NOTES

THE EARLY EIGHT AND THE FUTURE OF CONSUMER LEGAL ACTIVISM TO FIGHT MODERN-DAY SLAVERY IN CORPORATE SUPPLY CHAINS

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INTRODUCTION

On September 28, 2015, a consumer sued a chocolate company.[1] In her complaint, Ms. Elaine McCoy alleged that Nestlé USA deceived her by failing to disclose slavery in its chocolate candy supply chain.[2] Nestlé USA produces some of its most popular products—"Nestle Crunch, 100 Grand, Baby Ruth, Butterfingers, Nestle Toll House, Nestle Hot Cocoa Mix, [and] Nestle Milk Chocolate"—using cocoa beans from Côte d'Ivoire.[3] Those beans are grown by farming cooperatives in which the Fair Labor Association discovered evidence of forced and child labor.[4] Ms. McCoy claimed that Nestlé's continued sourcing from those cooperatives, without disclosing the evidence of slavery to consumers, was a material omission in violation of California consumer protection law.[5]

Ms. McCoy's case was dismissed for failure to state a claim.[6] But Judge Joseph Spero of the Northern District of California acknowledged a troubling reality for socially conscious chocolate lovers: "Nestlé currently cannot trace the cocoa used in a particular Nestlé chocolate product to a specific plantation, and there is thus no way to know what labor practices were used in its production."[7] Nestlé USA[8] signed a 2001 international pact to end "the worst forms of

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1. Complaint for Violation of California Consumer Protection Laws at 1, McCoy v. Nestle USA, Inc., 173 F. Supp. 3d 954 (N.D. Cal. 2016) (No. 15-cv-04451), *appeal filed*, No. 16-15794 (9th Cir. Apr. 29, 2016).

2. *Id.* paras. 10-12.

3. *Id.* para. 3.

4. *Id.* para. 9; FAIR LABOR ASS'N, INDEPENDENT EXTERNAL MONITORING OF NESTLÉ'S COCOA SUPPLY CHAIN IN IVORY COAST: 2014-2015, at 3-4 (2015), http://www.fairlabor.org/sites/default/files/documents/reports/september_2015_nestle_executive_summary.pdf [https://perma.cc/EQZ6-TCB6]. This Note uses the terms "forced labor" and "slavery" synonymously.

5. Complaint for Violation of California Consumer Protection Laws, *supra* note 1, paras.11-13.

6. *See McCoy*, 173 F. Supp. 3d at 972 (holding California's Unfair Competition Law, Consumers Legal Remedies Act, and False Advertising Law did not permit the relief requested by Ms. McCoy).

7. *Id.* at 962.

8. Nestlé USA is a U.S. subsidiary of Nestlé S.A., the largest food company in the world. *Nestlé in the United States*, NESTLÉ, https://www.nestleusa.com/media/press-information-and-resources [https://perma.cc/5WC2-DPZ6]; *see also* Maggie McGrath, *World's Largest Food and Beverage Companies 2017: Nestle, Pepsi and Coca-Cola Dominate the Field*, FORBES (May 24, 2017, 7:00 AM), https://www.forbes.com/sites/maggiemcgrath/2017/05/24/worlds-largest-food-

child labor" and forced labor in cocoa production.[9] However, like many global enterprises, Nestlé USA has struggled to achieve supply-chain awareness,[10] a prerequisite for eliminating slavery from its supply chain.[11]

The International Labour Organization estimates that 24.9 million people globally are trapped in the forced labor economy,[12] which generates an estimated $150 billion in illegal profits per year.[13] Additionally, the U.S. Department of Labor lists 139 goods from 75 countries it believes are produced by child and forced labor.[14] Today's multinational corporations encounter forced labor—nearly always inadvertently—as they contract and subcontract production abroad to cut costs.[15] This problem transcends the chocolate

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and-beverage-companies-2017-nestle-pepsi-and-coca-cola-dominate-the-landscape/#185bd6893a69 [https://perma.cc/M8TY-WSXP].

9. CHOCOLATE MFRS. ASS'N, PROTOCOL FOR THE GROWING AND PROCESSING OF COCOA BEANS AND THEIR DERIVATIVE PRODUCTS IN A MANNER THAT COMPLIES WITH ILO CONVENTION 182 CONCERNING THE PROHIBITION AND IMMEDIATE ACTION FOR THE ELIMINATION OF THE WORST FORMS OF CHILD LABOR 2 (2001), https://web.archive.org/web/20151208022828/http://www.cocoainitiative.org/en/documents-manager/english/54-harkin-engel-protocol/file [https://perma.cc/Y6ST-7MP7]. The Harkin-Engel Protocol, the chocolate industry's attempt at self-regulation, also aimed to produce a slave-free chocolate certification system by 2005. *Id.* at 3. The industry has yet to develop a comprehensive certification system. PAYSON CTR. FOR INT'L DEV. & TECH. TRANSFER, OVERSIGHT OF PUBLIC AND PRIVATE INITIATIVES TO ELIMINATE THE WORST FORMS OF CHILD LABOR IN THE COCOA SECTOR IN CÔTE D'IVOIRE AND GHANA 8 (2011), https://www.dol.gov/ilab/issues/child-labor/cocoa/Tulane_Final_ Report.pdf [https://perma.cc/9S7C-57MF].

10. *See McCoy*, 173 F. Supp. 3d at 962.

11. FAIR LABOR ASS'N, ADDRESSING RISKS OF FORCED LABOR IN SUPPLY CHAINS: PROTECTING WORKERS FROM UNFAIR RESTRICTIONS ON THEIR FREEDOMS AT WORK 7 (2017), http://www.fairlabor.org/sites/default/files/documents/reports/addressing_forced_labor_in_supply_chains_ august_2017.pdf [https://perma.cc/MW97-5HQD].

12. INT'L LABOUR ORG. & WALK FREE FOUND., GLOBAL ESTIMATES OF MODERN SLAVERY: FORCED LABOUR AND FORCED MARRIAGE 9-10 (2017), http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_575479.pdf [https://perma.cc/DD8W-HWKT].

13. INT'L LABOUR ORG., PROFITS AND POVERTY: THE ECONOMICS OF FORCED LABOUR 45 (2014), http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_243391.pdf [https://perma.cc/V2PP-JT3Z].

14. BUREAU OF INT'L LABOR AFFAIRS, U.S. DEP'T OF LABOR, LIST OF GOODS PRODUCED BY CHILD LABOR OR FORCED LABOR 2 (2016), https://www.dol.gov/sites/default/files/documents/ilab/reports/child-labor/findings/TVPRA_Report2016.pdf [https://perma.cc/6LXA-H3TN].

15. *See generally* Doug Guthrie, *Building Sustainable and Ethical Supply Chains*, FORBES (Mar. 9, 2012, 9:09 AM), http://www.forbes.com/sites/dougguthrie/2012/03/09/building-sustainable-and-ethical-supply-chains/#396d117a4179 [https://perma.cc/VV23-2WZH].

industry.[16] Even Patagonia, a socially conscious apparel company and corporate leader in fighting forced labor,[17] discovered evidence of trafficking and exploitation at *most* of the Taiwanese mills producing raw materials for its clothing.[18]

Nongovernmental organizations (NGOs), investors, and consumers have called for increased supply-chain accountability from corporations.[19] International leaders, including former President Barack Obama[20] and British Prime Minister Theresa May,[21] have answered the call. Consequently, public outcry against forced labor in supply chains has changed, and will continue to change, multinational corporations' legal responsibilities.[22]

Many of these efforts, albeit noble, are inadequate to solve the tremendous problem of corporate supply-chain abuses.[23] In 2015, consumers tried a new tactic for holding corporations accountable: consumer activist litigation.[24] Eight groups of California consumers sued multinational corporations, including Costco,[25] Hershey,[26] Nestlé USA,[27] and Mars,[28] for not disclosing human rights abuses

16. BUREAU OF INT'L LABOR AFFAIRS, *supra* note 14, at 30-33 (listing 139 goods including bananas, bricks, coal, cotton, gold, rice, shrimp, and soccer balls).

17. Gillian B. White, *All Your Clothes Are Made with Exploited Labor*, ATLANTIC (June 3, 2015), http://www.theatlantic.com/business/archive/2015/06/patagonia-labor-clothing-factory-exploitation/394658/ [https://perma.cc/8LV4-8B3Y] (explaining how Patagonia cofounded the Fair Labor Association, implemented factory auditing in the mid-1990s, and decreased its number of suppliers). Patagonia should get credit for auditing its "second-tier suppliers," which many corporations avoid, perhaps for fear of discovering too much. *See id.*

18. *Id.*

19. *See* H.R. 3226, 114th Cong. § 2(a)(2) (2015).

20. *See, e.g.*, Exec. Order No. 13,627, 77 Fed. Reg. 60,029 (Sept. 25, 2012).

21. Modern Slavery Act 2015, c. 30 (Eng.), http://www.legislation.gov.uk/ukpga/2015/30/pdfs/ukpga_20150030_en.pdf [https://perma.cc/5WQU-ZHBQ] (sponsored by then-Member of Parliament (MP) Theresa May).

22. *See infra* Part I.

23. *See infra* Part II.

24. *See infra* Part III.

25. Sud v. Costco Wholesale Corp., 229 F. Supp. 3d 1075 (N.D. Cal. 2017), *appeal filed sub nom*. Sud v. Costco, No. 17-15307 (9th Cir. Feb. 21, 2017).

26. Dana v. Hershey Co., 180 F. Supp. 3d 652, 654-55 (N.D. Cal. 2016), *appeal filed*, No. 16-15789 (9th Cir. Apr. 29, 2016).

27. McCoy v. Nestle USA, Inc., 173 F. Supp. 3d 954, 956 (N.D. Cal. 2016), *appeal filed*, No. 16-15794 (9th Cir. Apr. 29, 2016); Barber v. Nestlé USA, Inc., 154 F. Supp. 3d 954, 956 (C.D. Cal. 2015), *appeal filed*, No. 16-55042 (9th Cir. Jan. 7, 2016).

28. Hodsdon v. Mars, Inc., 162 F. Supp. 3d 1016 (N.D. Cal. 2016), *appeal filed*, No. 16-15444 (9th Cir. Mar. 16, 2016); Wirth v. Mars Inc., No. SA CV 15-1470-DOC (KESx), 2016 WL 471234 (C.D. Cal. Feb. 5, 2016), *appeal filed*, No. 16-55280 (9th Cir. Feb. 25, 2016).

within their supply chains.[29] This Note refers to these cases as the "Early Eight." The courts dismissed each of the Early Eight, although six are currently on appeal with the Ninth Circuit.[30]

This Note focuses on the role of consumers in holding corporations accountable for human rights abuses within their supply chains. The launch point for this Note is the following question: Does a socially conscious consumer (here, one that abhors slavery) that unknowingly purchases a good produced with slavery feel a cognizable "harm" such that they should have a cause of action against the producing corporation? The Early Eight attempt to answer that question in the affirmative.[31] This Note argues that it depends.

Specifically, this Note argues that consumers should use existing legal mechanisms to hold corporations accountable for supply-chain practices. In arguing this, this Note neither attempts to solve the complex problem of slavery in corporate supply chains nor suggests this approach presents the proper incentives for corporations to remedy abuses.[32] Rather, it asserts that consumers should seek

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29. The other two "Early Eight" cases are *De Rosa v. Tri-Union Seafoods, LLC*, No. CV 15-07540-CJC(AGRx), 2016 WL 524059 (C.D. Cal. Jan. 15, 2016), and *Hughes v. Big Heart Pet Brands*, No. CV 15-08007-CJC(AGRx), 2016 WL 524057 (C.D. Cal. Jan. 15, 2016).

30. *Sud*, 229 F. Supp. 3d 1075; *Dana*, 180 F. Supp. 3d 652; *McCoy*, 173 F. Supp. 3d 954; *Hodsdon*, 162 F. Supp. 3d 1016; *Wirth*, 2016 WL 471234; *Barber*, 154 F. Supp. 3d 954.

31. *See infra* Part III.

