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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 REPLY IN SUPPORT OF ITS 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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INTRODUCTION

Since this Court dismissed the First Amended Complaint, Greenpeace has filed two more amended complaints, making only superficial changes in each. Nothing in the Third Amended Complaint should change this Court's prior conclusion that Greenpeace has failed to allege standing.

First, Greenpeace's discussion of the standing issues involves a red herring: its insistence that it can seek injunctive relief on behalf of the "general public" even if Greenpeace itself is not entitled to injunctive relief. That is not only wrong—and Greenpeace does not cite a single case (state or federal) adopting that view—but also irrelevant. Even if Greenpeace were right about the remedy, it would still lack standing to seek it. It has not alleged either "injury in fact" or that it lost money or property as a result of Walmart's alleged conduct, and the "organizational standing" doctrine it relies on is not viable under the UCL.

Second, because the "organizational standing" argument fails, this Court may and should dismiss the litigation rather than remand to state court. Greenpeace's standing argument would fail in state or federal court, so remand would be futile. Greenpeace is essentially asking the Court not to apply California law as it stands, but to assume the state court will make a mistake or create new law in its favor. The Court is not required to make that assumption and should not do so.

Third, if the Court has any doubt about organizational standing under the UCL, it should stay this matter pending the California Supreme Court's decision in *California Medical Association*. Contrary to Greenpeace's argument, it is clear that *CMA* will resolve whether organizational standing can be a basis for a UCL action, and it will do so within months. This Court has broad discretion to enter a stay, and Greenpeace has made no effort to show it would suffer any hardship or prejudice as a result. A stay would preserve judicial economy and save the parties time and effort.

As Walmart showed in its motion (and in its previous briefing), there is no merit to Greenpeace's case in any event. There is nothing misleading about Walmart's use of "recyclable," and the Court should reject Greenpeace's effort to disguise its case as one involving an effort to seek "substantiation." But the Court need not reach those issues because Greenpeace lacks standing to bring these claims. The Court should dismiss the Third Amended Complaint with prejudice.

LEGAL STANDARD

Greenpeace begins its factual summary by referring to the Rule 8 standard and insisting everything it says must be accepted as true. *See* Opp. at 5 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). But its summary, like the Third Amended Complaint itself, does little more than assert legal conclusions, which are "not entitled to the assumption of truth." *Iqbal*, 556 U.S. at 679. For example, Greenpeace's repeated assertions in its summary (and the opposition and TAC more generally) that, for example, it was "forced" to "spend" or "divert money, staff time, and other resources" because of Walmart's conduct are all conclusory allegations that the Court need not and should not assume to be true. As Walmart has shown, Greenpeace's own allegations demonstrate that it *chose* to devote these resources to litigation, and it *chose* Walmart as one of its targets. Neither Walmart nor anyone else forced Greenpeace to spend a single dollar, minute, or any other resource on this lawsuit. Greenpeace has never alleged any facts showing otherwise.

ARGUMENT

I. Greenpeace's standing argument distorts both federal and state law.

Greenpeace says that Walmart is "conflat[ing] UCL and Article III standing" (Opp. at 6), but Greenpeace is the one doing that. According to Greenpeace, it not only has standing, it has standing to seek injunctive relief to redress "intangible harms" it is not even suffering. This is not the law in either state or federal court.

A. The basic injury requirement of federal and UCL standing is identical—which does not mean Greenpeace can sue for intangible harms.

Greenpeace concedes that Article III and the UCL both require "injury in fact" and that the requirements for showing this are "fundamentally the same." Opp. at 6–7. Indeed, as Walmart pointed out, incorporating the federal standing requirement into the state UCL was a primary goal of the Prop 64 amendments:

> The text of Proposition 64 establishes expressly that in selecting this phrase ["injury in fact"] the drafters and voters intended to incorporate the established federal meaning. The initiative declares: "It is the intent of the California voters in enacting this act to prohibit private attorneys from filing lawsuits for unfair competition where they have no client who has been injured in fact under the standing requirements of the United States Constitution."

Kwikset Corp. v. Superior Ct., 51 Cal. 4th 310, 322 (2011) (citing Prop. 64 § 1(e), approved Nov. 2, 2004). More specifically, the intent was to confine standing to those actually injured by the defendant's targeted practices and "to curtail the prior practice of filing suits on behalf of 'clients who have not used the defendant's product or service, viewed the defendant's advertising, or had any other business dealing with the defendant'"—phrases that describe Greenpeace. *Id.* at 321 (citing Prop. 64 § 1(b)(3), further citation omitted). Importing the federal "injury in fact" requirement was the first step in curtailing that practice.

