

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

BEAN MAINE LOBSTER, INC., MAINE
LOBSTERMEN’S ASSOCIATION, INC., MAINE
COAST FISHERMEN’S ASSOCIATION, INC., MAINE
LOBSTER AND PROCESSING, LLC d/b/a ATWOOD
LOBSTER, LLC., and BUG CATCHER, INC.,

Civ. Action No. _____

Plaintiffs,

- v. -

MONTEREY BAY AQUARIUM FOUNDATION,

Defendant.

COMPLAINT AND DEMAND FOR JURY TRIAL
(INJUNCTIVE RELIEF REQUESTED)

Plaintiffs Bean Maine Lobster, Inc. (“BML”), Maine Lobstermen’s Association, Inc. (“MLA”), Maine Coast Fishermen’s Association, Inc. (“MCFA”), Maine Lobster and Processing, LLC d/b/a/ Atwood Lobster, LLC (“Atwood”), and Bug Catcher, Inc. (“Bug Catcher”), by and through their undersigned counsel, assert the following claims against Defendant Monterey Bay Aquarium Foundation (the “Aquarium”).

SUMMARY OF THE ACTION

1. This case arises out of the Monterey Bay Aquarium’s false and defamatory statements about Maine lobster fishing practices.
2. The lobster industry is an essential component of Maine’s fabric and identity. Lobstering is a shared heritage, a way of life for thousands of Maine residents, a ubiquitous cultural force shaping ambitions of the state’s youth, and a thread that connects families to prior generations while binding them to the region. Maine even offers a specialty license plate that features a lobster, and donates some of the proceeds from the purchase of these plates to lobster

research and education. As the Department of Motor Vehicles website states, the lobster is “Maine’s signature product.”

3. The lobster is not just a symbol. Maine is synonymous with lobster. Dating back before Maine became a state, lobsters have continually been a critical element of Maine’s economy. The Maine lobster industry contributes about \$1 billion annually to the state’s economy.¹ The industry directly supports roughly 12,000 jobs on the water and an additional 6,600 shoreside jobs through its supply chain.² Many ancillary businesses, including hospitality, retail, dining establishments, trucking, banking, and trap-making firms base their operations around the lobster fishery and depend on robust national and international markets for lobster.³ More than a thousand lobstermen fish with student licenses while in high school or college, working toward a commercial license.⁴ New lobstermen often apprentice on boats owned by relatives, carrying on a trade that often spans multiple generations. And a new Maine-based volunteer program focused on diversity and inclusion has been offering apprenticeship opportunities on lobster boats to Mainers of color in local high schools.⁵

¹ Michael Donihue, *Lobsters to Dollars: The Economic Impact of the Lobster Distribution Supply Chain in Maine* (June 2018), <https://colbycollege.maps.arcgis.com/apps/Cascade/index.html?appid=e0c247dcb1a34d8293d953f92f360eb9>.

² See Brief for MLA in support of Mot. to Expedite Briefing and Oral Arg. Ex. P, Decl. of Alexa M. Dayton, at ¶ 6, *MLA v. NMFS*, No. 22-5238 (D.C. Cir. Oct. 11, 2022).

³ See *id.*, Ex. H, Decl. of Lawrence Barker, at ¶¶ 7-8; *id.*, Ex. J, Decl. of Mark Brooks, at ¶¶ 9-10, 13.

⁴ See Shannon Mullen, *Maine’s Next Generation of Lobstermen Brace for Unprecedented Change*, NPR, (Sept. 19, 2021), <https://www.npr.org/2021/09/19/1036328606/maines-next-generation-of-lobstermen-brace-for-unprecedented-change>.

⁵ See Fred Bever, *These Young Men Catch More Than Lobsters. They Also Catch a Break*, NPR, (Sept. 24, 2022), <https://www.npr.org/2022/09/24/1123526182/maine-lobsters-lobster-fishing-apprentice-program>.

4. Maine businesses also depend on tourists who visit the State to eat locally-caught lobster. According to a survey, of the approximately 10.1 million people who visited Maine between May and August 2021, 64% said they visited for the state’s food and culinary experiences, and a whopping 42% said they specifically came to Maine for the lobster.⁶

5. Plaintiffs are some of the thousands of businesses that make up the Maine lobster fishing industry. By law, each of Maine’s 5,600 commercial lobstermen—a term that describes the men and women who hold commercial licenses to harvest lobster—is a self-employed small business owner who runs his or her own boat and lives, works, and spends earnings locally.⁷

6. Maine lobstermen are responsible stewards of the State’s natural resources and have long led efforts to make lobster fishing environmentally sustainable. Relevant here, Maine lobstermen have modified their harvesting practices at great expense, and in compliance with federal and state regulatory programs, to protect the endangered North Atlantic right whale.

7. The Aquarium runs a program called “Seafood Watch,” which assigns ratings to different varieties of seafood based on environmental impact and sustainability. The Aquarium describes Seafood Watch as a “global leader in the sustainable seafood movement.” Seafood Watch publishes ratings of different seafood varieties, purporting to indicate the environmental impact of consuming that type of seafood. The Aquarium claims that its ratings are based on science. Through this Seafood Watch ratings program, the Aquarium seeks to influence the

⁶ See Melissa Waterman, *Lobster’s Claw-hold on Maine is Strong: Impact of Fishery Goes Beyond Big-Dollar Landings*, ISLAND INSTITUTE (Jul. 6, 2022), <https://www.islandinstitute.org/working-waterfront/lobsters-claw-hold-on-maine-is-strong/>.

⁷ See *Advocacy and Education*, Maine Lobstermen’s Association, <https://www.maine lobstermen.org/policy-advocacy-and-education>; *Maine Lobster Fact Sheet*, The Maine Lobster Marketing Collaborative, <https://lobsterfrommaine.com/article/maine-lobster-fact-sheet/>.

seafood-purchasing decisions of consumers and businesses.

8. In September 2022, Seafood Watch published a “red” rating for lobster caught in certain Canadian and U.S. fisheries, stating that consumers and businesses should “avoid” purchasing them. The Aquarium applied this rating to lobster caught in the Gulf of Maine/Georges Bank region, where the Maine lobster fishery operates. In several public statements made to explain this “red” rating, the Aquarium has falsely depicted the Maine lobster fishery as being directly responsible for right whale injuries and mortalities. The Aquarium has stated that its rating was based on a review of “all available scientific data” which, it claimed, showed that lobster fishing practices in the covered regions pose “significant risks of entanglement” to North Atlantic right whales, which can cause serious harm and death. The Aquarium claimed that it followed a “rigorous, transparent, science-based process” in reaching its rating decision. The Aquarium also stated that the Maine lobster fishery does not have in place appropriate measures to protect right whales and that consumers’ appetite for seafood was “driving a species to extinction.”

9. The Aquarium’s purported factual statements about Maine lobster fishing practices are false. Contrary to what the Aquarium has represented, there are no “scientific data” showing that any North Atlantic right whale has been harmed—let alone killed—by entanglement in Maine lobster fishing gear in more than 18 years. In fact, the most recent instance of any observed right whale entanglement in Maine waters was in 2004, and that whale was not seriously harmed. For more than 20 years, the Maine lobster fishing industry has been making changes to its harvesting practices to avoid entanglements, including major modifications in 2009 when the fishery converted to rope that sinks between traps; in 2014 when the fishery removed 30% of its buoy lines from the water; and in 2022 when it removed additional buoy lines and weakened all remaining rope to break if a whale becomes entangled.

Recently, North Atlantic right whale migratory patterns have changed as a result of climate changes, and the whales rarely pass through Maine coastal waters. The Aquarium has ignored these facts, and its false statements in support of its “red” rating have misled consumers and businesses to believe that Maine lobster gear is causing serious harm to the right whale population, which is contrary to the scientific data the Aquarium purports to have reviewed.

10. There is no question that the Aquarium knew these statements were false when made. Indeed, the Aquarium *admits* that there are no recent documented cases of North Atlantic right whales being caught in Maine lobster fishing gear. Instead, the “scientific data” upon which the Aquarium purportedly relies show that right whales have been found entangled in gear that is *not linked to the Maine lobster fishery*—much of which has been directly linked to gear used in Canadian waters to harvest snow crabs. No “scientific data” warrant a conclusion that any of these entanglements are attributable to the Maine lobster fishery. The Aquarium has not engaged in a “rigorous, transparent, science-based process” to support its representations to businesses and consumers about Maine-caught lobsters. At best, the Aquarium has engaged in wild speculation about the cause of these entanglements, with a reckless disregard for the truth; at worst, the Aquarium knew that there was no science supporting its “red” listing of Maine-caught lobsters because reports of right whales harmed in Canadian fishing gear have been well-publicized in recent years.

