No. 19-16696

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRIENDS OF THE EARTH, *et al*.,

Plaintiffs-Appellants,

v.

SANDERSON FARMS, INC., *et al*.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
Case No. 17-cv-03592-RS

PLAINTIFFS-APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiffs-Appellants Friends of the Earth and Center for Food Safety certify that they have no parent corporations, and that no publicly held corporation owns more than ten percent of any of the Plaintiff-Appellant organizations.

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INTRODUCTION

Two public interest organizations, whose missions include protecting human health, animal health, and the environment, filed an unfair competition and false advertising case against Sanderson Farms, Inc. (Sanderson or Appellee). Sanderson's chicken raising process, the resulting product, and Sanderson's communications to the public constitute unfair, unlawful, and fraudulent business practices. Plaintiffs-Appellants (Appellants) were denied the opportunity to challenge Sanderson's unfair practices and misleading advertising in the district court because the court wrongly decided that Appellants lacked standing to bring this case.

JURISDICTION

This appeal arises from an order and judgment entered by the United States District Court for the Northern District of California, which had jurisdiction under 28 U.S.C. § 1332. Final judgment was issued on July 31, 2019. Excerpts of Record (ER) 001.[1] Appellants appealed on August 30, 2019. ER12. The appeal is from a final judgment and this Court has jurisdiction under 28 U.S.C. § 1291.[2]

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[1] "ER" refers to Excerpts of Record. The number corresponds to the Excerpts' consecutive, Bates-stamped page numbers.

[2] Pertinent statutes and regulations are set forth in the addendum.

ISSUES PRESENTED

1. Whether the district court erred by failing to consider Appellants' first cause of action under California's Unfair Competition Law (UCL), California Business and Professions Code § 17200 *et seq.*, in determining whether Appellants have standing to challenge Sanderson's unfair business practices.

2. Whether the district court erred when it failed to properly consider Appellants' declarations in support of their standing.

STATEMENT OF THE CASE

Sanderson Farms violated the UCL and California's False Advertising Law (FAL), California Business and Professions Code § 17500, *et seq*., by producing chicken in a manner that does not meet reasonable consumer standards for natural food and then advertising its chicken as "100% Natural."

Sanderson uses a host of practices that reasonable consumers find decidedly unnatural. ER398 ¶¶ 4, 49. For example, Sanderson routinely uses unnatural, synthetic pharmaceuticals, including antibiotics, in order to raise its chickens, ER416 ¶ 55; confines its chickens indoors in cramped, overcrowded conditions without access to the outdoors, *id*. ¶ 57; and slaughters its chickens in an inhumane and unnatural fashion, ER429 ¶ 78. Sanderson claims via video commercial, on its website, and in print that its chickens are "100% Natural," ER414 ¶ 42 (citing link to video commercials); ER 411 ¶ 41 (citing Sanderson's website); ER412 ¶ 43

(citing newsletter subscription webpage), while at the same time, touting its objections to using more natural practices to raise its chickens, ER164, 231 (referencing New York Times article).[3] These business practices frustrate Appellants' core missions to protect the earth from the harmful impacts of industrial agriculture, to defend the environment, and to champion a healthy and just world. ER171; ER353; ER401-02 ¶¶ 14, 19.

Appellants diverted significant resources to educate consumers about Sanderson's unfair and deceptive business practices. In August 2015, Friends of the Earth staff, particularly the Deputy Director of Food and Agriculture, became aware of Sanderson's business practices by reading a May 2015 Wall Street Journal article titled, "Sanderson Farms CEO Resists Poultry-Industry Move to Curb Antibiotics: Chicken processor CEO Joe Sanderson calls public-health concerns over antibiotic-resistant bacteria overblown." ER213-216. Given Sanderson's recalcitrance in addressing antibiotic use concerns, Friends of the Earth made the strategic decision to address the negative effects of Sanderson's

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[3] New York Times, *Poultry Producer Sanderson Farms Stands Its Grounds: It's Proud to Use Antibiotics*, publicly available at https://www.nytimes.com/2016/08/02/business/poultry-producer-sanderson-farms-stands-its-ground-its-proud-to-use-antibiotics.html?searchResultPosition=1 (last visited January 8, 2020.)

unfair business practices and deceptive advertising by pressuring Sanderson's institutional customers (e.g. Olive Garden, owned by Darden Restaurants, Inc. (hereinafter, "Darden")), who are household names, and also publicly linking those institutional buyers to Sanderson. ER201 ¶ 012. Friends of the Earth campaigned intently between 2015 and 2018 to eliminate the routine use of antibiotics in animal agriculture, with a focus on changing the purchasing policies of large restaurant chains that buy significant quantities of industrial meat, including from Sanderson. ER198 ¶ 7; ER151-53 (campaign overview document); ER344-51. Throughout this campaign, Olive Garden, owned by Darden and supplied by Sanderson, was Friends of the Earth's highest priority campaign target. ER198 ¶ 7.

On August 1, 2016, Sanderson publicly announced its refusal to eliminate the routine use of antibiotics for its chickens. ER165. At the same time, Sanderson launched its "Bob and Dale" advertising campaign, telling consumers that they do not need to worry about antibiotics in their chicken products. ER415 ¶ 52. Specifically, Sanderson claimed "there's only chicken in our chicken," and there are "no antibiotics to worry about here," among other things. *Id*.

Friends of the Earth immediately took additional steps to address Sanderson's newest deceptive business practices, diverting resources to counteract Sanderson's misinformation within days of the August 1, 2016 public statements. ER165; ER201 ¶ 14. On August 3, 2016, Friends of the Earth's Deputy Director of

the Food and Agriculture Program researched, drafted, and published a blog post on antibiotics in the food supply and specifically addressed Sanderson Farms' business practices, calling the company "recalcitrant." ER202 ¶ 15.[4] Friends of the Earth's antibiotics campaign had not previously publicly named Sanderson, but in order to counteract the impact of Sanderson's unlawful, unfair, and fraudulent business practices, it diverted additional resources from its other institutional priorities to mount a direct attack on Sanderson's business practices and promote greater consumer awareness about these practices. ER202-07 ¶¶ 15-28; ER193 (spreadsheet listing social media posts). On August 23, 2016, Friends of the Earth sent an alert to 322,149 supporters which stated:

> One of Darden's suppliers is Sanderson Farms – a massive chicken corporation. While other chicken producers are taking major steps to reduce antibiotic use, Sanderson is digging in. It's rejecting the science and refusing to do the right thing. As long as Darden continues to purchase meat from Sanderson, it's contributing to the problem. Tell Darden to dump Sanderson Farms and other suppliers if they won't stop contributing to one of the nation's leading public health threats.

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[4] This blog post remains publicly available at https://www.ecowatch.com/mcdonalds-chicken-now-raised-without-antibiotics-1957382218.html (last visited January 6, 2020). Materials that were equally accessible and publicly available to all parties were not re-produced in discovery, consistent with Appellants' objection. ER126-143.

ER154-155; ER168-169; ER204 ¶ 19. This direct attack on Sanderson's advertising and business practices required investigation, research, planning, and staff time, and took these resources away from Friends of the Earth's core educational and policy work. ER197-98 ¶ 5; ER200 ¶ 11. Due to Sanderson's unfair business practices, Friends of the Earth spent at least $8,900 that it would have spent to advance other programs. ER106; ER113; ER207 ¶ 29 (addressing costs in addition to staff salaries, wages, and overhead).

Throughout August, September, and October 2016, Friends of the Earth supplemented its public statements, ER202 ¶ 16; ER204 ¶ 19; ER205 ¶ 20, 23; ER206 ¶ 25, and blog posts, ER202 ¶ 15; ER 205 ¶ 22; ER 206-07 ¶ 28, with a push on social media during the period Sanderson released its "Bob and Dale" advertising campaign and created confusion around its business practices, ER193. Friends of the Earth communicated with the public approximately a dozen times through social media to address antibiotics, farmed animals, antibiotic resistance, chickens in cramped conditions, and Sanderson's large institutional customer during this time. ER202 ¶ 17. Friends of the Earth also produced evidence of its collaboration with other organizations concerned about Sanderson's practices, including researching to whom Sanderson sold its products. ER160-165 (emails and meeting agenda naming Sanderson); ER168.

Center for Food Safety is a government watchdog organization and the overwhelming majority of its animal agriculture work preceding this litigation was aimed at challenging federal agency actions and changing federal policy. *See*, *e.g.*, ER171 (comments to the U.S. Food and Drug Administration about collecting on-farm antimicrobial use data); ER175 (comments to Presidential Advisory Council on Combating Antibiotic-Resistant Bacteria); ER224-25 ¶ 9 (listing relevant Center for Food Safety litigation); ER404-05 ¶¶ 20-21; ER183, ER187; ER223-24 ¶¶ 7-9. When Center for Food Safety staff became aware of Sanderson's false and deceptive advertising and the confusion it sewed around its business practices, it joined with Friends of the Earth to focus on consumer awareness about antibiotics in meat, ER225 ¶ 11; ER497-98; ER499-506, and diverted resources away from its federal policy work to focus on corporate engagement and public awareness. ER226-30 ¶ 15-31. For example, Center for Food Safety took staff resources from its federal policy work on the implementation of the Food and Drug Administration's Guidance 213, addressing drugs in food-producing animals, and diverted those resources to educating the public about what "100% Natural" does not mean. ER226-27 ¶ 19. In response to Sanderson's misinformation, Center for Food Safety's lead staff person on animal agriculture spent approximately twenty-five percent more time on consumer awareness that he could have spent focusing

on Center for Food Safety's other campaigns. *Id*. These and other Appellant actions, described below, support their standing.

Appellants initiated this action on June 22, 2017. Sanderson filed its first adjudicated motion to dismiss on standing grounds on September 13, 2017. The district court denied the motion in its entirety on February 9, 2018. ER437. The district court ruled that Appellants successfully alleged their standing, that state law consumer protection claims were not preempted, and that it was plausible that consumers were misled. *See* ER437-447. In analyzing standing, the district court concluded, "[Appellant Friends of the Earth] has . . . established an injury sufficient to confer direct organizational standing." ER441-42. The district court found the same for Appellant Center for Food Safety. ER442-43. The district court noted that Sanderson challenged standing with a timing argument about the launch date of the Bob and Dale campaign, but that Sanderson ignored "the allegedly misleading materials on Sanderson's website (videos, FAQs, etc.) which also frustrated [Appellants'] missions and prompted their diversion of resources." ER443. Sanderson's challenge to standing, the court continued, also ignored Appellants' ongoing injury related to diverting "resources to counteract Sanderson's evolving, but still misleading, advertising efforts." *Id.* After the court denied the motion to dismiss, the parties served and responded to written

discovery, deposed seven fact witnesses, and exchanged six expert witness reports. ER362.

Appellants responded to Sanderson's discovery requests, which sought some, but not all, facts relevant to Appellants' standing. For example, Sanderson asked Appellants to "[i]dentify with specificity all bases for your contention that you have lost money or property as a result of the Sanderson *advertising* identified in the Complaint. . . ." ER108 (emphasis added). Sanderson by its own admission "could have," ER035 (21:25), but did not ask in depositions about the answers to these interrogatories. The veracity of these verified responses remains unchallenged. Similarly, Sanderson did not propound any interrogatories asking about Appellants diversion of resources to address Sanderson's business practices or its UCL cause of action. *See* ER126-143. Instead, Sanderson limited its written discovery and the questions posed at the depositions to advertising alone and only some of what California law considers "advertising" at that. Then Sanderson re-challenged Appellants' standing on the narrow record it created.

