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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA – SAN FRANCISCO

GREENPEACE, INC.,

Plaintiff,

vs.

WALMART INC.,

Defendant.

Case No.: 3:21-cv-00754 MMC

Judge: Hon. Maxine M. Chesney
Courtroom: 7

WALMART INC.'S NOTICE OF MOTION AND MOTION TO DISMISS THE THIRD AMENDED COMPLAINT

Date: May 13, 2022
Time: 9:00 a.m.

Complaint filed Dec. 16, 2020
First Am. Compl. filed Mar. 29, 2021
Second Am. Compl. filed Oct. 15, 2021
Third Am. Compl. filed Feb. 18, 2022

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NOTICE OF MOTION

PLEASE TAKE NOTICE that on May 13, 2022, at 9:00 a.m., or as soon thereafter as the matter may be heard, in the courtroom of the Honorable Maxine M. Chesney in the United States Courthouse, Courtroom 7, 19th Floor, San Francisco Courthouse, 450 Golden Gate Avenue, San Francisco, CA 94102, Defendant Walmart Inc. will and hereby does move for an order dismissing Plaintiff's Third Amended Complaint with prejudice, or staying the matter pending resolution of the *California Medical Association* case by the California Supreme Court.

Walmart moves on the following grounds: (1) Greenpeace has again failed to plead facts that would establish standing under either the federal or state standards; (2) the Court may and should dismiss because remand would be futile; (3) alternatively, the Court may and should defer a decision and stay this matter until the California Supreme Court issues its decision in *California Medical Association v. Aetna*; and (4) if the Court finds that Greenpeace does have standing, the UCL claims fail in any event.

INTRODUCTION

This is Greenpeace's fourth attempt to pursue a claim alleging that using the term "recyclable" on the labels of certain plastic packaging is misleading, unlawful, or unfair. Given a last chance to amend, Greenpeace has made only superficial changes to its complaint. These do not change the reality that Greenpeace did not suffer "injury in fact" and did not lose money or property as a result of the challenged conduct, and thus it lacks standing to bring Unfair Competition Law claims. Those claims fail in any event because Greenpeace still has not alleged facts showing that Walmart has done anything unlawful, unfair, or misleading by labeling the products as "recyclable," or by not maintaining whatever documents Greenpeace claims to be seeking. But Greenpeace does not even have standing to bring these claims, as its superficial amendments effectively concede.

The result should be dismissal, not remand. Under Ninth Circuit law, a district court may exercise its discretion to dismiss rather than remand if it is certain the state court would also dismiss. Dismissal is certain here because "injury in fact" is not just a federal requirement under Article III, it is also the basic component of UCL standing—indeed, incorporating the federal requirements was an express purpose of the Proposition 64 amendments. A plaintiff who seeks to bring a UCL claim now must show it suffered "injury in fact" and lost money or property. A plaintiff who cannot show "injury in fact" does not have "Article III" standing, and *by definition* also lacks standing to sue under the state law. Only by ignoring that settled law could a state court hold otherwise. Remand would be a futile waste of resources.

Alternatively, the Court should stay this matter and defer a final decision until after the California Supreme Court decides the pending *California Medical Association* case. As discussed in prior briefing (and again below), the decision in *CMA* will address whether the kind of "organizational standing" Greenpeace tries to assert is available under the UCL at all. As other district courts have recognized, staying a matter when a controlling decision is pending can conserve judicial and party resources that would otherwise be wasted if the matter is remanded immediately. A stay is appropriate here for that reason as well.

Finally, should the Court conclude Greenpeace has alleged "injury in fact," it should hold that the claims fail on the merits.

BACKGROUND AND FACTS ALLEGED

Greenpeace has only pursued UCL claims. It filed its initial complaint in December 2020, and filed a First Amended Complaint after Walmart removed the case. ECF 1, 24. Walmart moved to dismiss the FAC, and the Court granted the motion, noting Greenpeace was not a consumer and holding it had alleged no facts showing it lost money or property as a result of the allegedly misleading "recyclable" representations. *Greenpeace, Inc. v. Walmart Inc.*, No. 3:21-cv-00754-MMC, 2021 WL 4267536 (N.D. Cal. Sept. 20, 2021) (ECF 40). The Court granted leave to amend.

The Second Amended Complaint was not materially different, reflecting mostly superficial changes intended to downplay the fact that Greenpeace's claims are ultimately based on allegations of harm to consumers or the environment, not to Greenpeace itself. As Walmart pointed out in its motion to dismiss the SAC, for example, replacing the word "consumers" with "people" was not a material change. *See* ECF 45. Similarly, although Greenpeace no longer alleged a cause of action for "deceptive practices," the remaining causes of action were still based on allegations of deception. *Id*. The SAC also alleged for the first time that Walmart failed to maintain unspecified documentation that would substantiate the "recyclable" claims. As Walmart argued, none of this changed the fact that Greenpeace did not have standing to pursue the claim because it was not injured by the alleged misconduct. *Id*. It did not "lose" money, it *chose* to spend money to further its mission of environmental protection. That is not actionable under the UCL.

In its order addressing the SAC, the Court agreed Greenpeace had again failed to allege standing, including standing to seek prospective injunctive relief. *Greenpeace, Inc. v. Walmart Inc.*, No. 3:21-cv-00754-MMC, 2022 WL 591451 (N.D. Cal. Feb. 3, 2022) (ECF 56). The Court deferred ruling on the merits, however, giving Greenpeace one more chance to allege the necessary facts. *Id*. The Court also suggested that if Greenpeace failed again, the right course of action would be to remand the case instead of dismissing. *Id*. at *3.

Greenpeace filed a Third Amended Complaint on February 18. ECF 58. This set of amendments is even more superficial than the last one. As in previous complaints, Greenpeace does not contend the "recyclable" representation is literally false. It contends the representation is misleading because third parties may not recycle the products often enough. That is, Greenpeace

alleges the products are "not in fact recyclable" because some people may lack "access to recycling programs" or store drop-off points that accept these products and/or because there are no economically viable "end markets" for reusing or converting the products. *See, e.g.*, TAC ¶¶ 2, 64.

Greenpeace has never alleged that any of this is Walmart's fault. It alleges that due to changing market conditions, mostly driven by actions of the Chinese government and U.S. oil and gas companies, it has recently become more difficult for recycling companies to make a profit from selling used plastic. TAC ¶¶ 48–52. For that reason, it says, manufacturers and distributors of plastic products should stop advertising or labeling those products as being "recyclable," which Greenpeace alleges misleads consumers into buying products that ultimately may not be recycled. *See, e.g.*, *id*. ¶¶ 1, 2, 6, 32, 57, 69. But if market forces dictate recycling rates as Greenpeace alleges, then those rates will fluctuate constantly.[1] Greenpeace does not allege any specific facts in the TAC about the state of the market in 2022.

