

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION**

ORGANIC CONSUMERS ASSOCIATION,)	
)	
Plaintiff,)	Case No. 2020 CA 003368 B
)	
v.)	Hon. William M. Jackson
)	
MOWI ASA,)	Next Event: February 5, 2021, 9:30 AM
MOWI USA, LLC, and)	Initial Scheduling Conference
MOWI DUCKTRAP, LLC,)	
)	
Defendants.)	
)	

**BRIEF OF *AMICUS CURIAE* GLOBAL AQUACULTURE ALLIANCE
IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT**

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**STATEMENT OF AMICUS REGARDING
ITS AUTHORITY TO FILE, IDENTITY, AND INTEREST**

Global Aquaculture Alliance (“GAA”) appears as *amicus curiae* pursuant to a motion for leave filed contemporaneously herewith. Defendants Mowi ASA, Mowi USA, LLC, and Mowi Ducktrap, LLC (collectively, “Mowi”) have consented to GAA’s motion, while Plaintiff Organic Consumers Association (“OCA”) has indicated that it does not consent.

Identity of Amicus. GAA is an international, non-profit trade association dedicated to advancing environmentally and socially responsible aquaculture. GAA has more than 3,000 members, and is active in over 60 countries around the globe. GAA’s vision is a world that embraces and enables the role of responsibly farmed seafood in meeting global nutrition needs, and its mission is to promote responsible aquaculture practices through education, advocacy and demonstration. GAA promotes this vision and mission by encouraging innovation on a global scale; by incentivizing producers to adopt a rigorous set of best practices; by building meaningful partnerships with academic institutions, governments and non-governmental organizations recognized as worldwide leaders in environmental and social responsibility; and by providing educational resources. For over 20 years, GAA has demonstrated its commitment to feeding the world through responsible and sustainable aquaculture by improving practices throughout the farming, processing, and distribution of aquaculture products.

Interest of Amicus. GAA is deeply concerned about improving the sustainability of marine aquaculture, which involves the cultivation of aquatic animals in the ocean. Given that our oceans are being fished to their limits, humans need alternate sources of seafood to feed the planet’s growing population. Aquaculture is the tool to fill the gap of seafood supply. By 2030, 62% of all seafood produced for human consumption will come from aquaculture. Farming fish responsibly is the solution to providing future generations with access to healthy and

environmentally friendly protein options. To promote responsible aquaculture, GAA promulgates Best Aquaculture Practices (“BAP”) standards and certifications. BAP certification standards are scientific, rigorous, comprehensive, and generally accepted in the fields of conservation and aquaculture. In GAA’s view, maintaining the integrity and value of responsible aquaculture standards generally, and BAP standards and certifications particularly, is essential to its mission of increasing the use of responsible aquaculture practices, and the concomitant availability of responsibly sourced aquaculture products.

GAA therefore has a vital interest in promoting the use of best practices standards and certifications (such as BAP) among farmers, processors, and distributors of aquaculture products. In GAA’s view, this interest is harmed when third parties distort what “sustainably sourced” means to a reasonable consumer, by either misconstruing best practices standards such as BAP or relying on unreasonable assumptions to support overbroad deceptive marketing claims. Accordingly, GAA submits this *amicus* brief to explain why BAP certification standards, which represent the gold standard for sustainable aquaculture, inform how a reasonable consumer would understand “sustainably sourced” seafood marketing.

FACTUAL BACKGROUND

OCA has brought suit against Mowi, alleging that Mowi Ducktrap LLC (“Ducktrap”) has engaged in deceptive marketing. Compl. ¶ 1. Mowi is the world’s largest producer of Atlantic salmon. *Id.* ¶ 2. OCA alleges that Ducktrap has made misleading representations regarding its salmon products, namely, that the products are (1) sustainably sourced, (2) all natural, and (3) sourced from Maine. *Id.* ¶ 3.

As to Ducktrap’s sustainability representations, OCA alleges that Ducktrap’s statements regarding its products being “sustainably sourced,” “farm[ed] sustainably,” “environmentally sustainable,” and “eco-friendly” suggest that they are “made from salmon that are sustainably

sourced in accordance with higher environmental and animal welfare statements.” Compl. ¶ 4; *see id.* ¶¶ 22-29. OCA alleges that the salmon products are in fact made using “unsustainable and environmentally destructive practices.” *Id.* ¶¶ 5, 35. Specifically, OCA alleges that Mowi (1) uses substantial quantities of wild-caught fish feed in their fish farms, *id.* ¶¶ 36-37; (2) employs open net pen aquaculture that, according to OCA, creates crowded and unsanitary environments as well as increased disease and mortality, ¶¶ 38-49; and (3) uses artificial antibiotics and chemicals, ¶¶ 50-62. According to OCA, Mowi’s use of these practices render its sustainability representations false and misleading. *Id.* ¶ 63.