On April 1, 2019, Appellee filed its fifth motion to dismiss, which was its second motion to dismiss on standing grounds. ER238. Sanderson argued that, based on Appellants' discovery responses and a handful of statements made in depositions, Appellants lacked standing because, *inter alia*, their diversion activities addressed Sanderson's business practices and did not directly address

Sanderson's "Bob and Dale" advertising. ER259. Once Sanderson made a factual attack on Appellants' standing based on the limited record it created, Appellants responded by opposing the motion, citing evidence from the discovery record and depositions in support of their standing, and promptly providing declarations on standing, as contemplated by Federal Rule 12(b)(1). Fed. R. Civ. P. 12(b)(1). To create a more fulsome factual record, clarify and elaborate on some of the information produced through discovery, and satisfy their burden of establishing subject matter jurisdiction, *see, e.g.*, *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003), each Appellant provided a standing declaration. Appellants prepared these declarations after determining what Sanderson failed to ask in written discovery and at the depositions, after reviewing organizational records, and after conversing with critical staff and former employees.

The district court granted Sanderson's April 1, 2019 motion to dismiss. ER002-11. The district court held that in order to have standing, Appellants would need to:

> [P]ublish Action Alerts or send emails to their members addressing Sanderson's advertising . . . address Sanderson's advertising as part of its ongoing campaign to persuade Darden Restaurants to stop purchasing meats from routine antibiotic administrators … write letters to Sanderson or any of its customers complaining about Sanderson's advertising . . . [produce a] press release, blog post, or News Magazine article pertaining to or referencing Sanderson's advertising prior to the lawsuit . . . petition Sanderson (or anyone else) regarding Sanderson's advertising . . . [or, protest] at Sanderson (or anywhere else) regarding Sanderson's advertising.

ER006. In doing so, the district court erred by failing to consider the unfair and fraudulent business practices that form the basis of Appellants' Third Amended Complaint and considering only Appellants' false advertising claim. *See* ER002-11. The district court's failure to consider the UCL cause of action is apparent in this conclusion:

> This is a false advertising case, and Plaintiffs [Appellants] must establish that their alleged injury is traceable to the challenged ads at issue." Order at 6. Additionally, the district court stated, "with regards to Plaintiffs' activities after August 1, 2016, but before filing this lawsuit (June 22, 2017), there is no evidence that Plaintiffs undertook any action in response to the advertising because (a) most of Plaintiffs' cited activities neither referenced Sanderson nor its advertising, (b) activities tangentially related to Sanderson were not a response to the challenged advertising and were merely continuations of preexisting initiatives, (c) activities not required by Sanderson's advertising cannot establish standing. . .

ER005. The district court arbitrarily bifurcated Sanderson's animal husbandry practices that are the subject of its advertising and advertising *per se* to conclude that Appellants were required to divert resources to challenge the advertising campaign itself and not the content of the advertising, which are Sanderson's business practices. ER009 (holding that in order to have standing to pursue its claims against Appellee, Appellants must have "expended . . . resources investigating Sanderson's advertisements or began new education and outreach campaigns targeted at Sanderson's ads. . .").

The district court further failed to properly consider Appellants' declarations and the information contained therein in support of their standing. The district court's order creates an impermissibly narrow view of standing under California's unfair competition laws and restricts public interest organizations, like Appellants, from holding corporations accountable for deceiving consumers.

Appellants timely appealed. ER012.

STATUTORY BACKGROUND

California's Unfair Competition Law

The UCL prohibits businesses from engaging in "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising" in addition to any act in violation of the FAL. Cal. Bus. & Prof. Code § 17200; *see also Williams v. Gerber Products Co.*, 552 F.3d 934, 938 (9th Cir. 2008). This provision is disjunctive. Therefore, it "establishes three varieties of unfair competition—acts or practices that are unlawful, or unfair, or fraudulent. 'In other words, a practice is prohibited as "unfair" or "deceptive" even if not "unlawful" and vice versa.'" *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, 973 P.2d 527, 540 (Cal. 1999) (quoting *Podolsky v. First Healthcare Corp.*, 58 Cal. Rptr. 2d at 98) (internal quotation marks omitted).

The UCL allows for any person to pursue representative claims or relief on behalf of others if the claimant meets the standing requirements of UCL section

17204. *See* Cal. Bus. & Prof. Code §§ 17203-04. Under the UCL, standing extends to "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. The California Supreme Court in *Kwikset Corporation v. Superior Court*, 246 P.3d 877 (Cal. 2011), stated that the phrase "as a result of" is limited only by the "plain and ordinary sense" of a "causal connection." *Id.* at 887. The court noted further that "[t]here are innumerable ways in which economic injury from unfair competition may be shown." *Id.* at 885-86 (internal quotation marks omitted) (citing *Hall v. Time, Inc.*, 70 Cal. Rptr. 3d 466, 470-71 (Cal. Ct. App. 2008).

California's False Advertising Law

The FAL declares it unlawful for any person to disseminate any statement concerning personal property that the person knows, or through the exercise of reasonable care should know, to be untrue or misleading, with intent to dispose of that property or to induce the public to enter into any obligation relating thereto; or to disseminate such untrue or misleading statements as part of a plan or scheme with the intent not to sell the property as advertised. *See* Cal. Bus. & Prof. Code § 17500.

Any person or corporation that violates the FAL may be enjoined by any court of competent jurisdiction. *See id.* § 17535. Like the UCL, actions for injunctive relief under the FAL may be prosecuted by "any person who has

suffered injury in fact and has lost money or property as a result of a violation of this chapter." *Id*.

California consumer protection claims are governed by the "reasonable consumer test." *Williams*, 552 F.3d at 938. This standard "requires a probability that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled." *Hadley v. Kellogg Sales Co.*, 273 F. Supp. 3d 1052, 1079 (N.D. Cal. 2017) (internal quotation marks omitted). California's consumer protection laws prohibit companies from creating consumer confusion. "The California Supreme Court has recognized that these laws prohibit not only advertising which is false, but also advertising which, although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public." *Williams*, 552 F.3d at 938 (internal quotation marks and alterations omitted); *see also L.A. Taxi Cooperative v. Coop. v. Uber Techs., Inc.*, 114 F. Supp. 3d 852, 860 (N.D. Cal. 2015). In addition, "[a] perfectly true statement couched in such a manner that it is likely to mislead or deceive the consumer, such as by failure to disclose other relevant information, is actionable under" California's FAL and UCL. *Kellman v. Whole Foods Mkt., Inc.*, 313 F. Supp. 3d 1031, 1049 (N.D. Cal. 2018); *see also Dodson v. Tempur-Sealy Int'l, Inc.*, No. 13-04984, 2014 WL 1493676, at *5 (N.D. Cal. April 16, 2014).

SUMMARY OF THE ARGUMENT

Appellant public interest organizations have standing to challenge Sanderson's unfair practices because Sanderson's activities frustrated Appellants' missions and caused Appellants to divert scarce organizational resources to address Sanderson's harmful industrial agricultural practices and deception about those practices. Appellants presented evidence in the district court in order to establish standing to proceed on the UCL and FAL claims.

The district court's dismissal is reversible for two key reasons. One, the district court erred by ignoring all law and evidence supporting Appellants' standing to challenge Sanderson's unfair competition and only considered evidence related to advertising. Pursuant to the district court's order, an organizational plaintiff would almost never have standing to challenge a company's unfair business practices. Yet even on the artificially narrow record created by Appellee and considered by the district court, Appellants have standing to pursue their claims.

Two, the district court also erred by failing to properly consider Appellants' declarations, which were submitted to elaborate on and clarify evidence in the record in support of standing. These declarations and the evidence contained therein firmly support Appellants' standing.

Appellants have standing, and the district court has jurisdiction to adjudicate the case on the merits. *See* U.S. Const. art. III, § 2 (Article III of the U.S. Constitution grants federal courts the power to decide cases and controversies).

STANDARD OF REVIEW

This Court reviews *de novo* a district court's dismissal for lack of subject matter jurisdiction. *See, e.g.*, *Yu-Ling Teng v. Dist. Dir., U. S. Citizenship & Immigration Servs.*, 820 F.3d 1106, 1108 (9th Cir. 2016); *Tritz v. U.S. Postal Serv.*, 721 F.3d 1133, 1136 (9th Cir. 2013) (citing *Whisnant v. United States*, 400 F.3d 1177, 1180, 1185 (9th Cir. 2005) (reversing and remanding lower court's dismissal)). This Court also reviews *de novo* a district court's dismissal on Article III standing grounds. *See, e.g.*, *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1173 (9th Cir. 2004). This Court views the evidence in the light most favorable to the nonmoving party when reviewing *de novo*. *See*, *e.g.*, *Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 922 (9th Cir. 2004).

This Circuit has also spoken on reviewing declarations. Under the sham affidavit doctrine, this Court first "determine[s] de novo whether the trial court identified the correct legal rule to apply to the relief requested." *E.g.*, *United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc). If it did, then the Ninth Circuit reviews a district court's decision to apply the sham affidavit rule for abuse

of discretion. *See, e.g., Yeager v. Bowlin*, 693 F.3d 1076, 1079 (9th Cir. 2012) (citing *Van Asdale v. Int'l Game Tech.*, 577 F.3d. 989, 998 (9th Cir. 2009).

ARGUMENT

I. THE DISTRICT COURT HAS JURISDICTION BECAUSE APPELLANTS HAVE MET THE UCL STANDING REQUIREMENTS.

Well-established precedent recognizes standing for organizational plaintiffs like Appellants who have diverted organizational resources to investigate and combat a defendant's unlawful conduct, because that diversion harms the organization and frustrates its mission. *See, e.g., Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). This real or threatened injury does not need to be substantial—Supreme Court precedent instead places the injury bar low in order to ensure that "important interests [are] vindicated[.]" *United States v. Students Challenging Reg. Agency Procs. (SCRAP)*, 412 U.S. 669, 689 n.14 (1973). For the UCL, this Court has stated there are "'innumerable ways'" for an injured party to show economic injury from unfair competition. *Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1104 (9th Cir. 2013) (quoting *Kwikset*, 246 P.3d at 885).

Appellants' first cause of action is that Appellee Sanderson Farms violated the UCL. Appellants specifically asserted standing for its UCL claim:

> Plaintiffs have standing under California Business & Professions Code § 17204, which provides that actions for relief pursuant to the UCL shall be prosecuted exclusively in a court of competent

> jurisdiction by, inter alia, any person who has suffered injury in fact and has lost money or property as a result of unfair competition.

ER408 ¶ 31. The district court did not mention the UCL cause of action, the UCL statute, or any UCL caselaw in its Order Granting Motion to Dismiss Without Prejudice (Order). *See* ER002-09. These omissions created reversible error because the district court's dismissal for want of jurisdiction failed to consider the law and evidence supporting Appellants' standing to challenge Appellee's business practices under the UCL. *See Am. Diabetes Ass'n v. U.S. States Dep't of the Army*, 938 F.3d 1147, 1154-1155 (9th Cir. 2019); *see also Hinojos*, 718 F.3d at 1109 (reversing district court's dismissal of UCL and FAL claims on standing).

A. Standing Under the UCL Is Broad.

California's UCL is a broad statute that prohibits business practices constituting "unfair competition," defined as: "Any unlawful, unfair, or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by [the FAL]." Cal. Bus. & Prof. Code § 17200.