The complaint includes images of the labels of a few products Greenpeace contends are misleadingly labeled. TAC ¶¶ 54, 59, 61, 63. The labels direct consumers to other sources of information about recycling, including Walmart's own website and *www.how2recycle.info*. Both sites contain information about recyclability, descriptions of what the labels are intended to convey, some of the limitations on recycling programs, and whether particular materials can be recycled in particular communities and if so, where. *See, e.g.*, *https://how2recycle.info/check-locally* (last visited Mar. 19, 2022) (providing links that allow consumers to search for local recycling information by zip code and material type). Greenpeace does not allege which particular California communities' recycling programs are deficient, if any.

Greenpeace continues to argue that the term "recyclable" is misleading according to the FTC "Green Guides" standard. (The most significant change in the TAC is that these paragraphs have been moved closer to the beginning of the complaint. *Compare* SAC ¶¶ 34–40 *with* TAC ¶¶ 7–12.)

[1] For example, Greenpeace's own sources note that after China's policy took effect in January 2018, other countries increased their plastics imports, and the market responded in other ways. Cheryl Katz, "Piling Up: How China's Ban on Importing Waste Has Stalled Global Recycling," Yale Env. 360 (Mar. 7, 2019) (cited at TAC ¶ 48 n.41). For this and other reasons, "[w]hether China's ban leads to increased plastic pollution in the environment remains to be seen," and "if proper alternatives are found, plastic pollution could actually decrease." *Id*.

Greenpeace's argument radically reinterprets the Green Guides. According to the Guides, a product or package is recyclable, and can be labeled as such, if it "***can be*** collected, separated, or otherwise recovered from the waste stream through an established recycling program for reuse or use in manufacturing or assembling another item." 16 C.F.R. § 260.12(a) (emphasis added). Greenpeace does not allege the products and packaging it targets *cannot* be collected, separated, or otherwise recovered. It alleges that, at the moment, because of market forces outside of Walmart's control, they *are not being* recycled at acceptable rates by recycling facilities, or that it may not be profitable for those facilities to accept them. It does not allege they *cannot* be recycled.

Beyond that, the Green Guides standard is based on *access* to recycling facilities, not a percentage of what they recycle. The Guides allow marketers to make recyclable claims, without limitation, if at least 60% of targeted customers have access to facilities that can recycle the item. 16 C.F.R. § 260.12(b)(1). The Guides tell marketers to qualify recyclable claims—for example, by saying "this product may not be recyclable in your area"—if less than 60% of targeted customers have access to such facilities. *Id*. § 260.12(b)(2). Greenpeace does not allege that 60% or more of California consumers lack such access, or identify a particular community in which this is true.

As in the SAC, Greenpeace emphasizes its new version of the deception claims, which rephrases them as "failure to substantiate" claims. That is, rather than say Walmart makes unsubstantiated representations, it says Walmart cannot substantiate the representations it is making—a distinction without a difference. *Compare, e.g.*, SAC ¶ 15 (alleging Greenpeace's staff has been "exposing Defendant's practice of *misrepresenting* the recyclability of the Products") *with* TAC ¶ 21 (alleging Greenpeace's staff has been "exposing Defendant's practice of *making unsubstantiated claims about* the recyclability of the Products") (emphases added). Greenpeace alleges it has asked Walmart "on numerous occasions" to "substantiate" that the products are recyclable (TAC ¶ 75), but still does not clarify exactly what that means or what information it was demanding from Walmart. It does not allege it made some sort of formal demand for "substantiation" (the cited authorities set forth no specific procedures in any event). Elsewhere it refers to a survey it sent to companies including Walmart (*id.* ¶ 21), emails it sent discussing "issues related to ... unsubstantiated recycling representations" (*id*. ¶ 22), and a "pre-suit demand" in August

2020 "informing [Walmart] that its Products are not recyclable" (*id*. ¶ 75)—a determination it was evidently able to make *without* the information it has been demanding from Walmart. The TAC again fails to state what records Greenpeace believes Walmart was legally required to produce or even what records would have satisfied Greenpeace if had Walmart produced them.

Greenpeace has never alleged it was misled by the allegedly deceptive (or "unsubstantiated") labels. It contends it was harmed because it decided to focus on Walmart's "recyclable" claims as part of its organizational mission to protect the environment, and, to do so, "spent" or "diverted" staff time and effort that might have otherwise been devoted to something else. TAC ¶¶ 7, 13, 32 (alleging frustration of Greenpeace's "mission" or "purpose"); 19–32 (describing expenditures Greenpeace allegedly made). The few new allegations in the TAC mostly involve attempts to bolster Greenpeace's claim that it has been harmed by Walmart's alleged failure to provide information. *See id.* ¶¶ 6, 13, 31, 33–36, 70. But again these are conclusory allegations that fail to (for example) identify the information Greenpeace allegedly lacks or specify what harm the missing information is causing. *See, e.g.*, *id.* ¶ 6 (alleging that "[d]enial of access to statutorily required information is harming Greenpeace because it must continue to divert resources to investigate" in some way that will harm its "advocacy efforts").

Greenpeace seeks only injunctive relief that would force Walmart to "substantiate the validity of [its] recycling representations" and/or enjoin it from "making unsubstantiated recycling representations." TAC ¶ 70. It still does not explain what such an order would entail, in particular what information this Court should require Walmart to provide that Greenpeace does not have.

LEGAL STANDARD

A complaint must provide "fair notice" of the plaintiff's claims and enough facts to set forth a plausible claim for relief. Fed. R. Civ. P. 8(a); *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Labels, conclusions, and recitations of legal elements are not "facts" and need not be accepted as true. *Iqbal*, 556 U.S. at 678–79; *Twombly*, 550 U.S. at 555. Any claims grounded in fraud, however those claims may be labeled, must also be pleaded with particularity. Fed. R. Civ. P. 9(b); *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125–26 (9th Cir. 2009).

ARGUMENT

I. Greenpeace still fails to allege facts showing it suffered injury in fact and lost money or property as a result of the alleged misconduct.

A. The basic injury requirement of federal and UCL standing is identical.

UCL actions may be brought only by certain state or local officials "or by a person who has suffered injury in fact and has lost money or property as a result of the unfair competition." Cal. Bus. & Prof. Code § 17204; *see Kwikset Corp. v. Superior Ct.*, 51 Cal. 4th 310, 320–21 (2011). These requirements stem from the Proposition 64 amendments to the UCL, which eliminated the much-abused ability to bring UCL actions on behalf of the "general public." *See Kwikset*, 51 Cal. 4th at 317 (noting amendments were meant "to eliminate standing for those who have not engaged in any business dealings with would-be defendants...."); *Amalgamated Transit Union, Loc. 1756, AFL–CIO v. Superior Ct.*, 46 Cal. 4th 993, 1000 (2009) (noting amendments were motivated by abuse of UCL's broad standing provision). Before 2004, nonprofit groups (or anyone else) could freely bring UCL actions "in the public interest" to redress alleged harm to other people. *See, e.g.*, *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 17 Cal. 4th 553 (1998). That is no longer the case. *Kwikset*, 51 Cal. 4th at 320–21; *Californians for Disability Rts. v. Mervyn's LLC*, 39 Cal. 4th 223, 227, 234 (2006). Here, Greenpeace still does not allege facts showing that *it* was injured, much less that it "lost money or property," as a result of Walmart's alleged conduct. Instead, it alleges it *chose to spend* time and effort on investigating and suing Walmart as part of its mission to protect the environment. These allegations do not establish an actionable injury under federal or state law.