As alleged in the complaint, Mowi’s salmon facilities have been audited by independent certification bodies. *See* Compl. ¶ 24 n.5 (incorporating by reference YouTube video noting that Ducktrap sources BAP-certified product); *id.* ¶¶ 53 & n.35, 57 (citing Aquaculture Stewardship Council (“ASC”) audit documents). As the marketing video and audit documents cited by OCA show, Ducktrap sources its salmon from Mowi farms that have been audited under ASC and BAP standards.¹ Both ASC and BAP are third-party aquaculture certification programs that establish industry-leading standards for responsibly sourced aquaculture.² BAP is a third-party seafood-

¹ *See, e.g.*, Decl. of Donald Cynewski in Support of Defs.’ Mot. to Dismiss Pl.’s Compl. (“Cynewski Decl.”), Ex. B, at 0:07-0:25 (Youtube video noting sourcing of salmon from locations that have been certified by BAP); *id.* Ex. C (audit documents noting Mowi sites’ ASC certification). The video and the audit documents may be considered by the Court on a motion to dismiss because they have been incorporated by plaintiff into the Complaint. *See Washkoviak v. Student Loan Mktg. Ass’n*, 900 A.2d 168, 178 (D.C. 2006) (“Courts may consider documents ‘incorporated in the complaint’ when considering a 12(b)(6) motion.”).

² *See* <https://www.bapcertification.org/Home>; <https://www.asc-aqua.org/>. GAA requests that the Court take judicial notice of the contents of the websites cited herein, as well as the documents available through those websites. *See Canuto v. Mattis*, 273 F. Supp. 3d 127, 133 n.6 (D.D.C. 2017) (“The Court may take judicial notice of the information provided on the websites it has consulted.”); *Nat’l Grange of the Order of Patrons of Husbandry v. Cal. State Grange*, 182 F. Supp. 3d 1065, 1082 n.5 (E.D. Cal. 2016) (taking “judicial notice of www.google.com and www.zoominfo.com and the information contained therein”). These materials simply describe background facts regarding the nature of standards that set forth best practices for responsible aquaculture generally and salmon farms particularly. GAA cites the BAP website and BAP standards not for the purpose of demonstrating whether Mowi in fact complied with these best practices,

specific certification program, administered by GAA, that addresses four key areas of sustainability—environmental responsibility, social responsibility, food safety, and animal health and welfare.³ BAP provides standards for each step in the aquaculture production chain (processing plants, farms, hatcheries, and feed mills), and aquaculture producers may obtain certification for adherence to these standards.⁴ Certification is verification that producers are following best practices to deliver farmed seafood safely and responsibly.⁵

ARGUMENT

I. The Consumer Protection Procedures Act Prohibits Only Deceptive Conduct That Is Misleading to a Reasonable Consumer.

A complaint must “contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face.” *Potomac Dev. Corp. v. District of Columbia*, 28 A.3d 531, 544 & n.4 (D.C. 2011) (internal quotation marks omitted). OCA’s complaint alleges that Mowi violated the District of Columbia Consumer Protection Procedures Act (“CPPA”), D.C. Code § 28-3901 *et seq.* Compl. ¶ 11. OCA claims that Ducktrap’s sustainability representations violate Section 28-3904 because they are misleading. *Id.* ¶ 114 (citing D.C. Code § 28-3904). Under the CPPA, “a claim of an unfair trade practice is properly considered in terms of how the practice would be viewed and understood by a reasonable consumer.” *Pearson v. Chung*, 961 A.2d 1067, 1075 (D.C. 2008); *see generally* 16 C.F.R. § 260.2 (“A representation, omission, or practice is deceptive if it is likely to mislead consumers acting *reasonably* under the circumstances and is

but simply to describe the parameters established by independent third parties to define responsible aquaculture practices.

³ See <https://www.bapcertification.org/WhatWeDo>; *see also* Global Aquaculture Alliance, Best Aquaculture Practices Standards, Issue 14.8, at 5 *available at* <https://www.bapcertification.org/Downloadables/pdf/PI%20-%20Policy%20-%20BAP%20CB%20Requirements%20Document%20-%20Issue%2014.8%20-%2018-September-2020.pdf>. GAA’s website is cited in the Complaint. Compl. ¶ 28.

⁴ <https://www.bapcertification.org/Home>.

⁵ <https://www.bapcertification.org/WhatWeDo>.

material to consumer’s decisions.” (emphasis added)). Thus, a complaint may be dismissed where, as a matter of law, it fails to set forth plausible allegations that a reasonable consumer would be misled by the statements at issue. *See Whiting v. AARP*, 637 F.3d 355, 363-64 (D.D.C. 2011). Applying the “reasonable consumer” standard, OCA has not stated a plausible claim for relief under the CPPA based on Ducktrap’s sustainability representations.

II. References to “Sustainably Sourced” Seafood Would Be Understood by a Reasonable Consumer to Indicate Compliance with Industry-Leading Standards, Such as BAP, for Responsible Aquaculture.

Ducktrap has variously described its salmon products, which come from fish farms, as “sustainably sourced,” “farmed sustainably,” or “environmentally sustainable.” Compl. ¶¶ 22, 24-28, 36. Ducktrap’s representations regarding the sustainability of salmon sourced from marine aquaculture echo those that appear on government websites, such as the National Oceanic and Atmospheric Administration (“NOAA”): “Marine aquaculture provides a domestic source of economically and environmentally sustainable seafood that complements and supports our wild fisheries production.”⁶ As NOAA has explained, “[s]hellfish, finfish, and seaweed farming is a steady source of safe, nutritious, sustainable seafood for consumers.”⁷ According to NOAA, “[a]quaculture is one of the most resource-efficient ways to produce protein with fewer environmental impacts relative to other animal proteins. . . . Farmed-raised [*sic*] fish complement wild harvests as a way to provide more sustainable seafood to consumers.”⁸

⁶ NOAA Fisheries, Understanding Marine Aquaculture, *available at* <https://www.fisheries.noaa.gov/insight/understanding-marine-aquaculture>. The Court may take judicial notice of the NOAA website. *See Aston v. Johnson & Johnson*, 248 F. Supp. 3d 43, 47 n.1 (D.D.C. 2017) (taking judicial notice of FDA website).