The economic injuries that confer standing under the UCL are similarly broad. *See Kwikset*, 246 P.3d at 887 (citing *Hall*, 70 Cal. Rptr. 3d at 470-71). *Hall* catalogs "some of the various forms of economic injury" that confer standing

under the UCL.[5] *Id.* at 886 (citing *Hall* at 470-71). The money expended due to defendant's unfair competition can be as little as purchasing excess fuel in a rental truck, *see Aron v. U-Haul Co. of California*, 49 Cal. Rptr. 3d 555, 559 (2006); paying higher insurance premiums, *see Monarch Plumbing Co. v. Ranger Ins. Co.*, No. 06-1357, 2006 WL 2734391, at *6 (E.D. Cal. Sept. 25, 2006); costs to monitor and repair damage to credit caused by defendant's unauthorized release of private information, *see Witriol v. LexisNexis Grp.*, No. 05-02392, 2006 WL 4725713, at *6-7 (N.D. Cal. Feb. 10, 2006); and paying sales tax on an item advertised as free, *see Laster v. T-Mobile USA, Inc.*, 407 F. Supp. 2d 1181, 1194 (S.D. Cal. 2005).

The UCL standing requirement requires a plaintiff to show some form of economic injury. *Hinojos*, 718 F.3d 1098, 1103 (citing *Kwikset*, 51 Cal. 4th at 326). However, "the quantum of lost money or property necessary to show standing is only so much as would suffice to establish [Article III] injury in fact." *Id*.[6] This principle is consistent with Supreme Court precedent requiring only an

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[5] *Hall* has been superseded by *Kwikset*, *see Hansen v. Newegg.com Americas, Inc.*, 236 Cal. Rptr. 3d 61, 73 (Cal. Ct. App. 2018), but is relevant for its list of injuries that confer standing.

[6] In other words, the UCL's standing requirement is in line with standing under Article III of the federal constitution. *See, e.g.*, *Henderson v. Gruma Corp.*, No. CV 10-04173, 2011 WL 1362188, at *4 (C.D. Cal. Apr. 11, 2011) ("The injury in fact requirement of UCL and FAL standing overlaps with Article III standing requirements."). The requirements are identical where, as here, the injury is

"identifiable trifle" to show injury and establish standing. *SCRAP*, 412 U.S. at 689 n.14. In *SCRAP*, the Court found the government's attempt to "limit standing to those who have been 'significantly' affected by agency action" was "fundamentally misconceived." *Id.* The Supreme Court confirmed that even minimal injury can establish Article III standing:

> We have allowed important interests to be vindicated by plaintiffs with no more at stake in the outcome of an action than a fraction of a vote, a . . . $5 fine and costs, and . . . a $1.50 poll tax[.] . . . [W]e see no reason to adopt a more restrictive interpretation of 'adversely affected' or 'aggrieved.'. . . The basic idea that comes out in numerous cases is that an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation.'

Id. (internal citation and quotation marks omitted).

B. Broad UCL Standing Includes Public Interest Organization Plaintiffs.

An organization also has standing under the UCL when it has lost money or property as a result of the unfair competition. *See, e.g.*, *Am. Diabetes Ass'n*, 938 F.3d at 1154-1155 (an organization may establish injury in fact and therefore standing if it can demonstrate (1) frustration of mission and (2) diversion of

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economic in nature. *See Kwikset* at 894. Appellants have met the UCL's standing requirement and therefore also have Article III standing.

resources).[7] This rule stems from the Supreme Court's holding in *Havens*, where Justice Brennan held for a unanimous Court that a non-profit organization had standing because "injury to the organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests." 455 U.S. at 379. When an organization is forced to divert its resources to "identify and counteract" unlawful activity that frustrates its mission, "there can be no question that an organization has suffered an injury in fact" sufficient "to warrant his invocation of federal-court jurisdiction." *Id*. at 378-79). A plaintiff must eventually prove it is entitled to relief, but that is not the relevant inquiry for standing purposes. *See id.* at 379 n. 21.

The Ninth Circuit has interpreted the *Havens* diversion-of-resources injury as applying to actions "aimed at redressing the impact" of the challenged activity. *Fair Housing of Marin v. Combs*, 285 F.3d 899, 902, 905 (9th Cir. 2002). *Combs* found that "providing outreach and education to the community" was a sufficient diversion to establish standing. *Id*. at 902, 905. Thus, an organization that diverted

[7] It is not in dispute that Sanderson's conduct frustrated Appellants' missions. Sanderson did not dispute in its motion, ER238, or at the hearing, ER015, that Appellants satisfied the frustration of mission prong. Sanderson challenged only whether Appellants diverted resources.

resources to specifically respond to the defendant's conduct has standing, even it expended those resources in a manner consistent with its typical activities.

For example, in *National Council of La Raza v. Cegavske,* 800 F.3d 1032, 1040-41 (9th Cir. 2015), this Court noted that "[p]laintiffs have not alleged that they are simply going about their 'business as usual,' unaffected by [defendant's] conduct," where the organization used resources to register someone to vote who would have already been registered if the defendant had complied with the National Voter Registration Act. 800 F.3d at 1040-41. This Court found the organization had been injured because those diverted resources "would have [been] spent on some other aspect of their organizational purpose[.]" *Id*. at 1040. The Court then characterized its earlier decision in *Fair Housing Council of San Fernando Valley v. Roommate.com LLC*, 666 F.3d 1216, 1219 (9th Cir. 2012) as "holding that plaintiff organizations have standing to sue to stop a roommate-matching website from discriminating because they undertook a campaign against discriminatory [] advertising, even though their ordinary business includes investigating and raising awareness about housing discrimination[.]" *Nat'l Council of La Raza* at 1041.

This Ninth Circuit precedent is regularly applied in the trial courts. For example, the Northern District of California applied the Ninth Circuit rule in *Animal Legal Defense Fund v. HVFG LLC*, No. 12-05809, 2013 WL 3242244

(N.D. Cal. June 25, 2013). There, plaintiff Animal Legal Defense Fund (ALDF), a non-profit organization, brought a UCL claim against a foie gras producer, "challeng[ing] a business practice inimical to [ALDF's] purpose and against which [ALDF] expends its resources, thus reducing the money and property it would otherwise have for other projects." 2013 WL 3242244 at *3. The court found the plaintiff to be a "permissible plaintiff under [the UCL and FAL]." *Id*. ("If a competitor has standing by reason of money or property spent to combat a proscribed business practice, as a competitor surely does, then why should a public interest organization not have standing for the same reason?") (emphasis added) (citing *S. Cal. Hous. Rights Ctr.v. Los Feliz Towers Homeowners Ass'n*, 426 F. Supp. 2d 1061, 1068-79 (C.D. Cal. 2005). The Northern District further stated that "even after the passage of Proposition 64, an advocacy organization has standing under Section 17200 when it diverts resources in response to challenged unlawful activity." *Id.*

Similarly, the Central District in *Los Feliz Towers* held that a housing rights center lost financial resources and diverted staff time investigating case against defendants. *See* 426 F. Supp. 2d at 1068-69. *Hall* cited these organizational injury allegations as a means to prove standing after Proposition 64. *See* 70 Cal. Rptr. 3d at 471.

C. Appellants Have Standing Under Each Prong of the UCL.

As a threshold matter, Appellants clearly demonstrated that they incurred costs, both money and lost opportunity costs, to address Sanderson's unfair practices. These costs—which are a diversion of resources and injury in fact—were produced during discovery to substantiate Appellants' standing.[8] For example:

- Appellants published *annual reports and scorecards* related to the use of medically important antibiotics in meat and poultry, one of Sanderson's practices in chicken production. ER267, ER283, ER304. Appellants were aware of Sanderson's practices before publishing the first report. The primary purpose of the "Chain Reaction" reports is to educate consumers about deceptive practices like Sanderson's: widespread, routine use of medically important antibiotics in food animals and how that practice contributes to antibiotic resistant bacteria. Friends of the Earth stated it that invested at least 600 hours of staff time, costing at least $30,000. ER110 (verified response). Center for Food Safety stated that it invested approximately 100 hours in telephone conferences, fifteen hours reaching out to restaurant companies, and thirty hours drafting the report and press materials, costing at least $6,500 for staff time. ER121 (verified response); ER330.

- Appellants issued *press releases* on antibiotics and food animals to counteract the effects of Sanderson's public statements on the same topic. ER330-31. Friends of the Earth invested twenty-five hours of staff time, costing at least $1,000.

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[8] The veracity of the costs detailed in the verified response is not in dispute. Appellants provided specific dollar amounts with details, and Appellee failed to ask any questions during depositions about those costs.

ER111. Center for Food Safety invested approximately 40 hours, costing at least $1,900. ER117, ER122.

- Appellants researched and published *blogs* aimed at pressuring Sanderson's institutional purchasers and highlighting the harms of Sanderson's practice of routine antibiotics. ER492, ER337; *see, e.g.*, footnote 4, *supra*. Friends of the Earth invested twenty-five hours of staff time, costing at least $1,500. ER112. Center for Food Safety invested approximately fifty hours, costing $2,400. ER071-75; ER332-33.

- Appellants repeatedly posted to *social media* about Sanderson and a key institutional purchaser of Sanderson's products. ER193; ER497; ER499. Friends of the Earth invested approximately 160 hours, costing $5,000. ER112.

- Friends of the Earth *emailed action alerts* to its members related to Darden, a key institutional purchaser of Sanderson products, and reports on antibiotics in the food supply. ER448-485. Friends of the Earth invested approximately fifteen hours, costing at least $750. ER112.

- Friends of the Earth organized protests in multiple cities and delivered 130,000 *petition signatures* to one of Sanderson's institutional buyers. Staff were quoted in The Guardian saying "Right now, they [Sanderson's buyer, Darden] source most of their food through a corporate-controlled, industrial, toxic food supply chain." ER334-336; 486-491; Friends of the Earth invested approximately thirty hours of staff time, costing $1,500. ER112.

- Friends of the Earth hired *consultants* to assist in projects related to the use of antibiotics and antibiotic resistance in the food supply, costing $55,000. Friends of the Earth stated that at least $5,500 of that was directly attributable to Sanderson's false advertising (the information was provided in response to an interrogatory seeking only lost money related to advertising). ER113; ER217-221.

The district court excluded those costs from its consideration of Appellants' standing and instead limited its review solely to activities *after* Sanderson publicly launched the "Bob and Dale" advertising campaign. This completely ignored Appellants' UCL claim and impermissibly narrowed the FAL claim, a point that Appellants raised at the district court motion hearing. ER043 (29:18-19), ("the diversion doesn't need to be about the advertisements" because the case is not solely about advertisements.)

The FAL declares unlawful "any statement …which is untrue or misleading" made "to induce the public" to purchase a product, Cal. Bus. & Prof. Code § 17500, yet the district court's analysis assumed that Appellants second cause of action for FAL violations was limited to one advertising campaign by Appellee. The district court excluded Appellants' costs related to combatting unfair practices and false statements beyond the Bob and Dale advertising campaign that launched on August 1, 2016. However, investigative costs, such as researching and educating consumers about a company's business practices, are considered sufficient "injury in fact" to confer standing post-*Kwikset. See* 246 P.3d at 886-87.

The UCL has three prongs: unfair, unlawful, and/or fraudulent. *See* Cal. Bus. & Prof. Code § 17200. Courts have interpreted the UCL to prohibit practices that are "'unfair' or 'deceptive' even if not 'unlawful' and vice versa." *E.g.*, *McCann v. Lucky Money, Inc.*, 29 Cal. Rptr. 3d 437, 440 (Cal. Ct. App. 2005)

(quoting *Podolsky*, 58 Cal. Rptr. 2d at 98) (internal quotation marks omitted).

Appellants addressed all three prongs in the Third Amended Complaint (TAC):

> Sanderson engaged in unlawful, unfair, and/or fraudulent conduct under the California UCL, California Business & Professions Code § 17200, et seq., by advertising its Chicken Products as "100% natural" when in fact, Sanderson knows that the process by which it creates its Chicken Products and the resulting product itself does not meet reasonable consumer expectations for a product marketed as "100% natural."