11. In fact, MLA and other stakeholders in the lobster industry engaged in a dialogue with the Aquarium prior to September 2022 and repeatedly presented evidence that the Maine lobster fishery was not responsible for right whale entanglements. MLA informed the Aquarium that its claims would mislead the public and that available data contradicted its conclusions. But the Aquarium ignored these facts and maintained its unscientific approach, insisting that entanglements for which there was no known cause could be attributed to Maine

lobstermen.

12. The Aquarium’s false claims to “scientific” support for its “red” rating of Maine-caught lobsters have caused great harm to the Maine lobster industry—and Plaintiffs’ business and reputation in particular. This harm is intentional: The Aquarium told businesses and consumers to “avoid” and “take a pass” on purchasing Maine-caught lobster and lobster products on the basis of its false statements. In doing so, the Aquarium leveraged its significant influence over public opinion and the commercial decisions of major lobster purchasers, using its public platform to pressure those parties into cutting off business with Plaintiffs. As a result, several large businesses that had purchased lobsters from Plaintiffs in the past announced that they will no longer carry Maine-caught lobsters because of the Aquarium’s statements. This has caused Plaintiffs economic harm in the form of lost business. And, overall consumer demand for Maine-caught lobsters has decreased since September 2022, due in whole or in part to the Aquarium’s false statements, depressing the price for lobsters and causing further commercial harm to Plaintiffs.⁸

13. Prior to filing this lawsuit, Plaintiffs requested that the Aquarium remove its false statements about Maine-caught lobsters. The Aquarium refused. Plaintiffs also requested that the Aquarium come forward with any factual support for its statements about Maine lobster fishing practices. Again, the Aquarium refused. Left with no other options, Plaintiffs come to this Court for relief in the form of an injunction ordering the Aquarium to remove and retract any and all defamatory statements from its website and other publications, and damages for the business that Plaintiffs have lost as a result of the Aquarium’s false statements.

⁸ Data released by the Maine Department of Marine Resources shows that the average per-pound price of lobster in Maine between September and December 2022 was \$3.89, compared with \$6.59 for the same period in 2021. This reflects a 40% drop in price. *See 2004-2022 Maine Commercial Lobster Landings as of 2/22/2023*, Maine Department of Marine Resources, <https://www.maine.gov/dmr/sites/maine.gov.dmr/files/inline-files/LobByCntyMoZone.pdf>.

PARTIES

14. Plaintiff Bean Maine Lobster, Inc. (“BML”) markets and sells high-quality mid-coast Maine-caught lobster and lobster foods. BML has suffered actual injury, including economic losses, as a result of Defendant’s false and defamatory statements. BML is incorporated under the laws of the State of Maine, and has its principal place of business in Rockland, Maine.

15. Plaintiff Maine Lobstermen’s Association, Inc. (“MLA”) is a non-profit corporation that represents roughly 1,200 of Maine’s 5,600 lobstermen. MLA actively advocates to protect the lobster resource and lobster fishery, the members who depend on it, and the value of the resource, including the brand value and goodwill attached to the Maine lobster. MLA has suffered actual injury, including economic and reputational injury, as a result of Defendant’s false and defamatory statements. MLA is incorporated as a nonprofit corporation under the laws of the State of Maine, and has its principal place of business in Kennebunk, Maine.

16. Plaintiff Maine Coast Fishermen’s Association, Inc. (“MCFA”) is a non-profit corporation that works to enhance the sustainability of Maine’s fisheries—including the lobster fishery, which is the state’s largest—by advocating for the needs of community-based fishermen, the environmental restoration of the Gulf of Maine, and the brand value and goodwill associated with Maine lobster. MCFA works directly with approximately 200 Maine fishermen, nearly all of whom trap and sell lobster as part of their business. MCFA has suffered actual injury, including economic and reputational injury, as a result of Defendant’s false and defamatory statements. MCFA is incorporated as a nonprofit corporation under the laws of the State of Maine, and has its principal place of business in Brunswick, Maine.

17. Plaintiff Maine Lobster and Processing, LLC (doing business as Atwood Lobster, LLC) (“Atwood”) is a third-generation Maine lobster company and is one of the leading lobster

producers in the United States. Atwood has suffered actual injury, including economic and reputational losses, as a result of Defendant's false and defamatory statements. Atwood was formed under the laws of the State of Delaware and has its principal place of business in South Thomaston, Maine. Atwood is a citizen of a State other than California.

18. Plaintiff Bug Catcher, Inc. ("Bug Catcher") is a lobster fishing company run by Gerald R. Cushman, a sixth-generation lobsterman and member of both MLA and MCFA. Bug Catcher has three employees, including Mr. Cushman, and operates a single boat. Bug Catcher has suffered actual injury, including economic and reputational injury, as a result of Defendant's false and defamatory statements. Bug Catcher is incorporated under the laws of the State of Maine, and has its principal place of business in Port Clyde, Maine.

19. Defendant Monterey Bay Aquarium Foundation ("the Aquarium") is a nonprofit corporation organized under the laws of the State of California, and its principal place of business is in Monterey, California. The Aquarium operates Seafood Watch, a program that seeks and secures commitments from major buyers in the seafood industry to follow its recommendations and purchase only products Seafood Watch deems environmentally sustainable. Seafood Watch issues consumer and business-facing ratings and recommendations for seafood sources which those companies commit to follow and which it claims are based on its own assessments of environmental sustainability and supported by scientific data.

JURISDICTION AND VENUE

20. This Court has subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1332, as the Plaintiffs and the Defendant are citizens of different states and the amount in controversy between each Plaintiff and the Defendant exceeds \$75,000.

21. This Court has personal jurisdiction over the Aquarium under Maine's long-arm statute, 14 M.R.S.A. § 704-A(I), which authorizes jurisdiction over nonresident defendants to the

fullest extent permitted by the due process clause of the United States Constitution, 14th Amendment. Jurisdiction over the Aquarium satisfies due process because (1) Maine has a legitimate interest in the subject matter of this litigation; (2) the Aquarium, by its conduct, reasonably could have anticipated litigation in Maine; and (3) exercise of jurisdiction comports with traditional notions of fair play and substantial justice.

22. Maine has a substantial interest in protecting its industries and allowing its residents a forum in which to seek redress when out-of-state actors publish false statements about a business essential to Maine's economy, particularly after that actor refuses to correct those false statements. The Aquarium's false statements have had and continue to have a significant effect on an industry that is crucial to Maine's economy and impacts the lives of thousands of Maine residents.

23. This Court also has jurisdiction under 14 M.R.S.A. § 704-A(B), which confers jurisdiction over any person who "cause[s] the consequences of a tortious act to occur within this State." The consequences of the Aquarium's defamatory statements are impacting thousands of Maine residents. The Aquarium could reasonably have anticipated litigation in Maine based on its tortious conduct. By choosing to attack specifically the lobster fishing practices in the Gulf of Maine and Georges Bank regions, which encompass the entire Maine lobster fishery, the Aquarium directed its defamatory statements at entities and individuals located in Maine—particularly, businesses and individuals involved in the Maine lobster fishery. The Aquarium knew that injury caused by the publication of its defamatory statements would be felt in Maine, where Plaintiffs reside, conduct business, and have an established reputation. The Aquarium published falsehoods about the conduct of the Maine lobster industry and specifically told consumers not to purchase lobster caught in Maine fisheries.

24. Venue is proper in the District of Maine under 28 U.S.C. § 1391(b) because this is

where Plaintiffs reside and where the injuries caused by the Aquarium's conduct have occurred.

FACTS

A. The Maine Lobster Fishery Employs Sustainable Practices That Have Successfully Protected North Atlantic Right Whales From Harm.

25. The Gulf of Maine is the center of the U.S. lobster industry. The Maine lobster fishery has harvested in excess of 100 million pounds of lobster annually, and contributes more than a billion dollars to Maine's economy every year. According to the Maine Department of Marine Resources, in 2021, the Maine lobster fishery landed more than 100 million pounds of lobster, for a value of nearly \$725 million.⁹ The fishery employs more than 5,600 lobstermen,¹⁰ and in 2021 hauled in more than 80% of the country's lobster landings.¹¹ The lobsters are sold domestically and internationally, in both live and processed forms.

