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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JEFFREY CRAIG, on behalf of himself
and all others similarly situated,

Plaintiff,

v.

AMERICAN TUNA, INC. and WORLD
WISE FOODS, LTD.,

Defendants.

Case No.: 22-cv-473-RSH-MSB

**ORDER DENYING PLAINTIFF’S
MOTION FOR CLASS
CERTIFICATION**

[ECF No. 99]

Before the Court is Plaintiff’s Motion for Class Certification. *See* ECF Nos. 99 (Motion), 109 (Opposition), 114 (Reply), 116 (Objection to Reply), 118 (Response to Objection). As discussed below, the Court denies the Motion because Plaintiff has failed to establish the named Plaintiff, Ray Glass, has Article III standing.

I. BACKGROUND

Ray Glass, the sole named plaintiff in this action, is a resident of New York and a consumer of American Tuna products. ECF Nos. 75 ¶ 16, 99-3. Defendant American Tuna,

1 Inc.¹ is a San Diego-based company that sells canned and pouched albacore tuna products.
2 Defendant sells the majority of these products through Whole Foods Market, but they are
3 also available for direct purchase through American Tuna’s website. *See* ECF No. 109 at
4 8.

5 **A. Procedural History**

6 On November 4, 2021, former Plaintiff Jeffrey Craig, on behalf of himself and all
7 others similarly situated, filed the initial Complaint in this action in the Southern District
8 of New York. ECF No. 1. On January 31, 2022, Plaintiff filed an Amended Complaint.
9 ECF No. 21. On April 8, 2022, this case was transferred from the Southern District of New
10 York to this Court. ECF No. 40.

11 On April 19, 2023, Plaintiff filed a Second Amended Complaint—the operative
12 complaint in this action—which substituted plaintiffs Ray Glass and Michael Sizemore for
13 plaintiff Jeffrey Craig. ECF No. 75. The Court granted Sizemore’s subsequent motion to
14 withdraw as a plaintiff, leaving Ray Glass as the sole named plaintiff. ECF No. 94. Plaintiff
15 now moves this Court to certify Claims Two and Four of the Second Amended Complaint
16 on behalf of a class of New York consumers. ECF No. 127-1.²

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21 ¹ Defendant states that although Plaintiff’s Second Amended Complaint names a
22 second defendant, World Wise Foods, Ltd., that entity was never served and has never
23 appeared in this litigation. *See* ECF No. 109 at 8; 109-6 ¶ 4. According to American Tuna’s
24 corporate disclosure, World Wise Foods is American Tuna’s parent company, but is a
25 separate corporate entity—a privately held United Kingdom company. ECF No. 17.
Because there is no evidence World Wise Foods was ever served, the Court refers only to
Defendant American Tuna.

26 ² Plaintiff originally filed a redacted version of his Memorandum in Support of Class
27 Certification as ECF No. 99-1. Pursuant to this Court’s Order, ECF No. 123, Plaintiff has
28 refiled an unredacted copy as ECF No. 127-1. Accordingly, the Court cites ECF No. 127-
1.

1 **B. Plaintiff’s Allegations**

2 Plaintiff’s Second Amended Complaint alleges that although the labels on some of
3 Defendant’s products state that the tuna is “Caught and Canned in the USA,” “Caught and
4 Canned in America,” “American Made,” or “100% American Made,” Defendant instead
5 catches much of its tuna outside of U.S. Waters—defined as the U.S. Exclusive Economic
6 Zone (“U.S. EEZ”).³ ECF No. 75 ¶¶ 8, 27. Plaintiff relatedly claims that Defendant’s
7 website deceives consumers by claiming “Local Sourcing” of tuna and representing that
8 “We source only the most premium pole & line tuna from . . . the American pole & line
9 fishery in the American Pacific Northwest.” *Id.* ¶¶ 9, 31. The Complaint further alleges
10 that Defendant’s name—“American Tuna”—and its logo of a fish superimposed on an
11 American flag creates the impression that all of its tuna is caught in the U.S. EEZ. *Id.* ¶¶
12 10-12. Plaintiff alleges that because of this deception, consumers pay a premium for
13 Defendant’s products. *Id.* ¶¶ 12-13.

14 Plaintiff seeks to certify Claims Two and Four of the Second Amended Complaint,
15 which allege that Defendant has violated New York General Business Law prohibiting
16 “false advertising” and “[d]eceptive acts or practices in the conduct of any business, trade
17 or commerce or in the furnishing of any service.” N.Y. Gen. Bus. Law. §§ 349(a), 350.