This is because, while the UCL *also* requires lost money or property, its basic injury requirement is identical to the federal Article III standard. Under Article III, there must be an injury that (1) is concrete, particularized, and actual or imminent; (2) was likely caused by the defendant; and (3) would likely be redressed by judicial relief. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021). The basic UCL requirement is identical. As the California Supreme Court has noted, the intent of Prop 64 was *expressly* to prohibit private attorneys (as opposed to public prosecutors) from filing UCL actions "where they have no client who has been *injured in fact under the standing requirements of the United States Constitution*." *See Kwikset*, 51 Cal. 4th at 322 (quoting Prop. 64, §

1(e), emphasis added). Prop 64 restricted UCL standing still further by requiring the concrete injury to involve "lost money or property." Under Article III, "[v]arious *intangible* harms can also be concrete," such as harm to reputation or privacy. *TransUnion*, 141 S. Ct. at 2204 (emphasis added). Under the UCL, that is not true: only "lost money or property" qualifies. UCL standing is thus "qualitatively more restrictive than federal injury in fact, embracing as it does fewer kinds of injuries...." *Kwikset*, 51 Cal. 4th at 324. But the basic injury requirement is identical.

B. Greenpeace does not allege it "lost money or property as a result of" any of Walmart's alleged practices.

Because UCL standing is "more restrictive" than Article III standing, a standing analysis for UCL purposes will generally turn on whether the plaintiff adequately alleges lost money or property. *Kwikset*, 51 Cal. 4th at 323–25. That is the case here as well.

1. Greenpeace did not lose money as a result of any misrepresentations.

First, as the Court has already held, Greenpeace cannot base standing on any expenditures it allegedly made because advertising or labeling the products as "recyclable" is misleading. *Greenpeace*, 2021 WL 4267536, at *1. Whether it characterizes this conduct as "fraudulent," "unlawful," or "unfair" makes no difference: to the extent that it bases any cause of action on an alleged misrepresentation, it must plead its *own* actual reliance in order to show any loss was "as a result of" that conduct. *Id*. at *1–2 (citing *In re iPhone Application Litig.*, 6 F. Supp. 3d 1004, 1013–14 (N.D. Cal. 2013)); *see Kearns*, 567 F.3d at 1127 (holding unfair-practice claim failed for same reason as fraudulent-practice claim because both were based on the same "course of fraudulent conduct"). Greenpeace has not done so.

What it *has* done is make superficial amendments in an effort to avoid this problem, but that effort fails. To give just one example, there is no material difference between alleging that Greenpeace seeks to "expos[e] Defendant's practice of *misrepresenting* the recyclability of the Products" (SAC ¶ 15) and alleging that it seeks to "expos[e] Defendant's practice of *making unsubstantiated claims about* the recyclability of the Products" (TAC ¶ 21). In fact, "unsubstantiated claims" are not even actionable under California law unless a plaintiff pleads sufficient facts to show they amount to misrepresentations on which the plaintiff relied. *Kwan v. SanMedica Internat'l*, 854

F.3d 1088 (9th Cir. 2017); *Lytle v. Nutramax Laboratories, Inc.*, No. EDCV 19-835, 2019 WL 8060070, at *3–4 (C.D. Cal. Sept. 26, 2019); *National Council Against Health Fraud, Inc. v. King Bio Pharm., Inc.*, 107 Cal. App. 4th 1336 (2003). Public prosecutors can bring such actions, but private litigants cannot. *Kwan*, 854 F.3d at 1095–96. Greenpeace's SAC and TAC are little more than successive attempts to portray a misrepresentation-based action as one based on "lack of substantiation." But such a redefinition is unavailing because Greenpeace cannot bring that action, either. Regardless of the phrasing, Greenpeace has not alleged and cannot allege facts showing it lost money or property as a result of Walmart's use of the term "recyclable."

2. Greenpeace does not allege it lost money due to a failure to substantiate.

Greenpeace also has not alleged it lost money or property as a result of its supposed efforts to force Walmart to provide an undefined set of documents or evidence showing "recyclability." These allegations have barely changed. Again Greenpeace says that "on numerous occasions" it has asked Walmart to "substantiate" its claims, and that Walmart has not responded with any "documentation in written form" or "competent and reliable scientific evidence" that does so. TAC ¶ 5. The only occasions mentioned are a survey Greenpeace sent to companies including Walmart (*id.* ¶ 15), emails it sent Walmart discussing "issues related to ... unsubstantiated recycling representations" (*id.* ¶¶ 16, 25, 30), and pre-suit demands it made in 2020 "informing [Walmart] that its Products are not recyclable" (*id.* ¶¶ 30, 75). Greenpeace still does not explain what it was asking for or what it believed it was legally entitled to get. For that matter, its allegation about the pre-suit demand concedes Greenpeace did not *need* any such information; it could not have "inform[ed] [Walmart] that its Products are not recyclable" in 2020 unless it had already reached that conclusion. *Id.* ¶¶ 30, 75. Nor does Greenpeace identify any particular information it still needs. This further shows its focus on "substantiation" is a contrived effort to avoid the reliance requirement, not an effort to describe a real injury.

More importantly, Greenpeace pleads no facts showing it lost any money as a result of Walmart's alleged failure to provide whatever documentation or evidence Greenpeace is demanding. "It is not enough that a plaintiff lost money; to have standing, there must be a causal link between the unlawful practice and the loss." *Mayron v. Google LLC*, 54 Cal. App. 5th 566, 574 (2020).

Greenpeace still has not shown that. To the extent that it makes any effort to tie specific expenditures to "substantiation" attempts, it alleges it spent money to determine whether Walmart had the required documents. That could not establish causation. For example, it alleges it paid staff members to contact Walmart and ask for materials in 2019. TAC ¶¶ 16, 19. But if those expenditures were made *before* Greenpeace learned Walmart would not provide substantiation, as it alleges, then the expenditures could not have *resulted from* the lack of substantiation. This is money Greenpeace alleges it spent to *ask* the questions, not money it spent as a result of the answers or lack of answers. *See, e.g.*, *Mayron*, 54 Cal. App. 5th at 574–75 (holding plaintiff lacked standing because allegations suggested that he would have spent the money even if defendant had complied with the law); *Daro v. Superior Court*, 151 Cal. App. 4th 1079, 1098 (2007) (holding causation not shown where plaintiff would have suffered the same harm whether or not defendant complied).

