressuring Walmart to stop
7 using misleading labels on the Products. *Id.*, ¶ 24. Greenpeace would have used its money, staff
8 time, and organizational resources on other campaigns related to plastic pollution, but the large
9 number of Walmart’s false recycling representations in California required Greenpeace to focus its
10 attention on Walmart’s actions in California. *Id.*

11 The FAC does not seek any monetary relief. Rather, Greenpeace seeks an injunction to
12 prohibit Walmart’s ongoing false and misleading recycling representations. FAC, Prayer for
13 Relief. Absent such relief, Greenpeace will suffer irreparable harm because it will be forced to
14 continue to spend money, staff time, and other organizational resources to combat Walmart’s
15 misrepresentations and to inform the public that the Products are not recyclable. *Id.*, ¶¶ 4, 25, 68,
16 72, 82, 93. And, to the extent Greenpeace’s efforts are unsuccessful, Walmart will continue to tout
17 the Products as recyclable, and the plastic pollution caused by Walmart’s sale of the Products in
18 California will continue to negatively impact Greenpeace’s efforts to protect natural resources and
19 to promote legitimate recycling. *Id.*, ¶¶ 25, 65.

20 **IV. PLEADING STANDARD**

21 To survive a motion to dismiss, the FAC must contain sufficient factual matter, accepted as
22 true, to “state a claim of relief that is plausible on its face.” *Ashcroft*, 556 U.S. at 678. “A claim
23 has factual plausibility when the plaintiff pleads factual content that allows the court to draw a
24 reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* In reviewing the
25 plausibility of a complaint, courts must accept the factual allegations in the complaint as true and
26 construe the pleadings in the light most favorable to the nonmoving party. *Fayer v. Vaughn*, 649
27 F.3d 1061, 1064 (9th Cir. 2011)

28

1 **V. ARGUMENT**

2 **A. Greenpeace Has Organizational Standing to Bring Claims Under The UCL.**

3 Walmart argues California law does not support organizational standing for purposes of a
4 UCL “deceptive-practice claim” and that Greenpeace has not adequately alleged organizational
5 standing. MTD, at 7:11–11:23. Walmart is wrong. As an initial matter, Greenpeace alleges a
6 claim under each prong of the UCL—fraudulent, unlawful, and unfair (FAC, ¶¶ 69-95)—and it is
7 improper for Walmart to lump Greenpeace’s claims together as a “deceptive-practice claim” for
8 purposes of standing. In any event, California and federal courts have ruled that organizations
9 bringing claims under the UCL have standing, including cases involving UCL fraudulent claims.
10 Here, Greenpeace has alleged it directly lost money or property as a result of Walmart’s unlawful,
11 unfair, and fraudulent practices in connection with its sale of the Products labeled as recyclable,
12 thereby giving Greenpeace standing under the UCL. FAC, ¶¶ 13-25.

13 **1. California and Federal Courts Recognize UCL Organizational Standing.**

14 Walmart argues that California law does not support organizational standing for a
15 “deceptive-practice claim” under the UCL (MTD, at 7:9-10), but the weight of authority belies
16 Walmart’s position. Both California and federal courts have affirmed that organizations have
17 standing to pursue UCL claims on their own behalf, including claims under UCL’s fraudulent
18 business practices prong.

19 Prior to 2004, any person acting for the interests of the public could bring suit under the
20 UCL. Now, standing under the UCL is limited to any person who has suffered injury in fact and
21 has lost money or property as a result of unfair competition. *Kwikset*, 51 Cal. 4th at 320-321. Put
22 simply, standing under the UCL has two requirements: “(1) establish a loss or deprivation of
23 money or property sufficient to qualify as injury in fact, i.e., *economic injury*, and (2) show that the
24 economic injury was the result of, i.e., *caused by*, the unfair business practice or false advertising
25 that is the gravamen of the claim.” *Id.*, at 322 (emphasis in original). The intent of this change was
26 to confine standing to those actually injured by a defendant’s business practice. *Id.*, at 321.

27 Walmart argues that because the California Supreme Court held that associational standing
28 is incompatible with Proposition 64, an organization may not file a claim under the UCL since it is

1 still “derivative of the alleged economic harm to someone else, namely consumers.” MTD, at 8:10-
 2 12); *see, e.g., Amalgamated Transit Union, Loc. 1756, AFL-CIO v. Superior Ct.*, 46 Cal. 4th 993,
 3 998 (Cal. 2009). Walmart reasons that if an organization cannot use the UCL to redress harm to its
 4 own members, then it should not be able to use it to redress harm to consumers at large. *Id.*, 8:14-
 5 16. However, as Walmart itself acknowledges elsewhere in its motion (MTD, at 6:7-9 and 19:15-
 6 16), Greenpeace is seeking to redress harm to itself, not others. FAC, ¶¶ 4-25. *Amalgamated*
 7 *Transit* did not foreclose organizational standing where, as here, Greenpeace alleges that it lost
 8 money as a direct result of Walmart’s unlawful, unfair, and fraudulent business practices.