18 Plaintiff proposes a class of all persons “who purchased American Tuna Products in
19 New York State between November 2018 and the date class notice is disseminated.”⁴ ECF
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22 ³ Federal law defines “Waters of the United States” as “those fresh and ocean waters
23 contained within the outer limit of the Exclusive Economic Zone (EEZ) of the United
24 States.” 7 C.F.R. § 60.132. The U.S. EEZ extends 200 nautical miles from the coast. 60
25 Fed. Reg. 43825-01 (August 23, 1995).

26 ⁴ Plaintiff identifies eight types of American Tuna Products: American Tuna Pole
27 Caught Wild Albacore – No Salt (6 oz); American Tuna Pole Caught Wild Albacore – Sea
28 Salt (6 oz); American Tuna Pole Caught Wild Albacore – Smoked w/Olive Oil (6 oz);
American Tuna Pole Caught Wild Albacore – Jalapeño (6 oz); American Tuna Pole Caught
Wild Albacore – Garlic (6 oz); American Tuna Pole Caught Wild Albacore – No Salt (3.5

1 No. 127-1 at 12. The class includes only consumers who purchased these products
2 “primarily for personal, family, or household purposes, and not for resale.” *Id.*

3 **II. ARTICLE III STANDING**

4 Article III of the United States Constitution limits federal courts to the resolution of
5 cases and controversies. U.S. Const. Art. 3 § 2, cl. 1. The standing doctrine is one
6 component of the case or controversy requirement. To demonstrate standing, a party must
7 show that it has “(1) suffered an ‘injury in fact’ that is concrete, particularized, and actual
8 or imminent, (2) the injury is ‘fairly traceable’ to the defendant’s conduct, and (3) the injury
9 can be ‘redressed by a favorable decision.’” *Matter of E. Coast Foods, Inc.*, 80 F.4th 901,
10 906 (9th Cir. 2023) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992)).

11 “A plaintiff is required to establish the elements necessary to prove standing ‘with
12 the manner and degree of evidence required at the successive stages of the litigation.’”
13 *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 682 (9th
14 Cir. 2022) (quoting *Lujan*, 504 U.S. at 561). Accordingly, “named plaintiffs who represent
15 a class must allege and show that they personally have been injured, not that injury has
16 been suffered by other, unidentified members of the class to which they belong and which
17 they purport to represent.” *Lewis v. Casey*, 518 U.S. 343, 357 (1996). Because “standing is
18 the threshold issue in any suit,” if the named plaintiff lacks standing on a claim, “the court
19 need never reach the class action issue.” *Lierboe v. State Farm Mut. Auto. Ins. Co.*, 350
20 F.3d 1018, 1022 (9th Cir. 2003) (quoting 3 Herbert B. Newberg on Class Actions § 3:19,
21 at 400 (4th ed. 2002)).

22 **III. DISCUSSION**

23 Defendant argues that Plaintiff’s claims should be dismissed because he has not
24 offered evidentiary proof of his Article III standing in his motion for class certification.

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27 oz); American Tuna Pole Caught Wild Albacore – Sea Salt (3.5 oz); and American Tuna
28 Pole Caught Wild Albacore – No Salt (66.5 oz). ECF No. 127-1 at 12.

1 ECF No. 109 at 16-17. Because standing is a jurisdictional requirement, the Court
2 considers this argument first. *See Bd. of Nat. Res. of State of Wash. v. Brown*, 992 F.2d
3 937, 945 (9th Cir. 1993) (“The jurisdictional element of standing must be met in every
4 case, and we must satisfy ourselves that this element exists even if no party to the action
5 raises a doubt regarding its presence.”).

6 Defendant argues that Glass has failed to show an injury in fact because he has not
7 provided evidence that he saw the challenged statements or was injured by them. ECF No.
8 109 at 16-17. Plaintiff responds that Glass testified that he purchased cans with the “Caught
9 and Canned in America” label, ECF No. 114 at 6, and argues that, in any case, “Plaintiff
10 clearly was led to believe that the tuna was caught in America, as were the consumers who
11 wrote reviews on Amazon.” *Id.* at 7.