Even if expenditures were made *after* a request for substantiation, that would not necessarily mean they *resulted from* an inadequate response. Here the allegations show Greenpeace made the "substantiation requests" only to further a strategy it developed long before: to contend Walmart and other retailers were making recyclability claims that had become improper because of changes in market conditions. It had reached this conclusion years before it supposedly sought "substantiation" from Walmart. *See* TAC ¶ 20 & n.6 (citing "Packaging Away the Planet: U.S. Grocery Retailers and the Plastic Pollution Crisis" (2019)); *see also* "Packaging Away the Planet" at p. 15 (arguing in 2019 that retailers like Walmart "can no longer hide behind recycling" and that "recyclable" labels ignore "broken recycling systems"); ¶ 52 (alleging "the writing has been on the wall" about China's recycling policy since 2013). The later expenditures Greenpeace cites involve money it paid consultants for work done to support this strategy, not to investigate anything. The same problem plagues one of the only new allegations in the TAC, in which Greenpeace now says it has hired a consultant to work on another report discussing the "recyclability" issue, and alleges that if Walmart had provided the unspecified information upon request, hiring her would have been unnecessary. TAC ¶ 31. It does not explain why, nor could it. This again is not money that a failure to substantiate caused it to spend, but money it spent to further a pre-existing strategy—one it concedes was in place before it filed this lawsuit. *Id*. ¶¶ 30, 75.

Greenpeace also again alleges that Walmart's alleged failure to comply with laws requiring substantiation gives it "an unfair advantage over its competitors," who Greenpeace says *do* comply (it pleads no facts to support the assertion). TAC ¶ 86. That might be relevant if this action had been brought by one of Walmart's competitors (and that competitor could also show it lacked an adequate remedy at law). *See, e.g., Law Offices of Mathew Higbee v. Expungement Assistance Servs.*, 214 Cal. App. 4th 544, 564–65 (2013) (holding plaintiff adequately alleged it lost money as a result of competitor's violation of statute). But it is not relevant here.

In short, under the standard UCL standing analysis, which generally turns on whether a plaintiff has adequately alleged a loss of money or property caused by the defendant's conduct, Greenpeace's allegations fall short. It lacks standing for that reason alone.

C. Greenpeace cannot establish "injury in fact" through the "organizational standing" theory under federal *or* state standards.

What Greenpeace's allegations really describe is an effort to assert "organizational standing"—a theory of "injury in fact" based on an expenditure of money, time, or other resources to further an organization's "mission" or "purpose." *See, e.g.*, *Friends of the Earth v. Sanderson Farms, Inc.*, 992 F.3d 939, 942–43 (9th Cir. 2021); *Women's Student Union v. U.S. Dep't of Education*, No. 21-cv-01626-EMC, 2021 WL 3932000, at *4–7 (N.D. Cal. Sept. 21, 2021); *Havens Realty Corp. v. Coleman*, 455 U.S. 463 (1982). Greenpeace repeatedly alleges that its expenditures fit this description because Walmart was "frustrating" its mission or purpose. *See* TAC ¶¶ 13–15, 32, 33, 36, 69, 78, 88. Its allegations are not sufficient to establish standing even under the line of federal authorities it relies on, and the same is necessarily true for the UCL.

1. Greenpeace has not alleged it was *required* to expend resources.

Under federal precedent, organizations may be able to establish "injury in fact" if they "alter their resource allocation to combat the challenged practices, but not when they go about their business as usual." *Friends of the Earth*, 992 F.3d at 942–43 (punctuation omitted); *see also, e.g.*, *Am. Diabetes Assoc. v. United States Dept. of the Army*, 938 F.3d 1147, 1154–55 (9th Cir. 2019). They must have "expended additional resources that they would not otherwise have expended, and in ways they would not have expended them." *Friends of the Earth*, 992 F.3d at 942 (citing *Nat'l*

Council of La Raza v. Cegavske, 800 F.3d 1032, 1040 (9th Cir. 2015)). An organization "cannot manufacture the injury by ... simply choosing to spend money fixing a problem that otherwise would not affect the organization at all." *La Asociación de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010). "It must instead show that it would have suffered some other injury if it had not diverted resources to counteracting the problem." *Id*.; *see El Rescate Legal Servs., Inc. v. Exec. Off. of Immigr. Rev.*, 959 F.2d 742, 748 (9th Cir. 1992) (organizations had standing where challenged policy "*require[d]* [them] to expend resources ... they otherwise would spend in other ways") (modifications added). In short, an organization must do more than merely allege it chose to allocate resources in a particular way to pursue its "business as usual." Otherwise, there would be no meaningful limits on organizational standing.

In the TAC, Greenpeace's allegations again describe only business as usual. Greenpeace has long "worked to combat plastic pollution" in California and elsewhere, work that has included educating the public about "statements that certain plastic was ... recyclable when it was not...." TAC ¶¶ 13, 17. This work has not been limited to California or Walmart. To the contrary, for the "Packaging Away the Planet" report Greenpeace evaluated 20 retailers for its "2019 Supermarket Plastics Scorecard" (it gave all 20 a failing grade), and the report specifically discussed the same concerns now expressed in this lawsuit. *Id*. ¶ 20 & n.6. While Greenpeace again asserts that its actions toward Walmart came "at the expense" of other projects and campaigns, it again pleads no facts to support that assertion. *Id*. ¶ 34.

The Ninth Circuit held similar allegations insufficient in *Friends of the Earth*. The court noted that the plaintiff advocacy groups had been engaged in initiatives to further the stated goal (reducing antibiotic use in agriculture) for years before they targeted the defendant. *Friends of the Earth*, 992 F.3d at 942–43. Once the defendant came to their attention, the groups "simply continued what they were already doing—publishing reports on and informing the public of various companies' antibiotic practices." *Id*. This was not enough to confer standing. *Id*. The enhanced allegations the same plaintiffs then asserted in another lawsuit also fell short. *See In Defense of Animals v. Sanderson Farms, Inc.*, No. 20-cv-05293-RS, 2021 4243391, at *1 (N.D. Cal. Sept. 17,

2021) (noting court was experiencing "deja vu"). As Judge Seeborg held, they were simply missing the point because these were resources they had *chosen* to spend:

> [O]rganizational standing requires an injury to the organization itself, not merely its interests. An organization's entirely voluntary action cannot confer standing, no matter its quality or quantity. *The organization must be forced to respond to prevent injury*.... Even if the Plaintiffs had transformed themselves entirely into anti-Sanderson advocates, they would not have standing because it would not have been due to any injury by Sanderson. Thus, despite their efforts to manufacture standing, Plaintiffs still do not have a leg to stand on. They have missed the forest for the trees.