Plaintiffs' TAC , ER433 ¶ 84.

1. Appellants Have Standing Under the UCL's Unfair Prong.

Plaintiffs directly addressed the UCL "unfair" prong in their Complaint:

> Sanderson's conduct is unfair in that it offends established public policy and/or is immoral, unethical, oppressive, unscrupulous, and/or substantially injurious to Plaintiffs, Plaintiffs' members, and California consumers.

ER434 ¶ 86.

The standard for "unfair" is broad.

> The standard for finding an "unfair" practice in a consumer action is "intentionally broad, thus allowing courts maximum discretion to prohibit new schemes to defraud. The test of whether a business practice is unfair involves an examination of [that practice's] impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer. In brief, the court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim. . . . [A]n 'unfair' business practice occurs when that practice offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers."

Candelore v. Tinder, Inc., 228 Cal. Rptr. 3d 336, 351 (Cal. Ct. App. 2018) (quoting *Smith v. State Farm Mut. Auto. Ins. Co.*, 113 Cal. Rptr. 2d 399, 415 (Cal. Ct. App. 2001)) (internal quotation marks omitted). A "practice may be deemed unfair even if not specifically proscribed by some other law." *Cel-Tech Comms*., 973 P.2d at 540. Appellants detailed practices in the TAC that are substantially injurious to consumers, among other unfair attributes, including:

- Routine use of pharmaceuticals, including antibiotics, to all birds in a flock, throughout the majority of their lives, which sometimes results in residues remaining in the product. ER400 ¶ 6. Sanderson's own testing indicates positive results for certain pharmaceuticals that Sanderson administers to its flocks at various stages of their lives, including decoquinate, monensin, narasin, nicarbazin, and salinomycin. ER418 ¶ 63.

- Routine use of multiple antibiotics, thus contributing to the growth of antibiotic-resistant bacteria. Sanderson raises chickens that have tested positive for antibiotic-resistant salmonella and antibiotic-resistant campylobacter, as tested by the USDA's Food Safety Inspection Service after the chickens had left Sanderson's grow-out facilities. Some of these samples were resistant to antibiotics deemed critically important for human medicine. ER400 ¶ 6; ER423 ¶¶ 70-71.[9]

[9] At the time Appellants filed the suit in June 2017, the Centers for Disease Control (CDC) estimated that antibiotic-resistant bacteria caused 23,000 deaths and more than 2 million illnesses. ER425 ¶ 73(d). At the time Appellants filed this Appeal, the CDC estimates that antibiotic-resistant bacteria and fungi cause more than 35,000 deaths and 2.8 million infections in the United States each year. *More People in the United States Dying from Antibiotic-Resistant Infections than Previously Estimated*, press release dated November 13, 2019 and available at https://www.cdc.gov/media/releases/2019/p1113-antibiotic-resistant.html (last visited January 8, 2020).

Sanderson represents to consumers that it is unaware of "credible evidence" linking antibiotics use in chickens to antibiotic-resistant bacteria, misleading the public into thinking that credible evidence does not exist regarding the public health threat of routine antibiotics use in industrial poultry production, when is fact the opposite is true. ER427 ¶ 75.

- Confining birds inside crowded sheds in inhumane conditions, with upwards of 25,000 birds in a shed. Sanderson's corporate veterinarian stated that an industry standard of 1.097 to 1.180 square feet per bird was "a bit too roomy." ER428-29 ¶ 77. Sanderson's plants have been cited for excessive use of force, improper sorting of live and dead birds, and birds drowning in the scald tank. ER429 ¶ 78. A USDA inspector determined that a Sanderson plant's slaughtering process was "out of control." *Id.* ¶ 78.

Misleading consumers to purchase and consume food that is marketed as "100% Natural" but in fact is produced in a manner that is not only unnatural but injurious to public and individual consumer individual health is more significant than a mere "trifle" and more injurious than excess fuel costs in a rental truck, higher insurance premiums, and paying sales tax on an item advertised as free. *See Hall*, 70 Cal. Rptr. 3d at 470-71.

When Sanderson does communicate to the public, it continues to unfairly and unethically withhold crucial information, which (1) clearly offends established public policy of telling the truth to consumers who rely on those communications when trying to differentiate products from various food producers. For example:

- Disseminating deceptive materials to the public, including a video posted on YouTube titled "How We Grow Our Chicken," that states that Sanderson chickens are not injected with anything. In doing so,

Sanderson seeks to take advantage of reasonable consumers who do not know that broiler chickens are not *injected* with antibiotics but instead are *fed* antibiotics. As one confused person stated, "I thought you guys said all chickens in the US are supposedly antibiotic free or that you guys don't use them?" ER421 ¶ 67.

- Telling the public that its chicken is "100% Natural," despite its routine use of antibiotics in *every* flock throughout the birds' lives. ER416 ¶¶ 55, 66.

- Creating a website that hides the truth from consumers. ER411-12 ¶ 41.

- Obfuscating when asked simple questions about specific antibiotics by consumers who are trying to ascertain the truth about Sanderson's chicken. Sanderson's marketing director reviewed a draft response to a consumer and wrote, "I think we need to dumb it down a little but this particular consumer seems to be smarter than the average bear on this topic." After receiving a vague response from Sanderson, the consumer wrote again and specifically asked if Sanderson used any other antibiotics other than gentamicin and virginiamycin. Instead of truthfully answering yes and admitting to the routine use of antibiotics and pharmaceuticals, Sanderson avoided the question by responding with more self-serving statements about "serving people chicken that is delicious." ER432 ¶ 81.

Pursuant to *Candelore*, the impact these practices have on consumers (at a minimum, the economic injury of purchasing Sanderson poultry under false pretenses instead of a truly antibiotic free, humanely raised bird) far outweighs Sanderson's profit motive to sell its chicken, regardless of the truth. *See* 228 Cal. Rptr. 3d at 351. Most consumers prefer natural products, and by hiding the truth

about its antibiotic use in order to gain an unfair competitive advantage, Sanderson's conduct clearly violates the UCL's unfair prong.

2. Appellants Have Standing Under the UCL's Unlawful Prong.

Appellants directly addressed the UCL "unlawful" prong in their TAC:

> Sanderson's conduct is unlawful in that it violates the California FAL, California Business & Professions Code § 17500 *et seq*., described more fully in the Second Claim for Relief below.

ER398 ¶ 85.

The UCL's "unlawful" prong borrows violations from other laws by making them "independently actionable" as unfair competitive practices. *McKell v. Wash. Mut., Inc.*, 49 Cal. Rptr. 3d 227, 242 (Cal. Ct. App. 2006). It is well-settled that the UCL's unlawful prong can be anchored to a host of legal violations, even if those laws do not allow for a private right of action. *See, e.g.*, *De La Torre v. CashCall, Inc.*, 854 F.3d 1082, 1085 (9th Cir. 2017) (although the predicate California Finance Lenders Law did not have a private right of action, defendant's conduct was actionable under the unlawful prong of the UCL). Rather, if the violation nonetheless constitutes unfair competition, it is "independently actionable[.]" *Korea Supply Co. v. Lockheed Martin Corp.*, 63 P.3d 937, 943 (Cal. 2003); *see also Cel-Tech Comms.*, 973 P.2d at 539-40.

The underlying offense on which Appellants base their UCL claim of "unlawful" business practices is Sanderson's violation of the FAL. In addition to

non-advertising unfair practices, as documented more fully in section I(c)(1), *supra*, Appellants alleged that:

- Sanderson represented that its chickens are "100% Natural" in TV commercials, including "The Truth About Chicken: Mr. Floppy Arms," "Marketing Guru," "Employees," and "The Truth About Chicken: Supermarket." ER412 ¶ 42. However, Sanderson's chicken does not meet consumer expectations for a natural food product. ER413-415 ¶¶ 47-51.

- Sanderson represents to consumers in advertising "no antibiotics to worry about here," "There's Only Chicken In Our Chicken. Seriously." ER417 ¶ 59. This blatantly contradicts Sanderson routine use of antibiotics. ER383 (identifying antibiotics in chicken feed in response to an interrogatory).

- Despite the fact that its chickens have tested positive for antibiotic residues, ER418 ¶ 63, Sanderson, via the Bob and Dale television advertisements, says "The thing is, by federal law, all chickens must be cleared of antibiotics before they leave the farm. . . . No antibiotics to worry about here." This statement misleads consumers because it omits the fact that USDA's own process allows for chickens with scientifically detectable antibiotic residues to be sold to consumers, as long as the detected residues stay below the regulatory tolerance. ER419 ¶ 64.

Here, the district should have reviewed Appellants' evidence and standing broadly under UCL law, not narrowly, and not only under the borrowed FAL statute. It is axiomatic that in order to assess the truth or falsity of a particular advertisement about practices, one must first ascertain the particular production practices in question. Otherwise, it would be virtually impossible to determine the advertisement's truth or falsity. Indeed, the content of the advertising is precisely

what makes it objectionable, causing Appellants to challenge Sanderson under both the UCL and the FAL.

Sanderson advertised its chicken as "100% Natural," while at the same time, it produced the chicken contrary to these advertisements. The evidence in the record plainly shows that Appellants were forced to divert resources in order to investigate Sanderson's production practices in order to determine the truth or falsity of Sanderson's advertising. Once its falsity had been established, Appellants diverted additional resources to combat the effects of both Sanderson's production practices and false advertising. Given the facts, Appellants correctly asserted both UCL and FAL claims and have standing for both. However, the district court arbitrarily bifurcated the ads from their content, and then concluded that Appellants' efforts to counteract Sanderson's unlawful practices must address the advertising campaign *per se* and not the practices portrayed in those ads. Without diverting resources to investigate Sanderson's production practices, Appellants would have no way of determining that Sanderson's advertising is, in fact, false. Under the district court's ruling, it would be virtually impossible for any plaintiff to successfully allege a claim under the UCL's unlawful prong for a violation of the FAL.

3. Appellants Have Standing Under the UCL's Fraudulent Prong.

The district court altogether failed to consider Appellants' standing under the UCL fraudulent prong despite Appellants' numerous allegations of Sanderson's fraudulent conduct, as follows:

> Sanderson's advertising actions and practices with regard to the food product and process constitute "fraudulent" business practices in violation of the UCL because, among other things, they are likely to deceive reasonable consumers. As a direct and proximate result of Sanderson's violations, Plaintiffs suffered injury in fact because they were forced to divert substantial organizational resources away from their core missions. Sanderson's unlawful encouragement of such practices have frustrated Plaintiffs' efforts to promote transparency in the food system.

ER434 ¶ 87.

Appellants further alleged, with the required specificity, the "who, what, when, where, and how" of Sanderson's fraudulent business practices. *See Davidson v. Kimberly Clark Corp.*, 889 F.3d 956, 964 (9th Cir. 2018) (claims under the UCL's fraudulent prong must satisfy Rule 9(b)'s heightened pleading requirements) (internal quotation marks omitted); *see also E & E Co. v. Kam Hing Enters., Inc.*, No. 09-16418, 2011 WL 1480047, at *2-3 (9th Cir. Apr. 19, 2011. Specifically, Appellants identified the particular acts and omissions constituting Sanderson's fraudulent conduct, ER399-400 ¶¶ 5-6; ER401-11 ¶¶ 37-38; ER411-13 ¶ 40-45; ER 415-432 ¶¶ 54-82, the precise activities Appellants undertook to investigate and combat Sanderson's fraudulent statements, ER403 ¶ 18; ER406 ¶

24, the resulting diversion of resources from Appellants' primary mission, ER401-03 ¶¶ 14, 16-17; ER404-406 ¶¶ 19-23, the causal connection between Sanderson's fraudulent conduct and Appellants' diversion of resources to combat such conduct, ER406 ¶ 26; ER407 ¶ 27, and the likelihood of deception of the reasonable consumer. ER399¶ 4, 7; ER409-11 ¶¶ 47-53; ER421 ¶ 67; ER ¶ 426-27 ¶ 74; ER 432 ¶ 82. Appellants also substantiated their diversion of resources allegations during fact discovery. *See* Supra II.C., discussed above. As such, Appellants have adequately alleged the threshold requirements of standing under the UCL's fraudulent prong with the required particularity to put Sanderson on notice of the specific conduct at issue. *See E & E Co.*, at *3.

