NOTE

THE REAL PRICE OF CHOCOLATE: *TOMASELLA V. NESTLÉ USA, INC.* AND THE UNRESTRAINED EXISTENCE OF TAINTED SUPPLY CHAINS*

I. INTRODUCTION

For the average American consumer, a chocolate bar is simply a sweet treat. This sweet treat is incredibly popular; the United States confectionery industry generates over $37 billion in sales each year.[1] However, the sad truth is that the majority of America's popular candy, and many other frequently consumed food products, are created in supply chains that use cruel and illegal forms of child and slave labor. Drissa, a former child cocoa laborer who has never tasted chocolate, stated: "When people eat chocolate they are eating my flesh."[2] Few would imagine that their favorite candy exists because young children in West Africa are illegally trafficked from their home countries and forced to perform hazardous labor.

These child laborers are lured by a promise for an opportunity to provide for their families but are paid very little, if at all.[3] The children are cut off from their schooling and told they are not free to return home.[4] Some are as young as seven years old, and many are subject to physical abuse.[5] In the chocolate industry, "the evidence of objectionable practices [is] so clear, the industry's pledges to reform [are] so ambitious and the breaching of those promises [are] so obvious."[6] However, little has been done by the chocolate industry's largest players to reform this issue beyond the "just enough" required to dispel negative media attention.[7]

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1. NAT'L CONFECTIONERS ASS'N, SWEET INSIGHTS: GETTING TO KNOW CHOCOLATE CONSUMERS 2021, at 2 (2021).

2. *Cacao and Child Slavery*, BORGEN PROJECT (Jan. 5, 2014), http://borgenproject.org/tag/child-labor-west-africa/ [http://perma.cc/UQ8Q-5ZF2].

3. *Id.*

4. *Id.*

5. BORGEN PROJECT, *supra* note 2.

6. Peter Whoriskey & Rachel Siegel, *Cocoa's Child Laborers*, WASH. POST (June 5, 2019), http://www.washingtonpost.com/graphics/2019/business/hershey-nestle-mars-chocolate-child-labor-west-africa/ [http://perma.cc/4BFP-ZDC2].

7. *Id.*

Exploitative labor practices also acutely affect the seafood industry.[8] The United States is the world's biggest customer of Thai fish, which is commonly used in pet food products.[9] The fishing industry, concentrated in the South China Sea, is rampant with trafficking and labor abuse.[10] Traffickers promise men jobs, but the men are held indefinitely on fishing vessels against their will and subjected to horrific living conditions and abuse.[11]

Consumers have taken to class action litigation to stop major food corporations from being complicit in child and forced labor.[12] Over the past decade, these class actions developed in the United States Court of Appeals for the Ninth Circuit and became known as the *Chocolate and Seafood Cases*.[13] The consumers in these cases advanced a product disclosure theory under California law, arguing that these corporations must disclose the existence of child or forced labor in their supply chain on product labels.[14] This disclosure would enable a well-informed purchasing decision.[15] These attempts have consistently failed, leaving a potential resolution for illegal child and slave labor in supply chains uncertain.[16] The most recent case to bring attention to this issue is the First Circuit Court of Appeals case *Tomasella v. Nestlé USA, Inc.* (*Tomasella II*).[17] The suit was unsuccessful—the First Circuit held in favor of the defendant corporations, finding that the plaintiff consumers failed to state a valid claim under Massachusetts consumer protection laws.[18]

This Note challenges the reasoning behind *Tomasella II* and similar decisions, critiquing the lack of a legal remedy for consumers who seek an upfront disclosure of labor exploitation in a corporation's supply chain. This Note also confronts the lack of a clear legal mechanism to prevent American corporations from benefiting from covert and abhorrent labor practices. Disclosure to consumers is a step forward, but government-compelled action will be a more effective and enduring solution.

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8. *See* Ian Urbina, *'Sea Slaves': The Human Misery That Feeds Pets and Livestock*, N.Y. TIMES (July 27, 2015), http://www.nytimes.com/2015/07/27/world/outlaw-ocean-thailand-fishing-sea-slaves-pets.html [http://perma.cc/2U5N-K4RY].

9. *Id.*

10. *Id.*

11. *Id.*

12. *See, e.g.*, Sud v. Costco Wholesale Corp., 229 F. Supp. 3d 1075, 1088 (N.D. Cal. 2017), *aff'd*, 731 F. App'x 719 (9th Cir. 2018).

13. *See* Sarah Dadush, *The Law of Identity Harm*, 96 WASH. U. L. REV. 803, 843 (2019).

See *infra* Part III.D.2 for a discussion of the *Chocolate and Seafood Cases*.

14. *See, e.g.*, Complaint for Violation of California Consumer Protection Laws at 89–90, 104, 113, McCoy v. Nestlé USA, Inc., 173 F. Supp. 3d 954 (N.D. Cal. 2016) (No. 3:15-cv-04451).

15. *See, e.g.*, *id.* at 87.

16. *See, e.g.*, *Sud*, 229 F. Supp. 3d at 1088 (dismissing plaintiffs' complaint for failure to plead, among other claims, a violation of the "unlawful prong" of California's Unfair Competition Law); Barber v. Nestlé USA, Inc., 154 F. Supp. 3d 954, 962, 964 (C.D. Cal. 2015) (dismissing plaintiffs' complaint, applying California's "safe harbor doctrine" shielding liability after determining that the California Legislature had "considered the situation of regulating disclosure by companies with possible forced labor in their supply lines and determined that only the limited disclosure mandated by § 1714.43 [of the California Transparency in Supply Chains Act of 2010] is required"), *aff'd*, 730 F. App'x 464 (9th Cir. 2018).

17. 962 F.3d 60 (1st Cir. 2020).

18. *Tomasella* (*Tomasella II*), 962 F.3d at 79, 82.

This Note proceeds in four Sections. Section II sets forth the relevant facts and procedural history of the *Tomasella* decisions. Section III provides an overview of the prior law helpful to understanding the reasoning in *Tomasella II*. It explains the peripheral areas of regulation related to the issue of product label disclosure that are at the heart of *Tomasella II* and indirectly highlights the lack of direct action taken to hold corporations accountable in the legislature and the judiciary. Section III also examines previous attempts at mandated disclosure law. Section IV describes the reasoning used by the *Tomasella II* court to dismiss the consumer's claim.

Section V contests the court's reasoning and discusses the negative consequences of the courts' constant refusal to uphold this type of consumer claim. Section V also explores the effect that decisions such as *Tomasella II* could have on consumer awareness, a potential tool to pressure businesses to change their behavior. Finally, Section V recognizes the dire need for direct government intervention in this vacuum. It calls for legislative intervention, which could include modifications to existing state consumer protection laws, a new federal statute, or modifications to an existing federal statute. Ultimately, this Note implores the government to take quick and meaningful action to sever the relationship between American business and flagrant human rights abuse.

II. FACTS AND PROCEDURAL HISTORY

In *Tomasella II*, the First Circuit considered whether several chocolate manufacturers' lack of disclosure on product labels regarding the use of child labor in their supply chains violated Massachusetts's consumer protection laws.[19] The case, brought in federal court through diversity jurisdiction, was appealed to the First Circuit after the District Court for the District of Massachusetts granted the defendants' motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure Rule 12(b)(6).[20]

Danell Tomasella initiated a putative class action lawsuit against Delaware corporations Nestlé, Hershey, and Mars after purchasing their chocolate products in several retail stores.[21] Due to the defendants' failure to disclose the use of child or slave labor in their supply chains at the point of sale, Tomasella claimed that she and other consumers were "deceived into buying products they would not have otherwise" and unknowingly supported the use of child labor.[22] Tomasella alleged the defendant corporations had violated the Massachusetts Consumer Protection Act[23] by engaging in unfair and deceptive business practices and were unjustly enriched by the profits received from the sales made without disclosure.[24]

19. *See id.* at 64–65.

20. *See id.*; FED. R. CIV. P. 12(b)(6).

21. Class Action Complaint at 7–8, Tomasella v. Hershey Co., No. 1:18-cv-10360 (D. Mass. 2019); Class Action Complaint at 8, Tomasella v. Nestlé USA, Inc. (*Tomasella I*), 364 F. Supp. 3d 26 (D. Mass. 2019) (No. 1:18-cv-10269); Class Action Complaint at 7–8, Tomasella v. Mars, Inc., No. 1:18-cv-10359 (D. Mass 2019).

22. *E.g.*, Class Action Complaint, Tomasella v. Hershey Co., *supra* note 21, at 1.

23. MASS. GEN. LAWS ch. 93A §§ 1–11 (West 2020).

24. Class Action Complaint, Tomasella v. Nestlé USA, Inc. (*Tomasella I*), *supra* note 21, at 34–37.

To bolster the unfair and deceptive business practices claims, Tomasella cited the defendant corporations' participation in the Harkin-Engel Protocol,[25] a voluntary agreement made by the chocolate industry promising to end all use of child labor in cocoa production.[26] Many claim that despite the agreement's promises, the situation for child laborers in West Africa has only worsened.[27] Tomasella also used statistical data to support her argument that disclosure of these practices is material to consumers, such as a study finding that eighty-eight percent of consumers said they would stop buying a product if it was "associated with" human rights abuses.[28]

Because she would not have purchased the chocolate with this disclosure in place, Tomasella demanded monetary damages for herself and other similarly situated consumers.[29] She also asked the court to enjoin the defendants from the "unfair and deceptive marketing and sale" of the chocolate.[30] The defendants claimed that Tomasella failed to state a "cognizable injury" and that requiring this disclosure would violate their First Amendment rights.[31] The district court acknowledged that the labor practices were "reprehensible" but held that the corporations were not obligated to disclose the presence of child labor at the point of sale.[32]

In granting the motion to dismiss, the district court emphasized that the lack of disclosure was not deceptive because the omission was unrelated to the "central characteristics of the chocolate products sold, such as their physical characteristics, price, or fitness for consumption."[33] Further, the omission would not have the "capacity to mislead consumers . . . to act differently from the way they otherwise would have acted."[34] Because Tomasella did not directly challenge the legality of the labor practices themselves, but instead challenged the lack of disclosure of the labor practices on product labels, the district court did not accept Tomasella's argument that global policies against slavery and child labor proved that the companies' lack of disclosure was an unfair business practice under the statute.[35] Finally, the court swiftly dismissed the unjust enrichment claim after finding the defendants had not engaged in wrongful conduct.[36]

Tomasella appealed the dismissals of all three claims, and the First Circuit reviewed her claims de novo.[37] Tomasella believed the district court's analysis was "unduly narrow" because it focused only on the question of product label disclosure without

25. See *infra* Part III.C for a discussion of the Harkin-Engel Protocol.

26. *E.g.*, Class Action Complaint, Tomasella v. Nestlé USA, Inc. (*Tomasella I*), *supra* note 21, at 12–13.

27. *See, e.g.*, *id.* at 12–13.

28. *Id.* at 29.

29. *Id.* at 37–38.

30. *Id.* at 38.

31. Tomasella v. Nestlé USA, Inc. (*Tomasella II*), 962 F.3d 60, 68 (1st Cir. 2020).

32. Tomasella v. Nestlé USA, Inc. (*Tomasella I*), 364 F. Supp. 3d 26, 29–30 (D. Mass. 2019).

33. *Id.* at 33.

34. *Id.* at 35 (quoting Aspinall v. Phillip Morris Co., 813 N.E.2d 476, 488 (Mass. 2004)).

35. *Id.* at 36. ("Plaintiff is complaining about this *omission* and not about the *underlying conduct*. Plaintiff has not identified any common law or statutory authority requiring such disclosure, nor has she set forth any established concept of unfairness tethered to the *disclosure* of the labor abuses of a manufacturer's supplier." (emphasis added)).

36. *Id.* at 37.

37. Tomasella v. Nestlé USA, Inc. (*Tomasella II*), 962 F.3d 60, 70 (1st Cir. 2020).

factoring in the reprehensible nature of child labor itself into its analysis; Tomasella maintained that both elements must be analyzed together.[38] She also contested the district court's finding that the defendant corporations did not engage in unfair practices.[39] Though the defendants were not directly using child labor, Tomasella argued that the defendants' lack of disclosure was still unfair.[40]

III. PRIOR LAW

This Section analyzes key legislative advancements as well as developments in the chocolate industry leading up to *Tomasella II* and its corporate defendant victory. It proceeds in four Parts. Part III.A provides a broader look at the international response to the prevalence of child and slave labor in corporate supply chains, which lacks meaningful enforcement and prevention mechanisms. Part III.B explores the American statutory landscape relevant to the issue of illegal child and forced labor. Part III.B also discusses the limited recourse available in the United States for victims of supply chain labor abuse overseas. Part III.C examines the response by the chocolate industry to the child labor issues raised in the *Tomasella* decisions as well as the highly criticized Harkin-Engel Protocol. Finally, Part III.D examines California's attempt at a disclosure regime and the onslaught of consumer class action litigation that occurred in the state leading up to *Tomasella II*, foreshadowing its outcome.