32. This Note leaves those proposals to academics who have written fervently on the topic. *See generally, e.g.*, David J. Doorey, *Who Made That?: Influencing Foreign Labour Practices Through Reflexive Domestic Disclosure Regulation*, 43 OSGOODE HALL L.J. 353, 377-403 (2005) (advocating for the disclosure of factory locations because it would provide meaningful information at a low cost, engage local communities, and help identify companies that "cut and run" from supply-chain problems); Meredith R. Miller, *Corporate Codes of Conduct and Working Conditions in the Global Supply Chain*, *in* THE BUSINESS AND HUMAN RIGHTS LANDSCAPE 432, 459-62 (Jena Martin & Karen E. Bravo eds., 2016) (proposing required corporate disclosure on whether a company has a supplier code of conduct and advocating for "serious commitment[s] to terminat[e] non-compliant suppliers"); Marcia L. Narine, *Living in a Material World—From Naming and Shaming to Knowing and Showing*, *in* THE BUSINESS AND HUMAN RIGHTS LANDSCAPE, *supra*, at 219, 251 (proposing executive compensation clawback provisions to incentivize corporate supply-chain engagement); Kishanthi Parella, *Outsourcing Corporate Accountability*, 89 WASH. L. REV. 747, 802-15 (2014) (advocating for approaches that incentivize supplier engagement instead of buyer-only disclosure regimes); Laura Ezell, Note, *Human Trafficking in Multinational Supply Chains: A Corporate Director's Fiduciary Duty to Monitor and Eliminate Human Trafficking Violations*, 69 VAND. L. REV. 499, 532-40 (2016) (endorsing "[d]uty to [m]onitor" follow-on shareholder litigation after corporate TVPRA liability). This Note examines only the consumer's role in the accountability debate.

legal action after experiencing a cognizable harm, which has not yet occurred.[33]

Future consumer claims may plausibly fare better than the Early Eight.[34] For support, this Note draws on recent consumer protection application in the data privacy context.[35] Additionally, two changes in the supply-chain disclosure context—one actual and one assumed—will likely also play a role.[36] First, the UK Modern Slavery Act of 2015 increased the number of companies required to disclose supply-chain practices and policies,[37] so more disclosures will enter the marketplace. Second, this Note assumes that consumers will continue to increase the demand for ethically sourced products.[38] As companies respond to increased consumer demand, they will compete on supply-chain disclosures,[39] and it is possible that some will misrepresent their practices. Companies misrepresent their data-privacy efforts with some frequency,[40] and a similar phenomenon could occur in the supply-chain context. When a material misrepresentation occurs, consumers or the Federal Trade Commission (FTC) will then have seasonable grounds for consumer redress.[41]

This Note contains four parts. Part I introduces the supply-chain regulatory schemes with which today's corporations must comply. Part II analyzes the most popular regulatory framework—mandatory supply-chain disclosure—and argues its inefficacy in enabling

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33. *See infra* Part III.

34. *See infra* Part IV.

35. *See infra* Part IV.

36. *See infra* Part IV.

37. *See* HOME OFFICE, MODERN SLAVERY AND SUPPLY CHAINS CONSULTATION 15, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/448201/2015-02-12_TISC_Consultation_FINAL.pdf [https://perma.cc/8HLX-YHLH].

38. *See* Bryan Nella, *Consumer Study: Food, Apparel, & Pharmaceutical Industries Face Uphill Battle to Ensure Responsible Overseas Production*, GTNEXUS (Nov. 9, 2015), http://www.gtnexus.com/resources/blog-posts/supply-chain-visibility-and-transparency [https://perma.cc/WM7V-Z58H]. *But see* Michael E. Young & Anthony W. McCoy, *Millennials and Chocolate Product Ethics: Saying One Thing and Doing Another*, 49 FOOD QUALITY & PREFERENCE 43, 52 (2016) (finding millennials "unwilling to pay the substantially higher price necessary" to create organic and ethically sourced products).

39. Natalie Taylor, *HAVI Identifies Five Trends for 2017 Impacting Foodservice Supply Chains*, GROCERY HEADQUARTERS (Mar. 7, 2017, 11:15 AM), http://www.groceryheadquarters.com/News/HAVI-Identifies-Five-Trends-for-2017-Impacting-Foodservice-Supply-Chains/ [https://perma.cc/4RQ8-66TP].

40. *See infra* Part IV.

41. *See infra* Part IV.

consumers to hold corporations accountable. Part III evaluates the Early Eight and the pitfalls of private consumer protection litigation applied in this context. Finally, Part IV argues that, in the future, corporations may misrepresent their supply-chain practices, creating a cognizable consumer harm and enabling consumer redress. A brief conclusion follows.

I. LEGISLATIVE DEVELOPMENTS TO FIGHT FORCED LABOR IN CORPORATE SUPPLY CHAINS

The United States abolished slavery in 1865,[42] yet Americans seemingly remained ignorant of human rights abuses in corporate supply chains until the 1990s.[43] That changed with two events. In the early 1990s, reports revealed that Nike sold shoes made in Indonesian sweatshops.[44] And in 1992, Dateline NBC reported that Wal-Mart sold goods from Bangladeshi factories employing child labor.[45] These incidents sparked a broader public conversation on corporate supply-chain practices, including protests on college campuses and industry engagement.[46] Even with increased modern awareness to the problem in the 1990s, legislatures waited until 2010 to begin combatting human rights abuses in supply chains.[47]

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42. *13th Amendment to the U.S. Constitution*, LIBR. CONGRESS, https://www.loc.gov/rr/program/bib/ourdocs/13thamendment.html [https://perma.cc/XM5V-XKHG].

43. *See generally* Cristina A. Cedillo Torres et al., *Four Case Studies on Corporate Social Responsibility: Do Conflicts Affect a Company's Corporate Social Responsibility Policy?*, 8 UTRECHT L. REV. 51, 51-52 (2012); Jennifer Gordon, *Regulating the Human Supply Chain*, 102 IOWA L. REV. 445, 479 (2017). To be fair, modern corporations did not begin large-scale outsourcing until the late 1980s. *See* Rob Handfield, *A Brief History of Outsourcing*, N.C. STATE U. (June 1, 2006), https://scm.ncsu.edu/scm-articles/article/a-brief-history-of-out sourcing [https://perma.cc/WU4K-ZFVW].

44. *See* Max Nisen, *How Nike Solved Its Sweatshop Problem*, BUS. INSIDER (May 9, 2013, 10:00 PM), http://www.businessinsider.com/how-nike-solved-its-sweatshop-problem-2013-5 [https://perma.cc/J6KQ-3PLX].

45. Thomas C. Hayes, *Wal-Mart Disputes Report on Labor*, N.Y. TIMES (Dec. 24, 1992), http://www.nytimes.com/1992/12/24/business/wal-mart-disputes-report-on-labor.html [https://perma.cc/45RF-6CV2].

46. *See* Nisen, *supra* note 44.

47. *See* Erika C. Collins & Larissa Boz, *Full Disclosure: An Overview of Global Supply Chain Regulations*, PROSKAUER (Mar. 3, 2016), http://www.internationallaborlaw.com/2016/03/03/full-disclosure-an-overview-of-global-supply-chain-regulations/ [https://perma.cc/X2CP-CVK6]. The notable exception was Brazil's "Lista Suja," beginning in 2004, discussed in Part I.A.

Legislative efforts have taken different approaches to incentivize supply-chain accountability. Some employed direct regulation between the government and corporate actors, described in Part I.A. Others prescribed indirect regulation, by strengthening private rights of action against corporations or creating corporate supply-chain disclosure regimes, discussed in Part I.B.

A. Direct Regulations Between Governments and Corporate Actors

In direct or "command-and-control" regulation, governments adopt paternalistic "legal rules backed by [civil or criminal] sanctions."[48] In the supply-chain context, for example, the U.S. Congress could use its Commerce Clause or taxing powers to prohibit, regulate, or tax products in interstate commerce tainted with slave labor.[49]

In the United States, there have been two major direct regulatory developments in the last five years. First, Congress enacted a federal contracting compliance regime, which penalizes federal contractors and subcontractors found to have "engage[d] in" forced labor.[50] Second, Congress closed an eighty-five-year-old customs loophole, bolstering the U.S. Customs and Border Protection's ability to ban imported products tainted with forced labor.[51]

In South America, the Brazilian government implemented an aggressive antislavery scheme in 2004.[52] The regime was called "Lista Suja," or "Dirty List," (List) whereby the Brazilian government "name[d] and shame[d]" companies with forced labor in their supply chains.[53] Membership on the List affected companies in several ways. First, the Brazilian government excluded all List members from bidding on public contracts.[54] Equally important, several

48. Doorey, *supra* note 32, at 366.

49. *See* U.S. CONST. art. I, § 8, cls. 1, 3.

50. *See* National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, §§ 1701-1708, 126 Stat. 1632, 2092-98.

51. *See* Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114-125, § 910, 130 Stat. 122, 239-40 (2016) (repealing the "consumptive demand exception").

52. *See* Ashley Feasley, *Deploying Disclosure Laws to Eliminate Forced Labour: Supply Chain Transparency Efforts of Brazil and the United States of America*, 5 ANTI-TRAFFICKING REV. (SPECIAL ISSUE) 30, 35 (2015).

53. *Id.* at 35-36.

54. *Id.* at 38.

banks and private parties signed a pact agreeing to end dealings with List members.[55] As a result, the List promoted public-private partnership to fight modern-day slavery.[56] Brazil maintained the List for about ten years.[57] In 2014, however, Brazil suspended the List after two companies building stadiums for the 2014 World Cup landed on it, and Brazil reinstated the List in a weaker form in 2015.[58]

Direct regulation often attracts criticism because the regulator underestimates the complexity of the problem, lacks expertise to address it, or both.[59] In contrast, indirect regulation benefits from interested market actors rather than government enforcement.[60] So far, indirect regulation is much preferred in this context.[61]

B. Targeting the Consumer Through Indirect Regulation

Indirect regulation empowers others to impose sanctions on noncompliant entities.[62] The "others" are interested market participants or individuals harmed by the conduct.[63] For example, the Trafficking Victim Protections Reauthorizations Act (TVPRA) of 2008 enabled human trafficking victims to obtain civil redress against corporations that benefit financially from their labor.[64]

Corporate information disclosure is a popular form of indirect regulation.[65] Disclosure regimes merely require companies to release information.[66] Through this mechanism, the government actor attempts to "influence normative practices *indirectly* by shaping the

55. *Id.* at 36-37.
56. *See id.*
57. *Cf. id.* at 39.
58. *Id.* at 38-40.
59. Doorey, *supra* note 32, at 367.
60. *See id.* at 366-68.
61. *See id.* at 367-68; *infra* Part II.
62. *See* Doorey, *supra* note 32, at 366-68.
63. *Id.*
64. *See* Trafficking Victims Protection Reauthorization Act, 18 U.S.C. §§ 1589, 1595 (2012). For a full treatment of the TVPRA's application to multinational corporations, see Ezell, *supra* note 32, at 518-30.
65. *See* Doorey, *supra* note 32, at 353.
66. Alexandra Prokopets, Note, *Trafficking in Information: Evaluating the Efficacy of the California Transparency in Supply Chains Act of 2010*, 37 HASTINGS INT'L & COMP. L. REV. 351, 354-55 (2014).

context in which society's various actors and subsystems interact and bargain with one another."[67]

In this context, two existing regimes—California's Transparency in Supply Chains Act of 2010 and the UK's Modern Slavery Act 2015—require corporations to disclose "efforts" taken to monitor and eradicate slavery from their supply chains.[68] A third and often-proposed congressional regime, if passed, would require supply-chain disclosures to the Securities and Exchange Commission (SEC).[69]

These disclosure regimes are presented as powerful weapons to fight modern-day slavery.[70] They begin by recognizing consumers' collective buying power as sufficient to change business practices.[71] They also purport to empower consumer activists in two ways. First, in response to companies disclosing supply-chain abuses, consumers can impose marketplace sanctions, such as boycotts or social media shaming.[72] This risk of reputational harm creates an indirect incentive for companies to remedy supply-chain abuses ex ante.[73] Second, consumer advocates can use disclosures to make purchasing decisions among competing brands.[74] By rewarding clean companies and punishing bad actors, consumers can effect changes in corporate behavior.[75]

As Louis Brandeis famously wrote, "Sunlight is said to be the best of disinfectants."[76] In the supply-chain context, mandatory corporate disclosure is the "sunlight" believed to alter corporate behavior.[77]

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67. *See* Doorey, *supra* note 32, at 357 (emphasis added).

68. *See* CAL. CIV. CODE § 1714.43(a)(1) (West 2017); Modern Slavery Act 2015, c.30, § 54(4) (Eng.).

69. *See* S. 1968, 114th Cong. § 3 (2015); H.R. 3226, 114th Cong. § 3 (2015); H.R. 4842, 113th Cong. § 3 (2014); H.R. 2759, 112th Cong. § 2 (2011).

70. *See, e.g.*, 2010 Cal. Legis. Serv. 2642 (West) (recognizing consumers can "force the eradication of slavery and trafficking by way of their purchasing decisions").

71. *See id.* ("Absent publicly available disclosures ... [c]onsumers are at a disadvantage in being able to force the eradication of slavery and trafficking by way of their purchasing decisions."); *see also* S. 1968 § 2; H.R. 3226 § 2; HOME OFFICE, TRANSPARENCY IN SUPPLY CHAINS ETC.: A PRACTICAL GUIDE para. 2.8 (2015), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/471996/Transparency_in_Supply_Chains_etc__A_practical_guide__final_.pdf [https://perma.cc/84H2-KT77].

72. *See* HOME OFFICE, *supra* note 71, para. 2.8.

73. *Id.*

74. *See* 2010 Cal. Legis. Serv. 2642; *see also* H.R. 3226 § 2(b)(3)-(4).

75. *See generally* H.R. 3226 § 2(b)(3)-(4); 2010 Cal. Legis. Serv. 2642.

76. LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (1914).

77. *See infra* Part II.