Under this prong, advertising *or* business practices that are untrue, misleading, deceptive, or fraudulent are actionable. *See*, *e.g.*, *Hinojos*, 718 F.3d at 1103-04. Indeed, the UCL has repeatedly served as the basis of liability for fraudulent business practices regarding "how the merchandise … was actually produced" such as "meat falsely labeled as kosher or halal, wine labeled with the wrong region or year, blood diamonds mislabeled as conflict-free, and goods falsely suggesting they were produced by union labor." *Id.* at 1105 (citing *Kwikset*, 246 P.3d at 889-90). It follows that chicken marketed as "100% Natural" when in fact it is not, constitutes the very type of fraudulent business practices this prong of the UCL aims to combat.

Legions of caselaw in both this Circuit and California courts make clear that to establish standing under the UCL's fraudulent prong, a plaintiff need only allege: (1) that it suffered economic injury through the loss of money or property; (2) as a result of defendant's conduct; and (3) that conduct is likely to deceive members of the public. *See Hinojos*, 718 F.3d at 1108 (internal citations omitted); *see also DeCarlo v. Costco Wholesale Corp.*, 733 F. App'x 398, 399-400 (9th Cir. 2018); *E & E Co.*, 2011 WL 1480047, at *3. That is all the law requires at this stage. *Kwikset*, 51 Cal. 4th at 330, 246 P.3d at 890.

The district court was bound to accept as true the allegations in the TAC and to resolve all reasonable inferences in favor of Appellants, as the non-moving party. *Davidson*, 889 F.3d at 964*; see Dreier v. United States*, 106 F.3d 844, 847 (9th Cir. 1996). The district court did not do so. Rather, it failed to even mention, let alone address, Appellants' standing under the UCL by ignoring the legal claim and supporting evidence entirely.

II. THE DECLARATIONS DEMONSTRATE APPELLANTS' STANDING AND THE DISTRICT COURT ERRED BY FAILING TO PROPERLY CONSIDER THEM.

A. Declarations Are Proper in Response to Factual Attacks on Subject Matter Jurisdiction.

Sanderson moved to dismiss under Rule 12(h)(3), which was a factual attack on subject matter jurisdiction. *See* Fed. R. Civ. P. 12(h)(3). It is wholly proper, even expected, for a plaintiff to submit such a declaration with its opposition. "In

response to a summary judgment motion or a trial court's post-pleading stage order to establish Article III standing, a plaintiff can no longer rest on 'mere allegations' but *must* set forth by affidavit or other admissible evidence 'specific facts' . . . as to the existence of such standing." *Gerlinger v. Amazon*, 526 F.3d 1253, 1255-56 (9th Cir. 2008) (emphasis added) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992)).

Appellee's interrogatories and deposition questions were not intended to elicit all facts related to standing.[10] Appellee sought morsels of information that would bolster its narrow theory of standing and ignored facts that would support Appellants' standing. Defense counsel intentionally created an incomplete record in written discovery and at the depositions and Sanderson proceeded in its Rule 12 motion as if its attorneys had asked all questions relevant to standing. In other words, Sanderson emphasized what Appellants did not do instead of investigating what Appellants did do. The district court must consider the complete set of facts,

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[10] A declaration opposing a Rule 12(h)(3) motion could be the first time facts in support of standing are presented, reiterating the importance of declarations at the time a factual attack on standing is launched. A defendant could choose not to serve any discovery to elicit standing facts and not ask any deposition questions, then argue under Rule 12(h) that the discovery record is devoid of facts to support standing. Here, Sanderson did something similar by failing to ask relevant questions at the depositions about Appellants' standing, and then used that to argue that Appellants had not met their evidentiary burden.

not just a self-serving record truncated by defense counsel's gamesmanship. *See Van Asdale*, 577 F.3d. at 998-999 (citing *Sch. Dist. No. 1J, Multnomah Cty., Or. v. ACandS, Inc*., 5 F.3d 1255, 1264 (9th Cir.1993)); *see also Nelson v. City of Davis*, 571 F.3d 924, 928-29 (9th Cir. 2009).

B. District Courts Must Review Facts on Subject Matter Jurisdiction in the Light Most Favorable to the Non-Moving Party or Hold an Evidentiary Hearing to Resolve Any Dispute.

When a court has considered items outside a complaint in deciding a motion to dismiss, it is to apply a standard similar to the summary judgment standard and resolve all disputes of fact in favor of the nonmovant. *See, e.g., Dreier v. United States*, 106 F.3d 844, 847 (9th Cir. 1996) ("[W]e will consider items outside the pleadings that were considered by the district court in ruling on the 12(b)(1) motion, but resolve all disputes of fact in favor of the nonmovant."). Courts review 12(h)(3) motions under the same standards as a 12(b)(1) motion. *See, e.g., Wood v. City of San Diego*, 678 F.3d 1075, 1082 (9th Cir. 2012). Instead of reviewing the declarations in the light most favorable to Appellants, as it was required to do, the district court improperly excluded them. *See, e.g., Olsen*, 363 F.3d at 922.

If the district court suspected that the declarations were a sham, it should have held an evidentiary hearing to assess the facts and judge credibility. *See, e.g., Goldberg v. Kelly*, 397 U.S. 254, 269-70 (1970) ("In almost every setting where important decisions turn on questions of fact, due process requires an

opportunity to confront and cross-examine [] witnesses."); *Hohlbein v. Hosp. Ventures LLC*, 248 Fed.Appx. 804, 806 (9th Cir. 2007) ("[B]ecause the evidentiary burden to demonstrate standing remains on [plaintiff], the district court may revisit the issue of standing in an evidentiary hearing or at trial, where the controverted facts 'must be supported adequately by the evidence adduced' there" (quoting *Lujan*, 504 U.S. at 561)); *Munoz-Mendoza v. Pierce*, 711 F.2d 421, 425 (1st Cir. 1983) ("The court must resolve any genuine disputed factual issue concerning standing, either through a pretrial evidentiary proceeding or at trial itself"); *Bischoff v. Osceola Cty., Fla.*, 222 F.3d 874, 881 (11th Cir. 2000) (district court must hold evidentiary hearing, including live witness testimony, when court was presented with conflicting affidavits regarding standing issues); *Martin v. Morgan Drive Away, Inc.*, 665 F.2d 598, 602 (5th Cir. 1982) (vacating district court's order dismissing party for lack of standing without first holding evidentiary hearing when several fact issues were disputed). As the Eight Circuit explained:

> Clearly, the district court was presented with contradictory evidence bearing directly on the question of whether appellants had an ownership interest in the BMW. The district court ultimately ruled that appellants lacked standing to challenge the forfeiture. In so ruling, however, the district court resolved factual disputes and made witness credibility determinations central to the issue of standing simply by relying on a warring paper record consisting of conflicting affidavit and deposition transcripts. Because there were disputed factual issues and witness credibility determinations to be resolved, we conclude that the district court was required to conduct an evidentiary hearing.

United States v. 1998 BMW "I" Convertible, 235 F.3d 397, 400 (8th Cir. 2000).

The district court erred (1) by not viewing the evidence—the written discovery record, the depositions, and the declarations—in the light most favorable to Appellants and (2) by not having an evidentiary hearing before treating the declarations as if they were a sham.

C. The Declarations Detail Appellants' Standing.

In addition to the declarations timing being wholly proper, this Circuit has declared that "the non-moving party is not precluded from elaborating upon, explaining or clarifying prior testimony elicited by opposing counsel on deposition [and] minor inconsistencies that result from an honest discrepancy, a mistake, or newly discovered evidence afford no basis for excluding an opposition affidavit.'" *Van Asdale*, 577 F.3d. at 999 (quoting *Messick v. Horizon Indus.*, 62 F.3d 1227, 1231 (9th Cir. 1995)).

Van Asdale involved a claim of retaliatory discharge under the Sarbanes-Oxley Act. *See id.* at 991. There, the district court granted summary judgment in favor of the employer. In doing so, it failed to consider a post-deposition declaration, summarily concluding that that, "'[b]ecause [the relevant] portion of [Shawn's] declaration contradicts [his] deposition testimony it must be disregarded.'" *Van Asdale* at 998 *Van Asdale* at 999 (quoting *Van Asdale v. Int'l Game, Tech.*, 498 F. Supp. 2d 1321, 1331 (D. Nev. 2007)). This Court reviewed both the deposition testimony and the declarations, and found the explanations in

the declarations did not "flatly contradict" the deposition testimony. *Id.* Indeed, due specifically to opposing counsel's line of questioning, the deponent only provided cursory testimony regarding fraud. *See id*. "[H]is subsequent declaration was a legitimate attempt to 'explain[ ] or clarify[ ] prior testimony elicited by opposing counsel on deposition.'" *Id*. (quoting *Messick*, 62 F.3d at 1231). This Court did not remand to the district court, but instead reviewed *de novo* and made a specific factual finding that the minor inconsistencies did not necessitate the invocation of the sham affidavit rule and exclusion of the declaration. *See id*. (finding that the declaration was a "legitimate attempt to explain[ ] or clarify[ ] prior testimony elicited by opposing counsel.") (internal quotation marks omitted).

Appellants' declarations explain why evidence in the record supports their standing. Specifically, the declarations clarify how the alleged resource diversions were actually that, because Sanderson's attorneys' self-serving line of questioning of Ms. Marcelin Keever and Ms. Rebecca Spector only elicited cursory testimony related to Appellants' actual diversion of resources.

For example, Ms. Keever explained:

> If Defendant had not advertised 100% Natural chicken and "no antibiotics to worry about here" to the public despite Defendant's routine antibiotics use, Friends of the Earth would not have had to use its resources to educate the public on the truth of Defendant's chicken raising process and product on the grocery store shelves. ER201 ¶ 13.
>
> Immediately after Defendant launched its false and misleading "Bob and Dale" advertising campaign, and Friends of the Earth learned of

> the connection between Darden restaurants and Defendant, Friends of the Earth spent considerably more time countering the misinformation being provided by Defendant through Friends of the Earth's Facebook posts, blogs, social media, and action alerts. Staff reached out to nonprofit partner organizations via telephone and also discussed Defendant's advertising internally via email. Friends of the Earth also spent considerably more time and effort campaigning to convince Darden to stop sourcing chicken raised with routine antibiotics. *Id*. ¶ 14.
>
> Blog posts highlighting commitments of Defendant's competitors or its competitors' customers to improve animal management practices and reduce dependence on critical drugs were designed to combat the effects of Defendant's advertising and encourage consumers to purchase from companies that committed to truthful representations about meat production. ER202 ¶ 15.
>
> Within 10 days of learning about Defendant launching the "Bob and Dale" campaign, and because of Defendant's over-the-top deceptive advertising about antibiotics and chicken production, Friends of the Earth used its Facebook account to publicize the truth about antibiotics and chicken in August, September and October 2016. For each Facebook post, a staff member drafts a post, seeks approval from a supervisor, and schedules the post. Even a simple post can take 20 minutes of the Digital Communications Coordinator's time to publish. Many Facebook posts are also cross-posted on Twitter. ER202-03 ¶ 17.