A. The International Response to Tainted Labor Practices

From a human rights perspective, slave, forced adult, and illegal child labor have been extensively discussed internationally,[41] but a vacuum (or, "governance gap") fails to hold transnational corporations accountable for these practices.[42] The globalization of business has played a key role in laying the groundwork for these abuses to occur.[43] Host nations, often conflict-affected areas, are keen to attract foreign investment and therefore fail to remediate these abuses.[44] This globalization creates incentives for large corporations to find the cheapest source of labor and resources to maximize corporate growth, which in turn incentivizes other nations to offer labor and resources as cheaply as possible.[45]

Disapproval of these labor abuses in corporate supply chains is reflected in the U.N. Universal Declaration of Human Rights, which explicitly states that "[n]o one shall be held in slavery or servitude" and advances the rights of free choice of employment and

38. Appellant's Opening Brief, at 39–40, Tomasella v. Nestlé USA, Inc. (*Tomasella II*), 962 F.3d 60 (1st Cir. 2020) (No. 19-1131).

39. *See id.* at 40–41.

40. *Id.*

41. *See generally* LEE SWEPSTON, INT'L LAB. ORG., FORCED AND COMPULSORY LABOUR IN INTERNATIONAL HUMAN RIGHTS LAW (2014); A. Yasmine Rassam, *International Law and Contemporary Forms of Slavery: An Economic and Social Rights-Based Approach*, 23 PENN ST. INT'L L. REV. 809 (2005); Shima Baradaran & Stephanie Barclay, *Fair Trade and Child Labor*, 43 COLUM. HUM. RTS. L. REV. 1 (2011).

42. Adam S. Chilton & Galit A. Sarfaty, *The Limitations of Supply Chain Disclosure Regimes*, 53 STAN. J. INT'L L. 1, 8 (2017).

43. *Id.* at 7–8.

44. *Id.* at 8.

45. *See* Jennifer Gordon, *Regulating the Human Supply Chain*, 102 IOWA L. REV. 445, 485 (2017).

human dignity for anyone who works.[46] Even corporations with tainted supply chains cite this declaration, the International Labor Organization Conventions against child and forced adult labor, and the U.N. Guiding Principles on Business and Human Rights in their supplier documents.[47]

Despite several efforts, the international response to the issue of child, forced adult, and slave labor in supply chains is considered weak and ineffective.[48] Lack of enforcement mechanisms within existing international agreements, which do not require participating nations to enact extraterritorial legislation, causes this weak response.[49] Underreported instances of trafficking in supply chains frustrate estimation of the true extent of abuse and exacerbate the problem of nonenforcement.[50] Therefore, the absence of a binding international treaty has resulted in increased attention to domestic legislation and, in particular, domestic disclosure laws.[51]

B. The U.S. Statutory Landscape Regarding Forced and Child Labor

This Part examines how the U.S. legal landscape does not directly regulate the use of overseas slave and child labor. Critically, the protections offered by U.S. employment and labor laws do not apply transnationally unless Congress explicitly provides for extraterritorial application; thus, the protections do not reach supply chain workers abroad.[52] The United States neither directly regulates business use of overseas labor nor

46. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, arts. 4, 23, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

47. *See* HERSHEY CO., THE HERSHEY COMPANY SUPPLIER CODE OF CONDUCT 1–2 (2019) (stating commitment to ending "worst forms of child labor" and supporting International Labor Organization Conventions against child labor); NESTLÉ, NESTLÉ RESPONSIBLE SOURCING STANDARD 6–10 (2018) (requiring suppliers to comply with the U.N. Universal Declaration of Human Rights and Worst Forms of Child Labor Convention). The U.N. Guiding Principles, informally known as the "Ruggie Framework" after U.N. Special Representative John Ruggie, set forth thirty-one principles and guidelines for both businesses and governments to address and remedy these labor abuses. Roza Pati, *Global Regulation of Corporate Conduct: Effective Pursuit of a Slave-Free Supply Chain*, 68 AM. U. L. REV. 1821, 1853 (2019).

48. *See* Chilton & Sarfaty, *supra* note 42, at 10.

49. *Id.* at 3, 10 (criticizing the U.N. Guiding Principles because they are "voluntary and lack independent monitoring and enforcement mechanisms").

50. Julie A. Gutierrez, *Less than Transparent: How California's Effort To Shine Light on Modern Slavery May Ultimately Keep Consumers in the Dark*, 19 LOY. J. PUB. INT'L L. 57, 60–62 (2017).

51. Chilton & Sarfaty, *supra* note 42, at 11 ("In the absence of a U.N. treaty, the international law landscape consists only of voluntary soft law standards . . . . Given the limitations of existing international legal mechanisms, domestic law is emerging as a potential tool for regulating the extraterritorial human rights abuses of multinational corporations."). The United Kingdom and Australia are among the nations taking the approach of domestic disclosure laws. The U.K.'s Modern Slavery Act of 2015 requires all companies with at least £36 million in revenue to publicly disclose on their websites what steps they have taken to ensure their supply chains are free of slave or forced labor. E. Christopher Johnson Jr., Fernanda Beraldi, Edwin Broecker, Emily Brown & Susan Maslow, *The Business Case for Lawyers To Advocate for Corporate Supply Chains Free of Labor Trafficking and Child Labor*, 68 AM. U. L. REV. 1555, 1593–94 (2019). Brazil, however, has taken a more "aggressive" disclosure strategy by maintaining a public list of companies found to be using forced labor and using punitive measures. Annie Kelly, *Brazil's 'Dirty List' Names and Shames Companies Involved in Slave Labour*, GUARDIAN (July 24, 2013, 12:21 PM), http://www.theguardian.com/sustainable-business/brazil-dirty-list-names-shames-slave-labour [http://perma.cc/49C9-5VDS].

52. Gordon, *supra* note 45, at 483 n.174.

mandates businesses to disclose use of overseas labor, but it has enacted statutes operating in the peripheral area of tainted labor in supply chains.[53] The United States has also attempted to mandate disclosure for human rights issues in the past.[54]

Part III.B.1 examines the uncertain protections provided in the United States for trafficking victims overseas. Part III.B.2 discusses the efforts to prevent the importation of goods produced by tainted labor practices. Part III.B.3 surveys these previous disclosure laws as well as efforts currently underway to mandate disclosure of forced and child labor.

1. Protection for Trafficking Victims? The Alien Tort Statute and Trafficking Victims Protection Act

The Alien Tort Statute[55] (ATS) as well as the Trafficking Victims Protection Reauthorization Act[56] (TVPRA) establish liability for American corporations for tort damages suffered by foreign individuals.[57] Enforcement of the ATS against a multinational corporation for supply chain practices may be limited;[58] however, the TVPRA could potentially hold more traction in finding corporations liable for supply chain practices.[59]

The ATS lacks extraterritorial application, limiting its ability to hold transnational corporations accountable.[60] The Supreme Court made this clear in *Kiobel v. Royal Dutch Petroleum Co.*,[61] a case involving an aiding and abetting claim by Nigerian nationals against foreign corporations.[62] The Court held that the ATS did not apply to tort violations that occurred outside of U.S. sovereign territory.[63]

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53. *See infra* Parts III.B.1 and III.B.2.

54. *See infra* Part III.B.3.

55. 28 U.S.C. § 1350. The ATS gives the district courts jurisdiction over a cause of action brought forth by an alien for a tort committed against that alien. *Id.*

56. Pub. L. No. 109-164, 119 Stat. 3558 (2006) (codified as amended in scattered sections of 22 U.S.C.) (adding certain amendments to the original Trafficking Victims Protection Act of 2000, 18 U.S.C. §§ 1581–1597). The TVPRA requires the Secretary of Labor to develop a list of goods from nations that the Bureau of International Labor Affairs suspects are produced from forced labor, monitor use of forced labor, and provide this information to the Office to Monitor and Combat Trafficking housed within the State Department. 22 U.S.C. § 7112(a)–(b). The legislation calls on the president to "carry out international initiatives to enhance economic opportunity for potential victims of trafficking" such as business training, educational programs to keep children in school, and programs for public awareness. 22 U.S.C. § 7104(a)–(b).

57. Johnson Jr. et al., *supra* note 51, at 1611–12 (discussing litigation arising under the ATS and TVPRA).

58. See *infra* notes 60–69 and accompanying text for a discussion on the limits of litigation under the ATS.

59. *See* Ramona L. Lampley, *Mitigating Risk, Eradicating Slavery*, 68 AM. U. L. REV. 1707, 1711–12 (2019) (forecasting difficulty of employee-based cases brought under ATS violations but stating that the TVPRA could provide "fertile ground" for litigation against corporations with employee abuses in their supply chains).

60. *Id.* at 1729.

61. 569 U.S. 108 (2013).

62. *Kiobel*, 569 U.S. at 111–12.

63. *Id.* at 117, 124–25 (holding that the presumption against extraterritoriality "constrain[s] courts exercising their power under the ATS" and that the statute does not cover conduct occurring outside the United States where the claims do not sufficiently "touch and concern" U.S. territory).

The Ninth Circuit followed *Kiobel* a year later in *Doe I v. Nestlé USA, Inc.*,[64] a case involving victims of child slavery in Ivorian cocoa plantations.[65] While the court in *Doe I* held that the prohibition against slavery was a "universal norm" in international law that could be asserted against the defendant corporations, it declined to determine whether the plaintiff's claims involving extraterritorial conduct were barred under the ATS.[66] However, after the case was remanded and again appealed to the Ninth Circuit, the court held that U.S. corporate *funding* of the child slavery practices in the Ivory Coast was actionable under the ATS, allowing a potential pathway for former child slaves to assert an aiding and abetting claim against American corporations.[67] The case was again remanded.[68] This ongoing litigation leaves the possibility of corporations' extraterritorial liability an open question.[69]

The TVPRA is considered a more accessible approach to holding corporations accountable for labor abuses because, unlike the ATS, it explicitly provides for extraterritorial jurisdiction.[70] Before the Trafficking Victims Protections Act[71] (TVPA) was enacted in 2000 (along with its four subsequent reauthorizations known as the TVPRA), U.S. law did not hold corporations accountable for benefitting from human rights violations without directly perpetrating them.[72] Therefore, the TVPA and TVPRA broke ground by imposing criminal liability and providing a private civil right of action for trafficking victims.[73] Under these acts, the "perpetrator" can include a person who knowingly benefits financially from participation in a venture involving trafficking.[74] The 2008 amendments of the TVPRA hold corporations directly liable for human trafficking after receiving a financial benefit, even if the trafficking is committed overseas or by another entity in the supply chain.[75]

Though extraterritorial obstacles are not a factor, claims under the TVPRA have yet to be seriously entertained by the courts.[76] However, while most cases to date have

64. 766 F.3d 1013 (9th Cir. 2014). The plaintiffs alleged the corporations aided and abetted child slavery in the Ivory Coast. Lampley, *supra* note 59, at 1729.

65. *Doe I*, 766 F.3d at 1016.

66. *Id.* at 1022, 1028–29. The Ninth Circuit remanded the case to allow the plaintiffs to amend their complaint to reflect the *Kiobel* holding; the district court dismissed the complaint because the alleged torts occurred outside of the United States, but the Ninth Circuit reversed. Lampley, *supra* note 59, at 1730–32.

67. Doe v. Nestlé, S.A., 906 F.3d 1120, 1126 (9th Cir. 2018).

68. *Id.* at 1127.

69. *See* Lampley, *supra* note 59, at 1733 ("This case will be closely watched by those seeking to litigate claims based on forced labor in the supply chain."). The Supreme Court ruled in *Nestlé USA, Inc. v. Doe* that six individuals from Mali alleging they were trafficked into the Ivory Coast to work on cocoa farms lacked standing under the ATS to sue major U.S. chocolate companies Nestlé and Cargill for aiding and abetting child slavery. Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1935, 1937 (2021). Because only "general corporate activity" occurred in the United States, the Court declined to apply the ATS domestically to hold Nestlé and Cargill liable. *Id.*

70. Lampley, *supra* note 59, at 1729; *see* 18 U.S.C. § 1596(a) (providing extraterritorial jurisdiction for offenses including, peonage, slavery, involuntary servitude, and trafficking).

71. 18 U.S.C. §§ 1581–1597.

72. Laura Ezell, *Human Trafficking in Multinational Supply Chains: A Corporate Director's Fiduciary Duty To Monitor and Eliminate Human Trafficking Violations*, 69 VAND. L. REV. 499, 508 (2016).