9 Walmart’s argument also conflicts with well settled jurisprudence that an organization may
 10 bring a UCL claim when it has directly suffered an injury in fact due to a defendant’s unfair,
 11 unlawful, and fraudulent conduct. *See, e.g., Animal Legal Defense Fund v. LT NAPA Partners*
 12 *LLC*, 234 Cal. App. 4th 1270 (Cal. Ct. App. 2015) (“*ALDF I*”) (organization had standing to bring
 13 a UCL claim for violation of a foie gras ban); *Animal Legal Defense Fund v. Great Bull Run, LLC*,
 14 No. 14-cv-01171-MEJ, 2014 U.S. Dist. LEXIS 78367 (N.D. Cal. June 6, 2014) (“*ALDF II*”) (organization had standing to bring a UCL claim for violation of animal cruelty laws); *People for*
 15 *the Ethical Treatment of Animals v. Whole Foods Mkt. Cal., Inc.*, No. 15-cv-04301, 2016 U.S. Dist.
 16 LEXIS 11006 (N.D. Cal. Jan. 29, 2016) (organization had standing to bring a claim under the UCL
 17 fraudulent prong); *S. Cal. Hous. Rights Ctr. v. Ass’n & Los Feliz Towers Homeowners Ass’n Bd. of*
 18 *Dir.*, 426 F. Supp. 2d 1061 (C.D. Cal 2005) (organization had standing to bring a UCL claim for
 19 violation of housing laws).
 20

21 Walmart ignores all these cases besides *ALDF I*, which Walmart argues was wrongly
 22 decided (MTD, at 8:22); however, the California Court of Appeal recently affirmed the holding in
 23 *ALDF I*. *See California Medical Assn. v. Aetna Health of California, Inc.*, 63 Cal. App. 5th 660,
 24 667-669 (Cal. Ct. App. 2021). In *ALDF I*, the court held that an organizational plaintiff had
 25 standing when it sued a restaurant for serving foie gras in violation of the law. 234 Cal. App. 4th at
 26 1283-84. Relying on *Kwikset*,³ the court determined that the plaintiff had standing because it lost

27 _____
 28 ³ Contrary to Defendant’s claim that the *ALDF I* Court did not apply *Kwikset* (MTD, at 9:7), the Court relied heavily on *Kwikset* in its analysis. *ALDF I*, 234 Cal. App. 4th at 1284.

1 money to counteract defendant’s violation of law, which frustrated the organization’s mission of
2 prohibiting the sale of foie gras. *Id.* Specifically, the plaintiff suspected that the defendant was
3 selling foie gras, hired an investigator to determine whether that was true, diverted staff resources
4 to evaluate the results of the investigation, and attempted to persuade authorities to enforce the foie
5 gras ban on defendant. *Id.*, at 1280. The Court found that, although the plaintiff’s expenditure of
6 resources was wholly consistent with its mission, this did not mean that the resources were not
7 diverted from other activities as a result of defendant’s conduct. *Id.*, at 1283.

8 Walmart also seeks to distinguish *ALDF I* on the grounds that the case involved an unlawful
9 claim under the UCL instead of a “deceptive-practice claim.” MTD, at 9:16. However,
10 Greenpeace is also bringing claims under the unlawful and unfair prongs of the UCL and it is
11 improper for Walmart to include each claim together as a “deceptive-practice claim” for purposes
12 of standing. And, under the fraudulent prong of the UCL, Greenpeace “must show that the
13 misrepresentation was an immediate cause of the injury-producing conduct.” *Kwikset*, at 326-27
14 (*citing In re Tobacco II Cases*, 46 Cal. 4th at 326). Here, Walmart’s false recycling statements
15 were the immediate cause of Greenpeace’s loss of money, staff time, and other organizational
16 resources. FAC, ¶¶ 13-25.

17 Walmart will likely rely on *California Medical Assn.* on reply, but that recent decision also
18 affirms that an organization may have standing under the UCL if it suffers its own injury as a result
19 of the conduct at issue. 63 Cal. App. 5th at 667. In *California Medical Assn.*, plaintiff CMA
20 argued that defendant Aetna’s insurance plans interfered with its members’ exercise of their sound
21 medical judgment, and that Aetna’s conduct thus frustrated CMA’s purpose of protecting
22 physicians and the public. *Id.*, at 664. The Court ruled that CMA did not have standing because
23 there is no associational standing for a UCL claim and because, under the specific facts of the case,
24 the harm to CMA was based exclusively on the harm to its members. *Id.*, 669. The court
25 specifically distinguished *ALDF I* on the ground that the plaintiff in that case did not bring a
26 representative action and was not advocating on behalf of or providing services to help its members
27 deal with their loss of money or property, as CMA was doing. *Id.*, 668. Here, similar to the
28 plaintiff in *ALDF I*, Greenpeace is not bringing a representative action, nor is it advocating on

1 behalf of its members with regard to lost money or property; rather, Greenpeace is bringing this
2 action on its own behalf because Walmart's misrepresentations regarding the recyclability of the
3 Products frustrate Greenpeace's mission to protect the environment from plastic pollution, which
4 has caused it to spend money, staff time, and organizational resources in response.

5 While Walmart seeks to create a distinction between federal and state courts' treatment of
6 UCL standing, federal courts sitting in diversity jurisdiction are obliged to apply state substantive
7 law. *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938). And the federal courts have done so by
8 recognizing that an organization has standing to pursue UCL fraudulent claims where the
9 organization has suffered an economic loss as a result of the defendant's deceptive business
10 practices. For instance, in *Organic Consumers Ass'n v. Sanderson Farms, Inc.*, 284 F. Supp. 3d
11 1005 (N.D. Cal. 2018), the district court initially found at the pleading stage that the organizations
12 had standing for a UCL fraudulent claim because they diverted resources from their government
13 watchdog work to respond to the advertising at issue. *Id.* at 1010-12. The case was ultimately
14 dismissed for lack of standing after extensive discovery revealed that the plaintiffs' allegations did
15 not comport with the facts. *Friends of the Earth v. Sanderson Farms, Inc.*, 2021 U.S. App. LEXIS
16 9384, at *6 (9th Cir. 2021). However, the district court properly concluded that California law
17 supports organizational standing for a UCL fraudulent claim where the facts support the
18 allegations. *Id.*⁴

19 The ultimate import of Walmart's argument would be that an organization may never bring
20 a UCL claim on behalf of itself. Walmart cannot point to any authority supporting such an
21 outcome, which would conflict with the plain language of the UCL and authorities cited herein.