⁷ *Id.*

⁸ NOAA Fisheries, Sustainable Seafood, *available at* <https://www.fisheries.noaa.gov/topic/sustainable-seafood#farmed-seafood>.

OCA alleges that a reasonable consumer would understand Ducktrap’s sustainability representations to suggest that its products are made from salmon that are “sustainably sourced in accordance with higher environmental and animal welfare standards.” Compl. ¶ 4. In fact, these sustainability representations were tied to the company’s sourcing of “BAP certified product,” *see* Cynewski Decl., Ex. B at 0:10—in other words, product produced in accordance with environmental and animal welfare best practices. NOAA similarly states that fish farms that “operate under robust environmental protections,” such as those in the U.S., produce “environmentally safe, sustainable sources of domestic seafood.”⁹ Accordingly, product sourced from farms that abide by best practices is accurately described as “sustainable.”

Indeed, the nation’s leading seafood sellers in the retail, grocery, and restaurant industries—who know best what reasonable consumers (*i.e.*, their customers) demand and understand in terms of sustainable seafood—define sustainability as product sourced from suppliers who follow industry best practices such as BAP:

- According to Walmart’s seafood policy, Walmart aspires to require, by 2025, “all fresh and frozen, farmed and wild seafood suppliers to source from fisheries who are . . . [t]hird-party certified as sustainable using Marine Stewardship Council (MSC) or **Best Aquaculture Practices (BAP)**, or certified by a program which follows the FAO Guidelines and is recognized by the Global Sustainable Seafood Initiative (GSSI) as such”;¹⁰
- Kroger, the world’s largest supermarket chain, explains in its Seafood Sustainability Policy that “[w]e rely on third-party certification standards **such as the Global Aquaculture Alliance’s (GAA) Best Aquaculture Practice (BAP)** standards to ensure environmental sustainability and other benefits in our supply chain *Our goal is to ensure that, by 2020, 100% of farm-raised seafood in our*

⁹ NOAA Fisheries, Sustainable Seafood, *available at* <https://www.fisheries.noaa.gov/topic/sustainable-seafood>.

¹⁰ Walmart Seafood Policy, *available at* <https://corporate.walmart.com/policies#seafood-policy> (emphasis added).

Seafood Department is certified to sustainable seafood certifications and programs recognized by the Global Seafood Sustainability Initiative (GSSI)”;¹¹ and

- Red Lobster likewise describes sustainability as compliance with best practices: “**Sustainable** – we only source from suppliers who follow industry best practices . . . Best practices include third-party certification programs, such as Global Sustainable Seafood Initiative (GSSI), **Best Aquaculture Practices (BAP)** or engagement in credible Fishery Improvement Projects (FIPs) or Aquaculture Improvement Projects (AIPs).”¹²

These are but a sampling of the many companies that recognize BAP standards (or other similar programs) as a leading guide for responsible aquaculture.¹³ This consensus among the retailer, grocery, and restaurant industries—who understand what their customers demand—strongly indicates that sustainability representations, applied to seafood, would be understood by a reasonable consumer as describing seafood sourced according to industry best practices.

Sustainability representations like those made by Ducktrap are not misleading to a reasonable consumer simply because Ducktrap’s products are sourced from salmon farms. Instead, to plausibly allege that such representations are deceptive, a plaintiff must allege something more, such as failure to abide by best practices. OCA has not done so.

OCA’s complaint fails to set forth a plausible claim that Ducktrap’s representations are misleading because the complaint alleges simply that Mowi uses wild-caught fish feed, open net pen aquaculture, and antibiotics and chemicals, but fails to explain how those practices violate best practices. *Id.* ¶ 36-62. As described below, BAP standards—which provide industry-leading guidelines for responsible environmental and animal welfare practices—permit use of these measures, within certain parameters. OCA apparently wishes to substitute its own standards in

¹¹ Kroger Seafood Sustainability Policy, available at <https://www.thekrogerco.com/wp-content/uploads/2018/07/The-Kroger-Co-Seafood-Sustainability-Policy-2018-July.pdf> (bold emphasis added; italics in original).

¹² Seafood with Standards, available at: <https://www.redlobster.com/our-story/seafood-with-standards/our-beliefs> (first emphasis in original; second emphasis added).

¹³ See <https://bapcertification.org/WhereToFind>.

place of the relevant generally accepted standards, such as BAP, and to thereby create through the judicial process a new (and unrealistic) baseline for responsible aquaculture practices. A reasonable consumer would not take such a view, but would instead view Ducktrap’s sustainability representations in light of best practices for the industry. Absent a plausible claim that Mowi does not satisfy best practices for responsible aquaculture, therefore, OCA’s claim based on the sustainability representations should fail.