73. Johnson Jr. et al., *supra* note 51, at 1586–87.

74. *Id.*

75. Ezell, *supra* note 72, at 502.

76. Pati, *supra* note 47, at 1835 n.62.

been unsuccessful in terms of holdings, critical points made during litigation forecast potential success in the future.[77] In *Ratha v. Phatthana Seafood Co*.,[78] Cambodian seafood workers brought a TVPRA claim alleging a trafficking and forced labor scheme among three Thai corporations and one U.S. distributor.[79] The claim survived the defendant corporations' motion to dismiss[80] before summary judgment was granted in favor of the defendants.[81] Further, the court held that the TVPRA clearly applies to corporations and not just individuals, leaving the door open for future meritorious claims of trafficking victims against multinational corporations.[82]

2. Stopping Tainted Goods at the Border: The Tariff Act

The interplay between the Tariff Act of 1930[83] and the Trade Facilitation and Trade Enforcement Act of 2015[84] is also relevant in tackling tainted supply chains. Because it explicitly bans importing goods produced in a foreign country through forced, convict, or indentured labor, the Tariff Act has been cited by plaintiffs in consumer protection lawsuits to substantiate why a corporation's practices are unlawful or unfair under the law.[85] However, the Tariff Act's Consumptive Demand Clause previously allowed goods to be imported anyway if the "consumptive demand" of the goods was higher than production ability to meet the demand.[86]

The Trade Facilitation and Trade Enforcement Act explicitly repealed this exception and thus closed an eighty-five-year-old "loophole" that allowed goods

77. Johnson Jr. et al., *supra* note 51, at 1562; *see* Adhikari v. Kellogg Brown & Root, Inc., 845 F.3d 184, 205–06. (5th Cir. 2017) (holding that TVPRA claim of Nepali citizen's allegation of human trafficking activity at a U.S. military base in Iraq under the TVPRA to be barred because the alleged conduct occurred prior to the grant of extraterritorial jurisdiction provided in the 2008 amendments to the TVPA). The court held that allowing the claim to move forward would have "an impermissible retroactive effect," and the result of a ruling on the case's merits is uncertain. *Id.* at 206.

78. No. CV 16-4271-JFW, 2016 WL 11020222 (C.D. Cal. Nov. 9, 2016).

79. *Ratha*, 2016 WL 11020222, at *1.

80. *Id.* at *6.

81. Ratha v. Phatthana Seafood Co., No. CV 16-4271-JFW, 2017 WL 8292391, at *6 (C.D. Cal. Dec. 21, 2017) (granting defendant S.S. Frozen Food Co.'s motion for summary judgment on plaintiffs' TVPRA claim); Ratha v. Phatthana Seafood Co., No. CV 16-4271-JFW, 2017 WL 8292922, at *8 (C.D. Cal. Dec. 21, 2017) (granting defendant Phatthana Seafood Co.'s motion for summary judgment on plaintiffs' TVPRA claim); Ratha v. Phatthana Seafood Co., No. CV 16-4271-JFW, 2017 WL 8293174, at *6 (C.D. Cal. Dec. 21, 2017) (granting defendants Rubicon Resources, LLC's and Wales & Co. Universe, Ltd.'s motions for summary judgment on plaintiffs' TVPRA claim).

82. *See Ratha*, 2017 WL 8293174, at *6. In holding that the TVPRA did not solely apply to individuals, the court stated that "courts have uniformly upheld extraterritorial jurisdiction over TVPRA claims against corporations." *Id.*

83. 19 U.S.C. §§ 1202–1683g.

84. Pub. L. No. 114–125, 130 Stat. 122 (codified as amended at 19 U.S.C. §§ 4301–4454).

85. *See* 19 U.S.C. § 1307 ("All goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in any foreign country by convict labor or/and forced labor . . . under penal sanctions shall not be entitled to entry at any of the ports of the United States."); Tomasella v. Nestlé USA, Inc., 962 F.3d 60, 80 (1st Cir. 2020) (noting the plaintiff's citation to the Tariff Act as a basis for demonstrating that defendants committed unfair business practices by utilizing tainted supply chains); Sud v. Costco Wholesale Corp., 229 F. Supp. 3d 1075, 1088 (N.D. Cal. 2017) (noting that plaintiffs alleged defendant violated the Tariff Act to underscore argument of unlawful business practices).

86. Johnson Jr. et al., *supra* note 51, at 1595.

produced by child or slave labor to still enter the United States due to high demand.[87] The legislation's enactment has resulted in companies being monetarily penalized or having goods detained at the border by a Withhold Release Order issued by U.S. Customs and Border Protection (CBP).[88]

3. Past and Potential Future Disclosure Regimes in the United States

The United States has yet to adopt an official disclosure regime regarding supply chain labor practices.[89] However, it has adopted product disclosure laws for other humanitarian purposes, which is exemplified by the conflict minerals disclosure requirements of the Dodd-Frank Wall Street Reform and Consumer Protection Act.[90] Congress believed that the trade of conflict minerals produced by the Democratic Republic of the Congo (DRC) financially contributed to violence and conflict in the region.[91] The Dodd-Frank Act requires certain companies to disclose whether they source minerals from the DRC or its bordering countries to the U.S. Securities and Exchange Commission (SEC) through filing a Conflict Minerals Report.[92] Companies must disclose this information on their websites and can label eligible products "DRC conflict free."[93]

To ensure compliance and due diligence of these companies, the Dodd-Frank Act imposes penalties on companies who fail to comply in good faith with the requirements.[94] The law has been heavily criticized due to alleged high compliance costs, doubt in its effectiveness, and overreach of SEC power.[95] Additionally, in *National Association of*

87. Rachel Revesz, *Obama Bans Slave-Produced Imports, Ends 85-Year-Old Loophole*, INDEPENDENT (Feb. 25, 2016, 6:32 PM), http://www.independent.co.uk/news/world/americas/obama-bans-slave-produced-imports-ends-85-year-old-loophole-a6895761.html [http://perma.cc/8AY5-5LE3]; *see* Pub. L. No. 114–125, 130 Stat. 239.

88. *See CBP Issues Detention Order on Seafood Harvested with Forced Labor*, U.S. CUSTOMS & BORDER PROT. (Aug. 18, 2020), http://www.cbp.gov/newsroom/national-media-release/cbp-issues-detention-order-seafood-harvested-forced-labor-0 [http://perma.cc/72CZ-KABN] (reporting the detainment of all seafood harvested by *Da Wang*, a Taiwanese fishing vessel, for use of forced labor); *CBP Collects $575,000 from Pure Circle U.S.A. for Stevia Imports Made with Forced Labor*, U.S. CUSTOMS & BORDER PROT. (Aug. 13, 2020) [hereinafter CBP, *CBP Collects $575,000*], http://www.cbp.gov/newsroom/national-media-release/cbp-collects-575000-pure-circle-usa-stevia-imports-made-forced-labor [http://perma.cc/R4MX-UFJL] (reporting the first penalty CBP issued for imported goods made by forced labor).

89. *See* Gutierrez, *supra* note 50, at 65–68 (discussing how California's attempt at a state disclosure regime is advancing a potential national disclosure regime in the future).

90. Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified at 15 U.S.C. § 78m); *see* Johnson Jr. et al., *supra* note 51, at 1588 (explaining that the Dodd-Frank Act was a "reflection of Congress's concerns" that U.S. consumption of conflict minerals from the Democratic Republic of the Congo contributed to the humanitarian crises there).

91. Pub. L. No. 111-203, tit. 15, sec. 1502(a), 124 Stat. 2213 (2010) (codified at 15 U.S.C. § 78m).

92. Chilton & Sarfaty, *supra* note 42, at 12.

93. 15 U.S.C. § 78m(p).

94. Chilton & Sarfaty, *supra* note 42, at 12.

95. Galit A. Sarfaty, *Shining Light on Global Supply Chains*, 56 HARV. INT'L L.J. 419, 440 (2015); *see also* Johnson Jr. et al., *supra* note 51, at 1588 (explaining that the law was criticized for its "onerous reporting obligations and investigation costs").

Manufacturers v. SEC,[96] the United States Court of Appeals for the District of Columbia Circuit held that the website reporting requirement violates the First Amendment.[97] In response, the SEC renounced portions of the law's requirements, rendering it "largely toothless" and creating more confusion.[98] However, the law is still in effect, and many companies still comply out of uncertainty.[99]

In a similar vein to the Dodd-Frank Act, both the U.S. House of Representatives and Senate introduced bills in 2020 calling for certain companies to disclose their efforts to detect and handle instances of forced labor, modern slavery, and child labor in their supply chains.[100] The House bill, titled the Business Supply Chain Transparency on Trafficking and Slavery Act of 2020, calls for amending the Securities Exchange Act[101] to require certain companies to file an annual report with the SEC.[102] The reports would disclose any policies or initiatives the company follows to identify and eradicate instances of labor abuse in their supply chains, the efforts of the company to evaluate any risks of these abuses, and the remedial action taken when detected.[103] The Senate bill, titled Slave-Free Business Certification Act of 2020, would require a similar disclosure to the SEC as required by the House bill.[104]

Both bills require that the information disclosed to the SEC be disclosed on the company's website through a "conspicuous and easily understandable link."[105] Neither bill would coerce corporations to conduct remedial activities, but only to disclose whether and to what extent they do.[106] Since being introduced, neither bill has advanced to a floor vote, leaving the adoption of a nationwide disclosure regime uncertain.[107]

C. The Advent of Voluntary Agreements: Harkin-Engel Protocol and Private Sector Action

Congress has previously attempted to compel the chocolate industry's disclosure of child labor.[108] After negative media attention, the U.S. House of Representatives passed

96. 800 F.3d 518 (D.C. Cir. 2015).

97. *See Nat'l Ass'n of Mfrs.*, 800 F.3d at 530.

98. Marc Butler, *Why the Conflict Minerals Rule Refuses To Die*, INTELLIGIZE (June 21, 2018), http://www.intelligize.com/why-the-conflict-minerals-rule-refuses-to-die/ [http://perma.cc/MP9B-593P].

99. Johnson Jr. et al., *supra* note 51, at 1589. Ambiguity may explain continued compliance with the law, but investor concerns for human rights may also be pushing companies to continue their reporting under the Dodd-Frank Act. Butler, *supra* note 98.

100. Business Supply Chain Transparency on Trafficking and Slavery Act of 2020, H.R. 6279, 116th Cong. (2020); Slave-Free Business Certification Act of 2020, S. 4241, 116th Cong. (2020).

101. 15 U.S.C. §§ 78a–qq.

102. H.R. 6279.

103. *Id.* §§ 3(1)(A)–(E).

104. S. 4241 § 2(b).

105. H.R. 6279 § 3(2)(A); S. 4241 § 2(b)(1)(C).

106. *See* H.R. 6279 § 3; S. 4241 § 2(b).

107. *See H.R. 6279 – Business Supply Chain Transparency on Trafficking and Slavery Act of 2020*, CONGRESS.GOV, http://www.congress.gov/bill/116th-congress/house-bill/6279?s=1&r=2 [http://perma.cc/VHH5-HEVC] (last visited Apr. 1, 2022); *S. 4241 – Slave-Free Certification Act of 2020*, CONGRESS.GOV, http://www.congress.gov/bill/116th-congress/senate-bill/4241 [http://perma.cc/W7X8-YU5T] (last visited Apr. 1, 2022).

108. *See* Gutierrez, *supra* note 50, at 65–66.

a bill in July 2001 that would have required the Food and Drug Administration to create "Slave-Free" labels for cocoa products.[109] "Big Chocolate" lobbyists, however, impeded the bill from making it to a Senate vote and becoming law.[110] The success of the lobbying efforts resulted in the creation of the Harkin-Engel Protocol, which was signed on September 19, 2001, by members of the chocolate industry in lieu of a mandated disclosure law.[111] Signatories of the Harkin-Engel Protocol vowed to "develop and implement credible, mutually-acceptable, voluntary, industry-wide standards of public certification" to ensure that cocoa beans were produced free of child labor by July 1, 2005.[112] The corporations "bound" by this agreement include the *Tomasella II* defendants: Nestlé, Hershey, and Mars, among others.[113] The signatories promised to establish a joint international foundation and advisory groups to detect child labor and investigate labor practices on West African cocoa farms.[114]

The "soft, business-friendly" nature of the agreement, evidenced by its completely voluntary standards, resulted in a lack of efficacy.[115] Compliance with the agreement was encouraged by an empty threat of reintroducing the disclosure legislation that the lobbyists formerly quashed, which has not been reintroduced despite the agreement's failure.[116] On July 1, 2005, the parties agreed to a three-year extension to complete the goals of the Protocol with the promise of establishing a certification system covering fifty percent of the cocoa-growing regions in the Ivory Coast and Ghana.[117] The deadline was then extended to 2010, at which point a sector-wide certification system was promised.[118] The parties finally extended the deadline to 2020.[119] On top of the lack of enforced deadlines, some research shows that the situation has not improved—and

109. *Id.* The bill passed the House by a vote of 291–115. *Id.*

110. *Id.*; *see* Pati, *supra* note 47, at 1866 (stating that business lobby groups generally oppose prescriptive laws compelling them).