But Prop 64 went further by requiring that the "injury in fact" must involve a loss of money or property. *Id*. at 324. As the Court pointed out in *Kwikset*, this means that UCL standing is "substantially narrower" than standing under Article III:

> [B]ecause economic injury is but one among many types of injury in fact, the Proposition 64 requirement that injury be economic renders standing under section 17204 substantially narrower than federal standing under article III, section 2 of the United States Constitution, which may be predicated on a broader range of injuries.

Id. at 324. As it explained in a footnote, the "broader range of injuries" that might provide standing under Article III included intangible injuries such as "recreational and aesthetic harms," the "use and enjoyment of the natural resources" of an area, and "environmental interests." *Id*. at 324 n.6 (citing cases including *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972)). But after Prop 64, intangible injuries cannot be the "injury in fact" that provides standing to bring a UCL action. *Id*. at 324 (citing *Troyk v. Farmers Group, Inc.*, 171 Cal. App. 4th 1305, 1348 n.31 (2009) (noting actions for "intangible" injuries were precluded by Prop 64)).

As Greenpeace now admits, "intangible harms" are exactly what it is complaining about here. Opp. at 7. In a broader sense, it alleges harm to "environmental interests," which is itself an "intangible" injury. But in an effort to overcome its standing deficit, Greenpeace has amended its pleadings to focus on the alleged "informational injury" it supposedly suffered due to Walmart's failure to provide the "substantiation" Greenpeace claims to need. That is, "Greenpeace alleges that, by depriving it of information to which it is entitled..., Walmart is depriving the organization of its statutory rights." *Id*. (citing TAC ¶ 36). Greenpeace then argues this "informational injury" gives it standing ***under the UCL*** as well as under federal law. *Id*. at 7–8. It is wrong: this is just the kind of

"intangible" injury that "does not suffice to support" a UCL claim. *Kennard v. Lamb Weston Holdings, Inc*., No. 18-cv-04665-YGR, 2019 WL 4278940, at *4 n.6 (N.D. Cal. Sept. 10, 2019); *see also In re Yahoo! Inc. Customer Data Sec. Breach Litig*., No. 16-MD-02752-LHK, 2017 WL 3727318, at *22 (N.D. Cal. Aug. 30, 2017) (holding plaintiffs' "'intangible' allegations of future costs" might satisfy Article III but "do not show that Plaintiffs have 'specifically ... lost money or property' as a result of Defendants' misconduct."); *McKenzie v. Fed. Exp. Corp.*, 765 F. Supp. 2d 1222, 1237 (C.D. Cal. 2011) (granting summary judgment because "intangible injuries ... fail to satisfy the more stringent standing requirement under Proposition 64.").

McKenzie is especially relevant here because it also involved an alleged violation of a statutorily guaranteed right to receive information. 765 F. Supp. 2d at 1237. McKenzie claimed her employer failed to provide a wage statement required by law, and sued under the Private Attorney General Act and the UCL. *Id*. at 1224–25. A PAGA claim does not require injury at all, so that was not a problem. But the court granted summary judgment against McKenzie because she had shown only informational and other "intangible" injuries, which might be sufficient under Article III, but not under the UCL. *Id*. at 1237. Here too, an "injury" allegedly suffered due to a failure to receive information "substantiating" recyclable claims is simply not actionable under the UCL.

Greenpeace's counter-argument is confusing, but it seems to be saying that in state court, it could seek injunctive relief under the UCL (the only relief it seeks) for intangible injuries even if Greenpeace could not meet the traditional requirements for seeking injunctive relief. Opp. at 6–7, 16–18. That is, it contends that as long as it has alleged it lost money or property in the past because of Walmart's conduct, it has UCL standing, and may then seek an injunction *of any kind* on behalf of "the general public," whether or not the injunction would redress any injury Greenpeace itself was suffering. It does not cite any cases where this has been permitted (and Walmart is not aware of any). That is unsurprising because, if successful, this argument would dramatically rewrite California law. It would mean, among other things, that UCL standing would not be "substantially narrower" than federal standing, as the voters who passed Prop 64 intended (*Kwikset* at 324), but far *broader*. That would defeat the purpose of the Prop 64 amendments, and is not California law.