It was necessary to clarify these facts—already in evidence—because defense counsel did not ask Ms. Keever to explain why Friends of the Earth's diversion of

resources were actually that; instead, opposing counsel only asked whether certain documents "discuss Sanderson's advertising." *See, e.g.*, ER 354 (81:1-12.)[11]

Ms. Spector's declaration contained similar clarifying—not contradictory—testimony:

> Because of Sanderson's false advertising, Center for Food Safety had to identify any and all opportunities to educate consumers in blogs and press releases that had to do with antibiotics. It was no longer enough to say that routine use of antibiotics was a public health issue that the Food and Drug Administration needed to address. Instead, Center for Food Safety had to be clear about the specific nature of the issue: that routine antibiotics causes selection for resistance among bacteria, increasing resistant bacteria and creating the presence of resistant bacteria on meat and in the environment, thus resulting in resistant infections in humans. ER227 ¶ 20.
>
> In blog posts on the issue of antibiotics, Center for Food Safety highlighted and provided greater detail on the fact that the primary concern related to routinely or continuously administering chickens antibiotics via feed and water is not the presence of drug residues on meat, but rather the increase and spread of antibiotic resistant bacteria that can cause life-threatening human illness and the transmission of these bacteria on meat and in the environment. *Id.* ¶ 21.
>
> [B]log posts highlighting commitments of Sanderson's competitors or its competitors' customers to improve animal management practices

[11] Ms. Keever also explained that the record did not contain every "internal email referencing every draft of any social media post or other public statement" because Friends of the Earth objected to producing drafts and emails about drafts and instead produced final versions of documents. During discovery, Appellants argued that the burden of producing all emails and draft emails was too great. Therefore, the district court could not have simply relied on Appellants' failure "to produce evidence demonstrating they expended additional resources to address Sanderson's advertisements." ER009.

> and reduce the dependence on critical drugs were designed to combat the effects of Sanderson's advertising and encourage customers to purchase from companies that committed to truthful representations about meat production. ER229 ¶ 27.

1. The Declarations Elaborate, Explain, and Clarify Appellants' Standing.

The Ninth Circuit warned in *Van Asdale* that aggressive invocation of the sham affidavit rule and exclusion of the declaration "threatens to ensnare parties who may have simply been confused during their deposition testimony and may encourage gamesmanship by opposing attorneys." 577 F.3d at 998-999 (citing *ACandS*, 5 F.3d at 1264); *see also Nelson*, 571 F.3d at 928-29. As explained by both 30(b)(6) deponents in their declarations, defense counsel's gamesmanship both confused the deponents and elicited only the answers that defense counsel was seeking in order to make Appellee's standing arguments.

Defense counsel asked both Ms. Spector and Ms. Keever a number of vague questions that called for legal conclusions, and only attempted to show that Appellants' discovery materials do not mention Sanderson's advertising. For example, defense counsel asked Ms. Spector, "You agree that Sanderson's advertising didn't require CFS to do anything at all, correct?" ER358 (85: 4-6, 14-16). Defense counsel also asked if Ms. Spector "agree[d] that Sanderson's advertising didn't forbid or prohibit Center for Food Safety from doing anything?" ER359-60; (86: 19-25; 87: 1-4). Similarly, defense counsel asked Ms. Spector to

agree that Center for Food Safety was not "required to" file this lawsuit. ER359 (86: 10-13). Ms. Spector answered much like any person would answer such a question—Appellee Center for Food Safety was not "forced" to filed the lawsuit. Ms. Spector explained in her declaration that she provided "factual testimony as [she] understood the common meaning of the words and [her] testimony did not serve as legal conclusions under Ninth Circuit case law." ER230 ¶ 33. Ms. Spector then stated, under penalty of perjury, that "Center for Food Safety diverted resources as a result of [Sanderson's] false advertising. In other words, [Appellee's] actions caused Center for Food Safety to expend more time, money, and other resources and 'but for' those actions it would have spent those resources to accomplish other aspects of its organizational mission." ER230 ¶ 34.

Similarly, defense counsel asked Ms. Keever several times about why Friends of the Earth took certain actions and whether it was "because of Sanderson advertising." Ms. Keever explained in her declaration that "some of the questions were vague without clear understanding of what Friends of the Earth action defense counsel was referring to, which specific statement by Sanderson was at issue, or the timing of both." ER211 ¶ 44. Ms. Keever even stated in her deposition that the answers to defense counsel's questions depend "on the statements that you're talking about, if they're pre-Sanderson advertising, no." ER355 (129:12-14).

2. Ms. Keever and Ms. Spector's Declarations Are Consistent with Their Deposition Testimony.

The declarations are consistent with the deposition testimony elicited by opposing counsel; they explain how Appellants had to change their approach on educating the public, diverting resources to counteract the effects of Sanderson's advertising and its unlawful business practices. Sanderson has not pointed to any statement in the declarations that contradicts the deposition testimony. *See* ER050-69. Notably, the district court also admitted that the declarations and the deposition contain the "same set of facts." ER007-8, fn.1. And that makes it impossible to hold that the deposition testimony directly contradicts the affidavits.

3. It Is Proper to Present a Full Set of Facts to the District Court When It Is Determining Its Own Jurisdiction.

Van Asdale also discussed whether "newly discovered evidence" was presented in the declaration. 577 F.3d. at 999. Ms. Spector's declaration provided evidence that a former staff member diverted twenty-five percent of his staff time "educating the public about why [Sanderson's] advertising, specifically its messaging on antibiotics, was misleading and twenty-five percent less time on federal policy work. This amounts to at least $2,620.00 in Mr. Harsh's wages and salaries from August 1, 2016 to October 5, 2018 diverted to challenge Sanderson's deceptive advertising." ER229 ¶ 29; ER236.

Here, the district court failed to consider the newly discovered evidence presented by the Spector declaration, claiming that, in its opinion, this new information is "suspect" because, notwithstanding that it was "newly discovered," it was not presented earlier in discovery. ER008. Had the district court conducted the factual investigation it was required to, it would have learned that Ms. Spector did not speak with the former employee Mr. Cameron Harsh before her deposition, but did speak with him before drafting her declaration and therefore introduced new information about diversion of resources that she was formerly unaware of. Compare ER357 (9:2-4) with ER223 ¶ 3. Ms. Spector testified that not all of Center for Food Safety's staff keeps contemporaneous time records on their activities:

> Q. Are CFS staffers required to maintain contemporaneous time records of their activities?
> A. Some staff members are.
> Q. How do you determine who is and who is not?
> A. It varies from department to department.

ER361 (102:12-16). Ms. Spector explained that Center for Food Safety staff keeps records on how much they spent on programs, but not necessarily on individual aspects of those programs. ER361 (102:8-9).

The Ninth Circuit has cautioned that newly-remembered facts, or new facts, accompanied by a reasonable explanation, should not ordinarily lead to the striking of a declaration as a sham. *See, e.g.*, *Yeager v. Bowlin*, 693 F.3d at 1081 (citing

Cleveland v. Pol'y Mgmt. Sys. Corp., 526 U.S. 795, 806-07 (1999) (stating the general rule that parties may explain or attempt to resolve contradictions with an explanation that is sufficiently reasonable)). In *Yeager*, the Ninth Circuit found that the declaration was a sham, because:

> The district court could reasonably conclude that no juror would believe Yeager's weak explanation for his sudden ability to remember the answers to important questions about the critical issues of his lawsuit. It is implausible that Yeager could refresh his recollection so thoroughly by reviewing several documents in light of the extreme number of questions to which Yeager answered he could not recall during his deposition and the number of exhibits used during the deposition to try to refresh his recollection. Thus, the district court's invocation of the sham affidavit rule to disregard the declaration was not an abuse of discretion.

693 F.3d at 1081. Here, Ms. Spector did not refresh her recollection with documents or fail to answer an extreme number of questions. She did not suddenly remember facts. Moreover, her deposition testimony was not based strictly on personal knowledge; she served as an organization's designee and answered questions to the best of her abilities based on the general topics for which she had prepared to testify. This included responding to questions in 2019 regarding activities of staff members in multiple offices several years prior to the deposition. After the deposition, when it became clearer what false narrative defense counsel was trying to create, Ms. Spector spoke with a former CFS employee who had new evidence on diversion of resources not presented by the Appellant previously. Ms. Spector, serving as Center for Food Safety's Rule 30(b)(6) designee, was unaware

of the specifics of Mr. Harsh's diversion of resources because Center for Food Safety does not keep contemporaneous time records for each individual activity of its program staff. The district court erred when it ignored this evidence in support of Appellants' standing.

D. The District Court Erred by Disregarding the Declarations As If They Were Sham Affidavits.

The district court erred because it summarily disregarded the declarations Ms. Keever and Ms. Spector without adherence to the Ninth Circuit analysis that must be followed to analyze the declarations. If the district court did not want to credit the declarations or hold an evidentiary hearing, at a minimum, the district court could have analyzed the affidavits under the sham affidavit rule, which is the only proper way to eventually disregard them. *Van Asdale*, 577 F.3d at 998-99. If the district court had held an evidentiary hearing or properly analyzed the declarations under this Circuit's sham affidavit test, it could not have reasonably concluded that Appellants lacked standing.

1. This Circuit Has a Two-Part Test to Evaluate Potentially Sham Affidavits.

The Ninth Circuit has established a two-part test in order to trigger the sham affidavit rule: (1) the district court must make a factual determination that the contradiction is a sham, and (2) the "inconsistency between a party's deposition testimony and subsequent affidavit must be clear and unambiguous to justify

striking the affidavit." *Van Asdale* at 998-99. This two-part test was described in detail in *Van Asdale*:

> First, we have made clear that the rule "does not automatically dispose of every case in which a contradictory affidavit is introduced to explain portions of earlier deposition testimony," [*Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266-67 (9th Cir. 1991)]; rather, "the district court must make a factual determination that the contradiction was actually a 'sham.'" *Id*. at 267. Second, our cases have emphasized that the inconsistency between a party's deposition testimony and subsequent affidavit must be clear and unambiguous to justify striking the affidavit. Thus, "the non-moving party is not precluded from elaborating upon, explaining or clarifying prior testimony elicited by opposing counsel on deposition [and] minor inconsistencies that result from an honest discrepancy, a mistake, or newly discovered evidence afford no basis for excluding an opposition affidavit." *Messick*[,] 62 F.3d [at] 1231 [].

Van Asdale at 998-99.

The Ninth Circuit has warned that the sham affidavit rule "'should be applied with caution'" because it is in tension with the principle that the court is not to make credibility determinations when granting or denying summary judgment. *Id*. at 998 (quoting *ACandS*, 5 F.3d at 1264).

2. The District Court Did Not Identify Any Contradictions and Did Not Make a Sham Affidavit Finding, But Nevertheless Disregarded the Declarations As If They Were a Sham.