111. PAYSON CTR. FOR INT'L DEV., TULANE UNIV. SCH. PUB. HEALTH, FINAL REPORT 2013/14: SURVEY RESEARCH ON CHILD LABOR IN WEST AFRICAN COCOA GROWING AREAS 5–6 (2015); Gutierrez, *supra* note 50, at 65–66.

112. 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 (2001).

113. *Id.*

114. *Id.*

115. Gutierrez, *supra* note 50, at 65–66.

116. *Id.* at 66 ("The 'stick' used to encourage compliance would be resubmission of the previous bill if the terms of the pledge were not met.").

117. PAYSON CTR. FOR INT'L DEV. & TECH. TRANSFER, TULANE UNIV., FOURTH ANNUAL REPORT: OVERSIGHT OF PUBLIC AND PRIVATE INITIATIVES TO ELIMINATE THE WORST FORMS OF CHILD LABOR IN THE COCOA SECTOR IN CÔTE D'IVOIRE AND GHANA 28 (2010) [hereinafter TULANE UNIV., FOURTH ANNUAL REPORT]; *see* Press Release, Joint Statement from U.S. Senator Tom Harkin, Representative Eliot Engel and the Chocolate/Cocoa on Efforts To Address the Worst Forms of Child Labor in Cocoa Growing (July 1, 2005) (on file with author).

118. TULANE UNIV., FOURTH ANNUAL REPORT, *supra* note 117; *see* Press Release, Joint Statement from U.S. Senator Tom Harkin, Representative Eliot Engel, and the Chocolate and Cocoa Industry on the Implementation of the Harkin-Engel Protocol (June 16, 2008) (on file with author).

119. Gutierrez, *supra* note 50, at 66.

actually has gotten worse—in West Africa.[120] Recent research reports that the number of overall child laborers, and children used in hazardous labor, has increased.[121]

In the vein of the Harkin-Engel Protocol, individual chocolate companies acknowledge the issue of child labor on their websites and have launched their own action plans with voluntary commitments to combat the issue.[122] For example, Nestlé launched its own "Cocoa Plan" as an attempt to implement its own solutions to the use of child labor.[123] In spite of the overall failed goals of the Harkin-Engel Protocol, Nestlé ambitiously states that it will source one hundred percent of its cocoa beans by 2025.[124]

Similarly, in its "Cocoa for Generations" plan, Mars also "aims" to have one hundred percent of its cocoa beans responsibly sourced by 2025.[125] Finally, Hershey launched a plan titled "Cocoa for Good," in which the company pledges to invest $500 million in the affected areas by 2030.[126] Similar to Nestlé, Hershey seeks to eliminate child labor through its Child Labor Monitoring and Remediation Systems in its supply chain.[127]

D. Steps Forward and Steps Back: California Disclosure Laws and Lawsuits

Though the U.S. legal landscape has leaned away from a mandated disclosure regime, California has stepped ahead and developed its own.[128] Part III.D.1 discusses California's attempt to combat the issue of modern-day slavery through its own legislation. Part III.D.2 closely examines the series of recent consumer class action lawsuits concentrated in California to attempt compelled disclosure of tainted labor practices on product labels.

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120. *See* TULANE UNIV., FOURTH ANNUAL REPORT, *supra* note 117, at 131 (concluding that child trafficking for work in cocoa agriculture continues to be an issue, particularly in Burkina Faso and Mali).

121. NORC UNIV. OF CHI., ASSESSING PROGRESS IN REDUCING CHILD LABOR IN COCOA PRODUCTION IN COCOA GROWING AREAS OF CÔTE D'IVOIRE AND GHANA: FINAL REPORT 2018/2019 SURVEY ROUND – DRAFT, at 5 (2020) (stating that between the 2008–2009 and 2018–2019 agricultural seasons, the prevalence rate of child labor increased from 31% to 44% and the prevalence rate of children involved in hazardous labor increased from 31% to 41%). The report suggests that an overall increase in cocoa bean production could be attributed to the increases in child labor. *Id.*; *see also* COCOA HORIZONS FOUND., 2018-19 PROGRESS REPORT 8 (2019) (reporting an increase of child labor detected in the Callebaut supply chain).

122. *See* NESTLÉ, NESTLÉ COCOA PLAN PROGRESS REPORT 2019 (2019).

123. *Id.* Nestlé launched this initiative in 2009, and since has celebrated its Child Labor Monitoring and Remediation System in Côte d'Ivoire and contributions to schools in West Africa. *Id.* Nestlé reported an increase in the child labor rate from 17% to 23% between 2017 and 2019. NESTLÉ, TACKLING CHILD LABOR 2019 REPORT 13 (2019).

124. NESTLÉ COCOA PLAN PROGRESS REPORT, *supra* note 122.

125. Press Release, MARS, Mars Launches New Cocoa Sustainability Strategy (Sept. 19, 2018), http://www.mars.com/news-and-stories/press-releases/cocoa-sustainability-strategy#:~:text=Through%20its%20first%20pillar%2C%20Mars,and%20higher%20incomes%20for%20farmers [http://perma.cc/S8QK-MNCQ].

126. *Cocoa for Good*, HERSHEY CO., http://www.thehersheycompany.com/en_us/sustainability/shared-business/cocoa-for-good.html [http://perma.cc/6EYK-Q9XQ] (last visited Apr. 1, 2022) [hereinafter HERSHEY, *Cocoa for Good*].

127. *Id.*

128. See *supra* Part III.D.1 for a discussion of California's disclosure legislation.

1. One Step Forward? The California Transparency in Supply Chains Act

In the spirit of international disclosure regimes, as well as the Dodd-Frank Act, the California Transparency in Supply Chains Act of 2010[129] ("California Transparency Act") became effective January 1, 2012.[130] This law applies to any worldwide manufacturer or retailer doing business in California exceeding $100 million in revenue.[131] Similar to its mandated disclosure predecessors, the law requires these businesses to disclose efforts taken to eliminate slave labor and human trafficking in supply chains on their websites with a "conspicuous and easily understood link."[132] At a minimum, the disclosures should describe "to what extent, if any" the company verifies its product supply chains and audits its suppliers.[133] The "exclusive remedy" provided is a civil action brought by the California Attorney General for injunctive relief.[134]

The California Transparency Act reflects the role that government can play in encouraging private businesses to adopt better practices given the "unique position" of corporations to combat trafficking and labor abuse in supply chains.[135] The legislation functions as both a "carrot" and a "stick," incentivizing businesses to care about abuse in their supply chains to maintain their brand image and save face with would-be consumers and investors.[136] The legislation contains industry standards for corporate social responsibility and provides a framework for corporations to inspect their supply chains with resources to help them do so.[137] However, the legislation has faced criticism for its failure to directly compel covered businesses to actually take action against instances of labor abuses detected.[138] A company could disclose that it takes no action at all and still comply with the law.[139] Finally, even if the company does disclose the efforts it makes, such statements are often interpreted by courts as aspirational; thus, the companies are not susceptible to liability.[140]

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129. CAL. CIV. CODE § 1714.43 (West 2020).

130. Jonathan Todres, *The Private Sector's Pivotal Role in Combating Human Trafficking*, 3 CALIF. L. REV. CIR. 80, 81 (2012).

131. Travis Miller, *The Evolving Regulations and Liabilities Entwined in Corporate Social Responsibility*, 46 TEX. ENV'T L.J. 219, 231 (2017).

132. CAL. CIV. CODE § 1714.43(a)(1), (b) (West 2020).

133. *Id.* § 1714.43(c)(1)–(5).

134. *Id.* § 1714.43(d).

135. Todres, *supra* note 130, at 91. Todres discusses the role that the private sector has played in preventing human rights abuses, such as the twenty-first century slave trade. *See id.*

136. *Id.* at 92.

137. Gutierrez, *supra* note 50, at 70–71. Gutierrez indicates that many popular shopping websites such as Target and Macy's include links on their homepage in accordance with the legislation. *See id.* at 71. Over 500 companies are currently required to make disclosures under the California Transparency Act. Chilton & Sarfaty, *supra* note 42, at 15.

138. Johnson Jr. et al., *supra* note 51, at 1590.

139. Alexandra Prokopets, *Trafficking in Information: Evaluating the Efficacy of the California Transparency in Supply Chains Act of 2010*, 37 HASTINGS INT'L & COMP. L. REV. 351, 361–62 (2014) ("This lack of legal consequences is problematic because companies that have not taken action are not incentivized to change their status quo, to investigate supply chains, or to implement strategies to eradicate human trafficking.").

140. Pati, *supra* note 47, at 1838; *see, e.g.*, Barber v. Nestlé USA, Inc., 154 F. Supp. 3d 954, 961–62 (C.D. Cal. 2015).

In addition to the criticism that the legislation requires mere reporting without meaningful change, critics point out the law is ill-equipped to help the consumer make informed purchasing decisions.[141] For example, there is no list of companies provided to inform consumers which manufacturers and retailers must comply.[142] Therefore, unless a consumer knows whether a company's revenue does or does not exceed $100 million, they will not know whether a company has refused to comply with the law or is not required to comply in the first place.[143]

The law does not provide specific reporting requirements, such as what kind of audits the corporation conducts and how often compliance information must be updated.[144] This lack of specificity inevitably results in disparities from business to business on the quality of information reported to the consumer, giving the consumer a limited point of reference to make an informed purchasing decision.[145] Further confusing the consumer is the fact that companies can post the "conspicuous" link to the disclosure information on a parent company's website instead of the subsidiary company brand with which the consumer is familiar.[146] Many companies fail to comply without facing legal consequences.[147] The California Attorney General has yet to bring forth any action for injunctive relief.[148]

2. California Consumers, Class Action Complaints, and Consistent Dismissal

A multitude of consumer class action litigation attempting to mandate product labels to disclose child and slave labor has been hosted in California.[149] An early example is *Barber v. Nestlé USA, Inc*.[150] This class action suit called for product label disclosure from Nestlé regarding the forced labor used to procure the fish used in its cat food, Fancy Feast®.[151] The plaintiffs alleged violations of three specific laws: the California Unfair Competition Law[152] (UCL), False Advertising Law[153] (FAL), and Consumers Legal

141. *See* Gutierrez, *supra* note 50, at 71.

142. *Id.*

143. *Id.*

144. Prokopets, *supra* note 139, at 363.

145. *See id.*

146. *Id.* at 364.

147. Gutierrez, *supra* note 50, at 71–72.

148. *Id.* at 71; *see* GERALD T. HATHAWAY, AM. BAR ASS'N LAB. & EMP. L. SECTION INT'L COMM. MID-YEAR MEETING 2021, at 15 (2021) ("To date, enforcement of the law has been slow and only in the spring of 2015 did the California Attorney General's Office send a series of letters to companies they believe fall under the CTCSA's jurisdiction reminding them of compliance obligations.").

149. See *infra* notes 150–183 for a discussion on the series of failed consumer class action lawsuits in the Ninth Circuit.

150. 154 F. Supp. 3d 954 (C.D. Cal. 2015).

151. *See Barber*, 154 F. Supp. 3d at 956.

152. CAL. BUS. & PROF. CODE §§ 17200–17210 (West 2020). The UCL prohibits "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." *Id.* § 17200.

153. *Id.* §§ 17500–17509. The FAL prohibits corporations with the intention to "induce the public" into entering a transaction from making or disseminating a statement that is untrue or misleading "which is known, or which by the exercise of reasonable care should be known." *Id.* § 17500.

Remedies Act (CLRA).[154] The court, in what would become a common trend in subsequent years, granted Nestlé's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6)[155] for failure to state a claim.[156]

The court did not find statements in Nestlé's Corporate Business Principles and Supplier Code of Conduct forbidding suppliers from using forced labor practices to be misleading.[157] In fact, the court agreed with Nestlé that these statements were merely aspirational when read in context.[158] "[N]o reasonable consumer" would interpret these statements to mean Nestlé's suppliers definitively comply with Nestlé's requirements.[159]

Soon after *Barber* came the identical orders of *McCoy v. Nestlé USA, Inc.*[160] and *Dana v. Hershey Co.*,[161] both raising the same trinity of California consumer protection laws.[162] In *Dana*, the plaintiff alleged that Hershey's failure to disclose the prevalence of child labor in its supply chain at the point of sale was an omission material to a reasonable consumer.[163] Because the CLRA only provides a consumer with a remedy if the company makes an affirmative misrepresentation or an omission involving product safety or utility, the court dismissed this claim.[164] A policy concern against limitless corporate liability underpinned the court's finding that there was no duty to disclose the labor practices.[165] The court acknowledged that "countless issues . . . may be legitimately important to many customers, and the courts are not suited to determine which should occupy the limited surface area of a chocolate wrapper."[166]

A year after *McCoy*, the court similarly addressed issues in *Sud v. Costco Wholesale Corp.*[167] The plaintiff's claim, that prawns purchased from Costco were tainted by slave labor and therefore mandated product label disclosure, was dismissed under Federal Rule

154. CAL. CIV. CODE §§ 1750–1785 (West 2020). The CLRA forbids certain unfair methods of competition and/or deceptive acts such as mispresenting the source of goods, representing that goods have certain characteristics they do not, and representing that goods are of a certain standard or grade that they are not. *Id.* § 1770(a).