Greenpeace cites only two cases for this proposition, but neither supports its view. *McGill v. Citibank, N.A.*, 2 Cal. 5th 945, 956 (2017); *Olosoni v. HRB Tax Grp., Inc.*, No. 19-cv-03610-SK, 2019 WL 7576680 (N.D. Cal. Nov. 5, 2019). Both cases concern the enforceability of arbitration agreements, not standing. Standing was not even disputed in either case. *McGill* was a putative class action in which the plaintiff alleged that defendant's representations and omissions misled her into paying certain fees. 2 Cal. 5th at 951–53. *Olosoni* was a putative class action in which the plaintiffs alleged that defendants' "bait and switch" scheme misled them into paying certain fees. 2019 WL 7576680, at *1–2. Thus, both were run-of-the-mill consumer class actions in which standing was undisputed and based on allegations that plaintiff lost money or property as a result of the defendants' conduct. Both cases hold only that a provision in an arbitration agreement is unenforceable if it requires a consumer to waive all rights to seek "public injunctive relief." *McGill*, 2 Cal. 5th at 951–52, 958–61; *Olosoni*, 2019 WL 7576680, at *3–4. Greenpeace misinterprets these cases in connection with its argument in support of remand, as discussed further below. But neither case even suggests that intangible injuries could support standing for a UCL claim, whether that claim is pending in state or federal court. *McGill* is of no use to a plaintiff who does not already have standing, as the Court of Appeal held in *CMA*:

> CMA also relies on *McGill v. Citibank, N.A.* (2017) 2 Cal.5th 945 ... which held a private person or association may seek injunctive relief for the benefit of the general public, *so long as the plaintiff has standing*.... Assuming without deciding CMA seeks to benefit the general public, and not just its members, *McGill* is of no use to CMA because it did not suffer injury in fact or lose money or property as a result of the UCL violations it alleges here.

California Med. Assoc. v. Aetna Health of Cal. Inc., 63 Cal. App. 5th 660, 669 (2021) (emphasis added), rev. granted (Cal. July 28, 2021). *McGill* is a red herring.

B. Greenpeace lacks standing because it has not alleged a loss of money or property as a result of Walmart's alleged practices.

First, Walmart argued that to the extent Greenpeace alleges it spent money as a result of misleading representations, that could not justify standing because Greenpeace did not spend that money in reliance on Walmart's representations. Mot. at 8–9. Greenpeace responds that to say its "claims are tied to deception" mischaracterizes the TAC. Opp. at 8. But while Greenpeace dropped

the separate cause of action for "deceptive business practices," it did not drop its allegations of deception. It just reworded them. As Walmart argued (*see* Mot. at 8), there is no material difference between alleging "misrepresentations," as in prior complaints, and alleging the "making [of] unsubstantiated representations" as Greenpeace does not. Greenpeace does not argue otherwise. The search-and-replace operation Greenpeace apparently conducted to generate the TAC does not mean its claims are no longer "tied to deception." Other statements in the TAC reinforce this. *See, e.g.*, TAC ¶¶ 16 (alleging Greenpeace seeks to "expose corporate greenwashing" representations that are contrary to fact), 19 (alleging it tries to "discourage" companies "from representing that products are recyclable when they are not"), 32 (alleging efforts to "prevent[] companies from touting the environmental benefits of their products when none exist," and that Walmart's "unsubstantiated recyclability representations" are misleading consumers), 57 (alleging the representations are "deceptive"), 64 (same). The TAC also contains the same examples of "recyclable" representations as in prior complaints. TAC ¶¶ 53–68. Greenpeace allegedly includes these examples to show "Defendant is making unsubstantiated representations regarding the recyclability of its Products" (TAC ¶ 53), and in each case, it then proceeds to explain why in its view the "unsubstantiated representations" are false or misleading. *Id*. ¶¶ 53–68. Thus, the TAC remains inextricably tied to deception. Greenpeace does not and cannot allege that it was deceived, and has never alleged facts showing that any non-party consumer has been deceived. It does not allege it "lost money or property" as a result of any such deception.