Id. (emphasis added). The new "diversion of resources" allegations there were much like those Greenpeace makes here: the plaintiffs alleged, in general terms, that they diverted staff time and resources to a campaign to "counteract the effects of Sanderson's conduct," including investigating and publicizing that conduct. *Id*. at *2. They alleged these efforts diverted time and resources from other campaigns. *Id*. But none of this made a difference, because to have organizational standing, "plaintiffs must show they would have suffered some other injury if they had not diverted resources to fix the problem.... The organization must be 'forced' into acting because the defendant affected its operations." *Id*. at *4 (citing some of the "numerous cases" that make this point). Merely alleging that the defendant "frustrate[d] their mission in a general sense" was not enough. *Id*.

Greenpeace's conclusory allegations here are insufficient for the same reasons. As Judge Seeborg noted, to hold that an organization has standing "by virtue of investigating conduct or starting a new campaign against someone who frustrates its general mission" would nullify standing requirements. *Id*. "Just as an individual cannot gin up standing by researching and tweeting about something that indirectly makes his or her life harder, neither can an organization." *Id*. Without concrete facts showing the organization was *forced* to divert resources, including "specific averments about what it would have done with its time and money otherwise," this standing argument fails. *Id*. at *5; *see also Women's Student Union*, 2021 WL 3932000, at *5–7 (holding organization lacked standing because it failed to plead specific facts explaining how defendant's actions directly impaired its ability to operate and function). Greenpeace has alleged no such facts.

2. Organizational standing is not available under the UCL.

Here the "injury in fact" analysis must have the same result under state law, by definition, because as discussed above the UCL requires "injur[y] in fact *under the standing requirements of the*

United States Constitution," in addition to lost money or property. *Kwikset*, 51 Cal. 4th at 322 (quoting Prop 64; emphasis added). If Greenpeace lacks "injury in fact" for purposes of Article III, then it necessarily lacks "injury in fact" for purposes of the UCL. State precedent also shows that organizational standing cannot satisfy that requirement here.

The California Supreme Court has expressly held that the federal doctrine of "associational standing," which allows an association to pursue an action based on the standing of its members, conflicts with the amended UCL. *Amalgamated Transit*, 46 Cal. 4th at 1002–04. Even if a member assigned his or her claim to the association, this would be "in direct violation of the express statutory requirement ... that a private [UCL action] be brought *exclusively*" by the injured party. *Id*. at 1002. (emphasis in original). Greenpeace relies instead, as before, on organizational standing: the theory that it suffered injury because Walmart "frustrated Greenpeace's mission" to protect the environment and "caused" it to spend resources "in response to that frustration of purpose." TAC ¶ 13. But like associational standing, organizational standing is incompatible with the amended UCL. If an association cannot use the UCL to redress harm to its own members (*Amalgamated Transit*, 46 Cal. 4th at 1002–04), it would make little sense to let an organization use it to redress harm to "the general public," a far more attenuated claim and one that Prop 64 was intended to prevent. That also conflicts with the requirement that private UCL actions be brought "exclusively" by an injured party.

The California Supreme Court has never held that organizational standing can be a basis for a UCL action. Greenpeace presumably will again rely on *ALDF*, but that case provides no support for its claim here. *See Animal Legal Def. Fund v. LT Napa Partners LLC*, 234 Cal. App. 4th 1270, 1277–84 (2015). In *ALDF*, the Court of Appeal considered unlawful-practice claims against a restaurant that served *fois gras* in violation of a state statute. *Id*. at 1275–76. ALDF paid an investigator to visit the restaurant and sued after he was served *fois gras*. *Id*. at 1276. The restaurant brought an anti-SLAPP motion, arguing that its conduct was protected because it was serving *fois gras* as a protest. *Id*. at 1277. The court held the motion was properly denied in part because ALDF had shown it was likely to prevail on standing. *Id*. at 1278–84. But in asserting that organizational standing could support a UCL claim, the court relied on federal authority, not an analysis of California law. It did not mention *Amalgamated Transit* and did not apply *Kwikset*. *ALDF*, 234 Cal.

App. 4th at 1280–81. Instead, it relied ultimately on a 2005 decision that *Kwikset* did not even cite. *See id*. (citing *S. Cal. Hous. Rts. Ctr. v. Los Feliz Towers Homeowners Ass'n*, 426 F. Supp. 2d 1061, 1068–69 (C.D. Cal. 2005)). The court itself acknowledged that *Kwikset* did not directly support its conclusion. *See id*. (acknowledging *Kwikset* did not address the issue, but claiming it "did express some approval for that proposition through its approving citation to *Hall [v. Time]*.") The court's conclusion does not follow. Had the California Supreme Court meant to approve of organizational standing in *Kwikset*, it would have said so explicitly, especially in view of its decision just two years before in *Amalgamated Transit*. But the proposition was not even at issue in *Kwikset*.

ALDF also conflicts with the more recent *California Medical Association* case. *California Med. Assoc. v. Aetna Health of Cal., Inc.*, 63 Cal. App. 5th 660 (2021). In *CMA*, the association brought a UCL claim seeking to enjoin Aetna from restricting referrals to out-of-network providers. *Id.* at 662. CMA alleged Aetna marketed insurance plans as allowing unrestricted use of out-of-network providers, but then tried to deter member physicians from making referrals to those providers. *Id*. Because CMA did not itself have a contract with Aetna, it could not allege it was directly harmed by this conduct. It therefore needed another basis for its action.

CMA argued it had standing to bring a "nonclass representative action" seeking injunctive relief. *Id*. at 662–63. The Court of Appeal disagreed, pointing out that the case law CMA relied on had "developed many years before the electorate passed Proposition 64 in 2004...." *Id*. at 663. And in *Amalgamated Transit*, the California Supreme Court held that associational standing was inconsistent with the amended UCL, so that following the amendments, "all unfair competition law actions seeking relief on behalf of others ... must be brought as class actions." *Id*. at 666 (quoting *Amalgamated Transit*, 46 Cal. 4th at 1005). The *CMA* court also noted that two years later, *Kwikset* emphasized the new requirement that a UCL plaintiff must show personal, direct economic harm caused by the alleged misconduct. *Id*. "[T]he decisions in *Amalgamated Transit* and *Kwikset* require an association such as CMA to produce evidence that CMA itself, and not just its members, lost money or property" to bring a UCL action, and "the cases recognizing an association may have standing to assert its members' *non*-UCL claims do not apply here." *Id*. at 667.