III. OCA Has Not Plausibly Alleged That Mowi Fails to Meet Industry-Recognized Standards for Responsible Aquaculture.

A. Industry-leading standards such as BAP are designed to promote responsible aquaculture by requiring food safety, social responsibility, environmental responsibility, and animal health and welfare.

BAP standards are achievable, science-based and continuously improved global performance standards for the aquaculture supply chain that assure healthful foods are produced through environmentally and socially responsible means.¹⁴ These standards are designed to address four key areas of sustainability—environmental responsibility, social responsibility, food safety, and animal health and welfare—at each step of the aquaculture production chain.¹⁵

BAP is a program to certify compliance with responsible aquaculture standards.¹⁶ Using a rigorous process, BAP has established standards to ensure responsible aquaculture processes, including hatcheries, farms, feed mills, and processing plants.¹⁷ Each set of standards has been developed by the relevant Technical Committee (“TC”) within BAP, comprised of technical

¹⁴ See BAP Aquaculture Facility Certification, Salmon Farms, at 2, available at <https://www.bapcertification.org/Downloadables/pdf/standards/PI%20-%20Standard%20-%20Salmon%20Farms%20-%20Issue%202.3%20-%202013-October-2016.pdf>.

¹⁵ <https://www.bapcertification.org/WhatWeDo>.

¹⁶ <https://www.bapcertification.org/WhoWeAre>.

¹⁷ <https://www.bapcertification.org/Home>; <https://www.bapcertification.org/Standards>.

experts and representatives of groups interested in or affected by the standards.¹⁸ Proposed standards are published for 60 days of public comment.¹⁹ After any revision, proposed standards are reviewed by a Standards Oversight Committee (“SOC”) with broad stakeholder representation: one-third non-governmental conservation and social justice organizations, one-third academic and regulatory interests, and one-third industry.²⁰ Final standards must be approved by the SOC as well as GAA’s Board of directors.²¹ These standards are then regularly reviewed and revised as appropriate.²² All BAP standards are benchmarked with guidelines promulgated by internationally recognized third parties, including the Global Social Compliance Programme and the Global Sustainable Seafood Initiative.²³

B. Certification for aquaculture farms under industry-leading standards such as BAP promote responsible aquaculture by requiring adherence to rigorous guidelines regarding animal welfare, use of antibiotics and chemicals, and use of fishmeal and fish oil in feeds.

BAP has established specific standards governing salmon farms.²⁴ These standards address the community, the environment, animal health and welfare, food safety, and traceability. Community standards govern property rights and regulatory compliance, community relations, and worker safety and employee relations.²⁵ Environmental standards govern sediment and water quality, fishmeal and fish oil conservation, control of escapes, predator and wildlife interactions,

¹⁸ Best Aquaculture Practices Standards Development, at 4, *available at* <https://www.bapcertification.org/Downloadables/pdf/PI%20-%20Procedure%20-%20BAP%20Process%20Document%20-%20Issue%202.2%20-%2016-October-2020.pdf>.

¹⁹ *Id.* at 5.

²⁰ *Id.* at 3-5.

²¹ *Id.* at 6.

²² *Id.*

²³ <https://www.bapcertification.org/WhoWeAre>.

²⁴ BAP Aquaculture Facility Certification, Salmon Farms, *available at* <https://www.bapcertification.org/Downloadables/pdf/standards/PI%20-%20Standard%20-%20Salmon%20Farms%20-%20Issue%202.3%20-%2013-October-2016.pdf>.

²⁵ *Id.* at 2-6.

and storage and disposal of farm supplies.²⁶ Animal health and welfare standards govern not only health and welfare generally, but also biosecurity and disease management specifically.²⁷ Food safety standards control potential food safety hazards.²⁸ Finally, traceability standards establish record-keeping requirements.²⁹ These standards provide guidance to aquaculture producers regarding a wide variety of issues, including the issues that are the subject of OCA’s complaint: use of open net pen aquaculture, antibiotics and chemicals, and wild-caught fish feed. Each is discussed in more detail in turn.

1. The complaint does not allege any failure to abide by industry-leading standards, such as those established by BAP, for the safe employment of open net pen aquaculture.

OCA alleges that the use of open net pen aquaculture is an “ecologically dangerous method of salmon farming.” Compl. ¶ 38. OCA asserts that escaped salmon and disease may spread from the farms into the environment, risking damage to wild salmon populations, ecosystems, and society. *Id.* ¶¶ 39-40. OCA also asserts that open net pen aquaculture inflicts unnecessary suffering because crowded environments increase mortality rates from disease, parasite infestations, and stress levels, among other things. *Id.* ¶¶ 41-49. In fact, contrary to OCA’s assertion, open net pen aquaculture is not *per se* objectionable. Rather, what matters is adherence to BAP environmental as well as animal health and welfare standards. OCA has not alleged that Mowi’s practices are inconsistent with such standards.

Escapes. BAP Standard 6 provides: “Salmon farms shall take all practical steps to prevent escapes and minimize possible adverse effects on aquatic wildlife if escapes occur.”³⁰ Salmon can

²⁶ *Id.* at 6-15.

²⁷ *Id.* at 16-19.

²⁸ *Id.* at 20.

²⁹ *Id.* at 21-22.