Second, Greenpeace has not alleged it lost money or property as a result of any "failure to substantiate." Mot. 9–10. On this point, the opposition simply parrots the legal conclusions that permeate the TAC. Greenpeace says that "on numerous occasions" it asked for "substantiation," and the results did not satisfy it. But other than asserting the legal conclusion that Walmart's responses were insufficient, Greenpeace still refuses to explain just what it was asking for, what it believed it was legally entitled to get, or how these differed. And Greenpeace has no meaningful response to the argument that its own allegations show it was asking for information it did not need, because it had decided long before that the products are not "recyclable." It now suggests it only "suspected" the claims to be false, but that mischaracterizes its complaint. *See, e.g.*, TAC ¶¶ 30, 75 (alleging

Greenpeace "inform[ed]" Walmart in 2020 that "its Products *are* not recyclable"; *see also id*. ¶¶ 53–68 (alleging "Defendant *is making* unsubstantiated representations" and providing several alleged examples; emphasis added).

Beyond that, if Greenpeace did spend any money in connection with these alleged "substantiation requests," it did not do so as a result of any failure by Walmart to comply with the EMCA, which Greenpeace insists is the "unfair" or "unlawful" practice here. Mot. at 9–10; Opp. at 10–11. Any expenditures Greenpeace made connected with an initial request would not count because those could not have been *caused* by the alleged violation (the failure to substantiate). Greenpeace responds only that if Walmart had provided the information in response to that request, then its claim would have no merit. Opp. at 10. That is true, but irrelevant to standing. Greenpeace must have lost money or property "as a result of" an allegedly wrongful act. It makes no sense to say standing could be based on costs caused by a violation the defendant had not yet committed.

Further, money Greenpeace spent *after* the alleged request would also not have been caused by the alleged violation. As Walmart argued, just because an expenditure is made *after* an event does not mean it *resulted from* that event. Here, Greenpeace's allegations show it was making these repeated requests not to gain information (which its own allegations show it did not need) but as part of a litigation strategy it had developed long before. Mot. at 10. Greenpeace does not deny this in its opposition, admitting it would have spent resources "combatting the proliferation of plastic" no matter how Walmart had responded to its requests. Opp. at 10. It argues only that Walmart's failure to maintain and provide information "forced" it to "divert resources" from other efforts. *Id*. (citing TAC ¶¶ 6, 13, 21–22, 27–28, 33–36). Even if that could constitute "lost money" for UCL purposes (as discussed below, it cannot), none of the cited paragraphs or any others include any concrete facts supporting this claim. Greenpeace has simply listed a few resources and asserted it "diverted" them because of Walmart's conduct. These conclusory allegations are not enough to plead standing.

C. The UCL does not allow "organizational standing."

As the "diverted resource" argument shows, Greenpeace effectively concedes it must plead and establish "organizational standing." Apart from incorrectly arguing it can base UCL standing on "intangible harms," it argues only that it can establish "injury in fact" by means of the

organizational-standing theory. Opp. at 12–16. That theory is not viable under the UCL. To allow it, especially on the facts here, would defeat the purpose of the Prop 64 amendments by allowing anyone to bring a UCL claim simply by creating an "organization" and claiming to have "diverted resources." Greenpeace is trying to change California law, not asking this Court to follow it.

As before, Greenpeace relies exclusively on the Court of Appeal decision in *ALDF* and the federal precedent on which that case relied. Opp. at 12 (citing, *e.g.*, *Animal Legal Defense Fund v. LT Napa Partners LLC*, 234 Cal. App. 4th 1270 (2015)). *ALDF* is the only California case Greenpeace can cite for this proposition, and as Walmart has shown, that case is both distinguishable and wrongly decided. Mot. at 13–17. But *even under the federal precedent* on which *ALDF* and Greenpeace rely, Greenpeace has not alleged organizational standing. It concedes the standard requires (among other things) a showing that the organization was "*forced* to divert its resources" by the wrongful conduct. Opp. at 12 (emphasis added). But while it asserts several times that it was or will be "forced" to expend resources, its allegations do not show that, and it seriously misstates what the law requires in any event.

Walmart cited numerous cases, including Ninth Circuit authority, showing that an organization has not been "forced" to divert resources if it was simply going about its "business as usual," or was "choosing to spend money fixing a problem that otherwise would not affect the organization at all." Mot. at 12–13 (citing, *e.g.*, *Friends of the Earth v. Sanderson Farms, Inc.*, 992 F.3d 939, 942–43 (9th Cir. 2021); *La Asociación de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010). The organization must show, among other things, that "it would have suffered some other injury if it had not diverted resources to counteracting the problem." *La Asociación de Trabajadores*, 624 F.3d at 1088. Greenpeace has alleged no facts that might support these requirements—which may be why it does not even mention any of these cases. *See* Opp. at 12–13. It does not argue, for example, that it would have suffered some other injury if it had not diverted resources to "seeking substantiation." Again, its own allegations show it already had all the information it needed to determine that, under its theory, it was misleading for Walmart to label the products "recyclable." It did not make the requests or otherwise "divert resources" to avoid any injury, but rather to justify litigation.

