

1 Bethany Lukitsch (SBN 314376)
blukitsch@bakerlaw.com
2 Kamran Ahmadian (SBN 314566)
kahmadian@bakerlaw.com
3 **BAKER & HOSTETLER LLP**
11601 Wilshire Boulevard, Suite 1400
4 Los Angeles, CA 90025
Telephone: 310.820.8800
5 Facsimile: 310.820.8859

6 *Attorneys for Defendants*
RED LOBSTER MANAGEMENT LLC and
7 RED LOBSTER HOSPITALITY LLC

8
9 **IN THE UNITED STATES DISTRICT COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA**

11
12 Dezzi Rae Marshall, on behalf of
herself and all others similarly situated,

13
14 **Plaintiffs,**

15 **v.**

16 Red Lobster Management LLC and Red
Lobster Hospitality LLC,

17
18 **Defendants.**

Case No.: 2:21-cv-04786-JAK-MAR
[Assigned to Hon. John A. Kronstadt]

**REPLY IN SUPPORT
DEFENDANTS' MOTION TO
DISMISS PLAINTIFF'S FIRST
AMENDED COMPLAINT FOR
FAILURE TO STATE A CLAIM
UPON WHICH RELIEF CAN BE
GRANTED PURSUANT TO FED.
R. CIV. P. 12(B)(6)**

Hearing Date: March 21, 2022
Time: 8:30 a.m.
Courtroom: 10B

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1 I. ARGUMENT

2 A. Plaintiff’s FAC Lacks Facts to Support Consumer Protection
3 Claims Against Red Lobster.

4 Plaintiff attempts to create the illusion that her FAC contains the necessary
5 factual allegations to support her deceptive advertising claims. However, a closer
6 examination of what was *actually pled* reveals that facts necessary to support her
7 claims that Red Lobster’s sustainability representations are false do not exist. After
8 removing the non-factual, boilerplate allegations, Plaintiff’s factual allegations can be
9 reduced to the following:

- 10 • Plaintiff alleges that she entered a Red Lobster restaurant in Valencia,
11 California on January 4, 2020. FAC ¶ 23. While sitting in the
12 restaurant and prior to placing her order, Plaintiff reviewed Red
13 Lobster’s menu where she saw Red Lobster’s “Sustainability
14 Representations” *for the very first time*. *Id.* at ¶ 24.
- 15 • As demonstrated by the FAC, the Sustainability Representations on
16 Red Lobster’s menu *do not* make any promises relating to “the
17 highest *environmental and animal welfare standards*.” FAC ¶ 5
18 (emphasis added). The Sustainability Representations include an
19 invitation to “[l]earn more about [Red Lobster’s] commitments” at a
20 website which is provided in bold text as part of the Sustainability
21 Representations. *Id.* Specific origin sourcing information and
22 sustainability practices (which are updated regularly) are available on
23 the website provided on the menu. *Id.*



- 24 • Plaintiff claims the Federal Trade Commission’s (“FTC”) Green
25 Guides support her allegation that a reasonable consumer would be
26 deceived by Red Lobster’s Sustainability Representations. *See Opp.*
27 at 8; FAC ¶ 31. However, the cited section from the Green Guides
28 only warns that an “*unqualified* general environmental benefit claim

1 ... *may convey* that the item or service has no negative environmental
 2 impact.” See 16 C.F.R. § 260.4(b) (2012). Red Lobster’s
 3 environmental claims are not unqualified but rather are specific in
 4 nature and accompanied by “clear and prominent qualifying
 language” which explain the scope and breadth of Red Lobster’s
 environmental promises. See Mot. at 17; FAC ¶¶ 7-8.

- 5 • Plaintiff also cites to two consumer studies to support the
 6 “reasonableness” of her own interpretation of Red Lobster’s
 7 Sustainability Representations. FAC ¶¶ 32-34. Again, the studies
 8 she relies upon are inapplicable as they rely upon survey data
 9 obtained from an entirely different set of consumers—i.e., European
 grocery consumers—or analyze terms that *were not* included in Red
 Lobster’s Sustainability Representations—i.e., “eco-friendly” or
 “ecologically sustainable.”¹ *Id.*
- 10 • Plaintiff cites to a U.S. District Court opinion issued *several months*
 11 *after* Plaintiff visited the Valencia, CA Red Lobster restaurant as the
 12 sole allegation in support of her claim that Red Lobster knowingly
 13 sourced its Maine lobster contrary to its Sustainability
 14 Representations. FAC ¶¶ 35-40. Even if this opinion was available
 15 to Plaintiff at the time of her purchases, it is silent as to the
 16 sustainability practices of Maine lobster fisherman, and only
 concludes that a federal agency failed to comply with a procedural
 requirement of the Endangered Species Act. See *Ctr. for Biological*
Diversity v. Ross, 2020 WL 1809465 (D.D.C. Apr. 9, 2020).
- 17 • Finally, Plaintiff alleges that countries where Red Lobster sources its
 18 shrimp—Indonesia, Vietnam, India, and China—utilize
 “environmentally destructive and inhumane practices.” See FAC
 19 ¶¶ 41-59. Notably, however Plaintiff does not allege that Red Lobster
 20 sources shrimp from farms that employ *any* practices that are contrary
 to Red Lobster’s printed Sustainability Representations. See *id.*