II. WHY SUPPLY-CHAIN DISCLOSURE LAWS FAIL AS CONSUMER ACTIVIST TOOLS

Although the existing disclosure regimes—the California Transparency in Supply Chains Act of 2010 and the UK Modern Slavery Act 2015—aim to empower collective consumer action,[78] fundamental flaws in their designs limit their efficacy.[79] Their two main flaws are drafting imprecision and the lack of a meaningful enforcement mechanism.[80] Other regimes, such as the often-proposed U.S. Business Supply Chain Transparency on Trafficking and Slavery Act and the French "Corporate Duty of Vigilance" Law, for the reasons discussed below,[81] also appear unlikely to empower significant, collective consumer action.

A. The California Transparency in Supply Chains Act of 2010

The California Transparency in Supply Chains Act (California Act) requires "retail seller[s] and manufacturer[s] doing business in [California]" and generating over $100 million in annual revenue to disclose their "*efforts* to eradicate slavery and human trafficking from [their] direct supply chain[s]."[82] The California Act denotes specific categories of efforts, *if taken*, which a company must disclose[83] and requires access to the disclosure on the company's

78. *See supra* notes 70-75 and accompanying text.

79. *See infra* Parts II.A-B.

80. *See infra* Parts II.A-B.

81. *See infra* Parts II.C-D.

82. CAL. CIV. CODE § 1714.43(a)(1) (West 2017) (emphasis added). "Doing business in [California]" is defined by CAL. REV. & TAX. CODE § 23101 as any of the following: (1) domiciled in California, (2) generates revenue of $500,000 or 25 percent of the corporation's total revenue in California, (3) maintains property of over $50,000 or 25 percent of the company's total property in California, or (4) pays compensation of over $50,000 or 25 percent of the company's total compensation to California employees. CAL. CIV. CODE § 1714.43(a)(2)(A); CAL. REV. & TAX. CODE § 23101(b)(1)-(4) (West 2018). Thus, the phrase "doing business," though seemingly benign, is a major limitation in the Act's scope. *See* CAL. REV. & TAX. CODE § 23101(b)(1)-(4).

83. A covered entity must "disclose to what extent, if any," it:

> (1) Engages in verification of product supply chains to evaluate and address risks of human trafficking ....
>
> (2) Conducts audits of suppliers to evaluate supplier compliance with company standards for trafficking and slavery in supply chains....

website.[84] In essence, if a covered entity takes any "efforts" to evaluate or address supply-chain problems, the California Act forces disclosure of those efforts.[85]

The California Act's legislative history expressly identifies consumers as a target audience for the disclosures.[86] For instance, the California Act states that consumers were (before the Act) "inadvertently promoting and sanctioning" forced labor by purchasing slave-derived products.[87] Furthermore, it explains that without these disclosures, consumers are "disadvantage[d]" in their inability (1) "to distinguish companies on the merits of their efforts to supply products free from the taint of slavery," and thus also (2) "to force the eradication of slavery ... by way of their purchasing decisions."[88] The California Act, therefore, presents itself as a consumer empowerment bill.

Despite the California Act's vision as a consumer tool, a few defects are apparent on its face. First, the law requires only disclosure of "*efforts* to eradicate slavery and human trafficking."[89] Disclosing "efforts" is different than disclosing whether the company *actually has* forced labor in its supply chain. Only the former is required.[90] Moreover, a company could comply fully by disclosing "no efforts taken."[91] As a result, the California Act's disclosures retain little

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> (3) Requires direct suppliers to certify that materials incorporated into the product comply with the laws regarding slavery and human trafficking of the country or countries in which they are doing business.
> (4) Maintains internal accountability standards and procedures for employees or contractors failing to meet company standards regarding slavery and trafficking.
> (5) Provides company employees and management, who have direct responsibility for supply chain management, training on human trafficking and slavery, particularly with respect to mitigating risks within the supply chains of products.

CAL. CIV. CODE § 1714.43(c)(1)-(5).

84. *Id.* § 1714.43(b). For a searchable database of all Transparency statements, see *SB 657 Disclosure Search*, KNOWTHECHAIN, https://knowthechain.org/sb657-search/ [https://perma.cc/2XWP-F8FK].

85. CAL. CIV. CODE § 1714.43(a)(1).

86. 2010 Cal. Legis. Serv. 2642 § 2(h)-(j) (West).

87. *Id.* § 2(h).

88. *Id.* § 2(i).

89. CAL. CIV. CODE § 1714.43(a)(1) (emphasis added).

90. *See id.*

91. *Id.* § 1714.43(c) ("The disclosure ... shall ... disclose to what extent, *if any*, that the [company] does each of the following..." (emphasis added)); KAMALA D. HARRIS, CAL. DEP'T OF

usefulness for the socially conscious consumer.[92] For example, a company that takes "no efforts" might face zero supply-chain risk, whereas a company that discloses its several efforts may utilize a supply chain with significant forced labor.[93]

Second, the California Act only mandates disclosure of efforts taken in a company's "direct supply chain," rather than its "extended" or "ultimate" supply chain.[94] In supply-chain-management parlance, a "direct" supply chain entails "a company, a supplier, and a customer."[95] Conversely, an "extended" supply chain entails the entity and two links on either side (supplier and customer), and an "ultimate" supply chain consists of every link from the "ultimate supplier to the ultimate customer."[96] As the introductory Patagonia example suggests, companies with clean first-tier suppliers may have forced labor at the second or third tiers.[97] A consumer relying on a company's California disclosure might be misled to believing many efforts in a "direct supply chain" correlates with little to no slavery in the ultimate supply chain.[98]

Several other technical weaknesses limit consumers' ability to hold companies accountable. For instance, the seemingly benign phrase "[d]oing business in [California]" limits the scope of covered entities.[99] The California Act limits itself again, to covering only "retail seller[s] [or] manufacturer[s]" as defined by a corporation's California tax filing.[100] Additionally, the law does not require periodic updates.[101] Thus, a company could remain in compliance by

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JUSTICE, THE CALIFORNIA TRANSPARENCY IN SUPPLY CHAINS ACT: A RESOURCE GUIDE 4 (2015), https://oag.ca.gov/sites/all/files/agweb/pdfs/sb657/resource-guide.pdf [https://perma.cc/L8VV-GWF9].

92. *See* Prokopets, *supra* note 66, at 362-63.

93. *Id.*

94. CAL. CIV. CODE § 1714.43(a)(1). *See generally* John T. Mentzer et al., *Defining Supply Chain Management*, J. BUS. LOGISTICS, Autumn 2001, at 1, 4.

95. Mentzer, *supra* note 94, at 4.

96. *Id.*

97. *See* White, *supra* note 17; *see also* ADIDAS GROUP, MODERN SLAVERY RISK ASSESSMENT 3-4 (2016), https://business-humanrights.org/sites/default/files/documents/adidasGroup_Summary_Modern%20Slavery%20Risk%20Assessment_Aug2016rev%20%28002%29.pdf [https://perma.cc/EJB2-VCZX] (identifying "Tier 2" and "Tier 3" modern-slavery risks).

98. Mentzer, *supra* note 94, at 4.

99. *See supra* note 82.

100. CAL. CIV. CODE § 1714.43(a)(1), (a)(2)(c)-(d) (West 2017).

101. KNOWTHECHAIN, INSIGHTS BRIEF: FIVE YEARS OF THE CALIFORNIA TRANSPARENCY IN SUPPLY CHAINS ACT 8 (2015), https://knowthechain.org/wp-content/uploads/2015/10/KnowThe

publishing one statement and never updating it.[102] Finally, the California Act does not require public disclosure of the covered entities, which limits consumers' ability to discern whether a nondisclosing company is in violation of the law or simply not covered.[103]

The largest defect of the California Act, however, is its enforcement mechanism (or lack thereof). The "exclusive remedy" for failed disclosure is "an action brought by the [California] Attorney General for injunctive relief."[104] In other words, the only remedy against noncompliance is the California Attorney General suing to force the corporation's disclosure (compliance) under the Act.[105] No financial penalty may be levied against noncompliant corporations.[106] Nor can consumers sue under the California Act to force compliance.[107] Thus, the law imposes no real penalty for companies that fail to comply or that insufficiently comply.

The results of the California Act—in effect since January 1, 2012[108]—have been mixed. One recent study found that only 31 percent of companies surveyed had a disclosure statement in compliance with all of the Act's requirements.[109] In a consistent finding, another study found only 62 percent of covered companies disclosed and gave only 41 percent of disclosing companies a passing score.[110] Several household companies—such as Guess?, Intuit,

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Chain_InsightsBrief_093015.pdf [https://perma.cc/MX9E-7H5D].

102. Prokopets, *supra* note 66, at 363.

103. KNOWTHECHAIN, *supra* note 101, at 5; Jonathan Todres, *Legal Glitch Means Trafficking Transparency Law Isn't So Transparent*, CNN (June 16, 2015, 7:08 AM), http://edition.cnn.com/2015/06/16/opinions/california-transparency-supply-chains-law-trafficking/ [https://perma.cc/EW8M-TXKM].

104. CAL. CIV. CODE § 1714.43(d).

105. *See id.*

106. *See id.*

107. *See id.*

108. Morgan Windsor, *In California, Companies Struggle to Combat Human Trafficking, Slavery in Compliance with Transparency in Supply Chain Act: Report*, INT'L BUS. TIMES (Nov. 4, 2015, 2:30 PM), http://www.ibtimes.com/california-companies-struggle-combat-human-trafficking-slavery-compliance-2169350 [https://perma.cc/UM39-TVH5].

109. KNOWTHECHAIN, *supra* note 101, at 5.

110. DEV. INT'L, CORPORATE COMPLIANCE WITH THE CALIFORNIA TRANSPARENCY IN SUPPLY CHAINS ACT OF 2010, at 2 (2015), http://media.wix.com/ugd/f0f801_0276d7c94ebe453f8648b91dd35898ba.pdf [https://perma.cc/BD2N-M2U6].

K-Swiss, Vulcan Materials, and Netflix—as of the date of this Note, have not published a Transparency statement.[111]

Despite the lackluster results, in some ways, studies like those above are exactly what the California Act aimed to encourage: NGOs and private parties holding companies accountable through nonlegal means.[112] Furthermore, benchmark studies, such as a recent study of the food and beverage industry,[113] promote comparisons between corporations, encourage industry standards, and create competition on efforts and transparency.[114] For instance, the *Food and Beverage Benchmark Findings Report* on supply-chain disclosures rated Unilever a "65" (the highest of 20 studied), Coca-Cola a "58," Pepsi a "45," Tyson a "13," Kraft Heinz a "9," and Monster a "0" (the lowest).[115] Whether consumers will begin to purchase Coca-Cola over Pepsi because of these comparisons remains to be seen.

B. UK Modern Slavery Act 2015

The UK Modern Slavery Act (MSA) became law in March 2015.[116] The MSA requires companies to publish supply-chain transparency statements similar to those of the California Act.[117] In particular,

111. *Compare* KnowTheChain, *See Which Companies Do and Do Not Have Statements Under the California Transparency in Supply Act*, BUS. & HUM. RTS. RESOURCE CTR., https://business-humanrights.org/en/know-the-chain-%E2%80%93-see-which-companies-do-and-do-not-have-statements-under-the-california-transparency-in-supply-chains-act [https://perma.cc/53XB-3V8T], *with* KNOWTHECHAIN, *supra* note 84. Guess?, however, published in-depth supply-chain data, policies, and commitments in its most recent *Sustainability Report*. *See* GUESS?, FISCAL 2016-2017 SUSTAINABILITY REPORT 36-43 (2017), http://sustainability.guess.com/wp-content/uploads/2017/09/GUESS-FY16-17-Sustainability-Report.pdf [https://perma.cc/EZT3-HQQU]. Additionally, Intuit maintains a Supplier Code of Conduct on its website. *See Supplier Code of Conduct*, INTUIT, https://www.intuit.com/company/strategic-sourcing/supplier-code-of-conduct/ [https://perma.cc/W72K-SUSX].

112. *See* 2010 Cal. Legis. Serv. 2642 § 2(h)-(j) (West).

113. *See id.*; KNOWTHECHAIN, FOOD & BEVERAGE BENCHMARK FINDINGS REPORT 6 (2016), https://knowthechain.org/wp-content/plugins/ktc-benchmark/app/public/images/benchmark_reports/KTC_Food_Beverage_Findings_Report_October.pdf [https://perma.cc/2SKK-2JXC].

114. *See* KNOWTHECHAIN, *supra* note 113, at 4, 7.

115. *See id.* at 9.

116. *See Modern Slavery Act 2015*, PARLIAMENT.UK, http://services.parliament.uk/bills/2014-15/modernslavery.html [https://perma.cc/7CNV-KMCM].

117. *See* Modern Slavery Act 2015 c. 30, § 54 (Eng.). For an updated database of MSA statements, see *Modern Slavery Registry*, BUS. & HUM. RTS. RESOURCE CTR., http://www.modernslaveryregistry.org [https://perma.cc/4LB2-RP3J] (listing links to over 2900 MSA

the MSA covers "commercial organisation[s]" that do business in the UK and earn more than £36 million globally per year,[118] and requires them to disclose "steps ... taken during the financial year to ensure that slavery and human trafficking is not taking place ... in any of its supply chains."[119] Again, the same rule applies: if a company takes "steps," it must disclose them.