22 **2. Greenpeace Has Properly Pled Standing To Pursue Its UCL Claims.**

23 Walmart also argues that Greenpeace has not alleged facts sufficient to confer standing
24 under the UCL (MTD, at 10:2-3), but Walmart is mistaken. Under the UCL, a plaintiff can
25

26 ⁴ See also *People for the Ethical Treatment of Animals v. Whole Foods Mkt. Cal., Inc.*, No. 15-
27 cv-04301, 2016 U.S. Dist. LEXIS 11006, at *8 (N.D. Cal. Jan. 29, 2016) (organization had
28 standing to bring a claim under the UCL fraudulent prong); Cf *People for the Ethical Treatment of
Animals v. Whole Foods Mkt. Cal., Inc.*, No. 15-cv-04301, 2016 U.S. Dist. LEXIS 55601, at *5-8
(N.D. Cal. April 26, 2016) (confirmed standing for UCL fraudulent claim but dismissed because no
reasonable consumer would be deceived by the misrepresentations at issue).

1 establish standing by showing a loss or deprivation of money or property that “was the result of,
2 i.e., *caused by*” the unfair business practice. *Kwikset*, 51 Cal. 4th at 320. When an organization is
3 forced to divert its resources to identify and counteract unlawful activity that frustrates its mission,
4 the organization has suffered an injury in fact sufficient to warrant standing. *ALDF II*, 2014 U.S.
5 Dist. LEXIS 78367, at *12. The proper focus of the inquiry is whether the plaintiff undertook the
6 expenditures in response to, and to counteract, the effects of the defendant’s alleged misconduct.
7 *ALDF I*, 234 Cal. App. 4th at 1283. Here, Walmart’s act of misrepresenting the recyclability of its
8 Products has directly injured Greenpeace because it has spent a significant amount of money, staff
9 time, and other organizational resources investigating and counteracting Walmart’s violations of
10 California law. Similar to the plaintiff in *ALDF I*, Greenpeace established its advocacy against
11 plastic pollution (FAC, ¶¶ 6-11), investigated the plastic pollution caused by Walmart (*id.*, ¶ 12),
12 hired a consultant to investigate the recycling labels on Walmart’s Products (*id.*, ¶ 16), expended
13 significant staff time and resources to evaluate the results of the investigation (*id.*, ¶¶ 13-21),
14 published a report to publicize Walmart’s misrepresentations (*id.*, ¶ 22), and then diverted time to
15 urge Walmart to stop its mislabeling practices (*id.*, ¶ 23).

16 Relying on *Friends of the Earth*, Walmart argues that Greenpeace’s allegations do not
17 suffice since, according to Walmart, Greenpeace’s expenditure of resources were no different than
18 the organization’s ongoing, ordinary lobbying activities. MTD, at 10:2–11:23. However, the
19 court’s ruling in *Friends of the Earth* was based on a well-developed factual record after discovery,
20 whereas here the Court must presume the allegations in the FAC are true. In that case, three
21 organizations sued Sanderson’s for labeling its products as “100% Natural.” *Friends of the Earth*,
22 2021 U.S. App. LEXIS 9384, at *3. As explained above and of most relevance here at the pleading
23 stage, the district court initially found that the organizations had standing. *Organic Consumers*
24 *Ass’n*, 284 F. Supp. 3d at 1010-12. After written discovery and depositions, the record revealed
25 that prior to August 2016, when the organizations learned of the advertising, they spent resources
26 encouraging purchasers to avoid Sanderson’s due to the use of antibiotics by sending action alerts
27 and other blog posts. *Friends of the Earth*, 2021 U.S. App. LEXIS 9384, at *6. After learning of
28 the advertisements at issue, the plaintiffs did not take any further action as a result of the alleged

1 misrepresentations.⁵ *Id.*

2 Here, on the other hand, the pleading sets forth that Greenpeace took immediate and
3 specific steps to counteract Walmart’s particular misrepresentations. FAC, ¶¶ 13-25. Thus, even
4 though part of Greenpeace’s mission is to reduce plastic pollution, the actions Greenpeace took
5 would not have been taken and were a direct result of, and specifically related to, Walmart’s
6 misrepresentations. Accordingly, Plaintiff has alleged facts to establish standing under the UCL.

7 **B. The FAC Satisfies Federal Pleading Standards.**

8 Walmart argues that the FAC does not meet federal pleading standards because (1) not a
9 single consumer is a party to the case; and (2) Greenpeace does not allege that it was misled.
10 MTD, at 12:13 – 13:26. Walmart’s arguments are not well taken. First, Greenpeace is not required
11 to be a consumer to meet federal pleading standards. Here, the FAC satisfies FRCP 8(a) and 9(b)
12 because it gives Walmart fair notice of the misconduct alleged so that it can defend against
13 Greenpeace’s claims. Second, Greenpeace is not required to plead that it was misled. Rather,
14 Greenpeace is required to plead reliance in accordance with the UCL, which the FAC does.