The district court did not follow the *Van Asdale* prongs. Instead, it bypassed the analysis and summarily disregarded the declarations. The district court did not identify any contradictions and failed to make a sham affidavit finding. The closest

the district court came to identifying a contradiction was a conclusory statement in a footnote that also references "the same set of facts":

> The Ninth Circuit has noted in the summary judgment context that, as a general rule, an affidavit submitted in response to a motion which contradicts earlier sworn testimony without explanation of the difference does not automatically create a genuine issue of material fact. *Scamihorn v. Gen. Truck Drivers*, 282 F.3d 1078, 1085 n.7 (9th Cir. 2002). A district court, however, must make a factual determination that the contradiction was actually a sham. *Id.* Although a party may not create his own issue of fact by an affidavit contradicting his prior deposition testimony, the non-moving party is not precluded from elaborating upon, explaining, or clarifying prior testimony elicited by opposing counsel on deposition; *minor* inconsistencies that result from an honest discrepancy, a mistake, or newly discovered evidence is not a basis to exclude an opposition affidavit. *Id.* The Keever and Spector Declarations, to the extent they allege Plaintiffs' diverted resources to address Sanderson's advertisements, are wholly inconsistent with Plaintiffs' deposition testimony, and their apparent explanation for this discrepancy (namely, to clarify their prior deposition testimony) is untenable. Nothing in either the Keever or Spector Declarations legitimately elaborates upon, explains, or clarifies prior testimony elicited by opposing counsel on deposition. *Scamihorn*, 282 F.3d at 1085 n.7. Instead, they attempt to put an entirely different and inconsistent gloss on the same set of facts, attempting to showcase their prior testimony in a more favorable light. *See Halo Mgmt.*, 2004 WL 1781013, at *6 n.15.

ER007-8, fn.1. It further indicated that it was disregarding additional evidence provided in the declaration, contrary to *Yeager*:

> [W]hile CFS represents in its post-deposition Spector Declaration that at least one of its staffers spent 25% more time on educating the public on why Sanderson's advertising was misleading, the declaration is suspect for the reasons just discussed and the figure is uncorroborated in the record. CFS had numerous opportunities prior to this declaration to showcase this expenditure, including the initial

> and supplemental interrogatory responses, document production, and the deposition itself. Its failure to do so is telling.

ER008; *see also* 693 F.3d 1081.

The district court's statements amount to a mere recitation of the standard without any explanation as to how it concluded Ms. Keever's and Ms. Spector's declarations contradicted the deposition testimony. Likewise, it provided no justification for why it concluded that they were actually a "sham." *See Van Asdale*, 577 F.3d at 998-999. Instead, the district court's analysis consisted primarily of reproduced language (almost verbatim) from a Northern District of California case where the deponents recited "impressionistic conclusions of *law*" instead of "legitimate assertions of material *fact*." *Halo Mgmt. LLC v. Interland, Inc.*, No. 03-1106, 2004 WL 1781013, at *5 (N.D. Cal. Aug. 10, 2004) (emphasis in original).

The district court in *Halo Management* relied on *Scamihorn v. General Truck Drivers*, 282 F.3d 1078 (9th Cir. 2002), a Family Medical Leave Act (FMLA) case where the plaintiff submitted a declaration to clarify deposition testimony. There, the plaintiff took FMLA leave to care for his father after his sister was murdered by her ex-husband, causing his 73-year-old father to fall into a deep depression *See* 282 F.3d at 1080. The district court granted summary judgment to the employer because it concluded that the plaintiff did not "care for" his father within the meaning of the FMLA. *Id.* at 1081. The Ninth Circuit,

viewing the evidence in the light most favorable to plaintiff as it was required to do on a motion for summary judgment, reversed. *See id.* at 1089. In doing so, it reviewed the post-deposition declaration submitted by the plaintiff's father. *See id*. at 1085. It found that while plaintiff's father initially downplayed the severity of his emotional problems during his deposition, the post-deposition declaration and corroborating new evidence suggested that the declaration sought to clarify statements in the deposition, was not a sham, and should not be excluded. *See id*. at 1086, n. 7.

Here, the district court did not view the evidence in the light most favorable to Appellants; nor did it make a "specific factual finding that the affidavit was a sham" before effectively striking it. *See Van Asdale* at 998-999.[12] It stated without explanation that Ms. "Keever and [Spector's] Declarations, to the extent they allege Plaintiffs' diverted resources to address Sanderson's advertisements, are wholly inconsistent with Plaintiffs' deposition testimony, and their apparent explanation for this discrepancy (namely, to clarify their prior deposition testimony) is untenable." ER008, fn. 1. The district court's conclusory factual finding does not rise to the standard of review required by *Van Asdale*. *See* 577

[12] Here, the district court did not explicitly strike the declarations, but did treat Ms. Keever and Ms. Spector's sworn statements as a sham when determining whether their organizations experienced injury in fact to establish standing.

F.3d at 998-999 ("[T]he sham affidavit 'rule does not automatically dispose of every case in which a contradictory affidavit is introduced to explain portions of earlier deposition testimony.'. . . The district court did not make a specific factual finding that the affidavit was a sham as it was required to do prior to striking it") (quoting *Kennedy*, 952 F.2d at 266-67).

Appellants amply demonstrate why the district court's ruling was incorrect *as a matter of law* in evaluating UCL standing and requires reversal. In addition, the district court should have reviewed the evidence in the light most favorable to Appellants, held an evidentiary hearing, or evaluated the declarations in a manner consistent with the law of this Circuit. It failed to do so.

III. A BROAD VIEW OF STANDING IS PARTICULARLY CRITICAL FOR PUBLIC INTEREST ORGANIZATIONS LIKE APPELLANTS THAT ARE VINDICATING A POLICY THAT THE STATE OF CALIFORNIA DEEMS TO BE A HIGH PRIORITY.

As a general rule, the courthouse door is open to Appellant public interest organizations. *See, e.g., Havens*, 455 U.S. at 379; *SCRAP)*, 412 U.S. at 689 n.14. Ninth Circuit precedent builds upon this open door policy for organizations prosecuting actions for the benefit of the general public, *see, e.g.*, *National Council of La Raza*, 800 F.3d at 1040-41; *Animal Legal Defense Fund*, 2013 WL 3242244, at *3, and allows a broad range of injuries for UCL actions, *see, e.g., Hinojos*, 718 F.3d at 1103-04, a statute which also benefits the general public. Protection of consumers and organizations against unfair, unlawful, and/or fraudulent practices

and false, misleading, or deceptive advertising is thus a priority for the State of California. Appellants' case fits within existing legal rights to come to court.

Here, public interest organizations filed suit against a private corporation, quite different than judicial proceedings involving other governmental branches. In *Spann v. Colonial Vill., Inc*. 899 F.2d 24 (D.C. Cir. 1990), then D.C. Circuit Court Judge Ruth Bader Ginsburg notes that "the separation of powers, which, the Supreme Court instructs, is the 'single basic idea' on which the Article III standing requirement is built." 899 F.2d at 30 (quoting *Allen v. Wright*, 468 U.S. 737, 752 (1984)). Article III standing, as it operates in "undifferentiated injury cases, prevents the courts from interfering in questions that 'our system of government leaves . . . to the political processes.'" *Id*. (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974)). The Ninth Circuit has endorsed this view for broadly evaluating standing in these types of cases, focusing its inquiry primarily on the presence or absence of allegations of a concrete and particularized injury. *See, e.g., Smith v. Pac. Props. & Dev. Corp.*, 358 F.3d 1097, 1105 (9th Cir. 2004) (allegation that disability group "has had (and, until the discrimination is corrected, will continue) to divert its scarce resources from other efforts to promote awareness of—and compliance with—federal and state accessibility laws . . . [is sufficient to show] a 'diversion of resources' . . . ." and confer standing). Thus, although the threshold Article III standing inquiry is whether the judicial branch or

the legislative branch is the appropriate venue for the dispute, Article III does not eviscerate judicial resolution for disputes between private entities.

Here, Appellants are not seeking to compel government action or to "involve the courts in a matter that could be resolved in the political branches[.]" *Spann*, 899 F.2d at 30. Nor are they seeking to "vindicate their own value preferences through the judicial process." *Id*. (internal quotation marks omitted). Appellants are public interest organizations whose missions have been frustrated by Sanderson's business practices, causing them to divert resources to combat the effects of fundamentally unfair and illegal behavior: "traditional grist for the judicial mill." *Id*. To the extent that Appellants seek to vindicate values, those values were endorsed by the State of California in enacting the UCL. Cal. Bus. & Prof. Code §§ 17203-04 (allowing any "person that has suffered injury in fact or lost money or property" to sue for relief).

Neither Sanderson nor the district court provide any support or rationale for constricting organizational standing in an unfair competition case. Public interest organizations litigating cases on the merits promotes the administration of justice and vindicates an important policy of honest business practices and truthful advertising.

CONCLUSION

For the reasons identified above, this Court should reverse and remand so that Sanderson does not use the court system to evade liability and so that Appellant public interest organizations can proceed to the merits of their unfair competition and false advertising claims.

Dated: January 8, 2020.

Respectfully submitted,

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STATUTORY AND REGULATORY ADDENDUM

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United States Code Service > TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE (§§ 1 — 5001) > Part IV. Jurisdiction and Venue (Chs. 81 — 99) > CHAPTER 83. Courts of Appeals (§§ 1291 — 1296)

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title [28 USCS §§ 1292(c) and (d) and 1295].

History

HISTORY:

Act June 25, 1948, ch 646, 62 Stat. 929; Oct. 31, 1951, ch 655, § 48, 65 Stat. 726; July 7, 1958, P. L. 85-508, § 12(e), 72 Stat. 348; April 2, 1982, P. L. 97-164, Title I, Part A, § 124, 96 Stat. 36.

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28 USCS § 1332, Part 1 of 5

Current through Public Law 116-91, approved December 19, 2019.

United States Code Service > TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE (§§ 1 — 5001) > Part IV. Jurisdiction and Venue (Chs. 81 — 99) > CHAPTER 85. District Courts; Jurisdiction (§§ 1330 — 1389)

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—

(1) Citizens of different States;

(2)citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State;

(3)citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4)a foreign state, defined in section 1603(a) of this title [28 USCS § 1603(a)], as plaintiff and citizens of a State or of different States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title [28 USCS § 1441]—

(1)a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of—

(A)every State and foreign state of which the insured is a citizen;

(B)every State and foreign state by which the insurer has been incorporated; and

(C)the State or foreign state where the insurer has its principal place of business; and

(2)the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d)

(1) In this subsection—

(A)the term “class” means all of the class members in a class action;

(B)the term "class action" means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action;

(C)the term "class certification order" means an order issued by a court approving the treatment of some or all aspects of a civil action as a class action; and

(D)the term "class members" means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which—

(A)any member of a class of plaintiffs is a citizen of a State different from any defendant;

(B)any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

(C)any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

(3)A district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction under paragraph (2) over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed based on consideration of—

(A)whether the claims asserted involve matters of national or interstate interest;

(B)whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;

(C)whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;

(D)whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;

(E)whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and

(F)whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

(4)A district court shall decline to exercise jurisdiction under paragraph (2)—

(A)

(i)over a class action in which—

(I)greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;

(II)at least 1 defendant is a defendant—

(aa)from whom significant relief is sought by members of the plaintiff class;

(bb)whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and

(cc)who is a citizen of the State in which the action was originally filed; and

(III)principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and

(ii)during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons; or

(B)two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.

(5) Paragraphs (2) through (4) shall not apply to any class action in which—

(A)the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief; or

(B)the number of members of all proposed plaintiff classes in the aggregate is less than 100.

(6) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs.

(7) Citizenship of the members of the proposed plaintiff classes shall be determined for purposes of paragraphs (2) through (6) as of the date of filing of the complaint or amended complaint, or, if the case stated by the initial pleading is not subject to Federal jurisdiction, as of the date of service by plaintiffs of an amended pleading, motion, or other paper, indicating the existence of Federal jurisdiction.

(8) This subsection shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.