Several improvements from the California Act are discernable. First, the scope of companies covered under the MSA is far greater than those covered under the California Act.[120] Parliament estimated that 12,259 companies would be subject to the MSA disclosure requirements,[121] whereas only an estimated 1700 companies are subject to the California Act.[122] Second, the MSA covers steps taken in "any of [a corporation's] supply chains," as opposed to just one's direct supply chain.[123] Finally, the MSA requires yearly updates.[124]

However, the MSA suffers from the same fatal flaw as the California Act—the lack of meaningful enforcement against companies that fail to disclose. Like the California Act, the MSA only provides injunctive relief by the Secretary of State for noncompliance.[125] There are no financial or criminal penalties for noncompliance, and consumers again lack a cause of action.[126] Rather, Parliament hopes that consumers, investors, and NGOs "engage and/or apply pressure" on businesses failing to disclose.[127]

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statements).

118. Modern Slavery Act 2015, c.30, § 54(1)-(2); HOME OFFICE, *supra* note 71, para. 2.2.

119. Modern Slavery Act 2015, c.30, § 54(4)(a). Unlike the California bill, which requires specific categories of disclosures, *see* CAL. CIV. CODE § 1714.43(c) (West 2017), the MSA merely recommends specific categories of disclosures, *see* Modern Slavery Act 2015, c.30, § 54(5)(a)-(f).

120. *See* HOME OFFICE, *supra* note 37, at 15. This is because the statute has a lesser annual revenue threshold and because it defines "commercial organisation[s]" as all companies that "suppl[y] goods or services," not limiting itself to narrowly defined categories of "retai[l] sellers [or] manufacturer[s]." *Compare* Modern Slavery Act 2015, c.30, § 54(1)-(2), *with* CAL. CIV. CODE § 1714.43(a)(1), (a)(2)(C)-(D).

121. *See* HOME OFFICE, *supra* note 37, at 15 tbl.1.

122. HARRIS, *supra* note 91, at 3.

123. Modern Slavery Act 2015, c.30, § 54(4)(a)(i).

124. *Id.* § 54(4)(a) (requiring the statement include the "steps ... taken during the financial year").

125. *Id.* § 54(11).

126. *Id.*

127. HOME OFFICE, *supra* note 71, para. 2.8.

Because of its recency it is unclear whether the MSA has been effective. The first businesses required to disclose were ones with a year-end of March 31, 2016, and Parliament recommended a deadline of September 30, 2016.[128] However, one study of 239 early reporting companies found a disappointing 35 percent failed to discuss their risk-assessment process and that "most statements ... provide little detail beyond general commitments and broad indications of processes."[129] In another survey, out of 34 companies, only 62 percent were confident in understanding their supply-chain risks after preparing their MSA statement.[130] On a positive note, 76 percent of responders believed their directors are more involved with supply-chain risk discussions after preparing their MSA statement.[131]

C. The Oft-Proposed U.S. Business Supply Chain Transparency on Trafficking and Slavery Act

U.S. Congresswoman Carolyn Maloney has proposed a supply-chain transparency bill in each of the past three congressional terms.[132] Her bill, the U.S. Business Supply Chain Transparency on Trafficking and Slavery Act (U.S. Bill), differs significantly from the existing disclosure regimes in that it would amend section 13 of the Securities Exchange Act of 1934 and require annual supply-chain disclosures in SEC filings.[133] In other words, the U.S. Bill would nationalize a supply-chain disclosure regime for public companies.[134] In the most recent congressional term, Senator Richard Blumenthal introduced a companion bill.[135] Although a similar bill has not been

128. *Id.* para. 8.4 ("[W]e would encourage organisations to report within six months of ... year end.").

129. ERGON ASSOCS., REPORTING ON MODERN SLAVERY: THE CURRENT STATE OF DISCLOSURE 3 (2016), http://ergonassociates.net/wp-content/uploads/2017/06/Reporting-on-Modern-Slavery 2-May-2016.pdf [https://perma.cc/FVE2-MRQ2].

130. ERGON, HAS THE MODERN SLAVERY ACT HAD AN IMPACT ON YOUR BUSINESS? 6 (2016), https://www.business-humanrights.org/sites/default/files/documents/msa-report-ergon-oct 2016.pdf [https://perma.cc/TNE6-TDDZ].

131. *Id.* at 4.

132. *See* H.R. 3226, 114th Cong. (2015); H.R. 4842, 113th Cong. (2014); H.R. 2759, 112th Cong. (2011).

133. *See* S. 1968, 114th Cong. § 3 (2015). For discussion on the SEC's disclosure authority beyond material financial information, see H.R. 3226 § 3; Doorey, *supra* note 32, at 388-90.

134. *See* H.R. 3226 § 3.

135. S. 1968.

introduced in the 115th Congress, momentum suggests it is only a matter of time. Last term's Senate companion bill is a positive sign, and the U.S. Bill's last introduction in the House was met with several new cosponsors.[136]

If reintroduced and passed, the U.S. Bill would require public issuers with greater than $100 million in global revenue annually to disclose their "measures taken" to "combat" the use of forced labor and human trafficking in their supply chains.[137] Like the MSA, the U.S. Bill defines "supply chain" broadly and would require annual updates.[138] Several other similarities exist between the existing regimes and the U.S. Bill. First, the U.S. Bill acknowledged its role to inform and shape consumer purchases.[139] Also, the U.S. Bill suggests a covered entity could comply by writing "no measures taken."[140]

The U.S. Bill would require disclosure beyond the other regimes—specifically, if a corporation takes any effort "to evaluate and address the risks of forced labor," the disclosure must "describe *any risks identified* within the supply chain, *and the measures taken toward eliminating those risks*."[141] Both the California Act and the MSA require disclosure only of "efforts" or "steps" taken—neither law forces affirmative disclosure of the risks identified.[142] Presumably consumers would rather know about "risks identified" than "steps taken," as the latter may not correlate with the amount of forced labor in one's supply chain.[143] However, requiring "risks

136. *See Cosponsors: H.R. 3226—114th Congress (2015-2016)*, CONGRESS.GOV, https://www.congress.gov/bill/114th-congress/house-bill/3226/cosponsors [https://perma.cc/WB26-W26C]; *Cosponsors: H.R. 4842—113th Congress (2013-2014)*, CONGRESS.GOV, https://www.congress.gov/bill/113th-congress/house-bill/4842/cosponsors [https://perma.cc/FB6T-YSQQ]; *Cosponsors: H.R. 2759—112th Congress (2011-2012)*, CONGRESS.GOV, https://www.congress.gov/bill/112th-congress/house-bill/2759/cosponsors [https://perma.cc/HGT2-5LPY].

137. S. 1968 § 3; H.R. 3226 § 3.

138. H.R. 3226 § 3 (defining "supply chain" as "all labor recruiters, suppliers of products, component parts of products, and raw materials used ... in manufacturing [an] entity's products"); *see also* S. 1968 § 3 (same).

139. *See* S. 1968 § 2; H.R. 3226 § 2.

140. H.R. 3226 § 3 (requiring disclosures to "describ[e] to what extent, if any, the covered issuer conducts any of the following"); *see also* S. 1968 § 3 (same).

141. S. 1968 § 3 (emphasis added); H.R. 3226 § 3 (same).

142. *See* CAL. CIV. CODE § 1714.43(a)(1) (West 2017); Modern Slavery Act 2015, c. 30, § 54(4)(a) (Eng.).

143. *See generally supra* notes 89-93 and accompanying text.

identified" is tantamount to requiring a corporation to disclose whether there is forced labor in their supply chain, something the prior disclosure regimes have avoided.

It is unclear whether requiring disclosure of "risks identified" would survive a First Amendment challenge under *National Association of Manufacturers (NAM) v. SEC*.[144] *NAM* examined the SEC's Conflict Minerals Rule, a similar rule to the U.S. Bill. There, the D.C. Circuit held the SEC's Conflict Minerals Rule's requirement that companies using "conflict minerals" disclose whether their products were "conflict free" or "not conflict free" was unconstitutional.[145] The D.C. Circuit concluded forcefully, "By compelling an issuer to confess blood on its hands, the statute interferes with that exercise of the freedom of speech under the First Amendment."[146] Because the U.S. Bill is similar to the Conflict Minerals Rule, the U.S. Bill could be weakened by a First Amendment challenge.

Another major difference between the existing regimes and the U.S. Bill is the enforcement mechanism. Amending the Securities Exchange Act of 1934 would subject companies to SEC scrutiny and potential penalty for material omissions or misrepresentations in their disclosures.[147] Furthermore, while the U.S. Bill does not provide an express consumer mechanism for holding issuers accountable, investors can bring private actions for an issuer's material omission or misrepresentation.[148]

While the bill seems more promising than the California Act from a consumer-accountability standpoint, there are two major hurdles to its passage. First, the SEC has expressed reluctance to accept the responsibility for verifying supply-chain disclosures.[149] In fact, the SEC significantly rolled back enforcing its Conflict Minerals Rule in April 2017.[150] Second, it is unclear whether there is sufficient

144. 800 F.3d 518 (D.C. Cir. 2015); *see also* Nat'l Ass'n of Mfrs. (NAM) v. SEC, No. 1:13-cv-00635-KBJ, 2017 WL 3503370, *1, (D.D.C. Apr. 3, 2017).

145. *See NAM*, 800 F.3d at 530-31.

146. *Id.* at 530 (quoting Nat'l Ass'n of Mfrs. (NAM) v. SEC, 748 F.3d 359, 371 (D.C. Cir. 2014)).

147. *See* 15 U.S.C. § 78r (2012); 17 C.F.R. 240.10b-5 (2016).

148. *See* 15 U.S.C. § 78r.

149. *See* Jeff Schwartz, *The Conflict Minerals Experiment*, 6 HARV. BUS. L. REV. 129, 142 (2016).

150. Sarah N. Lynch, *SEC Halts Some Enforcement of Conflict Minerals Rule amid Review*, REUTERS (Apr. 7, 2017, 3:23 PM), https://www.reuters.com/article/us-usa-sec-conflictminerals/

political appetite to pass this kind of bill. In late 2016, GovTrack, a website that predicts the likelihood of a bill's passage, gave the bill a 1 percent chance.[151]

For these reasons, the existing and proposed disclosure regimes fall short as useful tools for consumers to hold corporations accountable for supply-chain risks relating to forced labor. Weak enforcement mechanisms in the California Act and the MSA allow corporations to avoid disclosure or provide general policies of little use to consumers. Finally, while the oft-proposed U.S. Bill would require "risks identified," combined with a powerful enforcement arm, constitutional and administrative hurdles make the bill unlikely to pass in the near term.

D. 2017: The French "Corporate Duty of Vigilance" Law, the Dutch Child Labour Due Diligence Bill, and Other International Developments

European nations appear eager to increase corporate accountability for human rights abuses within supply chains.[152] In February 2017, both the French and Dutch Parliaments adopted new corporate due-diligence laws.[153] The Dutch bill still requires final approval by the Dutch Senate before becoming law.[154] Because of their recency, this Note merely introduces these laws and leaves their impact to future studies.

On February 21, 2017, the French Parliament passed a law that will impose a "corporate duty of vigilance" on large French corpora-

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sec-halts-some-enforcement-of-conflict-minerals-rule-amid-review-idUSKBN1792WX?cid=12232 [https://perma.cc/VD5M-Q43P].

151. *H.R. 3226 (114th): Business Supply Chain Transparency on Trafficking and Slavery Act of 2015*, GOVTRACK, https://www.govtrack.us/congress/bills/114/hr3226 [https://perma.cc/2HS7-6B5X]; *S. 1968 (114th): Business Supply Chain Transparency on Trafficking and Slavery Acts of 2015*, GOVTRACK, http://www.govtrack.us/congress/bills/114/s1968 [https://perma.cc/P746-AN5F].

152. *See France Adopts Corporate Duty of Vigilance Law: A First Historic Step Towards Better Human Rights and Environmental Protection*, EUR. COALITION FOR CORP. JUST. (Feb. 21, 2017), http://corporatejustice.org/news/393-france-adopts-corporate-duty-of-vigilance-law-a-first-historic-step-towards-better-human-rights-and-environmental-protection [https://perma.cc/P6M2-5NDF].

153. *Id.*

154. *Id.*

tions.[155] The law presents the most aggressive requirements to date.[156] Starting January 1, 2018,[157] covered entities must publish an annual "vigilance plan," which entails "[a] mapping that identifies, analyses and ranks [supply-chain] risks"; regular assessments of subcontractors and suppliers; actions against human rights violations; reporting mechanisms; and annual public updates.[158] Unlike the existing disclosure regimes, failing to comply has meaningful consequences.[159] The law grants private parties and victims a private right of action against corporations failing to comply, and a court may fine a delinquent corporation up to €10 million.[160]

The French law's scope, however, is limited.[161] The law defines covered entities as (1) French-headquartered corporations with five thousand employees, including subsidiaries, or (2) a French corporation, even headquartered abroad, with ten thousand employees.[162] Accordingly, the law will only cover 100-150 French corporations.[163]

The Dutch Child Labour Due Diligence Law, if passed by the Dutch Senate, would take effect on January 1, 2020.[164] This bill is much broader than the French law, because it would cover all companies that sell products to Dutch consumers, presumably

155. *Id.*

156. Littler Mendelson's Bus. & Human Rights Practice Grp. & Alexandre Roumieu, *Proposed French Law Would Impose New Due Diligence Obligations on Certain Employers and Their Supply Chains*, LITTLER (Dec. 12, 2016), https://www.littler.com/publication-press/publication/proposed-french-law-would-impose-new-due-diligence-obligations-certain [https://perma.cc/7K7Y-EPH5].