26. The Maine lobster fishery uses traps deployed on the seabed. These traps feature an entrance tunnel through which a lobster is lured with bait. Traps are laid out as singles or pairs, or in strings (trawls) with a number of traps attached to a rope. Ropes (vertical or buoy lines) connect the traps to surface buoys. The traps are generally harvested and re-baited several times a week.

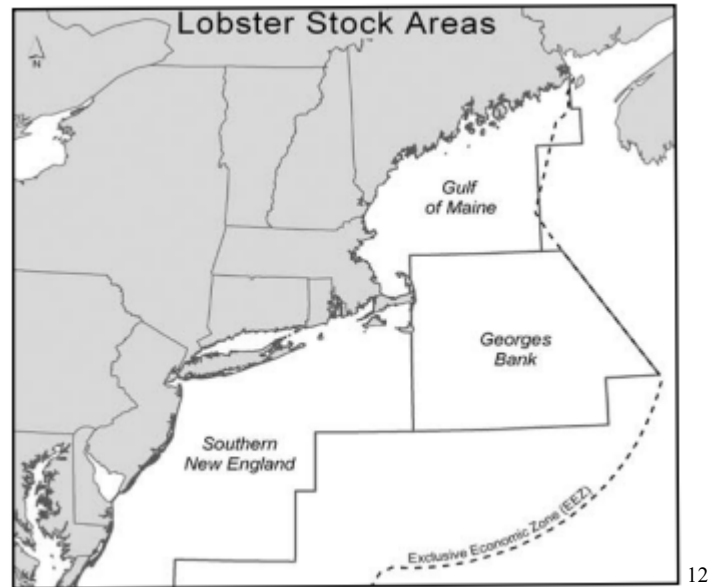
27. For management purposes, the Northwest Atlantic Ocean region from Maine to

⁹ See *2021 Maine Lobster Harvest the Most Valuable in the History of the Fishery*, State of Maine, Office of Governor Janet T. Mills (Feb. 14, 2022), <https://www.maine.gov/governor/mills/news/2021-maine-lobster-harvest-most-valuable-history-fishery-2022-02-14#:~:text=According%20to%20recently%20updated%20data,in%20value%2C%20year%20over%20year.>

¹⁰ See *Maine Lobster Fact Sheet*, The Maine Lobster Marketing Collaborative, <https://lobsterfrommaine.com/article/maine-lobster-fact-sheet/>.

¹¹ See Commercial Fishing Landings Database, NOAA Fisheries, available at <https://www.fisheries.noaa.gov/foss/f?p=215:200:6182282017135.>

North Carolina is divided into two discrete lobster stocks: Gulf of Maine/Georges Bank and Southern New England. The Maine lobster fishery targets the Gulf of Maine/Georges Bank lobster stock.



28. Lobster fishing in Maine coastal waters is subject to strict regulations that ensure resource and environmental sustainability. For example, there are minimum and maximum size limits for legal lobster harvest. Larger lobsters are protected because they generally produce more young. And, “berried” females carrying eggs must be released and marked with identifying “V-notches” to ensure the reproductive success of the lobster stock. There are also restrictions on the number and configuration of traps that may be used.

29. For more than 150 years, Maine lobstermen have employed sustainable practices that protect the health of the lobster stock as well as the entire marine environment with which they interact. In particular, the industry has employed practices that protect the North Atlantic right whale, a species that lives primarily in the North Atlantic Ocean and is listed as an “endangered species” under the Endangered Species Act and protected under the Marine

¹² Source: <https://www.mass.gov/files/2017-08/dmfng410.pdf>.

Mammal Protection Act. By 1890, the right whale population had substantially diminished due to commercial whaling. There were approximately 100 whales in 1935, when the National Marine Fisheries Service (“NMFS”) designated the right whale as endangered. According to NMFS, the right whale population tripled from roughly 150 whales in 1971 to a peak of 481 individuals in 2011.¹³ By 2017, NMFS detected an unusual rate of mortalities that brought the population down to its current number of about 350. None of the deaths during this “unusual mortality event” has been attributed to Maine lobster gear.

30. Since the 1990s, the Maine lobster industry has been contributing to the conservation effort by ensuring that the fishery’s practices do not cause harm to right whales. In 1997, the Atlantic Large Whale Take Reduction Plan (the “Take Reduction Plan”), developed by a collaboration of fisheries, agencies, scientists, lobstermen and environmental groups, began to require implementation of innovative fishing practices and gear deployment strategies designed to protect right whales. Those measures were continuously updated and improved in subsequent years to include: (1) the use of sinking lines between traps, which effectively removed 27,000 miles of rope from New England waters, to greatly reduce the risk that whales will encounter lobster gear; (2) requirements that more lobster traps to be attached to each buoy line, removing 3,000 more miles of rope in the water; and (3) the incorporation of “weak-links” or weak rope in the buoy line, so that a right whale would break free if it became entangled.¹⁴

31. These proactive measures significantly reduced the frequency and severity of

¹³ See Brief for MLA in support of Mot. to Expedite Briefing and Oral Arg. Ex. P, Decl. of Alexa M. Dayton, at ¶ 17, *MLA v. NMFS*, No. 22-5238 (D.C. Cir. Oct. 11, 2022).

¹⁴ See 72 Fed. Reg. 57,104, 57,106 (Oct. 5, 2007); 73 Fed. Reg. 51,241 (Sept. 2, 2008); 79 Fed. Reg. 36,586, 36,587 (June 27, 2014); 80 Fed. Reg. 30,367, 30,378 (May 28, 2015); Maine Lobstermen’s Association Comment Letter on NMFS proposed rule to amend the Take Reduction Plan, at 7 (Mar. 1, 2021).

interactions between whales and U.S. fishing gear.¹⁵ There has not been a single documented entanglement of a right whale in Maine lobster gear since 2004.¹⁶ A search of the official NMFS database that chronicles mortality and injury to right whales reveals not a single record of right whale entanglement with Maine fishing gear resulting in serious injury or death.¹⁷ By contrast, the same database and other experts have documented many incidents of right whale entanglements with gear from other fisheries—including Canadian snow crab fisheries—that led to serious injury and death.¹⁸

32. In 2021, the Take Reduction Plan was modified further. Under these most recent modifications: (1) the minimum number of lobster traps for each buoy line in certain areas is even higher; (2) nearly 1,000 square miles of prime winter fishing grounds have been closed to lobster fishing for one-third of the year, eliminating even more rope from the water; (3) new

¹⁵ See Patrice McCarron, *Comments of the Lobster Fishing Association to the Draft BiOp*, The Lobster Fishing Ass’n, 4-5 (Feb. 19, 2021), https://lobstermen.com/wp-content/uploads/2020/08/Lobster-Association-Comments-on-Draft-BiOp_Final_2021.02.19.pdf.

¹⁶ This entanglement did not result in serious injury or death to the whale.

¹⁷ See *2017-2023 North Atlantic Right Whale Unusual Mortality Event*, NOAA, <https://www.fisheries.noaa.gov/national/marine-life-distress/2017-2023-north-atlantic-right-whale-unusual-mortality-event>; *North Atlantic Right Whale Updates*, NOAA, <https://www.fisheries.noaa.gov/national/endangered-species-conservation/north-atlantic-right-whale-updates>; *North Atlantic Right Whale*, NOAA, <https://www.fisheries.noaa.gov/species/north-atlantic-right-whale>.

¹⁸ According to an incident report cited by NOAA’s 2017-2023 Unusual Mortality Event tracker, in 2017 alone, multiple instances of right whale entanglement with snow crab gear were recorded. Snow crab fishing gear was “implicated in two observed NARW mortalities . . . as well as four of the five observed entanglements of free-swimming animals.” Daoust, P.Y., Couture, E.L., Wimmer, T., and Bourque, L. 2018. Incident Report: North Atlantic Right Whale Mortality Event in the Gulf of St. Lawrence, 2017, at 30, http://www.cwhc-rcsf.ca/docs/technical_reports/NARW_Incident_Report-%2020180405%20MD.pdf. See also Decl. of Glenn Salvador in support of Defendant-Intervenor’s Motion for Order on Remedy, *CBD et al. v. Ross et al.*, No. 1:18-cv-00112 (D.D.C. Jun. 18, 2020) at ¶¶ 18-21 (noting that since 2010, there has been a dramatic increase in right whale entanglements in Canadian gear, and the type of wide ropes removed from whales in recent years is typically not used by New England lobstermen).

requirements were established for the use of weak ropes designed to break at a force of 1,700 pounds; and (4) gear marking requirements were expanded.