³⁰ *Id.* at 10.

escape from farms through holes in containment nets caused by a variety of reasons, including wear and tear, collisions with boats, predator attacks, severe weather, or vandalism or robbery.³¹ Because the possibility of escape cannot be eliminated, BAP requires implementation of a written fish containment plan that addresses escape prevention, escape response, and inventory accounting procedures.³² Escape prevention measures must include, among other things:

- Third-party verified compliance with manufacturer and/or engineering design and installation specifications;
- Annual site risk analysis regarding potential and actual causes of fish escapes;
- Procedures responsive to the risk analysis that include management protocols and actions designed to monitor escape risks and timely respond to escape events;
- Regular inspection by qualified inspectors;
- Net inventory management procedures tracking the age and strength of nets;
- Predator deterrence procedures; and
- Measures to prevent potential boat damage, including protective equipment for farm marine traffic, and warnings for non-farm marine traffic.³³

In the event of an escape, BAP-certified farms must also have procedures and equipment for rapid response.³⁴ Finally, BAP-certified farms must employ inventory accounting procedures to ensure that projections regarding the number of fish expected to be harvested with the number of fish actually harvested.³⁵ If escapes or harvest variance identified through inventory accounting exceed certain measures, BAP certification must be suspended.³⁶ Further minimizing the impact of

³¹ *Id.*

³² *Id.*

³³ *Id.* at 10-11.

³⁴ *Id.* at 11.

³⁵ *Id.*

³⁶ *Id.*

escapes, BAP requires that farms not be located in critical or sensitive habitat areas absent regulatory approval based on independent environmental analysis.³⁷

Health and welfare. BAP Standard 9 provides: “Producers shall demonstrate that all operations on farms that involve fish, including ‘cleaner fish’ if used, are conducted with animal welfare in mind. Employees shall be trained to provide appropriate levels of husbandry and care.”³⁸ Fish can experience distress from a variety of causes, including poor water quality, parasite infestations, and rearing density.³⁹ Such distress can cause a decline in growth rates, less resistance to diseases, and increase in mortality.⁴⁰ Distress can be limited, however, by good husbandry techniques to avoid needless harm.⁴¹ Accordingly, BAP standards require fish welfare to be overseen by a designated fish health professional, for the farm to be located in waters where salmon would be expected to thrive, that high quality fish feed be offered at regular intervals, that trained staff make daily inspections to note water quality and fish appearance and behavior, and that regular reports be kept on water quality and fish conditions.⁴² Farms are required to have a written water quality management plan addressing dissolved-oxygen concentration, temperature, salinity, and harmful phytoplankton blooms.⁴³ Moreover, farms must apply volumetric limits, *i.e.*, stocking density criteria, based on local conditions.⁴⁴ Normally, farm stocking density is not permitted to exceed 25 kilograms per cubic meter.⁴⁵

³⁷ *Id.*

³⁸ *Id.* at 16.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 16-17.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

Biosecurity and disease management. BAP Standard 10 provides: “Farms shall operate with the aim of preventing infectious disease outbreaks, but when diseases or parasites infect farmed fish, diagnosis and treatment shall be carried out promptly and judiciously under the supervision of a fish health professional in a manner that minimizes impacts on the environment.”⁴⁶ Infectious disease outbreaks at farms may increase risks for disease transmission to surrounding farm sites and, in some cases wild fish populations.⁴⁷ Thus, while disease cannot be entirely precluded, precautions should be taken in salmon farming to reduce the likelihood of infection and clinical disease, and limit their impacts by appropriate treatment if they occur.⁴⁸ BAP requires salmon farms’ biosecurity efforts to be carried out under the direction of a veterinarian, or other fish health professional with equivalent qualifications, and for that professional to develop and implement a fish health management plan (“FHMP”).⁴⁹ An FHMP must address health management not only for the farm site itself but also in coordination with neighboring farms.⁵⁰ BAP standards establish detailed requirements for the FHMP, including a plan for cyclical production of fish that mandates a fallow period of at least eight weeks between harvesting and restocking; importation of smolts certified to be clinically healthy and free of diseases; fish vaccination; cleaning of farm equipment visitor and vessel hygiene precautions; sanitary disposal of dead fish; additional measures where disease is suspected; and sea lice management procedures.⁵¹ Farms must have in place measures to monitor bacterial and viral infections, and procedures for rapid diagnosis and treatment of disease based on best professional veterinary

⁴⁶ *Id.* at 17.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 18.

⁵⁰ *Id.*

⁵¹ *Id.* at 18-19.

practices regarding drugs, vaccines or non-medicinal use of chemicals (*i.e.*, for disinfection or water treatment).⁵²

As these BAP standards suggest, a salmon farm’s mere use of open net pen aquaculture does not suffice to plausibly allege that the farm is not environmentally responsible or that any representation regarding the responsible nature of its practices is false or misleading. Nor do OCA’s generalized assertions regarding escapes or mortality resulting from fish distress suffice. OCA’s implicit assumption that *any* use of open net pen aquaculture renders a marketer’s representations regarding responsible sourcing of aquaculture products false is misguided. Rather, more is required to plausibly allege that a producer has failed to responsibly source its aquaculture products contrary to its representations, such as failure to implement generally accepted standards—like those established by BAP—to ensure responsible open net pen operations by minimizing fish escapes, providing for animal health and welfare, and promoting sound biosecurity and disease management. *See* 16 C.F.R. § 260.2 (environmental marketing claims have a reasonable basis, and therefore are not misleading, if substantiated by “competent and reliable scientific evidence . . . based on standards generally accepted in the relevant scientific fields”). OCA’s complaint is bereft of plausible allegations showing that Mowi’s practices are inconsistent with best aquaculture practices.