12 On a motion for class certification, a plaintiff “must show standing through
13 evidentiary proof.” *Rivera v. Invitation Homes, Inc.*, No. 18-CV-03158-JSW, 2022 WL
14 504161, at *5 (N.D. Cal. Feb. 18, 2022). To satisfy the “case” or “controversy” requirement
15 of Article III, a named plaintiff “must allege a present or immediate injury in fact which is
16 fairly traceable to the challenged action and is likely to be redressed by a favorable court
17 decision.” *Brown*, 992 F.2d at 945. Accordingly, Glass must “show that [he] personally
18 [has] been injured, not that injury has been suffered by other, unidentified members of the
19 class to which [he] belong[s] and which [he] purport[s] to represent.” *Warth v. Seldin*, 422
20 U.S. 490, 502 (1975). Under New York’s General Business Law, a plaintiff has “suffered
21 an injury-in-fact [when] she purchased products bearing allegedly misleading labels and
22 sustained financial injury – paying a premium – as a result.” *Axon v. Florida’s Nat.*
23 *Growers, Inc.*, 813 F. App’x 701, 703–04 (2d Cir. 2020); *see also Langan v. Johnson &*
24 *Johnson Consumer Companies, Inc.*, 897 F.3d 88, 94 (2d Cir. 2018) (“[A] plaintiff who
25 purchased the same product, on the same day, at the same place, from the same defendant,
26 because of the same misleading offer as many other purchasers would plainly have standing
27 to sue on behalf of those similarly situated purchasers.”). Relatedly, to show injury for false
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1 advertising, a plaintiff must prove he “saw the specific advertisements that he asserts were
2 misleading.” *Chimienti v. Wendy’s Int’l, LLC*, No. 22-CV-02880 (HG), 2023 WL 6385346,
3 at *3 (E.D.N.Y. Sept. 30, 2023); *Lin v. Canada Goose US, Inc.*, 640 F. Supp. 3d 349, 360
4 (S.D.N.Y. 2022) (Without evidence that “Plaintiff actually saw the representations at issue,
5 the [claim] fails.”).

6 Plaintiff has failed to offer any evidence that Glass saw the advertisements he claims
7 to be false or purchased one of the products whose label Plaintiff challenges under New
8 York’s GBL. Plaintiff’s Motion for Class Certification offers only a vague description of
9 the nature of Ray Glass’s claim, and attaches a declaration of Glass in which he attests that:

10 Like all class members, I paid a premium for something that I did not
11 get. Every time I bought American Tuna, I believed that I was paying a
12 premium for the assurance that I was getting tuna that was caught in
13 America. It turns out that the tuna is not always caught in America, and
14 in fact a substantial amount of it is caught thousands of miles away from
15 America. It is not fair that I paid a premium to American Tuna for
16 something that I did not receive.

17 ECF No. 99-3 ¶ 6. Glass’s declaration does not attempt to describe—even at a high level
18 of generality—what statements were made on the cans of American Tuna that he bought.
19 See ECF No. 99-3 at 1-2.

20 Plaintiff’s Reply Brief makes similarly vague assertions as to Glass’s claim, stating
21 that “Plaintiff thought the tuna was caught in America and testified he paid a premium for
22 this.” ECF No. 114 at 4. For this proposition, Plaintiff’s Reply Brief cites two lines from
23 Glass’s deposition:

24 Q. What statements on American Tuna’s labels do you believe was
25 misleading or incorrect?

26 A. I think it was “Caught in American waters.”
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1 ECF No. 114-4 at 29. Relying exclusively on this testimony, Plaintiff’s Reply Brief asserts
2 that “Plaintiff testified that he purchased the Caught and Canned in America labels.” ECF
3 No. 114 at 6.

4 But Plaintiff’s deposition testimony does not establish what representations were
5 made on the cans Glass actually purchased or any advertisements he saw. Instead, the
6 testimony Plaintiff relies on only referred to Glass’s general opinion of statements that
7 might be misleading. Further, when asked directly about what misrepresentations appeared
8 on the cans he purchased, Glass testified that he had not retained any of them and had no
9 photographs or notes regarding what was on their labels. ECF No. 114-4 at 35. He stated
10 that the only evidence he had of what was stated on the cans came from a label his attorney
11 shared with him. *Id.*

12 Plaintiff bears the burden of proof and persuasion, *see Brown*, 992 F.2d at 945, but
13 his declaration and deposition do not offer particularized evidence of injury and his briefs
14 in support of his motion for certification fail to cite to any proof in the record to establish
15 Glass purchased the labels at issue. Without evidence or testimony to as to what misleading
16 statements appeared on the cans he purchased, Glass does not have standing to represent
17 the interests of other potentially injured consumers. *See Lewis*, 518 U.S. at 357 (“[N]amed
18 plaintiffs who represent a class must allege and show that they personally have been
19 injured, not that injury has been suffered by other, unidentified members of the class to
20 which they belong and which they purport to represent.”).