CMA also argued—just as Greenpeace does here—that it was suing on its *own* behalf, citing *ALDF* for the proposition that "diversion of its resources is a sufficient injury to confer standing under the UCL." *CMA*, 63 Cal. App. 5th at 667. CMA alleged that it advocates on behalf of physicians throughout California, "and carries out its mission through legislative, legal, regulatory, economic, and social advocacy." *Id*. at 664. It had been "forced to expend significant time and resources" on an "investigation and review of [Aetna's] wrongdoing," planning a strategy to counter it, and responding to public inquiries about it. *Id*. It provided a declaration in which a senior vice-president testified that "'preventing conduct that interferes with the physician-patient relationship' is part of CMA's core mission," and that it had been "especially active in advocacy and education on issues" like those described in its complaint. *Id*. After learning about and investigating Aetna's conduct, he testified CMA had determined that the conduct was "frustrating CMA's purpose of protecting physicians and the public." *Id*. at 665. He estimated CMA had "diverted" 200 to 250 hours of staff time to Aetna's conduct. *Id*. Citing this and *ALDF*, CMA argued this was sufficient.

Again the Court of Appeal disagreed. *Id*. at 668–69. It said *ALDF* was "distinguishable" because that case did not involve a "representative action," saying ALDF did not purport to be advocating on behalf of or providing services to members. *Id*. It had been arguing, the court suggested, only that it was directly injured by the restaurant's violation of the ban on sales of foie gras. *Id*. CMA, on the other hand, was advocating on behalf of others, and the staff time and resources it allegedly "diverted" to dealing with Aetna were typical of its normal operations. *Id*. "If we were to apply *ALDF* to this case," the court held, "then any organization acting consistently with its mission to help its members through legislative, legal and regulatory advocacy"—as Greenpeace is doing here—"could claim standing based on its efforts to address its members' injuries. The 2004 amendments to the UCL eliminated such representational standing." *Id*. at 668–69. The court then held the federal authorities that CMA cited—the same line of authority Greenpeace relies on here—were "neither binding on this Court nor instructive" as to associational *or* organizational standing. *Id*. at 669. Only one of them even considered a UCL claim, the court pointed out, and that one—the *Housing Rights* case mentioned in *ALDF*—predated the relevant California Supreme Court cases and so offered "little guidance." *Id*.

ALDF is distinguishable here because Greenpeace's claims, and its alleged injuries, are ultimately based on allegations that others are being deceived, while *ALDF* had nothing to do with deception. If *ALDF* applied to claims based on deception, any organization could declare a mission of protecting consumers from false (or "unsubstantiated") advertising, and then bring a UCL action based on injury to that mission. That would be functionally indistinguishable from the situation before Prop 64 passed. But the same is true even setting aside that distinction, because *ALDF* was wrongly decided. As the *CMA* court suggested, if *ALDF* were correct, "any organization acting consistently with its mission to help its members through legislative, legal and regulatory advocacy could claim standing based on its efforts to address its members' injuries," which the 2004 UCL amendments do not allow. *CMA*, 63 Cal. App. 5th at 668–669. The same is true if one replaces "members" with "the general public," which is Greenpeace's approach here. There is no reason to believe the California Supreme Court will endorse this approach to UCL standing.[2]

In short, Greenpeace has not alleged standing because it cannot invoke organizational standing to establish "injury in fact"—under federal or state law—and because it has not "lost money or property" as a result of Walmart's alleged conduct.

II. The Court should dismiss for lack of standing because remand would be futile.

In its previous order, the Court stated that it agreed Greenpeace had not alleged standing, but also that it was considering remand rather than dismissing this case outright. Under the unusual circumstances here, the Court can and should dismiss. The Ninth Circuit has held that a district court may dismiss a removed case instead of remanding if it is "certain that remand to the state court would be futile." *Bell v. City of Kellogg*, 922 F.2d 1418, 1425 (9th Cir. 1991). That is still the law, and here it is certain that remand would be futile.

Bell involved challenges to a state election held to approve a tax levy. 922 F.2d at 1421. Plaintiffs filed in state court, asserting both state and federal claims, and defendants removed the case to the District of Idaho. *Id*. The district court dismissed Bell's claims for lack of standing. *Id*. The Ninth Circuit affirmed, holding Bell did not meet the two-part test for taxpayer standing, a test

[2] As discussed further in Part III below, the California Supreme Court has granted review in *CMA*, and briefing on the merits is almost complete.

that "serves as an overlay to the minimum Article III requirements." *Id*. at 1422 (citing *Flast v. Cohen*, 392 U.S. 83 (1968)). Bell's complaints that citizens were not given enough information about the election, for example, were "not sufficiently particularized" to give him a "personal stake in the outcome." *Id*. at 1423. He was asserting "an interest held generally by the public," not a personal "injury in fact." *Id*. The court applied the same analysis to Bell's claim under the state election statute, and again held he lacked standing. *Id*. Finally, the court held his claim would also fail under the state statute itself. *Id*. at 1423–24.

Bell argued that his state-law claim should not have been dismissed outright, but rather remanded "once the federal claims were dismissed for lack of subject matter jurisdiction." *Bell*, 922 F.2d at 1424–25. The Ninth Circuit disagreed. If the district court had remanded, it predicted, the state court "would have simply dismissed the action" because Bell had not complied with the requirements of the state statute. *Id*. "Because we are certain that a remand to state court would be futile," it held, "no comity concerns are involved," and "[d]istrict court resolution of the entire case prevents any further waste of valuable judicial time and resources." *Id*. at 1425. Thus, under *Bell*, a district court may dismiss rather than remand if it is certain a state court would also dismiss.

As this Court noted in its order on the SAC, another panel of the Ninth Circuit addressed *Bell* a few years ago. *Polo v. Innovations Int'l, LLC*, 833 F.3d 1193, 1197–98 (9th Cir. 2016). That panel questioned *Bell*'s holding, but did not reverse it.[3] For that matter, the panel recognized that it likely did not have the authority to reverse *Bell*, something that would require an *en banc* decision. *Id*. at 1198 (citing *Miller v. Gammie*, 335 F.3d 889 (9th Cir. 2003)). But the panel did not reach the issue in any event, holding that under *Bell* and on the facts before it, remand would not be futile because it was "far from clear that a state court would dismiss Polo's CLRA claim." 833 F.3d at 1198. The district court had dismissed Polo's claim as moot because the defendant refunded the purchase price, curing any injury she suffered (for Article III purposes). *Id*. But under the CLRA, a defendant is prohibited from "picking off" a named plaintiff that way in a class action. *Id*. (citing *Meyer v. Sprint Spectrum, L.P.*, 45 Cal. 4th 634 (2009)). Assuming the state court applied state law correctly,

[3] Because *Polo* was decided by a panel and not the court sitting *en banc*, the panel likeit is not clear that the panel had the authority to reverse *Bell* (as the panel itself recognized).

therefore, it would "likely" find Polo had standing under the CLRA. *Id*. at 1199. Thus, what the panel said about *Bell* was dicta. And though it pointed out that the U.S. Supreme Court had questioned whether section 1447(c) gave district courts discretion to dismiss, that statement was *also* dicta. *See International Primate Prot. League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72, 89 (1991) (briefly discussing statute but ordering remand for other reasons); *Polo*, 833 F.3d at 1197–98 (noting that in *IPPL* the Supreme Court "did not reject the futility doctrine outright").