2. The complaint does not allege any failure to abide by industry-leading standards, such as those established by BAP, for the safe employment of chemicals and antibiotics.

OCA alleges that the use of antibiotics and chemical disinfectants pose risks to human health and the environment. Compl. ¶ 50; *see id.* ¶¶ 51-62. Accordingly, OCA asserts that the use of any chemicals and antibiotics is *per se* incompatible with heightened environmental and animal

⁵² *Id.*

welfare standards. *Id.* ¶ 63. Again, however, OCA seeks to enforce an unrealistic standard that does not reflect industry best practices. Reasoned, measured use of chemical disinfectants and antibiotics is compatible with high environmental and welfare standards, as long as such uses adhere to guidance—such as the guidance provided through BAP—regarding responsible use of drugs and disinfectants. Accordingly, general allegations that a producer uses antibiotics and chemicals, absent allegations explaining how such use deviates from best practices, should not suffice to state a claim.

BAP establishes reasonable guidelines governing the use of antibiotics and chemicals. As described above, BAP Standard 10 requires farms to “operate with the aim of preventing infectious disease outbreaks,” and further requires that, in the event of an outbreak, that “diagnosis and treatment shall be carried out promptly and judiciously under the supervision of a fish health professional in a manner that minimizes impacts on the environment.”⁵³ Under this standard, treatment of fish diseases must be overseen by a qualified fish health professional, either a veterinarian or another individual licensed for the prescription of medicines.⁵⁴

Further, any prescription of medicines or use of drugs must follow written procedures based on current guidelines for best professional veterinary practices on medicinal treatments with drugs, and any non-medicinal use of chemicals (*i.e.*, for disinfection or water treatment), must be selected and administered in order to minimize risks to human health and the environment.⁵⁵ A health professional may only prescribe antibiotics to treat diagnosed diseases (not for preventative purposes) in accordance with the instructions provided on product labels and national

⁵³ BAP Aquaculture Facility Certification, Salmon Farms, at 17, available at <https://www.bapcertification.org/Downloadables/pdf/standards/PI%20-%20Standard%20-%20Salmon%20Farms%20-%20Issue%202.3%20-%202013-October-2016.pdf>.

⁵⁴ *Id.* at 18.

⁵⁵ *Id.*

regulations.⁵⁶ Records must be maintained for every application of drugs and other chemicals that include the date, compound used, reason(s) for use, dose, withdrawal time and harvest date.⁵⁷ Moreover, BAP has introduced a new standard (effective in all its farm standards starting January 1, 2021) prohibiting the use of antimicrobials designated as “Critically Important for Human Medicine” by the World Health Organization in BAP-certified salmon farms.⁵⁸ The BAP update reiterates that antibiotics are only allowed for medicinal use under oversight by a veterinarian or fish health professional, and that use of antibiotics to promote growth is prohibited.⁵⁹

As with OCA’s allegations regarding use of open net pen aquaculture, BAP standards suggest that generalized allegations regarding the mere use of antibiotics and chemical disinfectants do not suffice to plausibly allege that Ducktrap has made any misrepresentations regarding the responsible nature of Mowi’s practices. OCA wrongly assumes that *any* use of antibiotics or chemical disinfectants is incompatible with representations regarding responsibly sourced seafood. Mere use of antibiotics and other chemicals in the course of good husbandry, pursuant to best practices as described in BAP standards, does not negate a producer’s claim that its seafood is sustainably sourced. OCA’s failure to allege that Mowi did not implement reasonable standards—such as those established by BAP—to ensure appropriate use of chemical disinfectants and antibiotics should defeat its misrepresentation claims under the CPPA.

⁵⁶ *Id.* at 19.

⁵⁷ *Id.*

⁵⁸ BAP Program Update, *available at*

<https://www.bapcertification.org/Downloadables/pdf/standards/PI%20-%20Notice%20-%20BAP%20bans%20use%20of%20Critically%20Important%20Antibiotics%20-%207August2019.pdf>.

⁵⁹ *Id.*

3. The complaint does not allege any failure to abide by industry-leading standards, such as those established by BAP, for the responsible use of feeds incorporating ingredients from wild-caught fisheries products.

OCA also alleges that “Mowi uses vast quantities of wild-caught fish as feed for the salmon it raises.” Compl. ¶ 37. According to OCA, the use of wild-caught fish as feed is *per se* unsustainable because salmon “require over a pound of wild fish for every pound of weight they gain.” *Id.* Contrary to the complaint, however, the use of wild-caught fish as ingredients in feed is not inconsistent with claims regarding responsible sourcing of seafood. Use of fishmeal and fish oil from wild-caught fisheries products can be responsible if utilized in accordance with guidance—again, such as BAP standards—regarding proper use of fish feeds.