157. *Devoir de Vigilance: Que Le Parcours fut Long!*, SYNDICAT CFTC (Feb. 23, 2017), https://www.cftc.fr/wp-content/uploads/2017/02/CP-23022017-devoir-de-vigilance-V2.pdf [https://perma.cc/TS3S-6PXX].

158. French Duty of Vigilance Bill, art. 1(L) 255-102-4, § 1 (2016), *available in English at* https://business-humanrights.org/en/french-duty-of-vigilance-bill-english-translation [https://perma.cc/HM88-HPBQ].

159. *See id.*

160. *Id.* arts. 1-2.

161. EUROPEAN COAL. FOR CORP. JUSTICE, FRENCH CORPORATE DUTY OF VIGILANCE LAW: FREQUENTLY ASKED QUESTIONS no. 3 (2017), http://corporatejustice.org/documents/french-corporate-duty-of-vigilance-law-faq.pdf [https://perma.cc/4WFR-UW6S].

162. French Duty of Vigilance Bill, art. 1.

163. EUR. COALITION FOR CORP. JUSTICE, *supra* note 152, no. 3.

164. Gerard Oonk, *Child Labour Due Diligence Law for Companies Adopted by Dutch Parliament*, INDIA COMMITTEE NETH. (Feb. 8, 2017), http://www.indianet.nl/170208e.html [https://perma.cc/T5UH-H4YD].

thousands.[165] It would require companies to assess whether child labor exists within the supply chains of products sold to Dutch consumers, take actions to mitigate against those abuses, and make public declarations of those assessments.[166]

Finally, there appears to be momentum of supply-chain disclosure bills in Switzerland, Belgium, Spain, and Australia.[167] The future impact of these bills remains to be seen. At a minimum, it appears that multinational corporations will be forced to disclose more about their supply chains, which implicates the future of consumer protection litigation.[168]

III. NEW CONSUMER ACTIVISM: STRATEGIC CONSUMER LITIGATION TO HOLD CORPORATIONS ACCOUNTABLE FOR SUPPLY-CHAIN RISKS

In August 2015, consumers filed the first consumer class action against a corporation for selling goods produced, in part, by forced labor.[169] This marked a novel turn in consumer activism: consumers seeking legal accountability for a corporation's supply-chain practices rather than relying on collective consumer behavior. In that case, *Sud v. Costco Wholesale Corp.*, the plaintiffs alleged Costco sold farmed prawns sourced from CP Foods, a Thai company that fed those prawns with fishmeal sourced from "ghost ships" employing slave labor.[170] Importantly, the plaintiffs alleged Costco did so

165. Liesbeth Unger, *Due Diligence on Child Labour in the Netherlands; a New Law*, LINKEDIN (Feb. 13, 2017), https://www.linkedin.com/pulse/due-diligence-child-labour-netherlands-new-law-liesbeth-unger [https://perma.cc/XX5J-6SGB].

166. Oonk, *supra* note 164.

167. *See* Cécile Barbière, *France Leads EU on Duty of Care Requirements for Multinationals*, EURACTIV (Feb. 22, 2017) (Samuel White trans.), http://www.euractiv.com/section/global-europe/news/france-leads-eu-on-duty-of-care-requirements-for-multinationals/ [https://perma.cc/SM8F-7EN6]; EUR. COALITION FOR CORP. JUST., *supra* note 152; Farrah Tomazin, *Big Business Will be Forced to Report Annually on Slavery in Supply Chains*, AGE (Aug. 16, 2017, 11:29 AM), http://www.theage.com.au/national/big-business-will-be-forced-to-report-annually-on-slavery-in-supply-chains-20170815-gxwv20.html [https://perma.cc/SGR2-JZMY].

168. *See infra* Parts III-IV.

169. *See* Class Action Complaint, Sud v. Costco Wholesale Corp., 229 F.Supp. 3d 1075 (N.D. Cal. 2017). For an earlier shareholder-derivative attempt along similar lines, see La. Mun. Police Emps.' Ret. Sys. v. Hershey Co., C.A. No. 7996-ML, 2013 WL 6120439, at *1-2 (Del. Ch. Nov. 8, 2013).

170. Class Action Complaint, *supra* note 169, paras. 12-14, 16, 40, 112. CP Foods is the largest prawn producer in the world. Norman Pickavance, *We Can Fight Slavery with Algorithms and Ambition*, ETHICAL CORP. (Nov. 18, 2016), http://www.ethicalcorp.com/

knowingly because NGOs and *The Guardian* had brought these abuses to light more than a year earlier.[171] This, they argued, violated several of California's consumer protection laws.[172]

Since *Sud* was filed, consumers have filed seven more class action lawsuits against Hershey,[173] Nestlé USA,[174] Mars,[175] and others.[176] The suits alleged violations of California's consumer protection laws—namely, California's Unfair Competition Law (UCL), Consumers Legal Remedies Act (CLRA), and False Advertising Law (FAL).[177] Specifically, the consumers' main complaint, as discussed more in Part III.B.1, was that the defendant-corporations inadequately disclosed the existing slavery in their supply chains, and thus consumers were ill-informed when purchasing their products, causing harm.[178] All eight were dismissed, on several different grounds ranging from lacking Article III standing to losing on the merits.[179]

These suits have not all been for naught, as they have heightened awareness of this issue.[180] Negative publicity can force drastic

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content/we-can-fight-slavery-algorithms-and-ambition [https://perma.cc/Z4CU-FWPX].

171. Class Action Complaint, *supra* note 169, paras. 12, 24; *see also* Kate Hodal & Chris Kelly, *Trafficked into Slavery on Thai Trawlers to Catch Food for Prawns*, GUARDIAN (June 10, 2014), https://www.theguardian.com/global-development/2014/jun/10/-sp-migrant-workers-new-life-enslaved-thai-fishing [https://perma.cc/4XB5-NJAR].

172. Class Action Complaint, *supra* note 169, para. 28.

173. Dana v. Hershey Co., 180 F. Supp. 3d 652, 654-55 (N.D. Cal. 2016), *appeal filed*, No. 16-15789 (9th Cir. Apr. 29, 2016).

174. McCoy v. Nestle USA, Inc., 173 F. Supp. 3d 954, 956 (N.D. Cal. 2016), *appeal filed*, No. 16-15794 (9th Cir. Apr. 29, 2016); Barber v. Nestlé USA, Inc., 154 F. Supp. 3d 954, 956 (C.D. Cal. 2015), *appeal filed*, No. 16-55041 (9th Cir. Jan. 7, 2016).

175. Hodsdon v. Mars, Inc., 162 F. Supp. 3d 1016, 1019 (N.D. Cal. 2016), *appeal filed*, No. 16-15444 (9th Cir. Mar. 16, 2016); Wirth v. Mars Inc., No. SA CV 15-1470-DOC (KESx), 2016 WL 471234 (C.D. Cal. Feb. 5, 2016), *appeal filed*, No. 16-55280 (9th Cir. Feb. 25, 2016).

176. De Rosa v. Tri-Union Seafoods, LLC, No. CV 15-07540-CJC(AGRx), 2016 WL 524059 (C.D. Cal. Jan. 15, 2016); Hughes v. Big Heart Pet Brands, No. CV 15-08007-CJC(AGRx), 2016 WL 524057 (C.D. Cal. Jan. 15, 2016). Notably, of the Early Eight, seven have been brought by one plaintiffs' law firm, Hagens Berman Sobol Shapiro LLP.

177. *See, e.g.*, *McCoy*, 173 F. Supp. 3d at 956. Each of the Early Eight was filed in California and applied California law, so this Note limits the following discussion to California law. California is known for its consumer-friendly tort law. *See California Tops Latest List of 'Judicial Hellholes,'* AM. TORT REFORM ASS'N (Nov. 9, 2016), http://www.atra.org/2016/11/09/california-tops-latest-list-judicial-hellholes/ [https://perma.cc/7VM9-72H2].

178. *See, e.g.*, *McCoy*, 173 F. Supp. 3d at 956.

179. Six of the Early Eight are on appeal with the Ninth Circuit. *See supra* note 30.

180. For example, several of the largest news organizations have covered these lawsuits. *See, e.g.*, Samantha Masunaga, *Costco Faces Lawsuit over Sale of Prawns Allegedly Farmed*

improvements in corporate social responsibility.[181] However, given the facts alleged and the existing legal frameworks, these suits were destined to fall short of the accountability the plaintiffs sought. This Part dissects the Early Eight to assess the hurdles consumers face in alleging a cognizable legal harm in this context: standing, misrepresentation, and omission precedent, and California's "safe harbor" doctrine.

A. Alleging Standing Properly

As discussed in Part II, the existing and proposed supply-chain disclosure regimes do not provide consumers a private right of action upon which to sue. Thus, the plaintiffs relied on private rights of action within California's consumer protection statutes—UCL,[182] CLRA,[183] and FAL.[184] Because the Early Eight were filed in federal court, the first hurdle the plaintiffs faced was establishing Article III standing.[185]

Article III standing has three requirements: (1) an injury in fact, (2) causation, and (3) redressability.[186] The consumers in the Early Eight alleged that the defendant-corporations failed to disclose the slavery in their supply chains, which led to misinformed purchases, causing harm to the consumer-plaintiffs.[187] As a remedy, they sought forced disclosure of slavery in the defendants' supply chains.[188] Notably, the remedy consumers sought extended beyond

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by Slave Labor, L.A. TIMES (Aug. 20, 2015, 10:12 AM), http://www.latimes.com/business/la-fi-costco-prawns-20150820-story.html [https://perma.cc/3DLR-SHFM]; Ian Urbina, *Consumers and Lawmakers Take Steps to End Forced Labor in Fishing*, N.Y. TIMES (Sept. 13, 2015), http://www.nytimes.com/2015/09/14/world/consumers-and-lawmakers-take-steps-to-end-forced-labor-in-fishing.html [https://perma.cc/8KG8-MRXW].

181. *See* Simon Zadek, *The Path to Corporate Responsibility*, HARV. BUS. REV., Dec. 2004, at 125 (detailing Nike's path from corporate culprit to CSR leader); *see also* Torres et al., *supra* note 43, at 63-68 (arguing publicity of conflicts for Coca-Cola, Apple, and Walmart caused them to take CSR leadership roles in their industries).

182. *See* CAL. BUS. & PROF. CODE §§ 17200-17210 (West 2018).

183. *See* CAL. CIV. CODE § 1752 (West 2017).

184. *See* CAL. BUS. & PROF. CODE § 17500.

185. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-61 (1992).

186. *See id.*

187. *See, e.g.*, McCoy v. Nestle USA, Inc., 173 F. Supp. 3d 954, 956, 962 (N.D. Cal. 2016), *appeal filed*, No. 16-15794 (9th Cir. Apr. 29, 2016).

188. *See, e.g.*, *id.* at 958.

what the existing disclosure laws require.[189] The remedy, however, speaks to redressability, or the courts' ability to redress the harm with "a favorable decision."[190] Because a favorable decision would address the alleged injury (the misinformation) by forcing disclosures,[191] redressability was met and not discussed. Furthermore, causation was satisfied because corporations are responsible for their disclosures. Therefore, the fight in several cases was on "injury in fact."

The Early Eight differ in how they assess "injury in fact." Some cases applied lax standards, while others required pleading with great specificity.[192] As a starting point, the courts determined that if the inquiry was whether a consumer experiences "harm" when consuming a good produced with slave labor, there would be no injury in fact.[193] However, the injury alleged is controlled by the plaintiffs. In these cases, the alleged injury was purchasing a product that "but for the [alleged] misrepresentation" they would not have purchased.[194]

The cases applying lax standards held that was enough.[195] Under this standard, even a claim that the plaintiff "would have paid less" for the product would constitute a cognizable injury.[196] Furthermore, several cases suggested an injury in fact would arise if the consumer would have paid less for a product if they had known slavery existed somewhere in the corporation's supply chain.[197] Under that final

189. *See supra* notes 89-90, 119 and accompanying text.

190. *See Lujan*, 504 U.S. at 561 (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 38, 43 (1976)).

191. *See, e.g.*, *McCoy*, 173 F. Supp. at 958.

192. *Compare* Hodsdon v. Mars, Inc., 162 F. Supp. 3d 1016, 1022 (N.D. Cal. 2016) (requiring a showing that the corporation's supply chain for a product generally contained slavery), *appeal filed*, No. 16-15444 (9th Cir. Mar. 16, 2016), *with* Sud v. Costco Wholesale Corp., 229 F. Supp. 3d 1075, 1081-84 (N.D. Cal. 2017) (requiring a showing that the plaintiff's product was a product of slave labor), *appeal filed* sub nom. Sud v. Costco, No. 17-15307 (9th Cir. Feb. 21, 2017).

193. *See, e.g.*, *Hodsdon*, 162 F. Supp. 3d at 1022.