155. FED. R. CIV. P. 12(b)(6).

156. *Barber*, 154 F. Supp. At 956.

157. *Id.* at 962–64.

158. *Id.* at 964.

159. *Id.*

160. 173 F. Supp. 3d 954 (N.D. Cal. 2016).

161. 180 F. Supp. 3d 652 (N.D. Cal. 2016).

162. *See McCoy*, 173 F. Supp. at 956; *Dana*, 180 F. Supp. 3d at 654–55.

163. Complaint for Violation of Consumer Protection Laws at 28, Dana v. Hershey Co., 180 F. Supp. 3d 652 (N.D. Cal. 2016) (No. 3:15-cv-04453).

164. *Dana*, 180 F. Supp. 3d at 664 ("The Court agrees . . . that the weight of authority limits a duty to disclose under the CLRA to issues of product safety, unless disclosure is necessary to counter an affirmative misrepresentation."). The court observed that overwhelming case law supported this conclusion and disagreed that Hershey had exclusive knowledge of a material fact not known or reasonably accessible to the consumer because Hershey acknowledged the use of Ivorian child labor in its supply chain. *See id.*; *see also McCoy*, 173 F. Supp. 3d at 965 (stating that an actionable claim under the CLRA must contain an omission the corporation was obligated to disclose, which largely means a safety issue).

165. *See McCoy*, 173 F. Supp. 3d at 966.

166. *Id.* The court similarly dismissed the UCL and FAL claims based on a lack of duty to disclose the information, making the corporate action a pure omission. *Id.* at 967–70.

167. 229 F. Supp. 3d 1075 (N.D. Cal. 2017). This case was a consumer claim calling for disclosure of the use of slave labor on a package of prawns sold at Costco. *See Sud*, 229 F. Supp. 3d at 1079–80.

of Civil Procedure 12(b)(6) for the CLRA, UCL, and FAL claims.[168] Citing *McCoy*, the court found no duty to disclose the use of slave labor on the product packaging and echoed a call for a "bright-line limitation on a manufacturer's duty to disclose" given the uncertainty of what consumers find important enough to be disclosed.[169]

In discussing the unfairness prong of the UCL, the court determined that unfair business behavior depends on whether the business practices are "immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers" when weighing the utility of the corporation's conduct against the gravity of the conduct's harm.[170] The plaintiffs failed this test because the court separated the heart of the plaintiff's claim (that the failure to disclose the labor practices on the product label was immoral) from the immoral labor practices themselves.[171] The court found the labor practices immoral, but not their lack of disclosure.[172]

The most recent litigation under California consumer protection law includes the appellate decisions of *Hodsdon v. Mars, Inc.*[173] and *Wirth v. Mars, Inc.*[174] Despite expressing sympathy for the conditions child cocoa laborers face, the *Hodsdon* court found no duty under the CLRA to disclose the use of child labor in Mars's supply chain without either an affirmative representation made on the subject or an omission relating to a product's physical defect or central function.[175] Under the UCL, the conduct was not found unfair because there was no "close nexus" between the lack of disclosure and a legislative policy against this behavior.[176] The plaintiffs claimed the behavior was unfair because of general policy against slave and child labor, but the crux of the claim hinged on the disclosure of the labor abuse, not the labor abuse itself.[177] Especially because the information was available on Mars's website, the court did not find Mars's lack of disclosure unfair.[178] The *Wirth* decision, released one month after *Hodsdon*, reached the same conclusions.[179]

Each plaintiff in this series of consumer protection litigation failed to compel mandated disclosure.[180] Further, policies against child or slave labor generally did not suffice to justify the need for disclosure.[181] The California courts and the Ninth Circuit were also concerned with the multitude of information consumers could find pertinent

168. *Id.* at 1079–80.

169. *Id.* at 1086 (quoting *McCoy*, 173 F. Supp. 3d at 966).

170. *Id.* at 1089 (quoting Boschma v. Home Loan Ctr., Inc., 129 Cal. Rptr. 874, 893 (Cal. Ct. App. 2011)).

171. *See id.*

172. *See id.* (stating that plaintiffs failed to cite a policy justifying the lack of disclosure of labor practices on product labels as unfair because companies have no duty to disclose this information).

173. 891 F.3d 857 (9th Cir. 2018).

174. 730 F. App'x 468 (9th Cir. 2018).

175. *Hodsdon*, 891 F.3d at 860, 865.

176. *Id.* at 866–67.

177. *Id.*

178. *Id.* at 867.

179. *See Wirth*, 730 F. App'x at 468.

180. *See, e.g.*, *Hodsdon*, 891 F.3d at 867–58.

181. *See, e.g.*, *id.*

enough to demand its inclusion on a product label.[182] These consistent outcomes highlight the limited recourse plaintiff consumers have in holding corporations accountable for labor abuses in their supply chains.[183]

IV. COURT'S ANALYSIS

The First Circuit decision in *Tomasella II* largely followed the reasoning of the Ninth Circuit, though it involved a distinct consumer protection law.[184] The court did not find the use of child labor to be a material fact warranting disclosure but acknowledged the "humanitarian tragedy" persisting today.[185] Instead, the court focused its attention on the "very narrow question" of whether the defendants' failing to disclose child labor on product packaging violates the Massachusetts Consumer Protection Act[186] (Chapter 93A)—*not* the use of child labor itself.[187]

The court emphasized that (1) Tomasella did not characterize the product label information about UTZ Certified and Rainforest Alliance certifications as misleading representations, and (2) the defendant corporations publicly admitted that child labor exists in their supply chains.[188] Because Tomasella did not raise the former statement as misleading, Tomasella's claim relied on a material omission theory; the court found the defendants' actions to be nonactionable "pure omission[s]."[189] The latter finding meant that the defendants had not committed unfair business practices because the information was technically available to consumers.[190] Finally, the policy implications of requiring the disclosures were central to the court's reasoning.[191]

As discussed in Parts IV.A and IV.B, the court chose to curb unpredictable corporate liability for product label omissions not related to product function or safety, which led to the defendants' success. Part IV.A discusses the court's dismissal of the deceptive practices claim, while Part IV.B focuses on the court's dismissal of the unfair practices claim.

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182. *See, e.g.*, McCoy v. Nestlé USA, Inc., 173 F. Supp. 3d 954, 966 (N.D. Cal. 2016) (discussing the limitless amount of consumer concerns that could mandate disclosure).

183. Thinking outside a disclosure theory, consumers have had limited success in holding corporations liable for misleading or inaccurate statements they have made. The California Supreme Court allowed a consumer's claim to survive the motion to dismiss stage after Nike allegedly made false statements in a public relations campaign regarding its labor practices. *See* Kasky v. Nike, Inc., 45 P.3d 243, 247 (Cal. 2002).

184. *See* Appellant's Opening Brief at 20, Tomasella v. Nestlé USA, Inc. (*Tomasella II*), 962 F.3d 60 (1st Cir. 2020) (No. 19-1131). California law requires finding an independent duty to disclose omissions, while Massachusetts law finds that an "inherent duty exists" to disclose material omissions, suggesting that a plaintiff would be more likely to succeed under this law. *Id.*

185. Tomasella v. Nestlé USA, Inc. (*Tomasella II*), 962 F.3d 60, 65 (1st Cir. 2020).

186. MASS. GEN. LAWS ch. 93A §§ 1–11 (West 2020).

187. *Tomasella II*, 962 F.3d at 65.

188. *Id.* at 66–67.

189. *Id.* at 68.

190. *Id.* at 82 ("[T]he fact that Defendants have repeatedly made information about the prevalence of the worst forms of child labor in their supply chains publicly available through their websites . . . mitigates the concern raised that their omission at the point of sale is unethical.").

191. *See id.* at 73 (noting reluctance to expand disclosure law to accommodate every potential consumer concern).

A. Dismissal of the Deceptive Practices Claim

The First Circuit reviewed de novo the district court's dismissal of the claim under Rule 12(b)(6).[192] The court began by analyzing the alleged deceptive business practice under Chapter 93A.[193] In finding that the defendants' actions do not fit into a clearly recognized category of deceptiveness,[194] the court relied on Federal Trade Commission (FTC) precedent and Massachusetts case *Aspinall v. Phillip Morris Companies, Inc*.[195] *Aspinall* held that a deceptive practice has the "capacity to mislead consumers, acting reasonably under the circumstances, to act differently from the way they otherwise would have acted" and recognized that certain omissions could be deceptive.[196]

Looking to the FTC for guidance, the court recognized that omissions could be ruled deceptive when they are either (1) half-truths where the seller fails to disclose qualifying information to prevent an affirmative statement from misleading the consumer, or (2) pure omissions where a seller says nothing but still misleads the consumer based on the appearance of the product or ordinary consumer expectations.[197]

The court relied heavily on *Hall v. SeaWorld Entertainment, Inc.*[198] and FTC case *In re International Harvester Co.*[199] to analyze when pure omissions can create liability.[200] In *Hall*, the Ninth Circuit found that SeaWorld's failure to disclose the poor treatment of the orcas in its theme park was not deceptive because the disclosure did not relate to the entertainment experience the consumers purchased.[201] Similarly, in *International Harvester*, the FTC found that a tractor manufacturer's failure to disclose the danger of "fuel geysering," a malfunction in which a tractor spews hot fuel that can burn its operator, was not deceptive because the low risk of the hazard did not render the tractor unfit for normal use.[202] The court grounded its analysis in the proposition advanced by these cases: that pure omissions are not deceptive when they do not relate to the product's "normal" use.[203]

Central to the court's finding was a refusal to expand liability for pure omissions.[204] The court highlighted that finding certain pure omissions deceptive would expand the idea "beyond limits" because the number of items consumers consider material "is

192. *See id.* at 70.

193. *Id.* Massachusetts courts require the plaintiff to allege a deceptive act committed by the seller and an injury suffered by the consumer directly caused by the alleged deceptive act. *See id.* at 71 (citing Casavant v. Norwegian Cruise Line, Ltd., 919 N.E.2d 165, 168–69 (Mass. App. Ct. 2009)).

194. *Id.* at 74.

195. 813 N.E.2d 476 (Mass. 2004). The *Aspinall* court affirmed the class certification of a group of cigarette consumers alleging deceptive practices in the marketing of Marlboro Lights as a healthier cigarette option with less tar and nicotine when the opposite was true. *See Aspinall*, 813 N.E.2d at 476.

196. *Id.* at 488.

197. *See Tomasella II*, 962 F.3d at 71–72.

198. 747 F. App'x 449 (9th Cir. 2018).

199. 104 F.T.C. 949 (1984).

200. *See Tomasella II*, 962 F.3d at 72–73.

201. *Hall*, 747 F. App'x at 453.

202. *Int'l Harvester Co.*, 104 F.T.C. at 1063.

203. *See Tomasella II*, 962 F.3d at 74–76.

204. *See id.* at 73.

literally infinite."[205] Refusing to depart from this precedent, the court found the chocolate packaging omissions to "lack the requisite capacity to mislead" because the use of child labor upstream does not cause the products to be unfit for the consumer's normal use.[206]

The court also rejected the plaintiff's argument to instead employ the broader language in the Code of Massachusetts Regulations.[207] This regulation states that failure to disclose "*any* fact" that may influence the buyer not to purchase violates Chapter 93A.[208] However, the court found that the regulation was "less expansive than meets the eye."[209] If read literally, the court stated it would create a "nearly boundless disclosure obligation" on businesses.[210]

B. Dismissal of the Unfair Practices Claim

The court similarly dismissed the claim of alleged unfairness under Chapter 93A.[211] The court set forth the criteria for an unfairness claim: the alleged practice must (1) fall within a penumbra of common or statutory law or another established category of unfairness; (2) be immoral, unethical, unscrupulous, or oppressive; and (3) cause a substantial injury to the consumer or other people.[212] The court found that Tomasella's claim fell into no recognized penumbra.[213]

Tomasella alleged that the district court's failure to find unfairness was "unduly narrow" and argued for analyzing the immoral labor practices and their lack of disclosure together because they go "hand in hand."[214] However, the court insisted on keeping the issue of labor practices separate from the issue of disclosure, stating that the facts relating to the labor practices themselves were mere "predicates" to the argument for disclosure.[215]

Tomasella also looked to legal precedent and policy to substantiate the unfairness claim.[216] Tomasella unsuccessfully offered the Tariff Act as proof that the defendants violated a statute by importing goods derived from slave labor into the United States.[217] First, the court doubted whether violating a federal statute would even be considered unfair under state law despite being illegal under federal law.[218] Further, the Tariff Act specifically regulates the *importation* of goods created by slave labor, not the labor

205. *Id.* (quoting *Int'l Harvester Co.*, 104 F.T.C. at 1059); *see Int'l Harvester Co.*, 104 F.T.C. at 1060 ("Since the seller will have no way of knowing in advance which disclosure is important to any particular consumer, he will have to make complete disclosures to all. A television ad would be completely buried under such disclaimers.").