15 **1. The FAC Satisfies FRCP 8(a) and 9(b).**

16 Walmart argues that Greenpeace’s claims do not provide fair notice under FRCP 8(a)
17 (MTD, at 12:11-12) and do not comply with FRCP 9(b) (MTD, at 13:10-11). Walmart is wrong on
18 both accounts because the allegations in the FAC are sufficiently specific to provide Walmart fair
19 notice to defend against Greenpeace’s claims. FAC, ¶¶ 18, 52-63; *see also Kearns*, 567 F.3d at
20 1124 (purpose of the heightened pleading standard is to “give defendants notice of the particular
21 misconduct . . . so that they can defend against the charge and not just deny that they have done
22 anything wrong.”). FRCP 8(a)(2) requires only “a short and plain statement of the claim showing
23 that the pleader is entitled to relief,” for the purpose of giving the defendant “fair notice” of what
24 the claim is. *Twombly*, 550 U.S. at 555. Under FRCP 9(b), a pleading must identify the who, what,

25
26 ⁵ The other cases cited by Defendant are likewise distinguishable. In *Am. Diabetes Assoc. v.*
27 *United States Dept. of the Army*, 938 F.3d 1147, 1154-55 (9th Cir. 2019), the only resource
28 diverted was staff time of one staff member for one intake call. In *Ctr. for Biological Diversity v.*
Bernhardt, No. 19-cv-05206-JST, 2020 U.S. Dist. LEXIS 129941, at *14 (N.D. Cal. 2020), which
did not involve a UCL claim, the organization only identified time and effort to prepare notices and
petitions to the government, which it was already doing.

1 when, where, and how of the misconduct charged, what is false or misleading about the purportedly
 2 fraudulent statement, and why it is false. *Davidson*, 889 F. 3d at 964; *see also Beasley v. Lucky*
 3 *Stores, Inc.*, No. 18-cv-07144-MMC, 2020 U.S. Dist. LEXIS 13211, at * 16 (N.D. Cal. Jan. 24,
 4 2020). The FAC satisfies both standards.

5 Greenpeace has put Walmart on notice of its claims by identifying the four specific
 6 categories of Products at issue by plastic type and label claim, and, for each category, quoting the
 7 specific misrepresentations at issue, detailing the reasons why those misrepresentations violate
 8 California law, and providing specific examples and label images. FAC, ¶ 52-63. The FAC
 9 therefore identifies the Products and explains why they are labeled in a manner that is unlawful,
 10 unfair, and fraudulent. *Id.*, ¶¶ 61-63, 69-95. While this more than satisfies pleading standards,
 11 Greenpeace goes still further by providing the details of its purchase (through a consultant) of
 12 specific Products at a particular Walmart location on a particular date. FAC, ¶ 18-19.

13 In each case cited by Walmart, the plaintiff either did not identify the products or
 14 misrepresentations at issue, did not explain the who, what, when, where, and how, or failed to
 15 describe why the misrepresentations were false or misleading.⁶ Here, on the other hand, the FAC
 16 meets the standards of FRCP 8(a) and 9(b) because it has described with particularity the Products
 17 and misrepresentations at issue to give Walmart notice so that it can defend against the charges and
 18 not just deny that it has done anything wrong.

19 _____
 20 ⁶ *See Ballard v. Bhang Corp.*, No. EDCV 19-2329-JGB, 2020 U.S. Dist. LEXIS 188626, at *19
 21 (C.D. Cal. Sept. 25, 2020) (stated that chocolate contained less CBD than advertised, but did not
 22 explain how it came to that conclusion); *Brodsky v. Apple, Inc.*, 445 F. Supp. 3d 110, 135 (N.D.
 23 Cal. 2020) (did not identify the dates it relied on the misrepresentation); *Becton, Dickinson and Co.*
 24 *v. Cytek Biosciences Inc.*, No. 18-cv-009933-MMC, 2020 U.S. Dist. LEXIS 66423, at *8 (N.D.
 25 Cal. Apr. 15, 2020) (alleged breach of contract but did not identify the breach); *Johnson v. United*
 26 *Cont'l Holdings, Inc.*, No. C-12-2730-MMC, 2013 U.S. Dist. LEXIS 171805, at *38 (N.D. Cal.
 27 Dec. 5, 2013) (some plaintiffs failed to identify the particular employment positions they would
 28 have applied, the location of the position, and or the time frame in which the position was
 available); *Becerra v. Dr. pepper/Seven Up, Inc.*, 945 F.3d 1225, 1228-31 (9th Cir. 2019)
 (determined that no reasonable person would believe that diet soda helped with weight loss);
Hairston v. South Beach Bev. Co., Inc., No. cv 12-1429-JFW, 2012 U.S. Dist. LEXIS 74279, at *13
 (C.D. Cal. May 18, 2012) (no fraud for a single out of context phrase that water is natural when it
 elaborated with language that said “with vitamins”); *Walker v. Nestle USA, Inc.*, No. 3:19-cv-723-
 L, 2021 U.S. Dist. LEXIS 61210, at *5 (S.D. Cal. Mar. 30, 2021) (plaintiff did not identify any
 specific products with the misrepresentation that she relied on, nor when and where she saw the
 misrepresentations); *Gross v. Vilore Foods, Co.*, No. 20-cv-0894-DMS, 2020 U.S. Dist. LEXIS
 200913, at *7 (S.D. Cal. Oct. 28, 2020) (plaintiff failed to identify who engaged in the misbranding
 as to which labels, and when and where it occurred).