21 Moreover, Defendant submits evidence in the form of a declaration from the CEO
22 of American Tuna that even if Glass meant to testify that he bought a product with a label
23 that said “Caught and Canned in America,” Glass could not have purchased such a label
24 because he only bought cans in 2022 and 2023 and labels stating tuna was “Caught and
25 Canned in the USA” or “Caught and Canned in America” exclusively appeared on the
26 “2016 Label” and “2017 Label,” which were last available at retail stores in November
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1 2018.⁵ See ECF 109-3 at 28. The only labels at issue that were available at retail stores in
2 2022 when Glass made his purchases were labels stating that products were “American
3 Made,” or that did not have any of Plaintiff’s challenged phrases. See ECF No. 109-3 at
4 23, 28.⁶

5 At the class certification stage, it is Plaintiff’s burden to show that he was, not that
6 he might have been, victim to the alleged mischaracterization. *Evans v. Linden Rsch., Inc.*,
7 No. C 11-01078 DMR, 2012 WL 5877579, at *6 (N.D. Cal. Nov. 20, 2012) (“On a motion
8 for class certification, Plaintiffs must demonstrate, not merely allege, that they have
9 suffered an injury-in-fact to establish Article III standing to bring the claims asserted on
10 behalf of the Main Class.”). Glass has not shown “specific, concrete facts demonstrating
11 that the challenged [statements] harm[ed] him.” *Warth*, 422 U.S. at 508.

12 Without evidence that Glass ever purchased cans with these labels, “[he] cannot
13 represent others who may have such a claim, and [his] bid to serve as a class representative
14 must fail.” *Lierboe v. State Farm Mut. Auto. Ins. Co.*, 350 F.3d 1018, 1022 (9th Cir. 2003)
15 (explaining “our law makes clear that ‘if none of the named plaintiffs purporting to
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18 ⁵ Defendant also offers evidence that by the time Glass purchased American Tuna in
19 2022, the American Tuna website’s only guarantee as to catch-location was that its fish
20 were sourced from the “North Pacific Ocean.” ECF No. 109-3 at 39.

21 ⁶ Plaintiff attempts to refute this, directing the Court to discovery responses in which
22 Defendant admits it “cannot control and does not know the exact timing of when its cans
23 of American Tuna Brand Product reach retail stores or how long cans stay on shelves.”
24 ECF No. 114 at 5. Defendant responds by citing to the declaration of American Tuna CEO
25 Sarah Eames, see ECF No. 116 at 6, which explains that it is possible to accurately estimate,
26 based on shipping records, when a version of the label stopped being sold at an outlet. See
27 ECF No. 109-3 at 13-14.

28 The Court agrees that Plaintiff has taken Defendant’s discovery response out of
context and finds Defendant has submitted credible evidence that it may predict with
reasonable, if not exact, accuracy how long cans may remain on the shelves. *Leite v. Crane
Co.*, 749 F.3d 1117, 1121–22 (9th Cir. 2014) (“[I]f the existence of jurisdiction turns on
disputed factual issues, the district court may resolve those factual disputes itself.”).

1 represent a class establishes the requisite of a case or controversy with the defendants, none
2 may seek relief on behalf of himself or any other member of the class” (quoting *O’Shea*
3 *v. Littleton*, 414 U.S. 488, 494 (1974)).

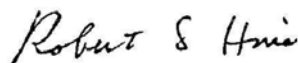
4 Because Glass, the sole remaining named Plaintiff in this action, has not met his
5 evidentiary burden to demonstrate standing, the Court denies Plaintiff’s Motion for Class
6 Certification, ECF No. 99. The Court directs Plaintiff to show cause why this action should
7 not now be dismissed for lack of standing.

8 **IV. CONCLUSION**

9 For the above reasons, the Court **DENIES** Plaintiff’s Motion for Class Certification
10 (ECF No. 99). The court further **ORDERS** Plaintiff to show cause why the action should
11 not be dismissed for lack of Article III standing. Plaintiff’s brief is due within thirty (30)
12 days of the date of this Order; Defendant may file a response within twenty-one (21) days
13 of the filing of Plaintiff’s brief; and Plaintiff may file a reply within seven (7) days of the
14 filing of Defendant’s brief.

15 **IT IS SO ORDERED.**

16 Dated: December 21, 2023



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Hon. Robert S. Huie
18 United States District Judge
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