(9) Paragraph (2) shall not apply to any class action that solely involves a claim—

(A)concerning a covered security as defined under [section] 16(f)(3) of the Securities Act of 1933 (15 U.S.C. 78p(f)(3) [15 USCS § 77p(f)(3)]) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

(B)that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

(C)that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

(10) For purposes of this subsection and section 1453 [28 USCS § 1453], an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized.

(11)

(A) For purposes of this subsection and section 1453 [28 USCS § 1453], a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.

(B)

(i) As used in subparagraph (A), the term “mass action” means any civil action (except a civil action within the scope of section 1711(2) [28 USCS § 1711(2)]) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs’ claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

(ii) As used in subparagraph (A), the term "mass action" shall not include any civil action in which—

(I)all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State;

(II)the claims are joined upon motion of a defendant;

(III)all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action; or

(IV)the claims have been consolidated or coordinated solely for pretrial proceedings.

(C)

(i) Any action(s) removed to Federal court pursuant to this subsection shall not thereafter be transferred to any other court pursuant to section 1407 [28 USCS § 1407], or the rules promulgated thereunder, unless a majority of the plaintiffs in the action request transfer pursuant to section 1407 [28 USCS § 1407].

(ii) This subparagraph will not apply—

(I)to cases certified pursuant to rule 23 of the Federal Rules of Civil Procedure; or

(II)if plaintiffs propose that the action proceed as a class action pursuant to rule 23 of the Federal Rules of Civil Procedure.

(D) The limitations periods on any claims asserted in a mass action that is removed to Federal court pursuant to this subsection shall be deemed tolled during the period that the action is pending in Federal court.

(e) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

History

HISTORY:

Act June 25, 1948, ch 646, 62 Stat. 930; July 26, 1956, ch 740, 70 Stat. 658; July 25, 1958, P. L. 85-554, § 2, 72 Stat. 415; Aug. 14, 1964, P. L. 88-439, § 1, 78 Stat. 445; Oct. 21, 1976, P. L. 94-583, § 3, 90 Stat. 2891; Nov. 19, 1988, P. L. 100-702, Title II, §§ 201(a), 202(a), 203(a), 102 Stat. 4646; Oct. 19, 1996, P. L. 104-317, Title II, § 205(a), 110 Stat. 3850; Feb. 18, 2005, P. L. 109-2, § 4(a), 119 Stat. 9; Dec. 7, 2011, P. L. 112-63, Title I, §§ 101, 102, 125 Stat. 758.

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USCS Fed Rules Civ Proc R 12, Part 1 of 5

Current through changes received December 10, 2019.

USCS Federal Rules Annotated > Federal Rules of Civil Procedure > Title III. Pleadings and Motions

Rule 12. Defenses and Objections: when and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

(a) Time to Serve a Responsive Pleading.

(1)*In General.* Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:

(A)A defendant must serve an answer:

(i)within 21 days after being served with the summons and complaint; or

(ii)if it has timely waived service under Rule 4(d), within 60 days after the request for a waiver was sent, or within 90 days after it was sent to the defendant outside any judicial district of the United States.

(B)A party must serve an answer to a counterclaim or crossclaim within 21 days after being served with the pleading that states the counterclaim or crossclaim.

(C)A party must serve a reply to an answer within 21 days after being served with an order to reply, unless the order specifies a different time.

(2)*United States and Its Agencies, Officers, or Employees Sued in an Official Capacity.* The United States, a United States agency, or a United States officer or employee sued only in an official capacity must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the United States attorney.

(3)*United States Officers or Employees Sued in an Individual Capacity.* A United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the officer or employee or service on the United States attorney, whichever is later.

(4)*Effect of a Motion.* Unless the court sets a different time, serving a motion under this rule alters these periods as follows:

(A)if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court's action; or

(B)if the court grants a motion for a more definite statement, the responsive pleading must be served within 14 days after the more definite statement is served.

(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1)lack of subject-matter jurisdiction;

(2)lack of personal jurisdiction;

(3)improper venue;

(4)insufficient process;

(5)insufficient service of process;

(6)failure to state a claim upon which relief can be granted; and

(7)failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings.

(d) Result of Presenting Matters Outside the Pleadings. If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

(e) Motion for a More Definite Statement.A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

(f) Motion to Strike. The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:

(1)on its own; or

(2)on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

(g) Joining Motions.

(1)*Right to Join.* A motion under this rule may be joined with any other motion allowed by this rule.

(2)*Limitation on Further Motions.* Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.

(h) Waiving and Preserving Certain Defenses.

(1)*When Some Are Waived.* A party waives any defense listed in Rule 12(b)(2)–(5) by:

(A)omitting it from a motion in the circumstances described in Rule 12(g)(2); or

(B)failing to either:

(i)make it by motion under this rule; or

(ii)include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.

(2)*When to Raise Others.* Failure to state a claim upon which relief can be granted, to join a person required by Rule 19(b), or to state a legal defense to a claim may be raised:

(A)in any pleading allowed or ordered under Rule 7(a);

(B)by a motion under Rule 12(c); or

(C)at trial.

(3)*Lack of Subject-Matter Jurisdiction.* If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.

(i) Hearing Before Trial. If a party so moves, any defense listed in Rule 12(b)(1)–(7)—whether made in a pleading or by motion—and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial.

History

Amended March 19, 1948; July 1, 1963; July 1, 1966; Aug. 1, 1987; Dec. 1, 1993; Dec. 1, 2000; Dec. 1, 2007; Dec. 1, 2009.

End of Document

Cal Bus & Prof Code § 17200

Deering's California Codes are current through all 870 Chapters of the 2019 Regular Session.

Deering's California Codes Annotated > BUSINESS & PROFESSIONS CODE (§§ 1 — 30047) > Division 7 General Business Regulations (Pts. 1 — 4) > Part 2 Preservation and Regulation of Competition (Chs. 1 — 7) > Chapter 5 Enforcement (§§ 17200 — 17210)

§ 17200. Definition

As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code.

History

Added Stats 1977 ch 299 § 1. Amended Stats 1992 ch 430 § 2 (SB 1586).

End of Document

Cal Bus & Prof Code § 17203

Deering's California Codes are current through all 870 Chapters of the 2019 Regular Session.

Deering's California Codes Annotated > BUSINESS & PROFESSIONS CODE (§§ 1 — 30047) > Division 7 General Business Regulations (Pts. 1 — 4) > Part 2 Preservation and Regulation of Competition (Chs. 1 — 7) > Chapter 5 Enforcement (§§ 17200 — 17210)

§ 17203. Injunctive relief; Court orders

Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition. Any person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of Section 17204 and complies with Section 382 of the Code of Civil Procedure, but these limitations do not apply to claims brought under this chapter by the Attorney General, or any district attorney, county counsel, city attorney, or city prosecutor in this state.

History

Added Stats 1977 ch 299 § 1. Amended Stats 1992 ch 430 § 3 (SB 1586); Amendment approved by voters, Prop. 64 § 2, effective November 3, 2004.

End of Document

Cal Bus & Prof Code § 17204

Deering's California Codes are current through all 870 Chapters of the 2019 Regular Session.

Deering's California Codes Annotated > BUSINESS & PROFESSIONS CODE (§§ 1 — 30047) > Division 7 General Business Regulations (Pts. 1 — 4) > Part 2 Preservation and Regulation of Competition (Chs. 1 — 7) > Chapter 5 Enforcement (§§ 17200 — 17210)

§ 17204. Actions for Injunctions by Attorney General, district attorney, county counsel, and city attorneys

Actions for relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by the Attorney General or a district attorney or by a county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, or by a city attorney of a city having a population in excess of 750,000, or by a city attorney in a city and county or, with the consent of the district attorney, by a city prosecutor in a city having a full-time city prosecutor in the name of the people of the State of California upon their own complaint or upon the complaint of a board, officer, person, corporation, or association, or by a person who has suffered injury in fact and has lost money or property as a result of the unfair competition.

History

Added Stats 1977 ch 299 § 1. Amended Stats 1991 ch 1195 § 1 (SB 709), ch 1196 § 1 (AB 1755); Stats 1992 ch 385 § 1 (SB 1911); Stats 1993 ch 926 § 2 (AB 2205); Amendment approved by voters, Prop. 64 § 3, effective November 3, 2004; Stats 2007 ch 17 § 1 (SB 376), effective January 1, 2008; Stats 2008 ch 179 § 23 (SB 1498), effective January 1, 2009.

End of Document

Cal Bus & Prof Code § 17500

Deering's California Codes are current through all 870 Chapters of the 2019 Regular Session.

Deering's California Codes Annotated > BUSINESS & PROFESSIONS CODE (§§ 1 — 30047) > Division 7 General Business Regulations (Pts. 1 — 4) > Part 3 Representations to the Public (Chs. 1 — 6) > Chapter 1 Advertising (Arts. 1 — 9) > Article 1 False Advertising in General (§§ 17500 — 17509)

§ 17500. False or misleading statements generally

It is unlawful for any person, firm, corporation or association, or any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services, professional or otherwise, or anything of any nature whatsoever or to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated before the public in this state, or to make or disseminate or cause to be made or disseminated from this state before the public in any state, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatever, including over the Internet, any statement, concerning that real or personal property or those services, professional or otherwise, or concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof, which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading, or for any person, firm, or corporation to so make or disseminate or cause to be so made or disseminated any such statement as part of a plan or scheme with the intent not to sell that personal property or those services, professional or otherwise, so advertised at the price stated therein, or as so advertised. Any violation of the provisions of this section is a misdemeanor punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding two thousand five hundred dollars ($2,500), or by both that imprisonment and fine.

History

Added Stats 1941 ch 63 § 1. Amended Stats 1955 ch 1358 § 1; Stats 1976 ch 1125 § 4; Stats 1979 ch 492 § 1; Stats 1998 ch 599 § 2.5 (SB 597).

End of Document

Cal Bus & Prof Code § 17535

Deering's California Codes are current through all 870 Chapters of the 2019 Regular Session.

Deering's California Codes Annotated > BUSINESS & PROFESSIONS CODE (§§ 1 — 30047) > Division 7 General Business Regulations (Pts. 1 — 4) > Part 3 Representations to the Public (Chs. 1 — 6) > Chapter 1 Advertising (Arts. 1 — 9) > Article 2 Particular Offenses (§§ 17530 — 17539.6)

§ 17535. Obtaining injunctive relief

Any person, corporation, firm, partnership, joint stock company, or any other association or organization which violates or proposes to violate this chapter may be enjoined by any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person, corporation, firm, partnership, joint stock company, or any other association or organization of any practices which violate this chapter, or which may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of any practice in this chapter declared to be unlawful.

Actions for injunction under this section may be prosecuted by the Attorney General or any district attorney, county counsel, city attorney, or city prosecutor in this state in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation or association or by any person who has suffered injury in fact and has lost money or property as a result of a violation of this chapter. Any person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of this section and complies with Section 382 of the Code of Civil Procedure, but these limitations do not apply to claims brought under this chapter by the Attorney General, or any district attorney, county counsel, city attorney, or city prosecutor in this state.

History

Added Stats 1941 ch 63 § 1. Amended Stats 1972 ch 244 § 1, ch 711 § 3; amendment approved by voters, Prop. 64 § 5, effective November 3, 2004.

End of Document

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

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9th Cir. Case Number(s) 19-16696

I am the attorney or self-represented party.

This brief contains 13,712 **words**, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

- (•) complies with the word limit of Cir. R. 32-1.
- ( ) is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- ( ) is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
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- ( ) complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one):*
  - ( ) it is a joint brief submitted by separately represented parties;
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- ( ) is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 19-16696

I hereby certify that I electronically filed the foregoing/attached document(s) on this date with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system.

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Appellants' Opening Brief

Signature s/Paige Tomaselli **Date** Jan 8, 2020

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