1 **2. Greenpeace Has Sufficiently Pled Reliance Under The UCL Fraudulent**
2 **Prong.**

3 Walmart also argues that the FAC should be dismissed because Greenpeace does not allege
4 that it was deceived (MTD, at 13:11-13), but Greenpeace is not required to do so in order to meet
5 the pleading standard for a UCL fraudulent claim. *See, e.g., Morgan v. AT&T Wireless Services,*
6 *Inc.*, 177 Cal. App. 4th 1235, 1256 (Cal. Ct. Ap. 2009) (explaining the difference between
7 deception under common law fraud and reliance under the UCL); *see also Clorox v. Reckit*
8 *Benckiser Grp. PLC*, 398 F. Supp. 3d 623, 646-647 (N.D. Cal. 2019) (explaining that under UCL a
9 plaintiff need not prove deception, only that a misrepresentation is “either actually misleading or
10 which has a capacity, likelihood or tendency to deceive or confuse the public”); *Smith*, 393 F.
11 Supp.3d at 846 (for claim under UCL a plaintiff must “show potential deception of consumers
12 acting reasonably in the circumstances”). To have standing to bring a claim under the UCL
13 fraudulent prong, Greenpeace is only required to plead reliance. *Moore v. Mars Petcare US, Inc.*,
14 966 F.3d 1007, 1020 (9th Cir. 2020) (*citing In re Tobacco II Cases*, 46 Cal. 4th 298). The
15 California Supreme Court has explained that “reliance is proved by showing that the defendant’s
16 misrepresentation or nondisclosure was ‘an immediate cause’ of the plaintiff’s injury-producing
17 conduct.” *In re Tobacco II Cases*, 46 Cal. 4th at 326. Moreover, reliance is inferred from the
18 misrepresentation of a material fact. *Id.* And whether a misrepresentation is sufficiently material
19 to allow for an inference of reliance is generally a question of fact that cannot be decided at the
20 motion to dismiss stage. *Id.*; *see also Williams v. Gerber Prods., Co.*, 552 F.3d 934, 938 (9th Cir.
21 2008). Here, Greenpeace has adequately alleged reliance by averring that: (1) Walmart’s
22 misrepresentation was an immediate cause of Greenpeace’s actions to further investigate and
23 thwart Walmart’s mislabeling practices (FAC, ¶ 13-25); and (2) a reasonable person would attach
24 importance to a recycling representation (FAC, ¶ 51, 64, 66).

25 In fact, by enacting the EMCA, the California Legislature has effectively determined that
26 Walmart’s representations are material and likely to induce reliance. *See, e.g., Kwikset*, 51 Cal. 4th
27 at 329; *Hinojos v. Kohl’s Corp.*, 718 F.3d 1098, 1107 (9th Cir. 2013); *Brown v. Hain Celestial*
28 *Group, Inc.*, 11-CV-03082-LB, 2015 U.S. Dist. LEXIS 67912, at *17-22 (N.D. Cal. May 26, 2015).
Thus, similar to *Kwikset*, “[t]he Legislature has recognized the materiality of this representation by

1 specifically outlawing deceptive and fraudulent [recyclable] representations.” *Id.*⁷

2 Walmart also argues that the FAC should be dismissed because Greenpeace does not
3 identify all the Products it is targeting. MTD, at 12:20-22. However, Greenpeace is not required to
4 identify every single Product at issue. The California Supreme Court has explained that where a
5 plaintiff alleges exposure to an extensive and long-term advertising campaign, “the plaintiff is not
6 required to plead with an unrealistic degree of specificity that the plaintiff relied on particular
7 advertisements or statements.” *In re Tobacco II Cases*, 46 Cal. 4th at 328. Accordingly, a plaintiff
8 challenging such a practice is not required to plead individualized reliance on each specific
9 misrepresentation. *Id.*; *Opperman*, 84 F. Supp. 3d at 976-977; *Morgan*, 177 Cal. App. 4th at 1258.
10 The Northern District of California has identified six factors to determine whether a plaintiff has
11 pled an extensive and long-term advertising campaign: (1) plaintiff must allege that it actually saw
12 or heard the advertising campaign; (2) the advertising campaign must be sufficiently lengthy in
13 duration, and widespread in dissemination, such that it would be unrealistic to require the plaintiff
14 to plead each misrepresentation; (3) the plaintiff must describe in the Complaint, and preferably
15 attach to it, a representative sample of the advertisements at issue so as to adequately notify the
16 defendant of the precise nature of the misrepresentation claim; (4) the plaintiff must allege the
17 degree to which the alleged misrepresentations contained within the advertising campaign are
18 similar to each other; (5) each plaintiff must plead with particularity, and separately, when and how
19 they were exposed to the advertising campaign so as to ensure the advertisements were
20 representations consumers were likely to have viewed; and (6) the court must be able to determine
21 when a plaintiff made his or her purchase or otherwise relied on defendant’s advertising campaign.
22 *Opperman*, 84 F. Supp. 3d at 976-977.

23 Greenpeace’s allegations meet this standard because the pleading alleges that Walmart
24 engaged in a long-term and extensive advertising campaign with respect to misrepresenting the
25 Products as recyclable. *See, e.g.*, FAC, ¶ 21, 51. First, Greenpeace alleges that it actually saw the

26
27 ⁷ Walmart also argues that Greenpeace does not satisfy FRCP 9(b) for a claim based on
28 nondisclosure (MTD, at 14:11-12), but Greenpeace does not raise such a claim. Accordingly, the
cases referenced by Defendant for claims based on nondisclosure are inapplicable to this case.