206. *Tomasella II*, 962 F.3d at 74.

207. *Id.* at 77.

208. 940 MASS. CODE REGS. § 3.16(2) (2020) (emphasis added).

209. *Tomasella II*, 962 F.3d at 72.

210. *Id.* at 77.

211. *See id.* at 82.

212. *Id.* at 79 (citing Heller Fin. v. Ins. Co. of N. Am., 573 N.E.2d 8, 12–13 (Mass. 1991)).

213. *Id.* at 80.

214. *Id.*

215. *Id.*

216. *See id.* at 80–81.

217. *See id.* at 80.

218. *See id.* at 81.

practices themselves, so a violation of this law was inapplicable to the claim.[219] As to the international provisions Tomasella cited to bolster her unfairness claim, the court again expressed doubt that violation of an international policy could constitute a valid unfairness claim under Massachusetts law.[220]

The ultimate undoing of the unfairness claim was the defendants' acknowledgment of child labor in their supply chains on their websites.[221] The court was unpersuaded that consumers should not have to research brand websites prior to purchase.[222] Because this information was available, the court did not find the lack of disclosure at the point of sale unethical.[223] Further, while the practices themselves could be considered unscrupulous or immoral, the lack of disclosure itself was not found injurious to consumers.[224] In fact, the court stated that consumers *benefit* because the labor practice allows the product to be sold at a lower price.[225] If website disclosure did not suffice, corporations would be required to disclose an unlimited amount of information on the limited space of their product labels.[226]

V. PERSONAL ANALYSIS

The *Tomasella II* decision is legally predictable but illustrates the depressing reality that American law does not prevent corporations from profiting from tainted labor practices.[227] While the court expressed sympathy with the cause, it found no legal recourse under the rigid categories of consumer protection law.[228] The court was unwilling to expand these categories.[229] *Tomasella II* and preceding Ninth Circuit decisions, coupled with a lack of meaningful legislative action on state and federal levels, perpetuate tainted supply chains.[230]

This Section proceeds in three Parts. Part V.A criticizes the court's insistence on removing the immoral nature of the labor practices from its analysis on lack of disclosure. It further challenges the court's reasoning and narrow interpretation of Tomasella's claims. Part V.B explores the implications the *Tomasella II* decision can have on the consumer by discussing effective consumer advocacy efforts that this decision could

219. *Id.*

220. *Id.*

221. *Id.* at 81–82.

222. *See id.*

223. *Id.* at 82.

224. *See id.*

225. *Id.*

226. *Id.* With both of these claims struck down, the basis for Tomasella's claim for unjust enrichment swiftly evaporated. The court dismissed this claim because Tomasella had an adequate (yet futile) legal remedy available to her in Chapter 93A, and all claims were dismissed. *See id.* at 82–84.

227. *See id.* at 65 ("This case thus serves as a haunting reminder that eradicating the evil of slavery in all its forms is a job far from finished.").

228. *See id.* ("The exploitation of children in the supply chain from which U.S. confectionary corporations continue to source the cocoa beans that they turn into chocolate is a humanitarian tragedy.").

229. *See id.* at 74 ("The challenged conduct does not clearly fall into either of the nondisclosure categories . . . .").

230. See *infra* Parts V.B and V.C for discussion on the current lack of and future need for increased government action to end modern-day slavery in supply chains.

inhibit. Finally, Part V.C focuses on the need for government regulation to provide a check against complicit corporate benefits from illegal labor practices. Part V.C also advocates for a solution that is not left solely in the hands of consumers or the corporations themselves.

A. The Court's "Unduly Narrow" Focus on a Nuanced Issue

Though analyzing different laws, the First Circuit's reasoning matched the Ninth Circuit's sentiment against expanding omission-based liability to a dangerous point.[231] The court feared it would open the door to an onslaught of litigation due to the consumers' "infinite" cares if it did not employ its "unduly narrow" reading of the case.[232] To be fair, Tomasella's claims of deceptive and unfair practices *are* ultimately rooted in the defendants' lack of disclosure, and not the use of child labor.[233] Still, the reprehensible nature and universal rejection of the labor practices is what justifies disclosure, and as Tomasella says, the two elements go "hand in hand."[234] Both elements should be analyzed together.

Part V.A.1 criticizes this narrow focus on product label disclosure while ignoring the broader issue of the use of child labor. It also discusses the court's misstep in stating that website disclosure properly informs the consumer. Part V.A.2 challenges the court's fear of limitless liability and examines how the changing marketplace could render the court's holding increasingly obsolete.

1. The Court Does Not Place Itself in the Consumer's Shoes

Massachusetts consumer protection law requires a seller to disclose material facts to the purchaser, and Tomasella "pleads numerous facts relating to the abhorrence and prevalence of the worst forms of child labor"[235] in defendants' supply chains to support *why* this fact is material.[236] These material facts, in turn, support Tomasella's argument that corporate behavior is deceptive and unfair.[237] When Tomasella's claim is construed narrowly to the discrete issue of disclosure of supply chain practices on a product's label, the court's failure to place the action in a recognized penumbra of unfairness may seem reasonable. However, Tomasella's claim states that the lack of disclosure, resulting in a consumer's unwitting monetary contribution to such clearly immoral practices, *is* the unfair business practice.[238]

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231. *See Tomasella II*, 962 F.3d at 80.

232. *Id.* at 73, 80.

233. *See* Appellant's Opening Brief at 1, Tomasella v. Nestlé USA, Inc. (*Tomasella II*), 962 F.3d 60 (1st Cir. 2020) (No. 19-1131).

234. *Id.* at 40.

235. *Tomasella II*, 962 F.3d at 80.

236. *See* Appellant's Opening Brief at 3–8, Tomasella v. Nestlé USA, Inc. (*Tomasella II*), 962 F.3d 60 (1st Cir. 2020) (No. 19-1131). Tomasella's brief, in its claim for deceptiveness, states that information regarding child and slave labor is material to the consumer and would sway their purchasing decisions if the truth were made readily apparent. Therefore, not disclosing the abhorrent practices is deceptive. *Id.* at 16–20.

237. *See Tomasella II*, 962 F.3d at 67.

238. Appellant's Reply Brief at 15–16, Tomasella v. Nestlé USA, Inc. (*Tomasella II*), 962 F.3d 60 (1st Cir. 2020) (No. 19-1130) ("[P]laintiff's complaint is replete with allegations that Nestlé violated chapter 93A by utilizing supply chains with known child and slave labor *and* failing to disclose it.").

When analyzed more broadly, Tomasella's claim goes beyond simple lack of disclosure and speaks to the deeper notion that defendants' use of consumer money from chocolate sales ultimately sustains and drives the demand for such harmful practices—often unbeknownst to the consumer.[239] The consumer, then, becomes a contributor to the abuse of workers and children who, because they are on a separate continent, are generally unknown.[240] The fact that the defendants continue to be at least complicit in such practices for years with no guaranteed solution in sight exacerbates this unfairness.[241] The illegal labor practices themselves are not just "predicates" to the disclosure claim—they go to the heart of the claim.[242]

The obvious counter to the claim that consumers do not know the chocolate they buy from defendants is the product of child labor is the fact that defendants have disclosed this information on their websites and participate in the Harkin-Engel Protocol.[243] The consumer could *technically* find this information prior to purchase.[244] However, it is unfair that defendants' discreet admissions help insulate them from liability[245] when the admission is strategically buried among information primarily featuring positive corporate contributions made to West African communities.[246]

While defendants state the information is "readily available" on their websites,[247] the information presented could mislead consumers to think that the corporations are actually fixing the problem or that the problem no longer persists.[248] To find information on child labor in Hershey's supply chains, the consumer must click on the "Sustainability" tab on Hershey's main website, then click on "Cocoa" displaying Hershey's charitable donations, and finally read under "Child Labor Monitoring and

239. *See* Appellant's Opening Brief at 2, Tomasella v. Nestlé USA, Inc. (*Tomasella II*), 962 F.3d 60 (1st Cir. 2020) (No. 19-1131) (discussing the "economic loss and unwitting consumer contribution to the proliferation of such labor" in alleging unfair business practice).

240. See *supra* Section I for an overview of the tainted labor practices existing in West Africa as well as the South China Sea.

241. *See* Gutierrez, *supra* note 50, at 65–66 (describing the failures of the voluntary Harkin-Engel Protocol); *see also* Whoriskey & Siegel, *supra* note 6 (accusing Hershey, Mars, and Nestlé of breaking their promises to discontinue child labor and only making minimal efforts to generate positive media attention).

242. *Contra Tomasella II*, 962 F.3d at 80.

243. *See, e.g.*, HERSHEY, *Cocoa for Good*, *supra* note 126 (stating Hershey's goal to identify and eliminate known instances of child labor in its supply chain). See *supra* Part III.C for a discussion of the Harkin-Engel Protocol.

244. *See, e.g.*, *Protecting Children Action Plan*, MARS, http://www.mars.com/about/policies-and-practices/protecting-children-action-plan [http://perma.cc/G7AU-E7QH] (last visited Apr. 1, 2022) (admitting to the issue of child labor in cocoa supply chains).

245. *See Tomasella II*, 962 F.3d at 81 (acknowledging defendants' argument that the information was "readily available" to consumers on defendant websites).

246. *See, e.g.*, NESTLÉ, TACKLING CHILD LABOR, *supra* note 123, at 22, 64–65 (highlighting positive impacts the corporation has made to West Africa, but admitting there are over 18,000 cases of children in need of remediation).

247. *See Tomasella II*, 962 F.3d at 81.

248. *See, e.g.*, MARS, *supra* note 244, at 3 (describing Mars's $1 billion investment to protect children as well as a "robust" child labor monitoring system to cover "100% of at-risk families").

Remediation System" that Hershey did not detect any child laborers under its system in 2019.[249] Lack of detection does not mean a lack of child labor.[250]

The concerns arising under the California Transparency Act that website disclosure is not helpful to consumers making purchasing decisions are also relevant here.[251] First, without prior knowledge of the issue itself, consumers may not know they should research food brands and the retailers that sell these products.[252] It is also possible that a company strategically chooses to disclose the uncomfortable information on its parent company website, causing the consumer to miss the pertinent information.[253] Considering that consumer expenditures have generally increased each year, and food expenditures rose 3.1% in 2019, expecting consumers to verify that each product they purchase comes from an ethical supply chain is unrealistic.[254] However, the court's holding suggests that consumers should be detectives in order to buy a slave-labor-free chocolate bar or accept ignorance as bliss.[255]

2. The Court's Holding Is Out of Touch with Today's Marketplace

The *Tomasella II* court supports the notion from *International Harvester* that the seller has "no way of knowing" which disclosures are important enough to make it on the product label, which is both impractical and costly to the seller.[256] This reasoning does not reflect today's increasingly conscious consumer "market for virtue" that demands increased disclosure.[257] Consumer consumption has increasingly become an expression of "civic, political, and personal values" rather than mere economic transactions.[258] Many studies show that consumers place a higher value on socially responsible products and factor a company's overall social responsibility into their

249. *See Supporting Kids in Cocoa-Growing Communities With the Child Labor Monitoring and Remediation System*, HERSHEY CO., http://www.thehersheycompany.com/en_us/sustainability/shared-business/child-labor-monitoring-and-remediation-system.html [http://perma.cc/67FE-5QAQ] (last visited Apr. 1, 2022).

250. *See* Peter Whoriskey, *Chocolate Companies Sell 'Certified Cocoa.' But Some of Those Farms Use Child Labor, Harm Forests.*, WASH. POST (Oct. 23, 2019), http://www.washingtonpost.com/business/2019/10/23/chocolate-companies-say-their-cocoa-is-certified-some-farms-use-child-labor-thousands-are-protected-forests/ [http://perma.cc/B2S8-Y8LJ] (describing how UTZ, the organization many chocolate companies use to certify cocoa beans, fails to detect cocoa beans derived from child labor).

