

## **“Fishy” Allegations: Judge Finds Plaintiffs’ Testimony in False Ad Suit Against SeaWorld Lacked Credibility**

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Following a three-day bench trial, Judge Jeffrey S. White of the Northern District of California recently held that Plaintiffs lack standing to pursue their false advertising claims against SeaWorld relating to its treatment of orca whales. [\*Kelly Nelson, et al. v. SeaWorld Parks and Entertainment, No. 15-cv-02172-JSW \(N.D. Cal. October 13, 2020\).\*](#)

Plaintiff Nelson alleged she saw false statements on SeaWorld’s website that SeaWorld “did not separate [orca] calves from mothers” and that its “captive orcas had similar lifespans to those in the wild.” On this basis, Nelson brought individual claims for alleged violations of California’s Unfair Competition Law, False Advertising Law, and Consumers Legal Remedies Act. Plaintiff Morizur alleged that during her visit, a SeaWorld trainer falsely claimed that collapsed dorsal fins are “normal, and equally common in the wild,” and that “captivity in general does not harm orcas.” On this basis, she brought an individual claim for alleged violation of the UCL.

Nelson alleged that she suffered economic injury based on the cost of her ticket to SeaWorld while Morizur claimed economic injury based on the cost of a Shamu orca plush toy she allegedly purchased at SeaWorld. Plaintiffs alleged they would not have spent money on these items had they known the statements they claimed to have relied on were false. Plaintiffs sought restitution and a court order requiring “SeaWorld to inform the purchasing public on its website that captivity in general negatively impacts orca health, that orca lifespans are shorter in captivity than in the wild, that collapsed dorsal fins are common only in captive orcas, and that SeaWorld separates closely related and tightly-knit orca family members.”

If our readers’ reaction to this lawsuit is “good grief, this suit sounds like *Texas vs. Pennsylvania* for finned creatures,” you are in good company. Judge White found that both plaintiffs failed to meet their burden of demonstrating standing. First, the court found plaintiffs failed to demonstrate Article III standing for their claim for injunctive relief because their trial testimony that they would return to or purchase merchandise from SeaWorld if SeaWorld stopped its alleged false statements was not credible. For example, Judge White found Nelson’s testimony that she “absolutely” would like to go

back to SeaWorld if she was able to trust its advertising was belied by her testimony that she does not support businesses that make animals do tricks and her consistently negative views about SeaWorld expressed in her social media posts. Similarly, the court found Morizur's testimony was belied by her negative social media posts about SeaWorld and more credible testimony from her own father and fiancé, including that her goal in bringing the case was to ensure "killer whales will no longer be held in captivity anywhere," and that she would never go back to SeaWorld as long as the orcas are in captivity.

The court found plaintiffs' testimony about their alleged economic injury to be equally problematic. Morizur testified that she purchased a Shamu plush toy in reliance on SeaWorld's representations. However, she did not produce a receipt of her purchase or any photographs of the toy, and when asked to produce the toy, she claimed it was destroyed by Brutus, her family's dog (which neither her parents nor her fiancé recalled happening). The court noted that Morizur's "lack of candor at trial" and her parents' and fiancé's inability to corroborate this story led it "to discredit Ms. Morizur's variation of 'the dog ate my homework excuse' as an explanation for why she did not produce the Shamu plush."

Due to several inconsistencies in Nelson's testimony regarding when and where she saw the alleged misrepresentations, Judge White was also unconvinced that she saw them before her trip to SeaWorld. And even if she did, Judge White found she failed to prove she acted upon her confidence in the truth of these statements when she made the decision to visit SeaWorld. Therefore, Ms. Nelson failed to prove actual reliance. The court noted a showing of actual reliance is required for causation between a plaintiff's injury and a defendant's advertising — an essential element of a plaintiff's statutory standing to sue under the UCL, FAL, and CLRA.

This case serves as a reminder that while false advertising laws are essential tools to protect consumers and competitors, they are not a tool to address moral or ethical issues entirely unrelated to advertising.

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