1 advertising campaign. FAC, ¶¶ 16-19. Second, Greenpeace alleges that the advertising campaign
 2 was lengthy in duration and widespread in dissemination. *Id.*, ¶¶ 21, 29. Third, Greenpeace
 3 describes the particular misrepresentations at issue and includes specific examples and label images
 4 in the FAC. *Id.*, ¶¶ 52-63. Fourth, each misrepresentation similarly pertains to the recyclability of
 5 the Products. *Id.* Fifth, Greenpeace pled with particularity when and how it was exposed to the
 6 advertising campaign. *Id.*, ¶ 18-19. Sixth, Greenpeace has provided a detailed explanation of the
 7 actions it took and when it took them in reliance on Walmart’s representations. *Id.*, ¶¶ 13-25.

8 In sum, Greenpeace has alleged that Walmart’s misleading recycling claims were an
 9 immediate cause of Greenpeace’s economic injuries and that these recycling claims are material.
 10 These allegations suffice for purposes of establishing reliance. Greenpeace has also alleged that
 11 Walmart engaged in an extensive and long-term advertising campaign, which obviates the need to
 12 prove reliance.

13 3. Greenpeace Has Adequately Pled a Claim Under The UCL’s Unlawful 14 Prong.

15 Independent of its claim under the UCL fraudulent prong, Greenpeace also alleges a claim
 16 under UCL’s unlawful prong. While Walmart seeks to lump Greenpeace’s unlawful claim with its
 17 fraudulent business practices claim (MTD, at 15:23 – 18:9), the UCL “borrows” violations of other
 18 laws and treats them as “unlawful” practices independently actionable under the UCL. *See Abbott*
 19 *Laboratories v. Superior Court*, 9 Cal.5th 642, 651 (Cal. 2020). In effect, the “unlawful” prong of
 20 the UCL makes a violation of the underlying law a *per se* violation of B&P § 17200. *See Kasky v.*
 21 *Nike, Inc.*, 27 Cal.4th 939, 950 (Cal. 2002); *Moore*, 966 F.3d at 1016. Greenpeace’s UCL claim
 22 under the unlawful prong is based on: (1) Section 5 of the Federal Trade Commission Act, 15
 23 U.S.C. § 45;⁸ (2) B&P Code § 17500; and (3) the EMCA. Greenpeace has adequately alleged a
 24 UCL unlawful claim based on Walmart’s violation of each of these laws. *See* FAC, ¶¶ 76-84.

25 First, Walmart argues that Greenpeace has not satisfied FRCP 8(a) and 9(b) with respect to

26 ⁸ Walmart argues that it is “questionable” whether a private plaintiff can use the FTC Act as a
 27 predicate for a UCL unlawful claim, but then undermines its own argument by citing to a recent
 28 Ninth Circuit decision holding in favor of the enforceability of the FTC Act under the UCL. MTD,
 at 16:3-13 (*citing Rubenstein v. Neiman Marcus Group LLC*, 667 F. App’x 564, 567 (9th Cir.
 2017)).

1 its unlawful claim. MTD, at 15:26-27. This argument fails for the same reason stated above:
2 Greenpeace has provided sufficient details to meet federal pleading standards.

3 Second, Walmart argues that Greenpeace’s unlawful UCL claim based on the EMCA fails
4 based on Walmart’s misguided view on the merits of that claim. EMCA prohibits false and
5 misleading environmental marketing claims and, by referencing the Green Guides, makes it clear
6 that recycling claims fall within the purview of the statute. B&P § 17580.5. Putting aside the
7 niceties of Walmart’s technical arguments about the proper interpretation of the Green Guides, the
8 bottom line is this: Greenpeace alleges that Walmart labels the Products as recyclable when they
9 are not. *See, e.g.*, FAC, ¶ 2. Surely these allegations suffice to state a claim under EMCA.

10 Ultimately, Walmart’s position seems to be that it can label the Products as recyclable if
11 they are theoretically capable of being recycled even if they are not actually recycled in practice.
12 MTD, at 17:20-21. This “wisecycling” theory does not make sense under a reasonable consumer
13 standard or the EMCA. *See, e.g.*, FAC, ¶¶ 35, 37. Consumers do not place the Products in their
14 blue bins based on the theoretical possibility they could be recyclable; rather, consumers do so
15 because they care about the environment and want to divert as much of their waste from landfills as
16 possible. *See* FAC, ¶¶ 64-67. And, as explained in detail above, the FTC has made it clear that the
17 Green Guides do not permit recycling labels based on theoretical possibilities, and that such claims
18 must instead be based on reality. *See* Section II, pp. 4-5. Courts agree: “the Green Guides state
19 that if a product is rendered non-recyclable because of its size or components—even if the
20 product’s composite materials are recyclable—then labeling the product as recyclable would
21 constitute deceptive marketing.” *Smith*, F. Supp. 3d at 846 (*citing* 16 C.F.R. § 260.12(d)). Thus,
22 Greenpeace is not asking the Court to rewrite the Green Guides as Walmart suggests (MTD, at
23 17:20), but to enforce the standards required by the EMCA, which encompasses the Green Guides.