33. Many individual Maine lobstermen also have implemented additional practices to further protect the right whales, using even less rope than permitted under the Take Reduction Plan. These measures are in keeping with the Maine lobster industry's more than century-old tradition of voluntarily adopting conservation measures to preserve the lobster stock and affected marine resources. For example, in addition to the federal requirements, the State of Maine has voluntarily maintained right whale protections in waters that are exempt from the federal whale plan, and implemented enhanced gear marking nearly two years sooner than federal rules required.

B. The Aquarium's Seafood Watch Program Publishes Purportedly "Science-Based" Ratings of Seafood Varieties According to Environmental Impact, in an Effort to Influence Consumer and Business Seafood-Purchasing Decisions.

34. The Aquarium established and operates "Seafood Watch," a program that claims to promote environmental sustainability in the seafood industry and aims to "push suppliers to source more environmentally responsible products."¹⁹ Seafood Watch bills itself as a "global leader in the sustainable seafood movement"²⁰ and "the leading source of science-based information for sustainable seafood around the world."²¹

35. Seafood Watch publishes recommendations telling consumers and businesses whether to purchase seafood products and rates various seafood sources based on its own purportedly scientific assessments of those sources' environmental sustainability.

¹⁹ Monterey Bay Aquarium Seafood Watch, <https://www.seafoodwatch.org/>.

²⁰ *Stories*, Monterey Bay Aquarium Seafood Watch, <https://www.seafoodwatch.org/stories>.

²¹ *Twenty Years of Seafood Watch*, Monterey Bay Aquarium Seafood Watch, <https://www.seafoodwatch.org/stories/twenty-years-of-seafood-watch>.

36. Seafood Watch seeks to influence consumer decisions and “spark change throughout the supply chain,”²² including by “leveraging the industry.”²³ To do this, Seafood Watch secures commitments from major seafood buyers, including restaurants, grocery stores, and retailers, to “serve environmentally responsible seafood following the Seafood Watch recommendations.”²⁴

37. Seafood Watch’s website touts “major buyers” of seafood that have made a “commitment to serve environmentally responsible seafood following the Seafood Watch recommendations.”²⁵ These buyers are in the food service, restaurant, grocery, and other related industries, which are listed on Seafood Watch’s website.²⁶

38. In its self-appointed role as arbiter of what constitutes sustainable seafood, Seafood Watch purports to review “all available scientific data” and follow a “rigorous, transparent, science-based process to evaluate the current environmental performance of a fishery.” Monterey Bay Aquarium, Seafood Watch Assigns Red Ratings to Canadian and U.S. Fisheries That Pose Dire Risk to the Endangered North Atlantic Right Whale (Sept. 5, 2022) **(Exhibit 1)**.

39. Seafood Watch defines “sustainable seafood” as “originating from sources, whether wild-caught or farmed, which can maintain or increase production in the long-term without jeopardizing the structure or function of affected ecosystems.” Monterey Bay Aquarium

²² Monterey Bay Aquarium Seafood Watch, <https://www.seafoodwatch.org/>.

²³ *Collaborations*, Monterey Bay Aquarium Seafood Watch, <https://www.seafoodwatch.org/collaborations>.

²⁴ *Businesses*, Monterey Bay Aquarium Seafood Watch, <https://www.seafoodwatch.org/collaborations/businesses>.

²⁵ *Id.*

²⁶ *See id.*

Seafood Watch, American Lobster, Report ID 524 (the “Lobster Report” or “Report”) (Sept. 6, 2022) (**Exhibit 2**) at p. 3.

40. Seafood Watch claims that each rating it issues is supported by “a Seafood Watch assessment,” in which “the fishery or aquaculture operation is evaluated using the Seafood Watch standard.” *Id.* This standard, in turn, is “built on [Seafood Watch’s] guiding principles,” ten of which are enumerated in the Report. *Id.* at p. 4.

41. Seafood Watch’s guiding principles are “operationalized” in four “criteria,” and once a rating has been assigned to each criterion, Seafood Watch develops and assigns a color-coded “overall recommendation.” Ex. 2 at p. 4.

42. Seafood Watch represents that seafood given a “red” or “avoid” rating “comes from sources that don’t align with [its] guiding principles.” *Id.* at p. 3. This rating means there is “a critical conservation concern or many issues need substantial improvement.” *Id.* Seafood Watch tells consumers to “[t]ake a pass” on seafood with a red rating because it is “caught or farmed in ways that harm other marine life or the environment.” *Id.* at p. 4.

43. In an October 5, 2022 FAQ released about its lobster assessment, the Aquarium also stated that fisheries given a red rating “pose a high risk of harm to marine life or the environment and appropriate management measures are not in place.”²⁷

44. By contrast, a “green” or “best choice” rating tells consumers: “Buy first; they’re well managed and caught or farmed responsibly.” Ex. 2 at p. 4. Sources of green-rated seafood “operate in a manner that’s consistent with [Seafood Watch’s] guiding principles” and the seafood “is caught or farmed in ways that cause little or no harm to other wildlife or the

²⁷ *Answers to frequently asked questions about Seafood Watch’s latest assessments for fisheries using gear that pose significant risk to the endangered North Atlantic right whale*, Monterey Bay Aquarium (Oct. 5, 2022), <https://www.montereybayaquarium.org/newsroom/press-releases/seafood-watch-assessments-faqs-north-atlantic-right-whale>.

environment.” *Id.* at p. 3. An intermediate “yellow” or “good alternative” label tells consumers, “Buy, but be aware there are concerns with how they’re caught, farmed or managed.” *Id.*

C. Seafood Watch Makes Defamatory Statements About The Effect of Maine Lobster Fishing Practices on Right Whales

45. In 2014, Seafood Watch assigned Maine lobster a “yellow” rating, describing it as a “good alternative” and stating that the lobsters were “from sources that align with most of our guiding principles.” Seafood Watch recommended that consumers and businesses should “[b]uy, but be aware there are concerns with how they’re caught, farmed or managed.”

46. Since 2014, the Maine lobster fishery has implemented even more changes to its fishing practices to protect right whales, even as whales have become more rare in waters where Maine lobstermen fish due to scientifically demonstrated changing ocean conditions.²⁸ The 2021 Take Reduction Plan modifications decreased the amount of rope in the water, created more exacting requirements for weak links, weak rope and break-aways to weaken vertical fishing lines, and closed nearly 1,000 square miles of fishing grounds for an entire season each year. There have been no scientific data collected since 2014 (or earlier) that would warrant an adverse change in the Aquarium’s rating of Maine-caught lobster.

47. Nevertheless, on September 5, 2022, the Aquarium changed its rating of Maine-caught lobster from “yellow” to “red.” On that date, the Aquarium published a press release on its website announcing that Seafood Watch had downgraded to a “red” rating all lobsters caught in certain Canadian and U.S. lobster fisheries, expressly including in the Gulf of Maine/Georges Bank region that encompasses the Maine lobster fishery. The press release stated that the “red” rating was based on “significant risks of entanglement in pot, trap, and gillnet fisheries to the

²⁸ See Meyer-Gutbrod, E.L., C.H. Greene, and K.T.A. Davies, *Marine species range shifts necessitate advanced policy planning: The case of the North Atlantic right whale*, OCEANOGRAPHY, 31(2):19–23 (2018), <https://tos.org/oceanography/article/marine-species-range-shifts-necessitate-advanced-policy-planning>.

endangered North Atlantic right whale and the lack of timely, effective management necessary to mitigate entanglement risks and promote recovery of the species.” The press release claims Seafood Watch reviewed “all available scientific data” and followed a “rigorous, transparent, science-based process” in determining that current management measures for these fisheries “do not go far enough to mitigate entanglement risks.” Ex. 1. The press release states that some of the rated fisheries “use gear with vertical lines that are known to entangle the endangered North Atlantic right whale.” *Id.*

48. On September 6, 2022, the Aquarium published the Lobster Report (“Report”) containing its recommendations for American lobster in the United States Northwest Atlantic region. The Report details Seafood Watch’s assignment of a “red” rating to lobster caught in the Gulf of Maine/Georges Bank and Southern New England regions. Ex. 2 at pp. 3-4.

49. The Aquarium’s Report tells readers to “***Avoid*** American lobster caught by trap from Georges Bank and the Gulf of Maine stocks due to risks to the critically endangered North Atlantic right whale and insufficient measures for reducing these risks.” *Id.* at p. 6.