BAP establishes guidelines for use of wild-caught fisheries products in responsible salmon farming. BAP Standard 5 provides: “Farms shall use feeds and feed ingredients produced by responsible methods, accurately monitor feed inputs and minimize the use of fishmeal and fish oil derived from wild fisheries.”⁶⁰ The majority of feeds manufactured for use in aquaculture contain fishmeal and fish oil, both of which are renewable resources derived primarily from populations of small fish that are not generally utilized for direct human consumption.⁶¹ Nevertheless, because there are limits to the amounts of these products that the world’s oceans can supply, BAP supports the use of feed ingredients derived from alternative sources as well as efforts to improve the efficiency with which feed is converted into fish biomass.⁶²

To promote these measures, BAP requires use of responsibly sourced feed—*i.e.*, feed from feed mills that comply with BAP feed mill standards for fishmeal and fish oil conservation.⁶³ In

⁶⁰ BAP Aquaculture Facility Certification, Salmon Farms, at 9, *available at* <https://www.bapcertification.org/Downloadables/pdf/standards/PI%20-%20Standard%20-%20Salmon%20Farms%20-%20Issue%202.3%20-%202013-October-2016.pdf>.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 9-10.

turn, BAP feed mill standards require feed mills to “actively favor marine ingredients from responsibly managed and independently assessed sources” and further require mills to “obtain terrestrial ingredients, notably soy and palm oil, from certified sources as they become available.”⁶⁴ BAP standards for feed mills also encourage use of fishmeal and fish oil from processing and fishery by-products or from aquatic species that are invasive or cultivated.⁶⁵ BAP standards for salmon farms also require farms to meet a “fish in:fish out” ratio, which compares the amount of fish consumed by the system (usually in the form of fishmeal and fish oil) with the amount of fish produced.⁶⁶ This ratio must be 1.5:1 or less.⁶⁷ This ratio compares favorably to the feed conversion ratio required to produce broiler chickens, hogs, or cattle.⁶⁸

Again, therefore, OCA’s allegations regarding the use of wild-caught fish feed in aquaculture does not sustain a claim for misrepresentation. The mere use of fishmeal and fish oil derived from wild fisheries in appropriate amounts, sourced appropriately, does not contravene a producer’s claim that its seafood is responsibly or sustainably sourced. OCA’s failure to allege that Mowi disregarded industry best practices by, for instance, obtaining feed from sources other than responsibly managed fisheries or exceeding the 1.5:1 “fish in:fish out” ratio defeat its misrepresentation claims under the CPPA.

⁶⁴ BAP Aquaculture Facility Certification, Feed Mills, at 19, *available at* <https://www.bapcertification.org/Downloadables/pdf/standards/PI%20-%20Standard%20-%20Feed%20Mill%20Standard%20-%20Issue%203.0%20-%202015-June-2020.pdf>.

⁶⁵ *Id.*

⁶⁶ BAP Aquaculture Facility Certification, Salmon Farms, at 9, *available at* <https://www.bapcertification.org/Downloadables/pdf/standards/PI%20-%20Standard%20-%20Salmon%20Farms%20-%20Issue%202.3%20-%202013-October-2016.pdf>.

⁶⁷ *Id.* at 9-10.

⁶⁸ See <https://www.aquaculturealliance.org/what-we-do/why-it-matters/>. This website is cited in the Ducktrap Facebook post cited in the Complaint. See Compl. ¶ 28.

C. Certification under industry-leading standards such as BAP requires a rigorous audit by independent, accredited third parties.

As the materials cited by OCA demonstrate, Ducktrap sources its salmon from ASC- and BAP-certified Mowi salmon farms. *See* Compl. ¶¶ 24 n.5, 53 n.35; Cynewski Decl., Ex. C. Aquaculture companies such as Mowi must go through a rigorous process to obtain certification under BAP. The rigorous, objective audit process required to obtain BAP certification provides a reasonable basis for making claims regarding the responsible nature of aquaculture processes employed in producing seafood. *See generally* 16 C.F.R. § 260.2 (noting that marketers' claims must be "supported by a reasonable basis" before they make claims).

BAP certification is available only from independent certification bodies ("CBs"), such as Lloyd's Register, SGS, NSF, or SAI Global.⁶⁹ Each CB must be accredited to ISO 17065, which establishes uniform requirements for the competence, consistent operation and impartiality of bodies certifying products, processes and services.⁷⁰ CBs wishing to audit against BAP standards must submit to an audit of their quality management systems, and obtain accreditation through a member of the International Accreditation Forum to apply BAP standards.⁷¹ A CB is permitted to work only within the specific fields of expertise relating to the BAP seafood categories for which they are approved.⁷² Further, each CB's auditors undertaking certification evaluations must have

⁶⁹ <https://www.bapcertification.org/WhatWeDo/ProgramIntegrity>.

⁷⁰ *See* Global Aquaculture Alliance, Best Aquaculture Practices Standards, Issue 14.8, at 10, *available at* <https://www.bapcertification.org/Downloadables/pdf/PI%20-%20Policy%20-%20BAP%20CB%20Requirements%20Document%20-%20Issue%2014.8%20-%2018-September-2020.pdf>; *see also* <https://www.iso.org/obp/ui/#iso:std:iso-iec:17065:ed-1:v1:en>.

⁷¹ *See* Global Aquaculture Alliance, Best Aquaculture Practices Standards, Issue 14.8, at 10-16, *available at* <https://www.bapcertification.org/Downloadables/pdf/PI%20-%20Policy%20-%20BAP%20CB%20Requirements%20Document%20-%20Issue%2014.8%20-%2018-September-2020.pdf>.