It bears repeating that Greenpeace's sole California authority, *ALDF*, purported to apply the same federal precedent Greenpeace relies on now. *See ALDF* at 1280–81 (citing, e.g., *S. Cal. Hous. Rts. Ctr. Ass'n v. Los Feliz Towers Homeowners Ass'n Bd. of Dirs.*, 426 F. Supp. 2d 1061 (C.D. Cal. 2005); Opp. at 12 (same). If Greenpeace cannot establish organizational standing under that precedent—and it cannot, for the reasons above—then the argument must fail whether Greenpeace makes it in federal or state court. As Greenpeace concedes, the "injury in fact" requirement is the same. Greenpeace has not alleged the necessary facts to establish it by means of "organizational standing," even if that theory were cognizable under the UCL.

And as Walmart has explained, that theory is not cognizable under the UCL, for the same reasons the California Supreme Court rejected the similar theory of "associational standing." *See* Mot. at 13–17 (discussing, *e.g.*, *Amalgamated Transit Union, Loc. 1756, AFL-CIO v. Sup. Ct.*, 46 Cal. 4th 993 (2009)). In Greenpeace's brief response to this critical point (Opp. at 13–14), it does not explain why it would make sense to hold that an association cannot sue on behalf of its own members, but an organization can sue on behalf of "the general public" or the "environment." Greenpeace again insists it sues only on behalf of itself, but again, it does not allege the necessary facts to plead organizational standing—or any other kind of standing.

II. The Court should dismiss because remand would be futile.

Because the result would be the same in state court, remand would be futile, and the Court may therefore dismiss. Under Ninth Circuit law, a district court may dismiss a removed case for lack of standing if it is "certain that remand to the state court would be futile." Mot. at 17–19 (quoting *Bell v. City of Kellogg*, 922 F.2d 1418, 1425 (9th Cir. 1991)). Greenpeace contends *Bell* is "no longer good law," quoting dicta in a 2014 decision by an Oregon district court. Opp. at 16 (quoting *Baugh v. Holder*, No. 3-13-CV-00561-ST, 2014 U.S. Dist. LEXIS 98814 (D. Or. Apr. 21, 2014) (denying motion for remand)). But that is not what the Ninth Circuit held when it addressed *Bell* two years later. *See* Mot. at 18–19 (discussing *Polo v. Innovations Int'l, LLC*, 833 F.3d 1193 (9th Cir. 2016)). As Walmart explained, *Polo* may have questioned *Bell* but did not overrule it. Mot. at 18–19; *see Polo*, 833 F.3d at 1198. As a result, this Court may dismiss rather than remand to state court if remand would be futile.

Greenpeace argues only that remand would not be futile because under *McGill*, in state court it could able to pursue injunctive relief on behalf of the "general public" even if it could not otherwise meet the traditional requirements for seeking injunctive relief. *See* Opp. at 16–17. That obviously would not be permitted in federal court, but according to Greenpeace, it *would* be permitted in state court. This argument, which Greenpeace now makes for the first time, is both irrelevant and wrong. It is irrelevant because, as explained above, Greenpeace has not alleged facts showing it has organizational standing (or any other kind). As the court held in *CMA*, *McGill* means only that a plaintiff "may seek injunctive relief for the benefit of the general public, *so long as the plaintiff has standing*...." *CMA*, 63 Cal. App. 5th at 669 (emphasis added). It is "of no use" to Greenpeace, which does not have standing to begin with, whether in state or federal court. *Id*.