50. The Aquarium’s Report further comments on the effectiveness of the Atlantic Large Whale Take Reduction Plan, asserting that “management measures and the Atlantic Large Whale Take Reduction Plan have not been successful at reducing serious injury and mortality to the North Atlantic right whale.” *Id.* at p. 5.

51. The Report further states: “Based on the available information and the significant risks to [the right whale], the American lobster fishery cannot be considered sustainable[.]” *Id.* at p. 41.

52. In connection with the Aquarium’s aggressive publicity of Seafood Watch’s recommendation against Maine lobster, the Aquarium’s Vice President of Global Ocean Initiatives stated in an interview that consumers’ “appetite for seafood is driving a species to

extinction.”²⁹

D. The Aquarium’s Statements Are Demonstrably False

i. Right whale mortality is driven by factors wholly unrelated to Maine lobster fishing practices.

53. The available scientific data show that the real threats to right whales come not from the Maine lobster fishery but from entanglements in Canadian snow crab gear, vessel strikes, climate change, and ocean noise.³⁰ There are no “scientific data” evidencing that any North Atlantic right whale has ever died or been seriously injured by entanglement with the lobster fishing gear that is used in the Maine fishery.

54. In fact, right whales are rarely found in Maine lobster fishing grounds. Beginning in 2010, the Gulf of Maine and Scotian Shelf regions of the Northwest Atlantic experienced a significant change in oceanic conditions that caused a substantial decline in the abundance of copepods, a primary component of the right whale’s diet.³¹ Copepod populations in the Gulf of

²⁹ *Seafood watch group lists New England lobster as seafood to avoid due to environmental concerns*, CBS NEWS (Sept. 6, 2022), <https://www.cbsnews.com/news/seafood-watch-group-new-england-lobster-north-atlantic-right-whale/>.

³⁰ See *2017-2023 North Atlantic Right Whale Unusual Mortality Event*, NOAA, <https://www.fisheries.noaa.gov/national/marine-life-distress/2017-2023-north-atlantic-right-whale-unusual-mortality-event>; *North Atlantic Right Whale Updates*, NOAA, <https://www.fisheries.noaa.gov/national/endangered-species-conservation/north-atlantic-right-whale-updates>; *North Atlantic Right Whale*, NOAA, <https://www.fisheries.noaa.gov/species/north-atlantic-right-whale>. See also *Review of North Atlantic right whale occurrence and risk of entanglements in fishing gear and vessel strikes in Canadian waters*. DFO Can. Sci. Advis. Sec. Sci. Advis. Rep. 2019/028, at 21 (noting that “the co-occurrence of NARW and fishing activities in the southern [Gulf of St. Lawrence] is high and entangled NARW have been discovered over the past three years (2016-2018), either in the GSL or elsewhere, carrying gear attributed to Canadian snow crab fisheries. There were at least two known entanglements in 2016, seven in 2017 and at least three in 2018. Since 2016, at least five NARW are considered to have died after being entangled in snow-grab gear.”).

³¹ See Nicholas R. Record et al., *Rapid Climate-Driven Circulation Changes Threaten Conservation of Endangered North Atlantic Right Whales*, OCEANOGRAPHY, Vol. 23, No. 2, 163-67 (June 2019).

Maine have remained low since then. Right whales have adjusted their own behavior as a result, abandoning Gulf of Maine waters in favor of Canada's Gulf of St. Lawrence, where copepods are more plentiful.³²

55. These climate-driven changes threatening the right whale's food supply have pushed the whales into Canadian waters, where they encounter vessel strikes and entanglement by heavy, deep-water snow crab gear. Canadian snow crab gear uses ropes that are significantly heavier and thicker than the ropes used by the Maine lobster fishery, and pose a greater risk to right whales as a result.³³ During the time the Maine lobster fishery has been implementing new protective gear deployment measures, Canada has not implemented similar measures for snow crab gear and is not expected to do so until 2024.³⁴

56. Coinciding with these oceanic and migratory changes, the right whale population

³² See Yvan Simard, *North Atlantic Right Whale Shift to the Gulf of St. Lawrence in 2015, Revealed by Long-term Passive Acoustics*, ENDANGERED SPECIES RESEARCH, 40, 271-284; Kimberly T.A. Davies & Sean W. Brilliant, *Mass Human-Caused Mortality Spurs Federal Action to Protect Endangered North Atlantic Right Whales in Canada*, Vol. 104 MARINE POLICY, 158 (2019); Genevieve E. Davis, *Exploring Movement Patterns and Changing Distribution of Baleen Whales in the Western North Atlantic Using a Decade of Passive Acoustic Data*, GLOBAL CHANGE BIOLOGY, 4813 (May 25, 2020), <https://onlinelibrary.wiley.com/doi/epdf/10.1111/gcb.15191>.

³³ See Endangered Species Act Section 7 Consultation on the: (a) Authorization of the American Lobster, Atlantic Bluefish, Atlantic Deep-Sea Red Crab, Mackerel/Squid/Butterfish, Monkfish, Northeast Multispecies, Northeast Skate Complex, Spiny Dogfish, Summer Flounder/Scup/Black Sea Bass, and Jonah Crab Fisheries and (b) Implementation of the New England Fishery Management Council's Omnibus Essential Fish Habitat Amendment 2 [Consultation No. GARFO-2017-00031], National Marine Fisheries Service (May 27, 2021), <https://repository.library.noaa.gov/view/noaa/30648> [hereinafter "BiOp"], at 217; Daoust, *supra* note 17, at 16 ("Recent analyses on the effects of snow crab gear entanglement in North Atlantic right whales demonstrate that the extreme weight of snow crab gear inflicts debilitating drag forces upon even healthy individuals.").

³⁴ See *P.E.I. Fishers Welcome Extension on Deadline for Gear to Protect Whales*, CBC NEWS (Jan. 11, 2023), <https://www.cbc.ca/news/canada/prince-edward-island/pei-right-whales-break-free-gear-1.6709434#:~:text=fishing%20community%20are%20welcoming%20DFO's,whale%20escape%20during%20an%20entanglement>.

has experienced an unusually high mortality rate since 2017. During this “unusual mortality event,” an unprecedented number of adult whales have been lost to vessel strikes and fishing gear entanglement.³⁵ Critically, none of the injuries or deaths caused by entanglement during this time have been attributed to Maine lobster gear or the Maine lobster fishery. The right whale population has also experienced a reduction in its calving rate since 2010, which is thought to be linked to the oceanic shift.³⁶

57. Numerous scientists have linked the post-2010 decline in right whale abundance to a spike in right whale serious injuries and mortalities caused by Canadian fishing gear and vessels in Canada’s Gulf of St. Lawrence.³⁷ In 2017 alone, 12 observed right whale mortalities were attributed to Canadian waters due to fishing gear, vessel strikes and unknown causes.³⁸ In 2019, another spike occurred, with 11 observed right whale mortalities occurring in Canadian waters.³⁹

³⁵ See *2017-2023 North Atlantic Right Whale Unusual Mortality Event*, NOAA, <https://www.fisheries.noaa.gov/national/marine-life-distress/2017-2023-north-atlantic-right-whale-unusual-mortality-event>; Erin L. Meyer-Gutbrod et al., *Ocean Regime Shift is Driving Collapse of the North Atlantic Right Whale Population*, OCEANOGRAPHY, Vol. 34, No. 3 (2021), <https://tos.org/oceanography/article/ocean-regime-shift-is-driving-collapse-of-the-north-atlantic-right-whale-population>; Record, *supra* note 26; Sean A. Hayes, *North Atlantic Right Whales – Evaluating Their Recovery Challenges in 2018*, NOAA Tech. Memo., (Sep. 2018), <https://repository.library.noaa.gov/view/noaa/19086>.

³⁶ See Meyer-Gutbrod, *supra* note 35.

³⁷ See *id.*; Hayes, *supra* note 35.

³⁸ See Daoust, *supra* note 17; Lindsay Jones, *Boat Strikes, Fishing Gear Behind Right Whale Deaths in Gulf of St. Lawrence: Report*, THE GLOBE AND MAIL, (Oct. 5, 2017), <https://www.theglobeandmail.com/news/national/veterinarians-release-results-from-study-of-north-atlantic-right-whale-deaths/article36499114/>.

³⁹ See Bourque, L., Wimmer, T., Lair, S., Jones, M., Daoust, P.Y. 2020. Incident Report: North Atlantic Right Whale Mortality Event in Eastern Canada, 2019, http://www.cwhc-rcsf.ca/docs/2019%20NARW%20incident%20report_June%202020.pdf.