194. *See, e.g.*, Dana v. Hershey Co., 180 F. Supp. 3d 652, 661 (N.D. Cal. 2016), *appeal filed*, No. 16-15789 (9th Cir. Apr. 29, 2016).

195. *See id.*; *Hodsdon*, 162 F. Supp. 3d at 1022-23.

196. *Dana*, 180 F. Supp. 3d at 661; *see also Hodsdon*, 162 F. Supp. 3d at 1022.

197. *Dana*, 180 F. Supp. 3d at 662-63; McCoy v. Nestle USA, Inc., 173 F. Supp. 3d 954, 962-64 (N.D. Cal. 2016), *appeal filed*, No. 16-15794 (9th Cir. Apr. 29, 2016); *Hodsdon*, 162 F. Supp. 3d at 1022.

standard, the court need not determine whether the plaintiff knew the purchased goods were produced via forced labor.[198]

Two district court decisions in *Sud v. Costco Wholesale Corp.* articulated a stricter approach. There, the Northern District of California emphasized that consumers must be able to trace the purchased products to the forced labor.[199] In the first *Sud* decision, the court dismissed the complaint because the plaintiffs failed to show that the purchased prawns originated from Thailand, where the "ghost ship" practices took place.[200] Costco, using its membership and supply-chain data, showed that plaintiffs' prawns originated in Vietnam and Indonesia.[201] Therefore, forced labor within Costco's supply chain broadly was insufficient to establish standing. In the second *Sud* decision, after plaintiffs amended the complaint to include plaintiffs who purchased prawns from Thailand, the court dismissed the complaint against the supplier, CP Foods, because the plaintiffs failed to allege that the prawns purchased were sourced by CP Foods.[202] The court emphasized traceability, stating that one of the products purchased must be purchased from the defendants.[203]

For the plaintiffs' claim against Costco, the court applied an altogether different standing inquiry. First, it distinguished between plaintiffs' omission and misrepresentation claims. For omissions, the court held standing is met if plaintiffs prove they would have been "aware" of the information had it been disclosed.[204] For example, consumers must allege that they read the company's supply-chain disclosures or packaging *before* making the purchase. For misrepresentations, the court held standing is met if plaintiff shows: (1) specific reliance on the misrepresentation when making

198. *See Dana*, 180 F. Supp. 3d at 662-63; *McCoy*, 173 F. Supp. 3d at 962-64; *Hodsdon*, 162 F. Supp. 3d at 1022 ("Hodsdon ties his harm to the lack of certainty about the source of the cocoa beans .... [and] [i]n so doing, he has established injury in fact.").

199. *See* Sud v. Costco Wholesale Corp., 229 F. Supp. 3d 1075, 1081-82 (N.D. Cal. 2017), *appeal filed sub nom.* Sud v. Costco, No. 17-15307 (9th Cir. Feb. 21, 2017); Sud v. Costco Wholesale Corp., No. 15-cv-03783-JSW, 2016 WL 192569, at *3 (N.D. Cal. Jan. 15, 2016).

200. *See Sud*, 2016 WL 192569, at *1, *3.

201. *See id.* at *3.

202. *See Sud*, 229 F. Supp. 3d at 1081-82.

203. *See id.*

204. *See id.* at 1083.

their purchase,[205] or that (2) the misrepresentations "were part of an extensive and long-term advertising campaign."[206] In summary, *Sud* held that plaintiffs *must* rely on the omission or misrepresentation in order to establish standing.[207] Applying this standard, the court found plaintiffs' claim that they read Costco's packaging before purchasing the prawns was sufficient to establish standing.[208] However, plaintiffs failed to establish standing for their misrepresentation claims because they did not prove that they read Costco's supply-chain disclosure statement—the basis of plaintiffs' misrepresentation claim—before purchasing the prawns.[209] Furthermore, Costco had not incorporated its supply-chain disclosures as part of a long-term advertising campaign.[210]

It remains unclear which standing standard California courts will apply in future cases. The Early Eight demonstrate the various standards courts could apply in this context. The *Sud* requirement that plaintiffs must know that the product was sourced using slave labor raises the bar as to what a plaintiff must allege to meet standing. As consumers generally lack awareness about where products are sourced, this requirement limits the number of consumers that could meet standing. Moreover, *Sud* shows the difficulty in suing a supplier if a corporation sources the same product from multiple suppliers in the region. In contrast, the lax standard would allow a case to proceed to the merits on the fact that slavery exists somewhere in the corporation's supply chain.

B. Seemingly Insurmountable Hurdles on the Merits

On the merits, the Early Eight failed because California consumer protection law does not require affirmative disclosures regarding supply-chain abuses. The cases rested this determination on two related grounds. First, the courts declined to extend California's material misrepresentation and omission precedent to this scenar-

205. *See id.* at 1082-84.
206. *Id.* at 1084 (quoting *In re* Tobacco II Cases, 207 P.3d 20, 41 (Cal. 2009)).
207. *See id.* at 1082-83.
208. *See id.* at 1083.
209. *See id.* at 1084.
210. *See id.*

io.[211] Second, several cases barred the allegations under California's "safe harbor" doctrine because the California Legislature considered and rejected affirmative admissions of supply-chain abuses.[212]

1. Material Misrepresentations and Omissions

A consumer has a cause of action against a corporation under California law if the corporation makes a material misrepresentation or omission.[213] Misrepresentations require a representation that was misleading or false, and the falsity must be material.[214] Omissions require a duty to disclose and that the failure to do so was material.[215]

The main case alleging misrepresentation failed to convince the court that the corporation had made one.[216] In *Barber v. Nestlé USA*, Ms. Barber claimed eight supply-chain representations on Nestlé's website were "false or misleading."[217] Nestlé's representations included, "a Supplier must under no circumstance use, or in any other way benefit, from forced labour"; "[Nestlé] require[s] [its] supplies [sic], agents, subcontractors and their employees to demonstrate honesty, integrity and fairness, and to adhere to [the Nestlé Supplier Code of Conduct]"; and "Suppliers will ensure [that] [t]here is no known sourcing from Illegal, Unreported and Unregulated (IUU) fisheries and vessels."[218] Ms. Barber argued that evidence of

211. *See Sud*, 229 F. Supp. 3d at 1084-85, 1087; Dana v. Hershey Co., 180 F. Supp. 3d 652, 664-65 (N.D. Cal. 2016), *appeal filed*, No. 16-15789 (9th Cir. Apr. 29, 2016); McCoy v. Nestle USA, Inc., 173 F. Supp. 3d 954, 966 (N.D. Cal. 2016), *appeal filed*, No. 16-15794 (9th Cir. Apr. 29, 2016); Hodsdon v. Mars, Inc., 162 F. Supp. 3d 1016, 1024-26 (N.D. Cal. 2016), *appeal filed*, No. 16-15444 (9th Cir. Mar. 16, 2016); Wirth v. Mars Inc., No. SA CV 15-1470-DOC (KESx), 2016 WL 471234, at *5-6 (C.D. Cal. Feb. 5, 2016), *appeal filed*, No. 16-55280 (9th Cir. Feb. 25, 2016); Barber v. Nestlé USA, Inc., 154 F. Supp. 3d 954, 962-64 (C.D. Cal. 2015), *appeal filed*, No. 16-55041 (9th Cir. Jan. 7, 2016).

212. *See Wirth*, 2016 WL 471234, at *6-9; *Barber*, 154 F. Supp. 3d at 958-59, 961-62; De Rosa v. Tri-Union Seafoods, LLC, No. CV 15-07540-CJC(AGRx), 2016 WL 524059, at *1 (C.D. Cal. Jan. 15, 2016) (summarily dismissed for the reasons stated in *Barber*); Hughes v. Big Heart Pet Brands, No. CV 15-08007-CJC(AGRx), 2016 WL 524057, at *1 (C.D. Cal. Jan. 15, 2016) (summarily dismissed for the reasons stated in *Barber*).

213. *See supra* notes 182-84 and accompanying text.

214. *See* Fox v. Pollack, 226 Cal. Rptr. 532, 536-37 (Cal. Ct. App. 1986).

215. *See Hodsdon*, 162 F. Supp. 3d at 1024, 1026.

216. *See Barber*, 154 F. Supp. 3d at 962-64.

217. *Id.* at 962-63.

218. *Id.* at 963.

slavery in Nestlé's supply chain, alone, made those statements misleading.[219] The court disagreed, finding those statements, "when read in context," merely "aspirational."[220] For emphasis, the court noted that Nestlé was "not shy about identifying for consumers the rules and expectations for its suppliers, but it d[id] not mislead them into thinking that its suppliers abide by those rules and meet those expectations in every instance."[221]

Plaintiffs in *Sud v. Costco Wholesale Corp.* launched a similar misrepresentation claim.[222] There, plaintiffs pointed to Costco's California Transparency disclosure, which states that Costco "prohibits human rights abuses in [its] supply chain."[223] One year prior, reports detailed the "ghost ship" atrocities, and Costco continued to purchase prawns from CP Foods.[224] So how, plaintiffs argued, could Costco claim it "prohibits human rights abuses in [its] supply chain"?[225] As discussed in Part III.A, the Northern District of California ultimately dismissed those claims because the plaintiffs failed to show they relied on those statements before purchasing the prawns.[226]

The Early Eight also pointed to the absence of representations. In particular, several cases argued that the defendant-corporations' failures to disclose the existing slavery in their supply chains were material omissions in violation of California's FAL, UCL, and CLRA.[227]

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219. *See id.* at 962.

220. *Id.* at 963-64 ("[W]hen read in context ... no reasonable consumer ... could conclude that Nestlé's suppliers comply with Nestlé's requirements in all circumstances.").

221. *Id.* at 964.

222. Sud v. Costco Wholesale Corp., 229 F. Supp. 3d 1075 (N.D. Cal. 2017), *appeal filed sub nom.* Sud v. Costco, No. 17-15307 (9th Cir. Feb. 21, 2017).

223. First Amended Class Action Complaint para. 19, *Sud*, 229 F. Supp. 3d 1075 (No. 4:15-cv-03783-JSW).

224. *See supra* notes 170-71 and accompanying text.

225. First Amended Class Action Complaint, *supra* note 223, para. 19.

226. *See supra* notes 207, 209 and accompanying text.

227. *See, e.g.*, McCoy v. Nestle USA, Inc., 173 F. Supp. 3d 954, 957 (N.D. Cal. 2016), *appeal filed*, No. 16-15794 (9th Cir. Apr. 29, 2016); Plaintiff 's Opposition to Defendants' Motion to Dismiss at 9 n.46, Hodsdon v. Mars, Inc., 162 F. Supp. 3d 1016 (N.D. Cal. 2016) (No. 3:15-cv-04450-RS); Complaint for Violation of California Consumer Protection Laws paras. 72-77, 89-92, 99-103, Wirth v. Mars Inc., No. SA-CV15-1470-DOC (KESx), 2016 WL 471234 (C.D. Cal. Feb. 5, 2016).

The FAL omission claims were summarily dismissed, because the FAL covers misrepresentations, not omissions.[228] For a material omission under the UCL and CLRA, the consumer-plaintiff must show the corporation had a duty to disclose the information at issue.[229] Corporations do not have a broad duty to disclose.[230] Instructive precedent is *Hall v. Sea World Entertainment Inc.*, in which plaintiffs, visitors of SeaWorld parks, alleged that SeaWorld "omitted information concerning the conditions and treatment of the whales."[231] The court rejected a broad duty to disclose, stating such a broad duty would "effectively require any company selling any product or service to affirmatively disclose every conceivable piece of information about th[e] product or service ... because inevitably some customer would find such information relevant to his or her purchase."[232] The courts in the Early Eight followed this reasoning and rejected a broad duty to disclose, stating that an unbounded material-omission doctrine "could leave manufacturers (chocolate or otherwise) little guidance about what information, if any, it must disclose to avoid ... UCL liability."[233]

When do corporations have a duty to disclose under California consumer protection law? California courts generally agree that duty arises in two related contexts: product-design defects or safety hazards.[234] This narrow material-omission doctrine provides certainty to companies as to what they must disclose and serves consumers' interests in receiving pertinent information about product risks.[235]

However, one case, often cited by the consumer-plaintiffs in the Early Eight, found a duty to disclose outside of the product-design or safety-hazard contexts.[236] In *Stanwood v. Mary Kay*, the consumer complained that Mary Kay fraudulently omitted information

228. *See, e.g.*, *Hodsdon*, 162 F. Supp. 3d at 1023-24.

229. *See id.* at 1024-26.

230. *See id.* at 1024-25; *Wirth*, 2016 WL 471234, at *4-5.

231. No. 3:15-CV-660-CAB-RBB, 2015 WL 9659911, at *6 (S.D. Cal. Dec. 23, 2015).

232. *Id.* at *7.

233. *Hodsdon*, 162 F. Supp. 3d at 1025-26; *see also Wirth*, 2016 WL 471234, at *4 (citing *Hall*, 2015 WL 9659911, at *7).

234. *See Hodsdon*, 162 F. Supp. 3d at 1024-26; *Wirth*, 2016 WL 471234, at *4-5.

235. *See Hodsdon*, 162 F. Supp. 3d at 1026; *Wirth*, 2016 WL 471234, at *4.