The argument is also wrong. Greenpeace seems to be arguing that under *McGill*, a plaintiff could seek an injunction on behalf of the "general public" even if that plaintiff could not meet the traditional requirements for injunctive relief under California law. *Id*. As shown above, neither *McGill* nor *Olosoni*—the only two cases Greenpeace cites for this proposition—held as Greenpeace claims. In *McGill*, the Court held that a provision in an arbitration agreement that prohibited a consumer from seeking any kind of "public injunctive relief in arbitration, in court, or *in any forum*," is unenforceable. 2 Cal. 5th at 956 (emphasis in original). In doing so, the Court rejected the defendants' argument that the provision was not unconscionable because Prop 64 already prohibited consumers from seeking relief of any kind on behalf of the "public." *Id*. at 958–60. The Court held this did not mean a private plaintiff could not obtain injunctive relief under the UCL (or CLRA) just because the injunction might *also*, or might even *primarily*, "prohibit and enjoin conduct that is injurious to the general public." *Id*. at 959. Because some form of "public injunctive relief" was still available to private plaintiffs, therefore, the provision barring consumers from seeking it was unenforceable. *Id*. at 961.

Greenpeace evidently interprets *McGill* to mean that once a plaintiff has established UCL standing (such as by pointing to a loss of money or property in the past), there are no limits on what sort of "public injunctive relief" might be available, and the plaintiff need not make the showings otherwise necessary to obtain an injunction. Neither *McGill* nor *Olosoni* said that. Greenpeace has

cited no other cases for the proposition, and Walmart is not aware of any. As this shows, Greenpeace's argument for remand is asking this Court not to apply state law as it stands, but to assume that the superior court will create new law allowing it to seek an injunction on behalf of the "public" even if Greenpeace is not suffering "ongoing injury."[1]

It has always been the case, even before Prop 64, that traditional equitable requirements apply to UCL remedies. *See, e.g.*, *Prudential Home Mortgage Co. v. Superior Court*, 66 Cal. App. 4th 1236, 1249–50 (1998) (agreeing that UCL relief "is subject to fundamental equitable principles, including inadequacy of the legal remedy."); *see also Madrid v. Perot Sys. Corp.*, 130 Cal. App. 4th 440, 463 (2005) (holding plaintiff not entitled to injunctive relief under "general rules" that apply to such relief). Indeed, California courts have continued to apply the usual requirements for injunctive relief even in UCL cases brought by *public* prosecutors, to whom the standing requirements do not apply at all. *See, e.g.*, *People ex rel. Herrera v. Stender*, 212 Cal. App. 4th 614, 630–31 (2012).

Federal courts, too, have routinely held—including in cases that involve the *McGill* arbitration rule—that a plaintiff seeking injunctive relief under the UCL must make the usual showings. Greenpeace is conflating two different issues. *See, e.g.*, *Brown v. Madison Reed, Inc.*, No. 21-cv-01233-WHO, 2021 WL 3861457, at *1, 12–13 (N.D. Cal. Aug. 30, 2021) (holding arbitration agreement's prohibition on seeking public injunctive relief was unenforceable and also that named plaintiffs failed to plead facts necessary to seek injunctive relief) *Roberts v. AT&T Mobility LLC*, No. 15-cv-03418-EMC, 2018 WL 1317346, *9 (N.D. Cal. Mar. 14, 2018) ("[W]hether [the plaintiffs] have standing to proceed on a claim for injunctive relief (public or otherwise) is an issue separate and distinct from the enforceability of the arbitration agreement"); *see also, e.g.*, *Veterans*

[1] Greenpeace wrongly suggests that Walmart must agree it would be entitled to prospective injunctive relief because Walmart did not devote a separate section to the requirements for such relief, as in prior motions. Opp. at 15 & n.3. Walmart did not think it was necessary to make the argument again separately, because the Court has already held the SAC did not allege facts showing entitlement to prospective injunctive relief (ECF 56), and the changes to the TAC are "superficial" at best. Mot. at 3; *see also id*. at 6 (arguing Greenpeace's TAC still did not explain what prospective injunctive relief it was seeking). In any event, Greenpeace's own argument shows it is not entitled to such relief, because it simply string-cites TAC paragraphs that are just as conclusory as those in the SAC. *See, e.g.*, TAC ¶ 72 (cited by Greenpeace but alleging only that "[t]he violation of any law constitutes an unlawful business practice under Business and Professions Code § 17200.").Most of those paragraphs, in fact, have nothing at all to do with any alleged "ongoing injury." Greenpeace has not "add[ed] more details and specificity" to its allegations, as it claims, only more words.