251. See *supra* Part III.D.1 for a discussion of the California Transparency Act.

252. *See* Prokopets, *supra* note 139, at 359 (explaining that if consumers are unaware of an issue, they will not know to research company websites).

253. *Id.* at 364.

254. *Economic News Release: Consumer Expenditures—2020*, U.S. BUREAU OF LAB. STAT. (Sept. 9, 2021, 10:00 AM), http://www.bls.gov/news.release/cesan.nr0.htm [http://perma.cc/4VSN-WLRH].

255. *See* Tomasella v. Nestlé USA, Inc. (*Tomasella II*), 962 F.3d 60, 81 (1st Cir. 2020) (describing the defendants' argument that the information was "readily available" on the defendants' websites and Tomasella's response that consumers should not be expected to "conduct internet research" prior to purchase).

256. *See id.* at 73 (quoting Int'l Harvester Co., 104 F.T.C. 949, 1059–60 (1984)).

257. *See* Sarah Dadush, *Identity Harm*, 89 U. COLO. L. REV. 863, 868 (2018) [hereinafter Dadush, *Identity Harm*] (describing a "rise of conscious consumerism and the emergence of the market for virtue").

258. Dadush, *supra* note 13, at 811.

purchasing decisions.[259] This shift in the marketplace is evident in the introduction of benefit and B corporations, which exist to make profits while considering the social and environmental impacts of their operations.[260]

As the *Tomasella II* court itself admitted, consumers are more willing to pay a higher price for products that match their values, such as Fair Trade coffee.[261] Around 55% of global consumers in a study stated they were willing to pay a premium for products created by companies dedicated to making positive social impacts.[262] Research further shows that 52% of global consumers claim to check the packaging before buying a product to evaluate the brand's positive social or environmental impact.[263] Another study revealed that more than 75% of American consumers claimed to avoid purchasing products made under poor working conditions (though a gap exists between what consumers say and actually do—the so-called halo effect).[264] Consumers are clearly paying attention to what type of impact their brands of choice have on the larger global community, and consumers and investors are important sources of pressure to drive businesses to care too.[265]

Therefore, it is not impossible, as the First Circuit says,[266] to know what consumers care about in making their purchasing decisions—data shows that consumers care about social and environmental impacts as well as the unknown people in the product's supply chain.[267] This change in consumerism does not mean, however, that disclosure would or should be opened to all "mere personal preferences," such as political leanings or whether factories are unionized; these items are not as material as the use of illegal child labor that violates global policy.[268] While a product's label has a limited surface area, the idea that product disclosure must only pertain to a product's physicality and central function is increasingly obsolete in today's marketplace, which values a brand's social and environmental impact. The requirement that the omitted information be material curtails unlimited disclosure requirements that the courts fear.[269]

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259. DAVID VOGEL, THE MARKET FOR VIRTUE: THE POTENTIAL AND LIMITS OF CORPORATE SOCIAL RESPONSIBILITY 47 (2005).

260. *See* Jessica L. Weber & Sonja E. Pippin, *Benefit Corporations and B Corporations*, CPA J. (Aug. 2016), http://www.cpajournal.com/2016/08/01/benefit-corporations-b-corporations/ [http://perma.cc/UWT2-RTLF].

261. *Tomasella II*, 962 F.3d at 82; Dadush, *Identity Harm*, *supra* note 257, at 870.

262. *Global Consumers Are Willing To Put Their Money Where Their Heart Is When It Comes to Goods and Services from Companies Committed to Social Responsibility*, NIELSEN (June 17, 2014), http://www.nielsen.com/eu/en/press-releases/2014/global-consumers-are-willing-to-put-their-money-where-their-heart-is1/ [http://perma.cc/X5EK-GL76].

263. *Id.* Nielsen evaluated the retail sales data for twenty brands and found that brands that introduced claims of sustainability resulted in an increase in sales. *See id.*

264. *See* VOGEL, *supra* note 259, at 47–48.

265. *Id.* at 46.

266. *Tomasella II*, 962 F.3d at 73.

267. *See* NIELSEN, *supra* note 262.

268. Appellant's Reply Brief at 1, Tomasella v. Nestlé USA, Inc. (*Tomasella II*), 962 F.3d 60 (1st Cir. 2020) (No. 19-1130).

269. *See Tomasella II*, 962 F.3d at 73; Appellant's Reply Brief, Tomasella v. Nestlé USA, Inc. (*Tomasella II*), *supra* note 268, at 4.

B. The Tomasella II *Decision Thwarts Progress on Modern-Day Slavery's Eradication*

The First Circuit's decision prolongs the development of a reliable solution to end child and forced labor in food supply chains. The lack of statutory or judicial remedy so far demonstrates that corporations will continue to profit from abuse simply because the abuse is perpetrated by the corporation's supplier on another continent. By limiting one way in which consumers can become aware of corporate involvement in human rights abuse (a product's label), the *Tomasella II* decision inhibits consumer pressure on food corporations to change.

This Part examines how *Tomasella II* and similar case law have delayed progress toward eradicating modern-day slavery. Part V.B.1 recognizes that the absence of a remedy in the courts, coupled with no direct statutory regulation, unacceptably leaves corporations to correct their own business practices voluntarily. Parts V.B.2 and V.B.3 discuss examples of successful consumer advocacy campaigns that contributed to corporate behavior change, which encourages disclosing labor abuse in chocolate supply chains that could also trigger similar consumer efforts.

1. *Tomasella II* Leaves the Fate of Child Laborers in the Hands of Corporations

The First Circuit's decision demonstrates that no realistic legal remedy exists for a consumer seeking disclosure about a supply chain. The Tariff Act only pertains to the importation of goods and does nothing to attack the source of the problem—corporate benefit from slave labor itself.[270] International protocols against slave labor are dismissed as irrelevant to state consumer protection law.[271] The ATS is limited in its extraterritorial scope, and the TVPRA offers no remedy to American consumers.[272] Therefore, consumers are forced to rely in vain on corporations to fix the problem they helped create and sustain.

Expecting the private sector to develop a solution is not reliable.[273] The Harkin-Engel Protocol represents decades of failed promises and has produced minimal progress and affected a limited number of people.[274] Some research shows that the situation has gotten worse since the Harkin-Engel Protocol began, potentially due to increased cocoa production.[275]

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270. *See Tomasella II*, 962 F.3d at 81 (dismissing Tomasella's argument that defendants' violation of the Tariff Act proves the defendants' actions to be unfair).

271. *See id.* (doubting that violation of international law demonstrates the defendants' actions as unfair under Massachusetts law).

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

273. See *supra* Part III.C for a discussion on how the Harkin-Engel Protocol, a voluntary agreement within the chocolate industry, led to no progress toward eradication of child labor.

274. Judy Gearhart, *Forced Labor in Cocoa; Twenty Years of Failure*, MORNING CONSULT (July 25, 2019, 5:00 AM), http://morningconsult.com/opinions/forced-child-labor-in-cocoa-twenty-years-of-failure/ [http://perma.cc/5NHE-ZPDB]; *see* Gutierrez, *supra* note 50, at 66 (discussing how the chocolate industry has still not created its promised standards of public certification to ensure all imported cocoa beans are grown without use of child labor).

275. Oliver Nieburg, *Hazardous Cocoa Child Labor Climbs 18% in West Africa: 'Rallying Call' for Chocolate Industry To Step Up*, CONFECTIONARY NEWS (July 30, 2015),

In response, corporations may point to voluntary positive contributions they have made to help communities affected by labor abuse in West Africa. For example, Nestlé partners with UTZ Certified/Rainforest Alliance in a multi-stakeholder initiative (MSI) to certify that its cocoa beans are responsibly sourced.[276] However, MSIs are not effective in protecting human rights and should not substitute government regulation.[277] By virtue of their partnership with the corporation, MSIs do not properly address corporate power that contributes to labor abuse.[278] Corporations are built to maximize shareholder profit and may be reluctant to take on initiatives threatening profits.[279] Finally, there is concern that MSIs adopt "weak or narrow standards" that misrepresent adequate detection and elimination of human rights abuses.[280] Therefore, consumers cannot and should not rely on a corporation's assurance that a human rights issue is being addressed.

Voluntary business action is not enough to eradicate child and slave labor in supply chains; relying on Nestlé to source one hundred percent of its own cocoa beans by 2025 could be just as futile as relying on the Harkin-Engel Protocol.[281] However, *Tomasella II* and similar decisions force reliance on the private sector to correct the problems they have created with no enforceable requirement to do so.[282] The courts' unwillingness so far to hold corporations accountable, coupled with the lack of legislation directly prohibiting these labor practices in supply chains, places the solution in the hands of American corporations. History has proven that expecting corporations to regulate themselves may be the same as doing nothing.[283]

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http://www.confectionerynews.com/Commodities/Tulane-publishes-cocoa-child-labor-report-21-rise-in-West-Africa [http://perma.cc/8N2B-32CY]; *see also* TULANE UNIV., FOURTH ANNUAL REPORT, *supra* note 117.

276. *See Nestlé Cocoa Plan*, NESTLÉ, http://www.nestleusa.com/socialimpact/responsible%20sourcing/nestl%C3%A9-cocoa-plan [http://perma.cc/3N9M-5V53] (last visited Apr. 1, 2022) (describing Nestlé's partnership with UTZ to certify cocoa beans used to make the NESQUIK powder product and NESTLÉ TOLL HOUSE morsels).

277. MSI INTEGRITY, NOT-FIT-FOR-PURPOSE: THE GRAND EXPERIMENT OF MULTI-STAKEHOLDER INITIATIVES IN CORPORATE ACCOUNTABILITY, HUMAN RIGHTS AND GLOBAL GOVERNANCE 4 (2020).

278. *Id.* at 5.

279. *Compare* Donald J. Kochan, *The Purpose of a Corporation Is To Seek Profits, Not Popularity*, HILL (Aug. 19, 2021, 2:30 PM), http://thehill.com/opinion/finance/568595-he-purpose-of-the-corporation-is-to-seek-profits-not-popularity [http://perma.cc/K3UX-RCK3] (describing a corporation's goal as maximizing profits), *with* Greg Rosalsky, *Does It Pay for Companies To Do Good?*, NPR (Sept. 17, 2019, 6:31 AM), http://www.npr.org/sections/money/2019/09/17/761312221/does-it-pay-for-companies-to-do-good [http://perma.cc/3YYW-9Q37] (arguing that companies care not only about their profits but also about social responsibility).

280. MSI INTEGRITY, *supra* note 277, at 12 ("Thus, even if a company or government complies with all of an MSI's standards, critical human rights abuses may continue. Yet few external actors—whether policymakers or consumers—have the time or expertise necessary to analyze an MSI's scope or limitations.").

281. *See supra* note 121 and accompanying text.

282. See *supra* Part III.D.2 and Section IV for a discussion on the First and Ninth Circuits' refusal to mandate product label disclosure by several food corporations.

283. *See* Sarfaty, *supra* note 95, at 434–37; Pati, *supra* note 47, at 1866.

2. *Tomasella II* Dampens Awareness Leading to Critical Consumer Action

Another disappointing implication of the *Tomasella II* decision, along with the preceding *Chocolate and Seafood Cases*, is the roadblock it creates to furthering consumer awareness of a critical human rights issue. A valid critique of disclosure regimes is that they improperly shift the burden from the corporation onto the consumer, which is both impractical and ineffective at eliminating labor abuse.[284] Consumer and investor pressure should neither be relied on to drive corporate change nor be seen as a substitute for needed government regulation.[285] However, without needed government regulation available, consumer action can still serve as an effective tool to bring awareness to the issue and create pressure for change.[286]

Despite express doubts that consumers understand the label disclosures[287] and that consumers should not be expected to read the "dirty lists" of companies involved in slave labor,[288] consumer awareness of human rights issues should be encouraged. Consumers are reading the labels of the food they purchase—one study found that roughly seventy-seven percent of American consumers read food labels.[289] Further, a majority of global consumers claim to check product packaging for social and environmental information.[290] With this increased consumer attention, disclosure could lead to higher consumer awareness of human rights issues.

Consumer awareness leading to boycotts or advocacy campaigns could help bring an end to tainted supply chains, especially in the age of social media.[291] Consumer experience drives a corporation's bottom line, and corporations have folded to consumer complaints in the past.[292] For example, following the 2018 mass shooting in Parkland, Florida, consumer pressure was successful in causing many companies to drop their ties

284. Pati, *supra* note 47, at 1843; *see also* Chilton & Sarfaty, *supra* note 42, at 21–25 (discussing the shortcomings of consumer disclosure).

285. *See* Monroe Friedman, *Using Consumer Boycotts To Stimulate Corporate Policy Changes: Marketplace, Media, and Moral Considerations*, *in* POLITICS, PRODUCTS, AND MARKETS: EXPLORING POLITICAL CONSUMERISM PAST AND PRESENT 45, 99 (Michele Micheletti et al. eds., 2004).