58. Right whales also face threats from the impacts of ocean noise on their ability to communicate and navigate. Ocean noise from human activities like military sonar, shipping, construction, and energy exploration and development has increased in the Northwest Atlantic, interrupting the normal behavior of right whales and other large whale species, and interfering with their communication. The noise likely reduces their ability to detect and avoid predators and human hazards, navigate, identify physical surroundings, find food, and find mates.⁴⁰ In just the last several months, *twenty-three* whale deaths—sixteen of them humpback whales—were recorded in New York and New Jersey.⁴¹ While these whale deaths did not involve right whales and were not linked to entanglement in fishing gear, they indicate the scope of threats right whales face.⁴²

59. The scientific evidence collected by the U.S. Government, the Government of Canada, and other researchers does not contain a single instance of Maine fishing gear involved in a serious injury or death of a right whale. There are, however, multiple instances of documented serious injuries and mortalities attributed to other commercial fisheries and vessels

⁴⁰ See *North Atlantic Right Whale*, NOAA, <https://www.fisheries.noaa.gov/species/north-atlantic-right-whale>; Andie Bulman, *The Wrong News About North Atlantic Right Whales: How Human Noise Affects the Animals*, CBC NEWS (Jan. 22, 2023), <https://www.cbc.ca/news/canada/newfoundland-labrador/right-whales-noise-1.6713077>.

⁴¹ See Tracy Tulley and Winston Choi-Schagrin, *Why 23 Dead Whales Have Washed Up on the East Coast Since December*, NY TIMES (Feb. 28, 2023), <https://www.nytimes.com/2023/02/28/nyregion/east-coast-whale-deaths.html>; Brandon Drenon, *14 Whale Deaths Along US East Coast Remain a Mystery*, BBC, <https://www.bbc.com/news/world-us-canada-64375264>.

⁴² See *id.*; Dana Difilippo, *Debate Grows Over Offshore Wind, As Whale Deaths Mount*, NEW JERSEY MONITOR (January 17, 2023), <https://newjerseymonitor.com/2023/01/17/debate-grows-over-offshore-wind-as-whale-deaths-mount/>. Some have linked these recent whale deaths to offshore wind farm development. See Carly Wanna, Jennifer A Dlouhy and Josh Saul, *The \$100 Billion Offshore Wind Industry Has a Whale Problem*, BLOOMBERG (Feb. 18, 2023), <https://www.bloomberg.com/news/articles/2023-02-18/why-are-whales-dying-in-new-jersey-some-blame-wind-farms>.

in the U.S. and Canada. These facts belie the Aquarium's claim that Seafood Watch conducted a rigorous, transparent assessment of all available scientific data.

ii. Appropriate and effective measures are in place in the Maine lobster fishery to protect right whales

60. Despite the Aquarium's statements that the fisheries in its Report have "insufficient measures" that "do not go far enough to mitigate entanglement risks," the data show that the measures implemented in the Maine lobster fishery are not only effective but a model for what a sustainable and environmentally responsible fishery can do.

61. The Take Reduction Plan and other measures implemented in the Maine lobster fishery over the last several decades have achieved their intended purpose of reducing risk to right whales in the increasingly rare circumstance when they migrate through areas fished by Maine's lobster fleet. These measures are continuously modified and improved to adapt to changing circumstances.

62. Beginning from the first right whale protections in 1997, the whale population increased from 295 to 481 in 2011. A population decline was not detected until 2017 with publication of a right whale population model which coincided with the 2017 unusual mortality event.⁴³

63. Since 2009, known entanglements in any U.S. lobster gear have fallen by 90% compared to the prior 13 years. And again, since 2004 there have been no entanglements linked to lobstering gear used in the Maine fishery.

⁴³ See *U.S. Atlantic and Gulf of Mexico Marine Mammal Stock Assessment*, NOAA, https://www.fisheries.noaa.gov/s3/2023-01/Draft%202022%20Atlantic%20SARs_final.pdf.

iii. The Aquarium ignores statistical trends, skews facts, and misrepresents data regarding right whale entanglements while making unfounded assumptions attributing the harm to Maine lobster fishing

64. Data relied upon by the Aquarium and Seafood Watch do not support that Maine lobster fishing practices pose a significant threat to or cause harm to the right whale. In attempting to skew the facts to support its conclusion, the Aquarium disregards the scientific process it claims to follow.

65. First, the Aquarium relies heavily on data regarding *Canadian* entanglements—which are irrelevant to what happens in waters fished by Maine lobstermen. The fact that entanglements have occurred in other locations involving unidentified gear does not mean they are attributable to Maine lobstermen, who use different and safer fishing methods and fish in areas with characteristics not common in other fishing grounds. Canadian snow crab gear is significantly different from gear used by the lobster fisheries, and poses far greater risks due to its rope size, rigging, heavy traps and the absence of weak links.

66. The Aquarium also misuses broad statistics about the existence of *any* documented injuries or deaths in U.S. or Canadian waters to support the specific charge that “each fishery” using vertical lines, including the Maine lobster fishery “is putting [the right whale] at risk of extinction.”⁴⁴ This statement is false as applied to the Maine lobster fishery. It is directly contradicted by NMFS, which attributes the risk of right whale extinction not to Maine lobster gear, but to “[c]urrent conditions that continue to act on the species, like the effect of Canadian fisheries and vessel strikes in the United States and Canada[.]”⁴⁵

⁴⁴ *Seafood Watch responds to misinformation regarding red ratings of Canadian and U.S. fisheries that pose dire risk to the endangered North Atlantic right whale*, Monterey Bay Aquarium (Sept. 16, 2022), <https://www.montereybayaquarium.org/newsroom/press-releases/seafood-watch-responds-to-misinformation-regarding-red-ratings-of-canadian-and-us-fisheries-that-pose-risk-to-endangered-north-atlantic-right-whale>.

⁴⁵ BiOp at 339.

67. The September 5, 2022 Seafood Watch press release states that “[m]ore than 90% of *entanglements cannot be linked to a specific gear type, and only 12% of entanglements can be linked to a specific location.*” Even so, the Aquarium ignored these facts, concluding, “Until there is more evidence, *all of the fisheries* using this gear are considered a risk.” Ex. 1. The Aquarium’s inference defies logic or common sense; and more critically here, lacks any scientific support. The gear used in the Maine lobster fishery is distinguishable from other gear, such as the kind used to catch snow crab in Canadian waters. If Maine lobster gear actually posed a risk of entanglement for right whales, the gear would surely have been identified in at least one of the entanglements since 2004. There is no basis for the Aquarium’s assumption that unidentified gear should be attributed to “all fisheries” using vertical lines.

68. The Aquarium concedes, “Due to a lack of information, it is often not possible to assign entanglements to a specific fishery.” Nonetheless, the Aquarium concludes, “**Documented entanglements from 2015 to 2019 involving pot/trap gear or unidentified gear are all attributed to unknown fisheries, of which the lobster fishery may be a part.**” Ex. 2 at p. 39 (emphasis added). This is not “science”; it is conjecture: There is no evidence supporting the Aquarium’s statements about the Maine lobster fishery.

69. The Aquarium’s Report acknowledges that Seafood Watch relies on data regarding entanglements that are “unattributed” to any particular fishery, but then asserts that, until more specific information is available, it considers that “all relevant fisheries that *may* overlap with [the North American right whale] pose risks.” (emphasis added). *Id.* at p. 41. In other words, the Aquarium’s “red” rating was based on naked guesswork that all lobster fisheries on the North American east coast are responsible for the unattributed entanglements. There is ample evidence that right whales spend significant amounts of time in parts of their habitat where the risk of entanglement is well documented, *e.g.*, the Gulf of St. Lawrence and areas of Cape

Cod Bay, where whales are known to aggregate at times when their behavior increases the risk of entanglement. The federal Take Reduction Plan and the State of Massachusetts have implemented seasonal closures to address the higher risk posed in these areas. The Canadian fisheries in the Gulf of St. Lawrence have yet to implement similarly effective whale protective measures. In light of these and other well-known areas of heightened risk for right whales in specific parts of its habitat, it is false, misleading and negligent for the Aquarium to represent to consumers and businesses that its “red” rating for the Gulf of Maine, for which there is no comparable record of entanglement risk, was based on a rigorous scientific assessment.