24 Walmart also argues that Greenpeace has not alleged facts sufficient to show that recycling
25 facilities are not available to 60 percent of consumers per the Green Guides’ standard (MTD, at
26 17:17-19), but Greenpeace has taken pains to explain in detail why that standard is not met (FAC,
27 ¶¶ 45-49, 52-63). And Walmart argues that regardless of whether the standard is met, it should not
28 be required to comply with it because of the burden it places on retailers. MTD, at 17:24-26.

1 However, the Products at issue are all sold under Walmart’s own private label brands; thus,
2 Walmart is essentially the manufacturer of these items. In any event, while Walmart may not be
3 responsible for the poor state of plastics recycling, Walmart is responsible for labeling its Products
4 truthfully. *See, e.g., Kwikset*, 51 Cal. 4th at 328-332. While the Court need not determine the
5 merits of Greenpeace’s claims at this juncture, Greenpeace has adequately pled a UCL unlawful
6 claim.

7 **4. Greenpeace Has Adequately Pled a Claim Under The UCL’s Unfair Prong.**

8 The unfair prong of the UCL prohibits business practices that are against public policy (*Cel-*
9 *Tech Commc’ns v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 185 (Cal. 1999)), that are “immoral,
10 unethical, oppressive, unscrupulous, or substantially injurious,” (*Drum v. San Fernando Valley Bar*
11 *Ass’n*, 182 Cal. App. 4th 247, 257 (Ct. App. 2010), or that cause injuries to consumers that are not
12 outweighed by countervailing benefits (*Camacho v. Auto Club of S. Cal.*, 142 Cal. App. 4th 1394,
13 1405 (Ct. App. 2006)). *Allen v. Hylands, Inc.*, 773 Fed. Appx. 870, 874 (9th Cir. 2019). Here,
14 Greenpeace has adequately alleged a claim under the UCL’s unfair prong by averring that
15 Walmart’s labeling practices violate several legislatively declared policies and are immoral,
16 unethical, oppressive, unscrupulous, and substantially injurious, and by detailing why those injuries
17 are not outweighed by any countervailing benefits. FAC, ¶¶ 85-95.

18 Walmart does not bother to address Greenpeace’s unfair claim separately, instead lumping
19 it together with the unlawful claim. MTD, at 15:23 – 18:9. By doing so, Walmart ignores the
20 import of Cal. Pub. Res. Code § 42355.5, which Greenpeace does not cite as a predicate for its
21 UCL unlawful claim. Rather, this statute is significant as it reflects a legislative policy against
22 misleading consumers about the environmental impact of plastic products. FAC, ¶ 88. By
23 mislabeling the Products as recyclable when they are not, Walmart engages in conduct that runs
24 afoul of this policy in violation of UCL’s unfair business practices prong.

25 Falsely touting the Products as recyclable is fundamentally unfair. Walmart argues that
26 removing the false label could lead to more plastic ending up in landfills (MTD, at 18:2-5), but the
27 opposite is true. The irony is that consumers are trying to do the right thing by placing the Products
28 in their recycling bins, but such actions may actually prevent legitimately recyclable material from

1 being recycled. FAC, ¶¶ 4, 65, 90. And, as long as Walmart continues to include the supposed
 2 recyclability of the Products as part of its long-term sustainability initiatives (FAC, ¶ 50), Walmart
 3 will have no incentive to take actions that will truly reduce the environmental impact of its plastic
 4 footprint.

5 **C. Greenpeace Has Adequately Alleged Entitlement To Injunctive Relief.**

6 Walmart argues that Greenpeace has failed to allege a basis for injunctive relief. Walmart
 7 is wrong.

8 Walmart principally relies on *Sonner v. Premier Nutrition Corp.*, 971 F.3d 834, 841 (9th
 9 Cir. 2020), where the Ninth Circuit affirmed that a plaintiff must demonstrate that there is no
 10 adequate remedy at law to obtain an injunction under the UCL in federal court. Here, Greenpeace
 11 alleges that it lacks an adequate remedy at law, and, although not required to do so, explains
 12 precisely why. FAC, ¶¶ 4, 25, 65, 68, 72, 82, 93.⁹

13 Walmart also argues that Greenpeace has failed to allege irreparable injury and that the
 14 balance of hardships and overall public interest weigh in favor of an injunction. MTD, at 18:21-26
 15 (citing *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)). To be sure, in evaluating
 16 whether to issue permanent injunctive relief, the Court will need to weigh the classic four factor
 17 test of irreparable injury, inadequate remedies at law, the balance of hardships, and the overall
 18 public interest. However, none of the cases cited by Walmart (and none that Greenpeace is aware
 19 of) establish this four-factor equitable guidance as a pleading standard.¹⁰

20 _____
 21 ⁹ The other cases cited by Walmart are distinguishable. In most of them, it was improbable that
 22 the plaintiffs would ever encounter the same conduct underlying the claims at issue, and therefore
 23 legal damages would suffice, and an injunction was unnecessary. See *Freeman v. ABC Legal*
 24 *Servs., Inc.*, 877 F. Supp. 2d 919 (N.D. Cal. 2012) (plaintiffs would need to go into debt again and
 25 be pursued by a debt collector that hired the same process server alleged to engage in “sewer
 26 service”); *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983) (plaintiff would need to be
 27 stopped again by a police officer, resist arrest, and then be subject to same alleged rogue practice of
 28 choke holds). Here, Walmart is continuing to misrepresent the Products as recyclable, so the
 possibility of future harm to Greenpeace is certain and not speculative. *Huynh v. Quora, Inc.*, No.
 5:18-CV-07597-BLF, 2020 U.S. Dist. LEXIS 241021 (N.D. Cal. Dec. 21, 2020), also relied upon
 by Walmart, is distinguishable as it was decided on summary judgment and not the pleadings, the
 plaintiff there did not even allege the lack of an adequate remedy at law, and the plaintiff was
 simultaneously pursuing a claim for damages that would redress the past harm caused by a one-
 time data breach.