Rideshare, Inc. v. Navistar Int'l Corp., No. 20-CV-01304-BAS-LL, 2021 WL 2206479, at *12 (S.D. Cal. June 1, 2021) (holding UCL plaintiffs had not alleged facts supporting allegations of ongoing harm); *Freeman v. ABC Legal Servs., Inc.*, 877 F. Supp. 2d 919, 925 (N.D. Cal. 2012) (holding that although "eligibility for restitution" is not a UCL requirement, that does not mean a plaintiff "is absolved from also demonstrating that she is entitled to seek an injunction.").

Thus, Greenpeace's new argument itself establishes that remand would be futile: it has not cited a single California (or federal) case that would support the argument it apparently plans to make if the case is remanded. And, again, this argument is of no use to Greenpeace in any event because it has not alleged and cannot allege the basic elements of UCL standing. The "certainty" requirement of the futility doctrine does not mean a federal court can or should assume a state court will create the law necessary for a plaintiff to prevail. The Court should dismiss.

III. If the Court does not dismiss, it should stay the matter pending the decision in *CMA*.

Alternatively, the Court should stay this matter pending the California Supreme Court's decision in *CMA*, which is now fully briefed and awaiting oral argument. Mot. at 20–21. In its opposition, Greenpeace says it is "unclear whether [*CMA*] will ... provide any relevant guidance" and that there is no more than a "mere possibility" the ruling may be "useful" on organizational standing. Opp. at 19. If Greenpeace believes that, it has not read the parties' briefs on the merits, which address nothing *but* organizational standing. Even a glance at the tables of contents is enough to show *CMA* is on point. *See, e.g.,* CMA's Reply Brief, 2022 WL 1262563, at *2 (filed April 15, 2022) (showing the brief's first 26 pages argue that "Organizational Standing Based on Diversion of Institutional Resources Is Consistent With the UCL's Standing Requirements Under Proposition 64.") It could not be more clear that the holding in *CMA* will not just be "useful," it will settle the issue whether organizational standing is viable under the UCL.

Setting the briefs aside, the Court of Appeal's decision itself shows that the issue of organizational standing is squarely presented in *CMA*. The court first held that the plaintiff could not assert "associational standing," an unsurprising result given the holding in *Amalgamated Transit*. *CMA*, 63 Cal. App. 5th at 666–67. But the Court of Appeal did not stop there. In fact, the bulk of its opinion addressed whether "CMA produced evidence of direct economic injury to CMA itself"—in

other words, whether it had organizational standing. *Id*. at 667–70. Just as Greenpeace does here, CMA relied on *ALDF* and the federal decisions that opinion cited. *Id*. And although the Court of Appeal said it was "distinguishing" *ALDF*, its opinion makes clear that it rejected the entire basis for that holding, in particular the federal decisions, none of which had considered "the stringent requirements for UCL standing after the Proposition 64 amendments became effective in 2004." *Id*. at 669–70. The decision could not be more relevant to Greenpeace's arguments here. And there is no reason to believe the California Supreme Court will not address organizational standing when it decides *CMA*. The parties in that case certainly believe it will, and have briefed nothing else.

Greenpeace also argues that it would be an abuse of discretion for this Court to stay the matter pending the decision in *CMA*. *See* Opp. at 18 (citing *Landis v. North Am. Co.*, 299 U.S. 248 (1936)).[2] To the extent Greenpeace is suggesting that *Landis* itself shows a stay is improper, the case does not stand for that proposition. In fact, *Landis* confirmed that district courts have discretionary power to control their dockets, reversing the D.C. Circuit's holding that a stay was improper on the facts of that case. 299 U.S. at 254–55. It then discussed the standards for the exercise of that discretion, emphasizing the flexibility that district courts have:

> The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.

Id. The Court did say, as Greenpeace notes, that if it is possible the stay would damage one party, the other would have to make out a clear case of hardship or inequity in being required to go forward. *Id*. But it rejected the idea that there was any general rule against granting a stay or strict limits on a district court's discretion to grant one. *See id*. ("Considerations such as these ... are counsels of moderation rather than limitations upon power."); *see also Clinton v. Jones*, 520 U.S. 681, 706–07 (1997) (district courts have "broad discretion to stay proceedings" to promote judicial economy).

Here, there is no possibility that granting a limited stay would damage Greenpeace. In the single sentence it devotes to that factor, it again string-cites the same conclusory paragraphs in the

[2] Greenpeace also cites *Lockyer v. Mirant Corp*. 398 F.3d 1098, 1110 (9th Cir. 2005), but that court was simply applying *Landis*, and because it did so in the context of an automatic stay in bankruptcy, the facts are not similar to those here.