70. The Aquarium’s Report also acknowledges that entanglement in fishing gear is only one of several factors likely contributing to the decline in the right whale population, along with “climate-related shifts in prey distribution, anthropogenic noise, pollution, [and] vessel strikes,” and that the cause of the decrease in the right whale’s population since 2011 “is unknown.” Ex. 2 at p. 39.

71. The Aquarium admits that there has been a northward distributional shift in recent years with the right whale’s presence “decreased in the Scotian Shelf and greater Gulf of Maine.” Ex. 2 at p. 41. In fact, the whales have shown “increased presence farther north in the Gulf of St. Lawrence.” *Id.* These data have been linked to the high rate of mortalities caused by Canadian snow crab gear.⁴⁶ The Aquarium ignores this evidence when assigning blame to Maine lobster fishing practices.

72. Finally, the Aquarium cites outdated studies that support its conclusion while failing to incorporate recent facts demonstrating a significant reduction in the potential harm posed to right whales by lobster fishing.

73. The Aquarium’s Report claims, “Rope strengths have increased in recent decades

⁴⁶ See Meyer-Gutbrod, *supra* note 28.

(based on data from 1994 to 2010), leading to reduced escape success from entangling gear.” *Id.* at p. 40. This *omits all data from the last 13 years* and disregards the implementation in the Maine lobster fishery of “break-aways” or “weak-links” in ropes, which allow entangled whales to break free. Indeed, the Aquarium had all of the 1994-2010 data available to it in 2014, when Seafood Watch assigned a benign “yellow” rating to Maine-caught lobster.

74. When it does acknowledge proactive measures taken to protect right whales, the Aquarium finds reasons to disregard such data. For example, the Report states, “Sinking groundline (2009) and vertical line (2015) regulations have been implemented, resulting in gear configuration changes *for which the effects on mitigation of whale entanglement have yet to be determined.*” *Id.* at 40 (emphasis added). The Aquarium does not adjust its calculations and estimates based on implementation of these harm-reduction measures to provide a rigorous scientific assessment of the effects of mitigation measures on risk to whales.

75. The Aquarium’s disregard for fact-driven analysis and its arbitrary treatment of data to suit its false narrative demonstrate the falsity of its assertions that “scientific data” show that Maine lobster fishing practices threaten North Atlantic right whales with extinction.

iv. The Aquarium ignored requests by Plaintiffs to retract or provide factual support for its false statements.

76. MLA learned around February 2020 that the Aquarium intended to downgrade its rating of American lobster. MLA and other interested parties reached out to the Aquarium repeatedly throughout that year to set the record straight and provided detailed scientific evidence demonstrating the falsity of the claims the Aquarium had made in unreleased draft reports. In multiple meetings and emails between June and September 2020, MLA provided the Aquarium with data showing, inter alia, that Maine lobster fishing was not the cause of right whale entanglements, that there had been a dramatic increase in entanglements in Canadian waters, that ropes being found on entangled whales were wider than those used in Maine, and

that ongoing measures had been implemented to drastically reduce the amount of rope in Maine waters. MLA continued these efforts in 2021 and 2022 and warned the Aquarium that publication of its false claims would mislead consumers about the Maine lobster fishery's impact on right whale mortalities and injuries. Nevertheless, the Aquarium ignored these appeals to the truth and insisted on promoting its unscientific conclusions.

77. On December 1, 2022, Plaintiffs, through their counsel, sent a cease-and-desist letter to the Aquarium demanding that the Aquarium remove Maine lobster from the "red" list and remove or retract all statements claiming that Maine lobster fishing endangers or harms the right whales. (**Exhibit 3**). Plaintiffs described the harm these statements caused and would continue to cause if not removed.

78. On December 9, 2022, the Aquarium's counsel responded that the Aquarium would not retract its statements. (**Exhibit 4**).

79. On December 15, 2022, Plaintiffs' counsel sent a follow-up letter to the Aquarium's counsel, asking that the Aquarium identify any scientific data or other facts that would support the Aquarium's statements about Maine lobster fishing practices. On December 17, 2022, the Aquarium's counsel responded that they would not do so. (**Exhibit 5**).

E. The Aquarium, by Knowingly Making These False Statements, Intentionally Caused Harm to the Maine Lobster Industry, and Plaintiffs in Particular.

80. Seafood Watch's powerful platform influences the commercial decisions of thousands of restaurants, stores, distributors, and other major purchasers of seafood, many of which have pledged to avoid any items that appear on the Seafood Watch "red" list.

81. Decisions to denounce certain products by certification programs like Seafood Watch have immediate and drastic impacts on the market. For example, following a 2013 red-listing by Seafood Watch, around 13,000 restaurants and stores across the U.S. that had made

“sustainability commitments” refused to sell Louisiana shrimp.⁴⁷

82. Based on the publication of the Aquarium’s false statements, several large commercial buyers have announced plans to stop selling Maine lobster,⁴⁸ and there are reports that large restaurant chains are in the process of removing Maine lobster from their menus because of the “red” listing.

83. Plaintiffs have suffered harm as a result, including lost income. As one example, Atwood lost significant profits when one of its major purchasers, citing the Aquarium’s “red” listing, announced in November 2022 that it would stop buying lobster caught in the Gulf of Maine. Atwood has been paying premiums to the lobstermen who catch and supply specifically for this purchaser, because the purchaser requires strict quality control measures that add to the lobstermen’s costs. This premium was originally ten cents more per pound of lobster caught, and increased to fifteen cents per pound on July 1, 2022. In 2022, Atwood paid \$153,194 in these premiums, which were then offset by revenues from the purchaser. Atwood has had to continue paying these premiums even after the purchaser decided to stop buying Atwood’s lobster. Without the purchaser’s business, Atwood has lost and will continue to lose significant revenue to offset the premiums. In 2023, Atwood is projected to pay \$156,965 in premiums, none of which will be recouped from sales to the purchaser. Atwood has suffered a loss of past and future profits in excess of \$75,000.

84. Seafood Watch’s ratings and recommendations also impact the market through their influence on public opinion and consumer choices. The “red” rating of Maine lobster and

⁴⁷ See Benjamin Alexander-Bloch, *Seafood Watch removes Louisiana shrimp from ‘avoid’ list*, NOLA.COM (Jul. 2, 2015), https://www.nola.com/news/environment/article_bd2bfbdd-f131-5c98-aa54-09b61f6bf9f7.html.

⁴⁸ See *Retailers Pull Lobsters From Menus After ‘Red List’ Warning*, NBC NEWS (Sept. 8, 2022), <https://www.nbcnews.com/news/us-news/retailers-pull-lobster-menus-red-list-warning-rcna46886>.

the Aquarium's statements supporting that rating have damaged the Maine lobster brand. They have caused a significant decrease in consumer demand for Maine lobster and, as a result, economic harm to Maine lobstermen. According to the Maine Department of Marine Resources, the average per-pound price of lobster in Maine between September and December 2022 was \$3.89, compared with \$6.59 for the same period in 2021.⁴⁹ At least part of this roughly 40% decline in price is the result of the Aquarium's statements and their influence on consumer and business decisions.

85. Because of the "red" rating, Gerald R. Cushman, the owner of Bug Catcher, has seen an estimated 20% decline in his business, which had made roughly \$600,000 in sales in 2021. Bug Catcher has suffered a loss of past and future profits in excess of \$75,000.

86. BML has suffered lost profits in excess of \$75,000 due to the sharp decline in demand for Maine lobster caused by the Aquarium's statements.

87. MLA has suffered losses in excess of \$75,000 as a result of the Aquarium's false and defamatory statements.

88. MCFA has suffered losses in excess of \$75,000 as a result of the Aquarium's false and defamatory statements.

89. The Aquarium's decisions are thus causing economic harm to Plaintiffs and thousands of people involved in the Maine lobster industry.

90. Each Plaintiff has also suffered ongoing reputational harm, loss of good will, and loss to the brand value of Maine lobster as a result of the Aquarium's defamatory statements, for which Plaintiffs seek injunctive relief. The value to each Plaintiff of the Maine lobster brand, the industry's reputation for sustainable practices and goodwill is substantial, and each Plaintiff will

⁴⁹ See *2004-2022 Maine Commercial Lobster Landings as of 2/22/2023*, Maine Department of Marine Resources, <https://www.maine.gov/dmr/sites/maine.gov.dmr/files/inline-files/LobByCntyMoZone.pdf>.

suffer ongoing harm absent an injunction ordering the Aquarium to remove and retract any and all defamatory statements. The value of such injunctive relief to each Plaintiff exceeds \$75,000.