⁷² *Id.* at 16.

appropriate qualification, training, experience and skills to perform an evaluation against the relevant BAP standards.⁷³

BAP conducts training for the auditors employed by each CB. The BAP Auditor and Industry Observer Training Course is an intensive, classroom-based seminar which provides a detailed explanation of the various BAP standards.⁷⁴ Auditors are required to have no conflict of interest, and individuals who work as consultants for a given company are thus excluded as auditor candidates of that company.⁷⁵ Auditors must also meet minimum competency requirements.⁷⁶ Auditors then must complete pre-work, case studies, classroom instruction, and final examination in order to be able to conduct audits for BAP-approved CBs.⁷⁷

Audits of aquaculture facilities are rigorous and conducted annually.⁷⁸ Audits require an opening meeting; site assessment; collection of samples for testing; review of management systems, records, documents and procedures; employee interviews; traceability exercises; review of non-conformities; and a closing meeting.⁷⁹ All BAP standard sections must be covered by reviewing the relevant facility's records, together with an inspection.⁸⁰ The auditor must then provide a full report of the audit, which is submitted to the CB.⁸¹ Any non-conformities must have facility corrective action responses and objective evidence submitted documenting effective

⁷³ *Id.* at 17.

⁷⁴ GAA BAP Auditor Competency and Course Approval Requirements, at 1, *available at* <https://bapcertification.org/Downloadables/pdf/PI%20-%20Policy%20-%20BAP%20Auditor%20Competency%20and%20Course%20Approval%20Requirements%20-%20Issue%2011.1%20-%202023-April-2019.pdf>.

⁷⁵ *Id.*

⁷⁶ *Id.* at 3-5.

⁷⁷ *Id.* at 7.

⁷⁸ Global Aquaculture Alliance, Best Aquaculture Practices Standards, Issue 14.8, at 32-33, *available at* <https://www.bapcertification.org/Downloadables/pdf/PI%20-%20Policy%20-%20BAP%20CB%20Requirements%20Document%20-%20Issue%2014.8%20-%202018-September-2020.pdf>

⁷⁹ *Id.* at 35.

⁸⁰ *Id.* at 36.

⁸¹ *Id.* at 40.

correction and implementation.⁸² A committee established by the CB must then engage in a final decision-making process regarding certification, which must be impartial and free from conflict of interest, to ensure (1) that the auditors were impartial and technically competent; (2) that all requirements of the relevant standards have been met; and (3) that the report provides satisfactory evidence that all areas within the scope of the certification have been investigated.⁸³ Audit results are made public through BAP.⁸⁴

In sum, BAP not only establishes industry-leading standards designed to promote responsible aquaculture, but it also ensures that those obtaining BAP certification are rigorously audited to ensure compliance with those standards.

D. A reasonable consumer would understand references to “sustainably sourced” seafood to refer to seafood sourced from practices certified to comply with industry-leading standards, such as BAP.

In GAA’s view, OCA’s complaint is premised upon an unrealistic, baseless—and therefore unreasonable—standard for alleging that a marketer’s sustainability representations are false or misleading. A reasonable consumer would understand marketing references to sustainably sourced seafood as meaning that the seafood was produced in compliance with industry-leading standards designed to promote responsible sourcing of seafood—not that the aquaculture producer (1) has eliminated all environmental impacts, an unreasonable standard which no animal food sourcing could possibly meet, or (2) avoids practices that are in fact compliant with industry-leading standards. Industry standards such as BAP establish the gold standard for responsible aquaculture, and require practices that are as environmentally sustainable as possible given

⁸² *Id.* at 41.

⁸³ *Id.* at 41-42.

⁸⁴ See <https://www.bapcertification.org/Producers>.

existing technology. A reasonable consumer would not expect that sustainability representations require aquaculture producers to exceed the gold standard for aquaculture.

If OCA's complaint states a viable claim for misrepresentation under the CPPA, then even the most conscientious aquaculture producers—those which have been certified as having satisfied BAP or comparable standards—will be subjected to potential liability simply because they make sustainability representations while employing open net pen aquaculture pursuant to strict environmental and animal welfare protocols, appropriately prescribing antibiotics and utilizing disinfectants, and using wild-caught fishmeal and fish oil according to rigorous conservation standards. GAA believes that such an outcome would ultimately be detrimental to the very cause of environmental sustainability that OCA claims to advocate for, as it would discourage aquaculture producers from taking the measures necessary to obtain BAP or comparable certification. One of the major benefits of BAP certification is the ability to make verified claims regarding the responsible nature of the producer's aquaculture practices. If adherence to, and representations regarding, compliance with industry-leading standards can give rise to misrepresentation claims under the CPPA, the law will have created a perverse disincentive to undertake the efforts necessary to comply with the standards designed to promote ever-increasing sustainability. Such an outcome would distort the reasonable consumer standard that applies under the CPPA.

CONCLUSION

GAA respectfully urges the Court to hold that OCA has failed to plead a plausible CPPA claim based on Ducktrap's sustainability representations. Plaintiff must allege something more than the use of accepted aquaculture best practices in order to sustain a claim under the CPPA. OCA has not done so here.

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