TAC, arguing that these paragraphs "enumerate severe harm" not just to Greenpeace, but to "the environment, recycling infrastructure, Walmart's competitors, and the public interest...." Opp. at 18–19. Those paragraphs enumerate nothing, much less "severe harm," and it is telling that Greenpeace cites these other extremely broad and vaguely defined interests in a case it repeatedly claims is only about whether it is entitled to get some information from Walmart. It does not need that information and has made no effort to show that not getting it in the next several months will cause it any harm. Because Greenpeace will not be harmed in any way, Walmart need not show any special hardship or inequity would result if this case proceeds.

But as Walmart argued, and other district courts have recently held, a limited stay may be justified by "economy of time and effort" for the court, counsel, and litigants. Mot. at 20. In the cases Walmart cited—all of which applied *Landis*—the courts held a stay was justified pending a decision in a relevant case, where neither side showed any particular harm would result and awaiting the decision would likely save everyone time and effort. *See* Mot. at 20; *Zhang v. Ancestry.com Operations, Inc*., No. 21-cv-07652-LB, 2022 WL 718486, at *1–3 (N.D. Cal. Mar. 10, 2022) (N.D. Cal. Mar. 10, 2022) (staying case instead of remanding where pending Ninth Circuit decision was "likely to be dispositive" of subject-matter jurisdiction); *Camacho v. Hydroponics, Inc.*, No. EDCV 20-980-JGB, 2021 WL 940318, at *3–4 (C.D. Cal. Mar. 10, 2021) (staying case for same reason because this would favor the "orderly course of justice"); *Tucker v. Organon USA, Inc*., No. C 13-00728-SBA, 2013 2255884, at *2 (N.D. Cal. May 22, 2013) (staying case instead of remanding where pending decision would "conserve judicial resources and promote judicial consistency).[3] Greenpeace tries to distinguish only *Zhang*, but those distinctions are not material. Opp. at 19 n.5. As the other examples show, there is no requirement that cases be officially related or connected in any way for a stay to be justified.

[3] *See also, e.g.*, *Baeza v. Baca*, 700 F. App'x 657, 658 (9th Cir. 2017) (court did not abuse discretion in vacating motions because similar motions were pending in a case involving virtually identical claims); *Mediterranean Enterprises, Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1465 (9th Cir. 1983) (court did not abuse discretion in staying case pending arbitration results); *CMAX, Inc. v. Hall*, 300 F.2d 265, 269–70 (9th Cir. 1962) (court did not abuse discretion in staying case pending result of administrative proceeding); *Burton v. Organon USA Inc.*, No. C 13-1535-PJH, 2013 WL 1963954, at *1–2 (N.D. Cal. May 10, 2013) (granting stay pending decision by MDL court; citing cases).

Greenpeace has offered nothing but conclusory statements on the issue of hardship, and its argument that it is "unclear" whether *CMA* will address organizational standing mischaracterizes the nature of that case. Nor does Greenpeace argue that the stay Walmart requests would involve an unreasonable delay. *CMA* was fully briefed last month. While oral argument has not yet been set, once the court hears argument it will render its decision within 90 days. Cal. Sup. Ct. Int. Op. Prac. & Pro. §§ VII, X; Cal. Const. Art. VI, § 19. The case will therefore be resolved within months, not years. Under the circumstances, a stay would benefit this Court, the state court (which would otherwise have to address this same issue unnecessarily if the case is remanded now), and the litigants. The Court should exercise its discretion to stay the matter.

IV. Greenpeace's claims would fail on the merits in any event.

Finally, as Greenpeace notes, the parties' arguments on the merits of the "recyclability" or "lack of substantiation" claims have not changed—supporting Walmart's view that the TAC is not meaningfully different from the SAC. *See* Opp. at 3 & n.1 (saying Greenpeace is "shorthanding" its discussion of those issues and referring the Court to its opposition to Walmart's previous motion). Walmart agrees that those issues are adequately addressed in the parties' prior briefing, and incorporates its arguments by reference. The Court need not reach these issues, however, because Greenpeace lacks standing.

CONCLUSION

For these reasons, the Court should grant Walmart's motion to dismiss, or in the alternative stay the matter pending the California Supreme Court's decision in *CMA*.

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Respectfully submitted,

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