236. *See* Stanwood v. Mary Kay, Inc., 941 F. Supp. 2d 1212, 1221 (C.D. Cal. 2012); *see also Hodsdon*, 162 F. Supp. 3d at 1025; *Wirth*, 2016 WL 471234, at *4-5.

that it tested products on animals, in violation of California's UCL, CLRA, and FAL.[237] The *Stanwood* court held that a duty to disclose always exists if the information was "material"—affecting the purchasing decision of a reasonable consumer.[238] Ms. Stanwood established materiality by producing a survey which found 72 percent of respondents thought testing cosmetics on animals was "inhumane or unethical" and 61 percent believed cosmetic companies should be barred from animal testing.[239] Thus, because Ms. Stanwood established the omission was "material," she had adequately pleaded a violation of California's UCL and CLRA.[240] However, the Early Eight courts rejected *Stanwood*, reiterating the policy against having a broad duty to disclose.[241]

The Early Eight also rejected the omission claims under the UCL's "unfairness prong." The UCL's unfairness prong prohibits "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising."[242] To succeed, a plaintiff must prove the challenged business practice—here, the omission of known supply-chain abuses on product packaging—either (1) is "immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers," or (2) violates public policy.[243] The Early Eight rejected these arguments.[244] In particular, the Early Eight distinguished between *slave labor in one's supply chain*—immoral and against public policy—and *the omission*, which they held was not.[245] Business practices only violate public policy when there is a clearly stated public policy against that practice.[246] These

237. 941 F. Supp. 2d at 1215-16.

238. *Id.* at 1221.

239. *Id.* at 1223.

240. *Id.*

241. *See, e.g.*, McCoy v. Nestle USA, Inc., 173 F. Supp. 3d 954, 965-66 (N.D. Cal. 2016), *appeal filed*, No. 16-15794 (9th Cir. Apr. 29, 2016); *Hodsdon*, 162 F. Supp. 3d at 1025-26.

242. CAL. BUS. & PROF. CODE § 17200 (West 2018).

243. *Hodsdon*, 162 F. Supp. 3d at 1026 (quoting S. Bay Chevrolet v. Gen. Motors Acceptance Corp., 85 Cal. Rptr. 2d 301 (Cal. Ct. App. 1999)).

244. *See* Sud v. Costco Wholesale Corp., 229 F. Supp. 3d 1075, 1089 (N.D. Cal. 2017), *appeal filed sub nom*. Sud v. Costco, No. 17-15307 (9th Cir. Feb. 21, 2017); Dana v. Hershey Co., 180 F. Supp. 3d 652, 667-68 (N.D. Cal. 2016), *appeal filed*, No. 16-15789 (9th Cir. Apr. 29, 2016); *McCoy*, 173 F. Supp. 3d at 967-69; *Hodsdon*, 162 F. Supp. 3d at 1027.

245. *See Sud*, 229 F. Supp. 3d at 1089; *Dana*, 180 F. Supp. 3d at 667-68; *McCoy*, 173 F. Supp. 3d at 967-69; *Hodsdon*, 162 F. Supp. 3d at 1027.

246. *See McCoy*, 173 F. Supp. 3d at 968-69.

claims failed, therefore, because plaintiffs could not point to a clearly stated public policy against omitting known supply-chain risks on product packaging.

The Early Eight's parsing of the conduct, between slave labor in a corporation's supply chain and the corporation's omission, exemplifies the consumer-plaintiffs' catch-22. Consumers currently must choose between (1) establishing standing and failing on the merits and (2) raising arguments that would succeed on the merits and failing for lack of standing. For example, several cases failed on the merits because the defendant's omissions were not counter to public policy.[247] However, plaintiffs could not establish standing if they argued the "unfair" business practice was the corporation's use of slave labor in its supply chain.[248] Defendants would raise strong injury-in-fact and causation objections, because consumers did not feel a direct harm due to the corporation's use of slave labor. Accordingly, to meet standing consumers must allege the harm was caused by the omission, but this eviscerates their ability to succeed on the merits because the omission does not relate to product safety or violate a clearly stated public policy.

2. Application of the "Safe Harbor" Doctrine

Four of the Early Eight also applied California's "safe harbor" doctrine to dismiss the complaints.[249] California's safe harbor doctrine is rooted in legislative intent. It shields corporations from UCL, CLRA, and FAL liability if the California Legislature has "considered a situation and concluded that no action should lie."[250] The relevant legislative action in the Early Eight was the California

247. *See Dana*, 180 F. Supp. 3d at 667-68; *McCoy*, 173 F. Supp. 3d at 968-69; *Hodsdon*, 162 F. Supp. 3d at 1027.

248. *See supra* note 193 and accompanying text.

249. *See* Barber v. Nestlé USA, Inc., 154 F. Supp. 3d 954, 961 (C.D. Cal. 2015), *appeal filed*, No. 16-55041 (9th Cir. Jan. 7, 2016); Wirth v. Mars Inc., No. SA CV 15-1470-DOC(KESx), 2016 WL 471234, at *7-9 (C.D. Cal. Feb. 5, 2016) (following *Barber*), *appeal filed*, No. 16-55280 (9th Cir. Feb. 25, 2016); De Rosa v. Tri-Union Seafoods, LLC, No. CV 15-07540-CJC(AGRx), 2016 WL 524059, at *1 (C.D. Cal. Jan. 15, 2016) (following *Barber* with no discussion); Hughes v. Big Heart Pet Brands, No. CV 15-08007-CJC(AGRx), 2016 WL 524057, at *1 (C.D. Cal. Jan. 15, 2016) (following *Barber* with no discussion).

250. *Barber*, 154 F. Supp. 3d at 958 (quoting Cel-Tech Comms., Inc. v. L.A. Cellular Tel. Co., 973 P.2d 527, 541 (Cal. 1999)) (UCL liability barred).

Act.[251] As discussed, the remedy sought in the Early Eight was forced disclosure of supply-chain abuses, beyond what the California Act requires.[252] Based on the Act's text and legislative history, several courts concluded that California's legislature "considered" the extent of required disclosures and "determin[ed] that businesses' responsibilities to inform consumers about the presence of forced labor in supply chains beg[a]n and end[ed] with the required disclosures in § 1714.43."[253] Accordingly, four cases that tried to force additional disclosure were barred by the safe harbor doctrine.[254]

Whether the safe harbor doctrine should apply in this context is disputed. *Hodsdon v. Mars* critiqued its applicability based on the California Act for three reasons. First, *Hodsdon* rejected the conclusion that California's legislature "considered [the] situation and concluded no action should lie."[255] Specifically, the court wrote, "[A]lthough there is evidence suggesting the legislature considered how to provide consumers with 'reasonable access to basic information to aid their purchasing decisions' *the legislative history is silent about whether the legislature contemplated disclosures on labels*," the relief requested there.[256] Second, *Hodsdon* noted, hypothetically, that if a safe harbor did apply, it would not shield omissions of child labor (complained about in that case) because the Act only covers "efforts to eradicate slavery and human trafficking."[257] Finally, the safe harbor would lead to an inequitable result where corporations with over $100 million in revenue (those covered by the Supply Chains Act) would be protected and smaller companies could still be liable.[258]

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251. *See id.* at 958-59.

252. *See id.* at 959; *see also supra* notes 89-91 and accompanying text.

253. *Barber*, 154 F. Supp. 3d at 962; *see also Wirth*, 2016 WL 471234, at *7-9 (following *Barber*); *De Rosa*, 2016 WL 524059, at *1 (following *Barber*); *Hughes*, 2016 WL 524057, at *1 (following *Barber*).

254. *See supra* note 249.

255. Hodsdon v. Mars, Inc., 162 F. Supp. 3d 1016, 1029 (N.D. Cal. 2016), *appeal filed*, No. 16-15444 (9th Cir. Mar. 16, 2016). *But see Wirth*, 2016 WL 471234, at *7-9; *Barber*, 154 F. Supp. 3d at 962.

256. *Hodsdon*, 162 F. Supp. 3d at 1029 (emphasis added) (citation omitted). *Contra Barber*, 154 F. Supp. 3d at 962.

257. *Hodsdon*, 162 F. Supp. 3d at 1029; *see* CAL. CIV. CODE § 1714.43(a)(1) (West 2017).

258. *Hodsdon*, 162 F. Supp. 3d at 1029.

Despite *Hodsdon*'s criticism of the safe harbor, the court dismissed the complaint on other grounds and left the safe harbor dispute unresolved.[259] Accordingly, no precedent has rejected the safe harbor doctrine in this context.[260] Although this remains an open dispute, several California courts appear uneasy with the doctrine's application based on the California Act.[261]

Of the Early Eight, six are on appeal with the Ninth Circuit.[262] It is unclear how the Ninth Circuit will resolve the lower-court discrepancies in standing standards and the safe harbor doctrine.[263] However, for the reasons this Note discusses, the interplay between standing and hurdles on the merits eliminates consumer-activists' chances of success in these suits.[264] For consumer-activists, the issue is not yet ripe.[265] Thus, consumer class actions remain a dull means for effecting corporate supply-chain accountability.

IV. HOW CONTINUED APPLICATION OF CONSUMER PROTECTION LAW MIGHT YIELD REDRESS TO CONSUMERS IN THE FUTURE

Consumer legal activism has thus far failed to elicit better supply-chain transparency and accountability from corporations. However, consumer class actions may gain traction in the future for two reasons. First, the Ninth Circuit, which currently has six of the Early Eight on appeal, could lay down plaintiff-friendly law in this context.[266] Second, and more likely, however, is that the issue will become ripe for redress under consumer protection law.

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259. *Id.*

260. *See supra* notes 249-54 and accompanying text; *cf., e.g.*, *Barber*, 154 F. Supp. 3d at 958 (citing Cel-Tech Comms., Inc. v. L.A. Cellular Tel. Co., 973 P.2d 527 (Cal. 1999)) (explaining the safe harbor doctrine).

261. *See Hodsdon*, 162 F. Supp. 3d at 1029; *see also* McCoy v. Nestle USA, Inc., 173 F. Supp. 3d 954, 972 (N.D. Cal. 2016), ("The Court ... echoes [*Hodsdon*'s] skepticism that the safe harbor doctrine is as broad as Nestlé contends."), *appeal filed*, No. 16-15794 (9th Cir. Apr. 29, 2016).

262. *See supra* note 30.

263. *See supra* Part III.A.

264. *See supra* notes 247-48 and accompanying text.

265. *See supra* Part III.A.

266. For example, the Ninth Circuit could follow the *Hodsdon* injury-in-fact standard, *see supra* notes 194-98 and accompanying text, and follow *Stanwood* with respect to material omissions, *see supra* notes 244-46 and accompanying text.

This Part details the future applicability of consumer protection law in holding corporations accountable for supply-chain disclosures and "efforts." It draws from another area in consumer protection law—privacy—and applies recent precedent to hypothetical fact patterns in the supply-chain disclosure space. Finally, it assumes that, eventually, companies will compete more meaningfully on supply-chain disclosures as these disclosure regimes become more familiar to consumers, NGOs, and the businesses themselves. If history of privacy disclosures is precedent, greater competition on supply-chain disclosures may lead to the occasional misrepresentation, in the form of over-selling a company's efforts, which would provide grounds for a consumer class action or Federal Trade Commission enforcement action.[267]

What was missing from the Early Eight was a true misrepresentation. The theory of omission law fails in this context because, under California law, corporations do not have a duty to disclose that information and the omission is not contrary to public policy.[268] Thus, alleging a material misrepresentation is the only avenue for future consumer success. To date, *Barber* held supply-chain commitments were "aspirational" and therefore not misleading,[269] and *Sud* dismissed similar claims on standing.[270] Both are on appeal with the Ninth Circuit.[271]

On appeal, if the Ninth Circuit wanted to rule in favor of the plaintiffs, it could invoke the "misrepresentation-by-omission" doctrine. The doctrine requires a plaintiff to identify a material, express statement and prove the "omitted information ... undercuts the veracity of the statement."[272] In fact, *Hodsdon* noted that the plaintiff's FAL claim would have continued had he pointed to an express statement by Mars that was undercut by the slavery in its

267. *Cf., e.g.*, *infra* notes 298-300.

268. *See supra* notes 233-35, 244-46 and accompanying text.

269. *See supra* notes 218-21 and accompanying text.

270. *See supra* notes 207-10 and accompanying text.

271. Sud v. Costco Wholesale Corp., 229 F. Supp. 3d 1075 (N.D. Cal. 2017), *appeal filed sub nom*. Sud v. Costco, No. 17-15307 (9th Cir. Feb. 21, 2017); Barber v. Nestlé USA, Inc., 154 F. Supp. 3d 954 (C.D. Cal. 2015), *appeal filed*, No. 16-55041 (9th Cir. Jan. 7, 2016).