¹⁰ Indeed, some courts have questioned whether *Sonner* establishes a pleading requirement as to
 the lack of an adequate remedy at law. While *Sonner* was decided on the pleadings, that was due to

1 In any event, Walmart’s argument once again ignores the allegations of the FAC since
2 Greenpeace alleges that it will suffer irreparable injury absent an injunction (FAC, ¶¶ 4, 25, 68, 72,
3 82, 93), and that the balance of hardships (FAC, ¶ 90) and the public interest weigh in favor of such
4 relief (FAC, ¶¶ 4, 25, 68). Walmart’s failure to acknowledge these allegations is underscored by its
5 claim that Greenpeace only refers to “injunctive relief” three times in the FAC, thereby ignoring six
6 other instances in which Greenpeace alleges the need for an injunction. *Compare* MTD, at 18:27 –
7 19:1 (*citing* FAC, ¶¶ 75, 84, 95) *with* FAC, ¶¶ 4, 65, 68, 72, 82, 93.

8 Walmart also seeks to confuse matters by arguing that Greenpeace “seems to be trying to
9 blur the lines between its injuries and consumer injuries.” MTD, at 19:5-6. Walmart is wrong
10 again as the FAC makes it clear that Greenpeace is suing on its own behalf and for its injuries,
11 which will continue so long as Walmart continues to misrepresent the Products as recyclable. *See,*
12 *e.g.*, FAC, ¶ 4 (“If an injunction is not granted, Greenpeace will suffer irreparable injury because it
13 will continue to spend money, staff time and other organizational resources to combat Walmart’s
14 false and misleading representations in California and to inform the public that the Products are not
15 recyclable in California.”). *See also id.*, ¶¶ 25, 68, 72, 82, 93. Indeed, while on the one hand
16 professing confusion as to the nature of the injury, Walmart on the other hand acknowledges that
17 the “injury asserted here as a basis for UCL standing is Greenpeace’s alleged diversion of
18 resources.” MTD, at 19:15-16.

19 While the harm at issue here is the harm to Greenpeace, there is a link between
20 Greenpeace’s injury and the harm to consumers, the environment, and legitimate recycling efforts
21 if an injunction is not issued. So long as Walmart continues to misrepresent the Products as
22 recyclable, consumers will continue to be duped into buying the Products under the mistaken
23 impression that they are recyclable; the environment will continue to be degraded by Walmart’s

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25 the unique procedural posture of the case as the plaintiff had made a strategic request to voluntarily
26 drop her claim for damages on the eve of trial and continued to press for the exact same damages as
27 restitution under the UCL. 971 F.3d at 838. Subsequent cases have recognized that it is premature
28 to evaluate a plaintiff’s entitlement to equitable remedies at the pleadings stage, and have
distinguished *Sonner* based on its uncommon posture. *See, e.g., Rothman v. Equinox Holdings, Inc.*, No. 2:20-cv-09760-CAS-MRWx, 2021 U.S. Dist. LEXIS 80683, at *34 (C.D. Cal. April 27, 2021) (“The Court finds it premature at this stage of the litigation to determine whether plaintiff’s alleged injuries have an adequate remedy at law.”).

1 contribution to the plastic waste crisis; and the Products will continue to act as a contaminant in a
2 manner that hinders recycling of other items. FAC, ¶¶ 4, 65, 90. While Greenpeace is not relying
3 directly on these injuries to support its standing or entitlement to injunctive relief, these harms
4 directly undermine Greenpeace’s mission and force it to divert resources to counter Walmart’s
5 ongoing deception. Further, the severity of these underlying problems undermines Walmart’s
6 unsupported arguments (which are contradicted by the presumptively true allegations of the FAC)
7 that any injury alleged by Greenpeace is insufficiently irreparable to qualify for injunctive relief
8 and that the balance of hardships favors Walmart. *See* MTD, at 19:16-24.

9 Finally, Walmart argues that an injunction will not affect “the market conditions that
10 Greenpeace itself alleges are responsible for low recycling rates.” MTD, at 20:2-4. Putting aside
11 whether this statement is true and whether it accurately characterizes Greenpeace’s allegations, an
12 injunction will ensure that Walmart no longer misrepresents the Products as recyclable, thereby
13 addressing the harm Walmart’s practices cause to Greenpeace.

14 VI. CONCLUSION

15 For the reasons set forth above, Walmart’s motion should be denied in its entirety. To the
16 extent the Court grants the motion at all, Greenpeace requests the opportunity to amend its
17 Complaint to cure any deficiency identified by the Court.

18
19 Dated: May 26, 2021

LEXINGTON LAW GROUP

20
21 /s/ Ryan Berghoff

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27 Attorneys for Plaintiff
Greenpeace, Inc.

CERTIFICATE OF SERVICE

1 I, Howard Hirsch, an attorney, hereby certify that on May 26, 2021, I caused a complete and
2 accurate copy of the foregoing document to be served via this Court’s ECM/ECF notification
3 system, which will serve electronically to all participants in this case.
4

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6 /s/ Howard Hirsch
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