Thus, *Bell* remains good law in the Ninth Circuit, and a number of district courts have applied it recently when deciding to dismiss rather than remand for lack of standing. *See Strojnik v. Hyatt Hotels Corp.*, No. CV-21-00741-PHX, 2022 WL 504480, at *10 (D. Ariz. Feb. 18, 2022); *Stanfield v. Tawkify, Inc.*, No. C 20-07000-WHA, 2021 WL 4199270, at *8 (N.D. Cal. Sept. 15, 2021); *Strojnik v. Forest Villas Inn* LLC, No. CV-20-08328-PCT, 2021 WL 2138797, at *6 (D. Ariz. May 26, 2021); *Romero v. United States Postal Serv.*, No. CV 20-6685-PSG, 2020 WL 8028105, at *2–3 (C.D. Cal. Nov. 23, 2020); *Advocs. for Individuals with Disabilities LLC v. MidFirst Bank*, 279 F. Supp. 3d 891, 893, 897 (D. Ariz. 2017).

The Arizona cases are especially instructive because they involved a plaintiff bringing claims under a state statute that "mirrors" federal law so that the same standing requirements apply in both state and federal court. *See, e.g.*, *Strojnik*, 2022 WL 504480, at *9. Because the standards were the same, it necessarily followed that if the plaintiff did not have federal standing, he also lacked state standing. As discussed above, that is also the case here: UCL standing *is* Article III standing (plus the money-or-property requirement.) Prop 64 explicitly stated that it was intended to incorporate the requirements "of the United States Constitution" as the minimum UCL requirement. It therefore follows that if Greenpeace has not alleged "injury in fact" under Article III, its UCL claim would fail in state court for the same reason. Put another way, while *Polo* and other cases have said that "[s]tate courts are not bound by the constraints of Article III" (833 F.3d at 1196), here the state court *would be* bound by the constraints of Article III because the state law in question explicitly says that it is.

Only if the state court did not follow the law would the result be different, but that is not the sort of prediction a federal court should make. Rather, it must apply state law as it predicts the state's highest court would apply it. As discussed above, the California Supreme Court has already held that

"associational standing" is incompatible with the amended UCL, and there is no support for "organizational standing" under that law. For that reason, the Court may and should dismiss Greenpeace's claims rather than remanding them, which would only waste further judicial and party resources. Greenpeace has had four opportunities to plead "injury in fact" and "lost money or property." It cannot plead either requirement, and there is no reason to give it another chance.

III. Alternatively, the Court should stay this matter pending the California Supreme Court's decision in *California Medical Association.*

If the Court is reluctant to dismiss, there is another option. When a potentially dispositive case is pending on appeal, a district court may defer ruling on whether remand is required until that case has been decided. *See, e.g.*, *Zhang v. Ancestry.com Operations, Inc.*, No. 21-cv-07652-LB, 2022 WL 718486, at *1–3 (N.D. Cal. Mar. 10, 2022); *Camacho v. Hydroponics, Inc.*, No. EDCV 20-980-JGB (KKx), 2021 WL 940318, at *4 (C.D. Cal. Mar. 10, 2021); *Tucker v. Organon USA, Inc.*, No. C 13-00728-SBA, 2013 2255884, at *2 (N.D. Cal. May 22, 2013). *Zhang*, for example, involved a claim that Ancestry.com was violating California law by using plaintiffs' names and likenesses (such as yearbook photographs) to advertise and sell its services without consent. *Zhang*, 2022 WL 718486, at *1. The court held the plaintiffs had not pleaded an injury in fact. *Id*. Because a case nearly identical to *Zhang* is now pending on appeal, the court agreed to stay the case "in the interest of efficiency and consistency" because the forthcoming decision "will likely be dispositive of subject-matter jurisdiction...." *Id*. at *2. It held those same concerns justified deciding the stay issue before deciding whether remand was appropriate. *Id*. at *5–8.

The California Supreme Court's opinion in *CMA* will address the issue of organizational standing. That court granted review in July of last year, and in the same order it denied the plaintiff's request that it "depublish" the Court of Appeal opinion pending review. *California Med. Assoc. v. Aetna Health of Cal.*, 491 P.3d 1045 (Cal. July 28, 2021). The Court of Appeal's decision discussed organizational standing and *ALDF* as well as associational standing, and the parties' briefing on the merits before the California Supreme Court addresses all these issues as well. If the California Supreme Court holds that neither form of standing is permitted under the UCL, this Court could then

be certain that remand would be futile, to the extent there is any doubt. If the California Supreme Court holds otherwise, this Court could remand at that time if appropriate.

A stay would not cause unreasonable delay. Briefing on the merits in *CMA* is now almost complete. The opening brief was filed on October 27, 2021, the answering brief was filed on January 25, and the reply is due in less than a month, on April 15. A few months will pass before the Court sets oral argument, but once it does it will issue a decision within 90 days of the argument date. Cal. Sup. Ct. Int. Op. Prac. & Pro. §§ VII, X; Cal. Const. Art. VI, § 19; Cal. Prac. Guide, Civ. Appeals & Writs § 13:195 (Rutter Group 2022). It is therefore possible that the Court will decide *CMA* before the end of this year. Under the circumstances, the Court should stay this matter until after *CMA* is decided, if it does not dismiss outright.

IV. If Greenpeace did have standing, its claims would still fail because it has not alleged facts showing Walmart has done anything deceptive, unlawful, or unfair.

Finally, should the Court decide Greenpeace *does* have standing to bring a UCL claim for unlawful or unfair practices, it should dismiss in any event because the claims fail for other reasons.

A. "Recyclability" claims are not subject to the substantiation requirement under current law.

The substantiation requirement does not apply to "recyclability" claims—it applies to claims that a consumer good "is not harmful to, or is beneficial to, the natural environment," for example by using terms like "environmentally safe," "green product," or "any other like term." Cal. Bus. & Prof. Code § 17580(a). While Greenpeace asserts that "recyclable" is one such "like term," there is no case law saying so. If this assertion were true, the Legislature would not have needed to amend the statute to specifically include "recyclable" claims, which it did only a few months ago. *See* 2021 Cal. Legis. Serv. Ch. 507 (S.B. 343) (West) (filed Oct. 5, 2021). Under the new law—which is not retroactive—the substantiation requirement will apply to claims that involve "the use of a chasing arrows symbol or by otherwise directing a consumer to recycle the consumer good...." SB 343, § 1 (amending section 17580(a)). Similarly, current law includes a legislative declaration that "environmental marketing claims" should be truthful and accurate. Cal. Pub. Res. Code § 42355.5. SB 343 adds a declaration that "claims related to the recyclability of a product or packaging" should

also be truthful and accurate. SB 343, § 4 (renumbering current section and adding new subsection). This also shows the Legislature views "environmental marketing" and "recyclable" claims differently, bolstering the interpretation above.