272. *See* Hodsdon v. Mars, Inc., 162 F. Supp. 3d 1016, 1023 (N.D. Cal. 2016), *appeal filed*, No. 16-15444 (9th Cir. Mar. 16, 2016).

supply chain.[273] Furthermore, if the Ninth Circuit reaches the merits of *Sud*'s misrepresentation claim, the doctrine could apply.[274] For example, the Ninth Circuit could rule that the "ghost ship" atrocities in Costco's supply chain make Costco's assertion that it "prohibits human rights abuses in [its] supply chain" a misrepresentation by omission.[275] The misrepresentation-by-omission doctrine is therefore the first possible grounds for future consumer redress.[276]

In future cases, affirmative misrepresentation claims (express misrepresentations, not through omission) might also play a role. Corporations have already begun to compete, on the margins, on supply-chain transparency. For example, several clothing manufacturers, such as American Apparel and PACT, advertise their clothing as "sweatshop-free."[277] Nisolo, a shoe company, advertises that its partner factories in León, Mexico, offer their employees healthcare and vacation benefits and pledge that their employees are older than 18.[278] Senda Athletics creates "fair trade soccer balls" and promotes them as produced with no child labor.[279] Finally, a list of ethically sourced chocolate producers exists and is growing.[280] In future cases, if a company oversells the purity of its supply chain, consumers who relied on that advertisement have a seasonable

273. *Id.* (citing *In re* Sony Gaming Networks & Customer Data Sec. Breach Litig., 996 F. Supp. 2d 942, 991 (S.D. Cal. 2014) (denying dismissal of a FAL claim because Sony stated it took reasonable efforts to protect consumers' data but omitted known flaws in its security system)).

274. *Cf. Sud*, 229 F. Supp. 3d 1075.

275. *See* Demand for Jury Trial at 3-4, *Sud*, 229 F. Supp. 3d 1075 (No. 15-cv-03783).

276. *Cf. Sud*, 229 F. Supp. 3d 1075; *Hodsdon*, 162 F. Supp. 3d 1023.

277. *See How It's Made*, AM. APPAREL, http://www.americanapparel.com/en/aboutus/how-its-made.jsp [https://perma.cc/J4WA-QX5K]; *Organic Is Better*, PACT APPAREL, https://wearpact.com/about [https://perma.cc/6ZT2-4MQT].

278. *Impact Report*, NISOLO, https://nisolo.com/pages/ethically-made [https://perma.cc/SQ94-HM2C].

279. *Premium Quality Soccer Balls that Give Back*, SENDA ATHLETICS, https://sendaathletics.com/pages/fair-trade [https://perma.cc/2JQ6-DPHU].

280. *Ethical Chocolate Companies*, SLAVE FREE CHOCOLATE, http://www.slavefreechocolate.org/ethical-chocolate-companies/ [https://perma.cc/356L-NHPE].

misrepresentation claim.[281] The First Amendment would not protect these corporate misrepresentations.[282]

As alluded to by the *Sud v. Costco Wholesale Corp.* example, however, these misrepresentations may arise in a corporation's supply-chain disclosure statements.[283] With the UK's MSA taking effect, over ten thousand companies not initially covered by California's Act will make supply-chain disclosures.[284] The sheer number of these disclosures significantly increases the chance that a corporation will make an express misrepresentation or misrepresentation by omission, even out of carelessness. Take L Brands', the parent of Victoria's Secret and Bath & Body Works, California Act statement as a hypothetical example.[285] In it, L Brands makes several express representations: it prohibits the sourcing of Uzbek and Turkmen cotton; its internal Sourcing Risk Committee meets quarterly; suppliers failing audits must submit corrective action plans within thirty days and must correct conduct within ninety; suppliers failing to correct face a warning letter, reduction of business, and ultimately loss of business; it participates in the Business Council for Global Development; and it supports the FACT (Factory Awareness to Counter Trafficking) training initiative annually.[286] Hypothetically, if any of those representations are false, L Brands would have made a misrepresentation.[287] A consumer would just need to prove materiality.[288]

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281. *See* McCoy v. Nestlé USA, Inc., 173 F. Supp. 3d 954, 964 (N.D. Cal. 2016) (arguing if Nestlé had "concealed Ivorian labor conditions from its consumers [and] falsely labeled all of its chocolate as certified to be free of child labor ... a customer who relied on that false promotion" would have a seasonable false advertising claim), *appeal filed*, No. 16-15794 (9th Cir. Apr. 29, 2016).

282. *See* Kasky v. Nike, Inc., 45 P.3d 243, 259 (Cal. 2002) (holding Nike's allegedly misleading statements about factory working conditions were not entitled to full protections of the First Amendment).

283. *See* Class Action Complaint, *supra* note 169, para. 19.

284. *See supra* notes 121-22 and accompanying text.

285. *See California Transparency in Supply Chains Act: Modern Slavery Statement for Fiscal 2016*, L BRANDS, https://www.lb.com/responsibility/supply-chain/california-transparency-act-statement [https://perma.cc/JL3J-UXUV]. As a disclaimer, this Note uses L Brands because it published a robust and concrete California Act statement. For this, L Brands should be applauded. This Note uses its statements for purely hypothetical purposes, and nothing in this Section should be construed to insinuate that any of the statements listed are false.

286. *Id.*

287. *See supra* Part III.B.1.

288. *See supra* Part III.B.1.

But why would L Brands affirmatively state that it prohibits the use of Uzbek cotton in its supply chain if it does not? Does L Brands not have incentives—for example, public criticism and litigation—to avoid making misrepresentations? Such disclosures are unwise, but as the data privacy context suggests, corporations make affirmative misrepresentations with some frequency.[289]

Administrative action by the FTC serves as another mechanism for consumer redress. The FTC's deception authority is triggered when a corporation makes a: (1) "representation, omission or practice" (2) "that is likely to mislead the [reasonable] consumer" and (3) is "material."[290] If a corporation made an express misrepresentation about its supply chain or "efforts taken," a court would analyze the empirical questions within the second and third elements.[291] Would the statement mislead the average consumer? And would that average consumer have changed her behavior had she known about the misrepresented information? These are factual inquiries which could vary depending on the statements.

One recent disagreement in FTC circles entails the presumption of materiality and what facts rebut it.[292] The FTC's Policy Statement on Deception states that express statements are presumed to be material.[293] In the supply-chain context, the FTC could argue that express supply-chain disclosures on a company's website are presumed to be material. FTC enforcement in this space, therefore, may provide consumer redress more readily than private class actions because consumers may not utilize this presumption.[294] However, others believe that the key materiality inquiry remains whether "consumers would have chosen differently but for the deception."[295] Consumers say publicly that sweatshop practices would materially

289. *See infra* notes 298-300 and accompanying text.

290. *See* Letter from James C. Miller III, Chairman, Fed. Trade Comm'n, to the Honorable John D. Dingell, Chairman, Comm. on Energy & Commerce, U.S. House of Representatives (Oct. 14, 1983) [hereinafter FTC POLICY STATEMENT ON DECEPTION], *appended* to Cliffdale Assocs., Inc., 103 F.T.C. 110 app. at 174, 174-75 (1984).

291. *Cf. id.*

292. *See* Dissenting Statement of Joshua D. Wright, *In re* Nomi Technologies, Inc., F.T.C. Matter No. 132-3251, at 3-4 (Apr. 23, 2015), https://www.ftc.gov/system/files/documents/ public_statements/638371/150423nomiwrightstatement.pdf [https://perma.cc/L7X4-VM9T].

293. FTC POLICY STATEMENT ON DECEPTION, *supra* note 290, at app. at 182.

294. *Cf. id.*

295. *Id.* at app. at 183.

affect their purchasing decisions,[296] but some empirical evidence suggests otherwise.[297]

While litigating parties might reasonably fight over materiality, the FTC's recent enforcement actions in the privacy space suggest the FTC could extract settlements from companies for misleading supply-chain disclosures. A few examples are worth noting. First, the FTC settled with Very Incognito Technologies over their advertisements that they participated in the Asia-Pacific Economic Cooperation (APEC) Cross-Border Privacy Rules (CBPR) certification system, when it did not.[298] In *Henry Schein Practice Solutions*, the FTC settled with a company that advertised using "industry-standard" encryption to protect sensitive medical patient information, even though it used substandard procedures.[299] Finally, in *In re Snapchat*, the FTC alleged, among other things, that Snapchat deceived consumers by advertising that "snaps" disappeared when in actuality they did not.[300] These representations appear similar to or more benign than the L Brands' supply-chain hypotheticals above.

It is unclear, however, whether the FTC would pursue supply-chain misrepresentations with the same vigor it has in the privacy context. Consumer data privacy has received much more attention than supply-chain exploitation on Capitol Hill over the last five years.[301] Perhaps this relates to harm felt by the constituent.[302] In

296. *See* Jens Hainmueller et al., *Consumer Demand for the Fair Trade: Evidence from a Multistore Field Experiment*, 97 REV. ECON. & STAT. 242, 242 (2015).

297. *See* Neeru Paharia et al., *Sweatshop Labor Is Wrong Unless the Shoes Are Cute: Cognition Can Both Help and Hurt Moral Motivated Reasoning*, 121 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 81, 86-87 (2013) (finding "participants endorsed sweatshop labor when self-interest was high"); Young & McCoy, *supra* note 38, at 52.

298. Press Release, Fed. Trade Comm'n, Hand-Held Vaporizer Company Settles FTC Charges It Deceived Consumers About Participation in International Privacy Program (May 4, 2016), https://www.ftc.gov/news-events/press-releases/2016/05/hand-held-vaporizer-company-settles-ftc-charges-it-deceived [https://perma.cc/7GG9-VKZ4].

299. Press Release, Fed. Trade Comm'n, Dental Software Provider Settles FTC Charges It Misled Customers About Encryption of Patient Data (Jan. 5, 2016), https://www.ftc.gov/news-events/press-releases/2016/01/dental-practice-software-provider-settles-ftc-charges-it-misled [https://perma.cc/D2QF-3LW9].

300. Complaint paras. 6-12, Snapchat, Inc., F.T.C. Docket No. C-4501 (Dec. 23, 2014), https://www.ftc.gov/system/files/documents/cases/141231snapchatcmpt.pdf [https://perma.cc/BU7A-ZZ5R].

301. From January 1, 2012, to February 15, 2017, Congress held hundreds of congressional hearings on the topic of consumer data privacy and held a few dozen on human trafficking.

the data privacy context, a breach could expose the consumer to significant, direct future harm—medical, financial, or otherwise—whereas consumer harm is felt more indirectly in the supply-chain context.[303] The real harm in the latter case is to those trapped in forced labor, somewhere in the world.[304] Thus, presumably Congress and the FTC obtain more political capital for pursuing data privacy misrepresentations than they would for corporate supply-chain misrepresentations. Nonetheless, the sheer number of future supply-chain promises—in advertisements and in mandatory disclosure statements—may implicate the FTC's consumer protection authority to reign in bad actors.

Robust enforcement, or even the threat of enforcement—private class action or FTC enforcement—in the supply-chain disclosure context has costs. One potential downside to enforcement is that it creates a disincentive to be specific with one's disclosures. For instance, if a company states its supply-chain policies with particularity and makes a material mistake, it could be scrutinized under misrepresentation law. In other words, there is an incentive to remain vague and discuss only the company's "commitments" to supply-chain best practices to shield it from misrepresentation liability. If every company lists only broad "commitments," disclosures are of no use to consumers. However, disclosures have always been and will continue to be driven by competition. As the landscape changes, corporate executives will be forced to weigh the costs of vague disclosure versus the marketplace benefits of concrete disclosure.[305] If NGOs and consumers, through standard-setting recommendations, comparisons among competitors, and actual changes in purchasing behavior, increase the demand for corporate supply-chain competition, this pressure could force a "race to the top" that consumer activists seek.[306]

See Advanced Search, U.S. GOV'T PUB. OFF., https://www.gpo.gov/fdsys/search/advanced/advsearchpage.action [https://perma.cc/58BL-2R2V] (search "consumer data privacy" and "human trafficking"; then parse out relevant hearings).

302. *Cf. id.*

303. *See supra* notes 298-300 and accompanying text.

304. *See supra* note 12 and accompanying text.

305. *See generally* Doorey, *supra* note 32, at 372.

306. *Cf. id.*

In sum, consumer activism in the future may play a role in holding corporations accountable for their supply-chain efforts.[307] However, a misrepresentation must first be made.[308] The UK MSA, which will increase the companies disclosing supply-chain practices by over ten thousand, could provide future bases for misrepresentation claims.[309] Companies should draft carefully.

CONCLUSION

To date, consumers have been unable to hold corporations accountable for their supply-chain practices. As discussed in Part II, fundamental flaws in the supply-chain disclosure regimes limit their efficacy to serve as consumer tools upon which to base boycotts or purchasing decisions.[310] Consumer activists who have turned to the courts, in the Early Eight, have also been unsuccessful.[311]

Future developments, however, including increased competition on supply-chain disclosures and the sheer volume of disclosures, may provide future grounds for consumer legal activism. This Note does not suggest that consumer legal activism will provide the proper incentive structure for companies to engage in supply-chain control or be transparent with consumers. Rather, this Note argues that future cases may provide consumer redress under California's consumer protection precedent or FTC enforcement.[312] If corporations oversell their supply-chain efforts, consumers can and should play a role in holding corporations accountable.

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307. *See supra* Part III.
308. *See supra* Part III.B.1.
309. *See supra* Part II.A.
310. *See supra* Part II.
311. *See supra* Part III.
312. *See supra* Part IV.

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