91. This harm is intentional. When the Aquarium released its updated recommendations and announced that businesses and consumers should avoid buying Maine lobster based on supposed harm to the right whales, it was in possession of scientific data contradicting its claims. There is no evidence that Maine lobster fishing is harming right whales, and the Aquarium does not cite a *single instance* of a right whale being killed, entangled, injured, or otherwise harmed by Maine lobster gear since 2004.

92. The Aquarium thus acted with malice, or alternatively, recklessly, negligently, or with disregard as to the falsity of its statements.

CAUSE OF ACTION – DEFAMATION

93. Plaintiffs incorporate by reference and reassert the allegations in the preceding paragraphs of the Complaint.

94. As set forth herein, Defendants knowingly and intentionally published false and injurious statements disparaging Plaintiffs' products and business, including, among other things, that commercial lobster fishing practices in the Gulf of Maine cause death and serious injury to North Atlantic right whales. Those statements include:

- (a) "At this time, each fishery using this gear is putting this protected species [*i.e.*, the right whale] at risk of extinction."
- (b) "No one wants to know their appetite for seafood is driving a species to extinction."
- (c) "The seafood [rated Avoid] is caught or farmed in ways that harm other marine life or the environment. There's a critical conservation concern or many issues need substantial improvement."

- (d) “[M]anagement measures and the Atlantic Large Whale Take Reduction Plan have not been successful at reducing serious injury and mortality to the North Atlantic right whale[.]”
- (e) “Based on the available information and the significant risks to NARW, the American lobster fishery cannot be considered sustainable.”
- (f) “The updated assessments highlight significant risks of entanglement in pot, trap, and gillnet fisheries to the endangered North Atlantic right whale and the lack of timely, effective management necessary to mitigate entanglement risks and promote recovery of the species.”
- (g) That Seafood Watch reviewed “all available scientific data” and followed a “rigorous, transparent, science-based process to evaluate” the Maine lobster fishery.
- (h) “According to Seafood Watch standards, when fisheries pose a high risk of harm to marine life or the environment and appropriate management measures are not in place, they are assigned a red rating.”
- (i) That consumers should “avoid” and “take a pass” on purchasing lobster and lobster products caught in the Gulf of Maine/Georges Bank region on the basis of these false statements.

95. This is not a situation where the Aquarium merely expressed an opinion regarding the Maine lobster fishery. The totality of these statements, in context, amounts to a representation that the average reader would understand to mean (a) that Maine lobster gear has caused and continues to cause harm to the North Atlantic right whale population that is pushing them to the brink of extinction; (b) that recent increases in right whale mortality have been due to Maine lobster gear; (c) that despite changes in its practices to further prevent entanglements, the

Maine lobster fishery is now endangering the right whale more than it did in 2014 when Seafood Watch rated assigned a “yellow” rating to Maine lobster; and (d) that a general scientific consensus exists on all of these points. The Aquarium has thus knowingly implied an assertion of objective facts about the Maine lobster industry that are verifiably false, and which have caused real economic harm.

96. By assigning the Gulf of Maine/Georges Bank region a “red” rating and urging the public to avoid seafood caught there, the Aquarium has targeted the Maine lobster fishery, despite the absence of any data showing serious injuries or deaths of right whales caused by entanglement with Maine lobster gear. The Aquarium knowingly communicated to the public that “each fishery” using vertical lines was placing the right whale at risk of extinction. In doing so, it specifically assigned responsibility to the Maine lobster industry for events in separate geographic locations and involving entirely different fishing practices. As a result, the Aquarium has steered consumers and businesses to factual conclusions that are false. Falling prices and decisions by large buyers to cut off lobster purchases confirm this.

97. Plaintiffs, and the individuals they employ and represent, depend on the reputation of the Maine lobster brand and robust markets for Maine-caught lobster.

98. The Aquarium’s defamatory statements to customers and prospective customers of Plaintiffs have caused Plaintiffs to lose business.

99. The Aquarium was aware that its statements set forth above were false or made these statements recklessly, negligently, or with disregard as to the falsity of the statements.

100. These statements by the Aquarium set forth above were made with the intent of influencing those who would consume lobster, including customers and business partners upon whom the Plaintiffs rely for commerce. Thousands of businesses, including seafood wholesalers, retailers, distributors, and restaurants use Seafood Watch’s recommendations to

inform their buying decisions, as do individual consumers.

101. The Aquarium's statements were false and were made available to the public through its reports and press releases, which were picked up widely by national media outlets. The statements specifically directed the audience to avoid purchasing Maine-caught lobster.

102. While the Aquarium expressly represented that its statements were based on science, it was not true. Instead, the Aquarium significantly misrepresented actual data, which provide no evidence that any right whale has been entangled in Maine lobster gear in nearly 20 years. By at least 2014 and continuing through September 5, 2022, the Aquarium had assigned a yellow rating to Maine-caught lobsters, telling the public that they were a "good alternative". There was no new "scientific data" available in September 2022 that would warrant the significant change from a "good alternative" rating for Maine-caught lobsters to a red "avoid" warning.

103. The Aquarium used its highly influential Seafood Watch platform to disparage Plaintiffs' business practices. Specifically, Defendant misrepresented statistics and conflated data about unrelated fishing practices in regions other than Maine to unfairly portray the Maine lobster fishery as environmentally unsustainable and as harmful to the right whale population.

104. The statements by the Aquarium set forth above were made with intent to damage Plaintiff's reputation and did in fact do so.

105. The statements by the Aquarium as set forth above were made with the intent of influencing Plaintiffs' existing and potential business relationships.

106. When the Aquarium made the statements, it was aware that the statements were false or made the statements recklessly, negligently, or with disregard as to their falsity. In particular, the Aquarium knew or should have known that there were no data supporting its statements linking death or harm to right whales to Maine lobster fishing practices. The

Aquarium was notified well before publication of their statements by MLA and other parties that the available scientific data did not support its statements.

107. The Aquarium's statements were defamatory *per se* because they were intended to—and did—injure the Plaintiffs in their occupation or profession.

108. The Aquarium's statements also caused damages to Plaintiffs in the form of lost business. As examples of the harm being inflicted on the multi-generational, family businesses that make up the Maine lobster industry, as alleged above, Atwood and Bug Catcher and incurring ongoing business losses directly traceable to the cancellation of contracts by companies who followed the Aquarium's malicious libel by ceasing purchases of Maine lobster. As time passes, these losses are continuing to accumulate.

109. As a direct and proximate result of Defendants' intentional, willful, and malicious acts in publishing false and defamatory statements, each Plaintiff has suffered a significant loss of income in excess of \$75,000, which entitles Plaintiffs to damages.

110. Plaintiffs also seek an injunction ordering the Aquarium to remove and retract any and all defamatory statements from its website and other locations where those statements are published.

111. Continued publication of the Aquarium's defamatory statements constitutes an ongoing violation of Plaintiffs' rights and will cause irreparable harm to Plaintiffs' reputation and to the brand value of Maine lobster that cannot be adequately compensated for by monetary damages, or for which compensation cannot accurately be measured. The value to each plaintiff of the Maine lobster brand, the industry's reputation for sustainable practices and goodwill is substantial. Each Plaintiff will suffer ongoing harm absent an injunction ordering the Aquarium to remove and retract any and all defamatory statements. The value of this injunctive relief to each Plaintiff exceeds \$75,000.

112. The Aquarium is capable of removing any and all false and defamatory statements from its websites and published material without undue burden. An injunction will not cause harm to the Aquarium, or in the alternative, any harm to the Aquarium caused by an injunction is substantially outweighed by the harm Plaintiffs will suffer in the absence of the injunction.

113. Issuance of this injunction would serve the public interest of the State of Maine, whose signature industry has been defamed. Alternatively, issuance of the injunction will not adversely impact the public interest.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court grant the following relief:

- a. Judgment in Plaintiffs' favor on their defamation claim against Defendant;
- b. An injunction requiring Defendant to remove from its websites and other published material all defamatory statements concerning the Maine lobster industry and its fishing practices;
- c. An award of money damages in Plaintiffs' favor, including but not limited to the value of all business Plaintiffs have lost or will lose in the future as a result of Defendant's defamatory statements;
- d. An award of Plaintiffs' reasonable attorney's fees and court costs in an amount to be determined by the Court;
- e. An award of punitive damages; and
- f. Any other relief as the Court deems proper.

DEMAND FOR JURY TRIAL

Plaintiffs demand a trial by jury of all issues so triable.

Dated: Portland, Maine

March 13, 2023

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