21 Clearly, when the factual allegations in the FAC are critically examined and
 22 the bald allegations and irrelevant “facts” are appropriately disregarded, Plaintiff is
 23 left with *no facts* to support her claim that a *reasonable Red Lobster consumer*—who
 24 very likely committed to eating seafood before they even looked at the menu—would
 25 be deceived by the Sustainability Representations, particularly given the wealth of
 26 information Red Lobster provided its consumers explaining its sustainability

27 ¹Notably, Plaintiff fails to rebut (or even address) Red Lobster’s arguments that the
 28 two surveys cited in the FAC are not applicable and cannot establish how a reasonable
 consumer would interpret Red Lobster’s Sustainability Representations. See Motion
 at 13-16

1 promises.² See *Moore v. Trader Joe's Co.*, 4 F.4th 874, 882 (9th Cir. 2021) (espousing
 2 the general principle that deceptive advertising claims should “*take into account all*
 3 *the information available to consumers and the context in which that information*
 4 *is provided and used.*”) (emph. added) (internal cit. omitted). And even
 5 if *some* consumers would make the same assumption as Plaintiff—i.e., interpreting
 6 the Sustainability Representations as a promise to abide by the “highest
 7 *environmental and animal welfare* standards” (whatever those may be)—her
 8 consumer protection claims still fail. See *Becerra v. Dr Pepper/Seven Up, Inc.*, 945
 9 F.3d 1225, 1230 (9th Cir. 2019) (advertising is “not deceptive just because *some*
 10 consumers could unreasonably misunderstand the [statement].”); *Lavie v. Procter &*
 11 *Gamble Co.*, 105 Cal. App. 4th 496, 508 (2003) (holding that it must be probable “that
 12 a *significant portion* of the general consuming public or of targeted consumers, acting
 13 reasonably in the circumstances, could be misled.”) (emph. added)).

14 In sum, Plaintiff has failed to allege any facts demonstrating that reasonable
 15 Red Lobster consumers would be deceived by the Sustainability Representations as
 16 they sit in a Red Lobster restaurant deciding what to order. As such, Plaintiff’s UCL,
 17 CLRA, and FAL claims should be dismissed with prejudice.

18 **B. Plaintiff Failed to Meet the Heightened Pleading Requirements of**
 19 **Rule 9(b).**

20 As demonstrated above, Plaintiff improperly relies on generalized allegations
 21 and fails to establish the specific facts required to establish the who, what, when, and
 22 how required under Rule 9(b) to support her fraud-based claims. See Opp. at 14-18.
 23 Plaintiff’s allegations are particularly deficient regarding “how” Red Lobster’s
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 25
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27 ² Common sense would dictate that the reasonable Red Lobster consumer is one that
 28 likely already is committed to eating animal products—a practice that most animal
 activist welfare practitioners and vegans are likely to avoid.

1 “Sustainability Representations” are misleading since the FAC contains *no specific*
2 *factual allegations* establishing their falsity.³

3 For example, Plaintiff’s allegations that Red Lobster sources its Maine lobsters
4 from Gulf of Maine lobster fishery suppliers that “endanger North American right
5 whales,” are based on an April 2020 district court opinion, an August 2020
6 announcement by the Marine Stewardship Council (“MSC”) that it would be
7 suspending the Maine lobster fishery’s sustainability certification, and a January 2021
8 publication issued by the National Marine Fisheries Service (“NMFS”). *See* Opp. at
9 17; FAC ¶¶ 36-39. Plaintiff fails to explain how these publications—all of which
10 were issued/published *months after* Plaintiff visited a Red Lobster restaurant on
11 January 4, 2020—plausibly show that Red Lobster’s menu was deceptive *at the time*
12 Plaintiff made her purchase. *See* FAC ¶ 23. *See Partida v. Tristar Prod., Inc.*, 2021
13 WL 4352374, at *8 (C.D. Cal. Aug. 5, 2021) (Bernal, J.) (“To state a claim under the
14 UCL, CLRA, and FAL, Plaintiffs must allege that Defendant was aware of the
15 [deceptive act] at the time of Plaintiffs’ purchase.”) (citing *Wilson v. Hewlett-*
16 *Packard Co.*, 668 F.3d 1136, 1145 (9th Cir. 2012)).

17 Plaintiff further argues that Red Lobster sources its shrimp from suppliers who
18 “use practices that are environmentally destructive [and] are inhumane to shrimp.”
19 Opp. at 17. The allegations in the FAC, however, attack the *general* practices of
20 unnamed shrimp farmers *generally* within Indonesia, Vietnam, India, and China, but
21 make no *specific* factual allegations against the practices of the *actual* shrimp farmers
22 that supply Red Lobster. *See* FAC ¶¶ 49-52. Moreover, Plaintiff fails to allege facts
23 showing that these practices are inconsistent with the three tenets of Red Lobster’s
24 sustainability representations: Sustainable. Traceable. Responsible or the more

25
26 ³ “In the false advertising context, an advertising claim is false if it has actually been
27 disproved, that is, if the plaintiff can point to evidence that *directly conflicts* with the
28 claim.” *Liou v. Organifi, LLC*, 491 F. Supp. 3d 740, 750 (S.D. Cal. 2020) (emph.
added); *see also Yamasaki v. Zicam LLC*, 2021 WL 4951435, at *4 (N.D. Cal. Oct.
25, 2021) (dismissing UCL, FAL, and CRLA claims where plaintiff failed to present
facts of falsity and instead alleged that the claims were unsubstantiated)

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