For that matter, from 1990 until 1995, the code *did* expressly refer to "recyclable" claims, but the Legislature repealed that provision. 1995 Cal. Legis. Serv. Ch. 642 (S.B. 426) (West) (filed Oct. 6, 1995) (repealing Cal. Bus. & Prof. Code § 17508.5). It did so because the definition of "recyclable" it used—that a product could be "conveniently recycled" in certain counties—was so vague it was unenforceable. *See* Sen. Committee Report on S.B. 426 (Mar. 27, 1995) (attached as Ex. A to ECF 45). As the report pointed out, there had been multiple efforts to redefine "recyclable" in a way that might prove workable, reflecting an ongoing debate about what that term should mean, but those efforts had failed. *Id*. For that and other reasons, the Legislature simply repealed the measure. *Id*. Again, therefore, the legislative history supports the interpretation that the existing substantiation requirement does not apply to "recyclability" claims.[4]

B. Private parties cannot enforce substantiation requirements in any event, at least under the circumstances here.

It is also not clear that any private party could enforce section 17580's substantiation requirement, even assuming it had UCL standing to do so. It *is* clear that private parties generally cannot sue to seek substantiation of advertising claims. *See, e.g.*, *King Bio*, 107 Cal. App. 4th at 1345 (holding "[p]rivate plaintiffs are not authorized to demand substantiation for advertising claims" under Business & Professions Code section 17508). Only prosecuting authorities may do so. Cal. Bus. & Prof. Code § 17508(b)–(d). This limitation is "certainly rational" because it "prevents undue harassment of advertisers" by a potentially unlimited number of parties, and "is the least burdensome method of obtaining substantiation for advertising claims." 107 Cal. App. 4th at 1345.

This specific limitation does not appear in section 17580. But as *King Bio* also held, to allow private parties to sue under the UCL to help force advertisers to "substantiate" marketing claims would violate public policy by improperly shifting the burden of proof from plaintiffs to defendants.

[4] If the requirement did apply, it would incorporate FTC standards, not the standard Greenpeace seeks to impose here. As discussed below, Greenpeace does not allege facts showing Walmart violated the FTC standards.

Id. at 1344–48. That is, the plaintiff always has the burden of proof and the burden to plead facts sufficient to state a claim. A defendant may eventually need to come forward with "substantiating" evidence to defeat a properly pleaded complaint, but a plaintiff cannot sue without the necessary facts and simply demand that the defendant "either 'put up or shut up.'" *Mier v. CVS Pharmacy, Inc.*, No. SACV 2001979-DOC-ADS, 2021 WL 1559367, at *4 (C.D. Cal. Mar. 22, 2021); *see also, e.g.*, *Johns v. Bayer Corp.*, No. 09-CV-1935-AJB-DHB, 2013 WL 1498965, at *48 (S.D. Cal. Apr. 10, 2013) (citing cases). Given the weakness of Greenpeace's allegations here, and to the extent it claims to be suing only to force Walmart to provide unspecified information, public policy should bar its attempt to do this. The policy underlying the requirement can best be furthered by leaving enforcement to prosecuting authorities.

C. Greenpeace does not allege facts showing it is unlawful or unfair to label the products as "recyclable," with or without substantiation.

Greenpeace's lawsuit also fails because it has not alleged facts showing that labeling the products as "recyclable," with or without "substantiation," is an unlawful or unfair practice.

Both causes of action allege that Walmart does not comply with the standards for "recyclable" claims under FTC's Green Guides. TAC ¶¶ 71–79, 80–89. According to the Green Guides, "[a] product or package shall not be marketed as recyclable unless it *can be* collected, separated, or otherwise recovered from the waste stream through an established recycling program for reuse or use in manufacturing or assembling another item." 16 C.F.R. § 260.12(a) (emphasis added). But Greenpeace does not allege that any of the challenged products *cannot* be "collected, separated, or otherwise recovered ... for reuse or use in manufacturing or assembling another item." It alleges only that, after recent changes in the market, this does not happen often enough. *See, e.g.*, TAC ¶¶ 47, 55 (alleging plastics #3–7 are now "rarely, if ever, recycled"); 48–52 (alleging this is because of market conditions including expanded production of "virgin plastic" by oil companies and decisions by the People's Republic of China); 55 (alleging "the majority of plastics #3–7"—but not all—are sent to landfills); 57 (conceding that some recycling facilities in California accept such plastics). But under the Green Guides, as Greenpeace concedes, a marketer can make "recyclable" claims so long as "a substantial majority" of consumers or communities "have access to" recycling

facilities. *Id*. ¶ 54; *see* 16 C.F.R. § 260.12(b)(1) (claim can be made so long as "*recycling facilities are available to* a substantial majority of consumers or communities where the item is sold," emphasis added). A "substantial majority" means at least 60 percent. *Id*. Greenpeace does not plead facts showing this standard is not being met in California as a whole or in any particular community.

Greenpeace is essentially asking the Court to rewrite the Green Guides to require marketers to ensure certain products are *actually being* placed into recycling bins by consumers and recycled by independent facilities at rates acceptable to Greenpeace. And if, as Greenpeace claims, recycling rates depend on changing market conditions, this duty would impose a heavy and continuing burden on retailers. Not only is this interpretation of the Green Guides wrong, it has drastic implications for the consumer goods industry as a whole, because similar labeling is used by other retailers and brands across the country. *See* How2Recycle, *https://how2recycle.info* ("The How2Recycle label was created to provide consistent and transparent on-package recycling information to consumers in North America."). While this litigation may fit within Greenpeace's stated goal to discourage the use of plastic, it goes well beyond what federal and California law require of retailers. And ironically, since the challenged labels educate consumers about which items can be recycled, removing the labels could lead to *more* plastic ending up in landfills. Greenpeace concedes that at least some of the challenged plastics are being recycled under current marketing conditions. If consumers stop depositing these products into collection bins, none of it will be recycled.

CONCLUSION

Because the Third Amended Complaint still does not allege facts showing that Greenpeace has standing to sue, and because remand would be futile, the Court should dismiss without further leave to amend. If the Court does not dismiss for lack of standing, it should stay this matter pending the California Supreme Court's decision in *California Medical Association*. Should the Court find Greenpeace *does* have standing, it should dismiss because Greenpeace has not alleged facts establishing any unlawful or unfair practice.

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Respectfully submitted,

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