286. *See* Dan Mitchell, *5 Times Big Businesses Actually Bowed to Pressure from Customers*, TIME (Mar. 6, 2015, 2:06 PM), http://time.com/3735718/consumer-pressure-business/ [http://perma.cc/L494-RCSM].

287. Chilton & Sarfaty, *supra* note 42, at 5.

288. Pati, *supra* note 47, at 1843–44.

289. Zoya Gervis, *Most People Think Food Labels Are Misleading*, N.Y. POST (June 7, 2018, 3:29 PM), http://nypost.com/2018/06/07/most-people-think-food-labels-are-misleading/ [http://perma.cc/PEL9-6BAA]. Another study found that ninety percent of consumers claim to read food labels, though primarily to obtain nutritional information. Press Release, NPD Group, New Year, New Nutrition Facts Label on Food: Most U.S. Consumers Read the Nutrition Facts Label and the Top Items They Look for Are Sugars and Calories (Jan. 8, 2020), http://www.npd.com/news/press-releases/2020/new-year-new-nutrition-facts-label-on-food-most-u-s-consumers-read-the-nutrition-facts-label-and-the-top-items-they-look-for-are-sugars-and-calories/ [http://perma.cc/JXE4-UPBQ].

290. *See* NIELSEN, *supra* note 262.

291. Kathleen Agena, *Boycotts Could Stop Slave Labor*, TIMES UNION (last updated July 25, 2016, 11:09 AM), http://www.timesunion.com/opinion/article/Boycotts-could-stop-slave-work-8401719.php [http://perma.cc/5RKR-EVVL].

292. *See* Mitchell, *supra* note 286.

with the National Rifle Association (NRA).[293] After the social media campaign #BoycottNRA was launched, companies such as Best Western, Wyndham Hotels, and Hertz stopped giving discounts to NRA members.[294] The #GrabYourWallet consumer advocacy campaign led to the demise of the Ivanka Trump brand.[295] After consumers listed the companies and retailers selling Trump brand products and pressured these companies to drop ties with the Trump brand, numerous large companies actually did so.[296]

This pressure has even worked in the food industry. Nestlé and Mars themselves have responded to consumer pressure previously by deciding to discontinue the use of artificial coloring and flavors from their candy products.[297] McDonald's announced it would stop using chickens raised with antibiotics after facing consumer pressure.[298] Finally, Chipotle, Unilever, and General Mills have begun labeling products without genetically modified organisms (GMO) as "GMO Free" to respond to consumer wariness of genetically modified crops.[299]

These examples demonstrate the increasingly tighter nexus between consumer purchases and social issues. When consumers are aware of human rights abuses, the pressure they place on companies to change their processes may cause corporations to change their behavior.[300] Product disclosure is one way to facilitate awareness that leads to change.[301] However, *Tomasella II*'s fear of liability expansion inhibits this method of fostering awareness in the consumer.[302]

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293. *See* Dominic Rushe, *NRA Under Mounting Pressures As Companies Cut Ties with Gun Lobby*, GUARDIAN (Feb. 23, 2018, 4:34 PM), http://www.theguardian.com/us-news/2018/feb/23/us-companies-nra-best-western-wyndham [http://perma.cc/X27B-JZKP].

294. *Id.*

295. Maggie McGrath, *A #GrabYourWallet Effect? Following Nordstrom Drop, Ivanka Trump Line Disappears from Neiman Marcus Website*, FORBES (Feb. 3, 2017, 5:05 PM), http://www.forbes.com/sites/maggiemcgrath/2017/02/03/a-grabyourwallet-effect-following-nordstrom-drop-ivanka-trump-line-disappears-from-neiman-marcus-website/?sh=5a1f4f6029ca [http://perma.cc/JW2U-PTL2].

296. *Id.* Though accompanying consumer litigation failed, consumer pressure (along with legislative changes) was still successful in causing SeaWorld to discontinue its orca entertainment program. Brian Clark Howard, *Controversial SeaWorld Orca Shows End in California, but Continue Elsewhere*, NAT'L GEOGRAPHIC (Jan. 4, 2017), http://www.nationalgeographic.com/news/2017/01/seaworld-final-orca-show-california-killer-whales/#close [http://perma.cc/A5A7-9JC9]. "Changing social attitudes" of customers helped prompt the change. Alastair Jamieson, *SeaWorld To End Breeding Program for Killer Whales*, NBC NEWS (last updated Mar. 17, 2016, 5:23 PM), http://www.nbcnews.com/business/business-news/seaworld-end-breeding-program-orca-whales-n540646 [http://perma.cc/57VR-XECB].

297. Mitchell, *supra* note 286.

298. *Id.*

299. *Id.*

300. *Id.* ("[W]hen sufficient organized pressure from consumers . . . is brought to bear, corporations can, and often do, change their ways.").

301. *See* Gutierrez, *supra* note 50, at 71 (describing how California disclosure law can spread awareness of modern-day slavery and human trafficking).

302. See *supra* notes 203–206 for a discussion of the *Tomasella* court's concern about expanding liability for omissions.

3. A Proposed Consumer Advocacy Solution: The Fair Food Program Model

Aside from traditional consumer boycotts, other consumer advocacy campaigns should be applied to the issue of illegal child labor in cocoa production. The Coalition of Immokalee Workers' Fair Food Program is a potential model for eradicating labor abuse in food supply chains.[303] The Fair Food Program has been credited with dramatically reducing—and even eliminating—rampant labor abuse that affected Florida tomato workers.[304] The movement partners consumer activists with affected farmworkers, as well as with businesses and retailers, in effectuating change.[305]

Participating buyers pay a one-cent premium that goes directly to the farmworkers, and the growers agree to a strict code of conduct upholding the rights of the workers in the fields.[306] An independent party monitors participating farms, performs auditing activities, and maintains a hotline where affected workers can report abuse.[307] Lack of compliance can result in suspension or elimination from the program, meaning participating farms can no longer sell crops to the participating buyers.[308] Unannounced audits ensure compliance with standards.[309] The buyers include retailers, such as Walmart, and large food companies such as Yum Brands, Burger King, Whole Foods, Trader Joe's, Chipotle, and Subway.[310] Access to these large buyers incentivizes participants to stay in the program.[311]

Consumer awareness could drive an approach similar to that of the Coalition of Immokalee Workers' to the issue of child labor in cocoa production or forced labor in the fishing industry. For example, such a program could force the *Tomasella II* defendants to only purchase cocoa beans from suppliers whose practices are independently verified.[312] In doing so, cocoa farms are incentivized to maintain ethical labor practices. Food corporations, in turn, will gain consumers' trust and avoid future lawsuits.[313] Challenges may exist in applying this solution to a problem of international scale. Still, the program's features of market incentive for participating farms, the

303. *See generally Fair Food Program*, COAL. OF IMMOKALEE WORKERS, http://www.fairfoodprogram.org/ [http://perma.cc/3WA6-82XK] (last visited Apr. 1, 2022).

304. *See* Steven Greenhouse, *In Florida Tomato Fields, a Penny Buys Progress*, N.Y. TIMES (Apr. 24, 2014), http://www.nytimes.com/2014/04/25/business/in-florida-tomato-fields-a-penny-buys-progress.html [http://perma.cc/DT6K-B8G4] (stating that "horrid conditions" and instances of sexual harassment for tomato workers have largely disappeared due to the Fair Food Program).

305. COAL. OF IMMOKALEE WORKERS, FAIR FOOD 2018 UPDATE 2 (2018) [hereinafter FAIR FOOD 2018 UPDATE].

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.* at 12.

310. Greenhouse, *supra* note 304.

311. *See id.*

312. *See* FAIR FOOD 2018 UPDATE, *supra* note 305, at 12 (describing how independent, unannounced audits give the coalition "unprecedented degree of insight" into what happens in the fields).

313. *See* Michael Fertik, *How To Get Customers To Trust You*, FORBES (Nov. 26, 2019, 2:43 PM), http://www.forbes.com/sites/michaelfertik/2019/11/26/how-to-get-customers-to-trust-you/?sh=2c5e3826f8d6 [http://perma.cc/W3YC-VWYK] (describing a survey finding that 45% of customers would never trust a brand again after the company engaged in unethical behavior and 40% would no longer purchase).

negligible cost to participating buyers, and independently monitored compliance could be applied to cocoa bean suppliers.[314]

These examples of successful consumer movements show that facilitating consumer awareness can lead to at least incremental change.[315] While not an all-encompassing solution, there is currently no sign that the federal or state governments will directly regulate businesses benefitting from tainted labor practices.[316] Therefore, consumer awareness of a corporation's social impacts should be encouraged because consumer-led action is one of the only available ways to bring an end to these practices.[317] However, consumers cannot pressure corporations to change if they are unaware of human rights abuse. By holding that failure to disclose the use of slave labor is not an actionable claim, the *Tomasella II* decision foreclosed one way to make consumers aware of the abuses that produce the food they consume.[318]

C. The Resounding Call for Government-Sponsored Solutions

Reliance on disclosure-centered consumer protection litigation has failed to hold corporations accountable for labor exploitation in their supply chains.[319] While consumer awareness should be encouraged and has contributed to businesses adopting policy changes,[320] consumer disclosure is ultimately a "band-aid fix" that attempts to course correct upstream misconduct out of the consumer's control.[321] Finally, the failed Harkin-Engel Protocol demonstrates why voluntary business action is not a reliable road to eradication.[322] The limited success of consumer and voluntary business effort calls for direct government intervention.

This Part discusses the need for intervening legislation to move toward ending forced and child labor in corporate supply chains. Part V.C.1 imagines potential revisions to state consumer protection laws that currently offer no remedy to a *Tomasella*-type plaintiff. Part V.C.2 discusses using a federal statute as a solution to apply to all American corporations.

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314. *See* FAIR FOOD 2018 UPDATE, *supra* note 305.

315. *See id.* at 6–7 (showing improvement of farms' average compliance scores from 10% in 2011 to 89% in 2017).

316. *See supra* Parts III.C.–III.D.

317. See *supra* Parts III.C–III.D and Section IV for a discussion of the lack of remedies given by the legislature and courts to bring an end to child labor, which effectively leaves the solution to consumers and voluntary business action.

318. See *supra* notes 289–290 for a description of how consumers increasingly pay attention to product labels, which leads to awareness of the issues that the labels may disclose.

319. See *supra* Part III.D for a discussion of recent case law in the Ninth Circuit consistently dismissing consumer protection claims.

320. See *supra* Part V.B for analysis of successful consumer advocacy campaigns against businesses on the basis of social policy goals.

321. *See* Pati, *supra* note 47, at 1843–44 (arguing that rather than place the burden on the consumer to do "homework" to inform their purchasing decisions, businesses should be expected to sell products not tainted by slave labor).

322. See *supra* Part III.C for a discussion of the Harkin-Engel Protocol failure.

1. Expanding State Consumer Protection Legislation Does Not Mean Limitless Expansion

Concerned with expanding liability, courts have been reluctant to say what a company must include on a product label outside of information related to its functioning.[323] However, the marketplace today is composed of social citizen-consumers who care about the location and circumstances in which their products of choice originate.[324] The fact that consumers care about human rights in supply chains is evident in the onslaught of recent class action litigation.[325]

Based on these consumer concerns, state consumer protection laws should be modernized to include disclosure of limited, specific categories reflecting a company's participation in human rights abuses that affect consumer purchasing decisions. In other words, the door to increased disclosure requirements should be opened, with limits in place, that more accurately reflect consumer concerns. Unlike the California Transparency Act,[326] uniform disclosure across all businesses in the state should be mandated.

Expanding liability for failure to disclose human rights abuses does not mean the door to liability must be opened to every single consumer preference.[327] State legislatures can and should decide what is material and therefore requires disclosure. The California and Massachusetts consumer protection laws that have been the subject of recent class action litigation are deceptively vague and broad—outlawing deceptive and unfair acts without defining what those terms truly mean.[328] The legislature is poised to enumerate examples of "unfair" in such nonspecific legislation. State legislatures should amend their current statutes to include human rights issues and environmental impacts in the definition of "unfair."

Though the *Tomasella II* court did not accept the argument that not disclosing tainted supply chain labor practices is unfair,[329] these labor practices violate numerous international policies.[330] The importation of the goods in question is technically barred under the Tariff Act.[331] The victims themselves may directly sue the corporation under the TVPRA for receiving financial benefit from a tainted labor scheme.[332] Therefore, with all of these regulations in place supporting the belief that the use of forced or child

323. *See, e.g.*, Tomasella v. Nestlé USA, Inc. (*Tomasella II*), 962 F.3d 60, 73 (1st Cir. 2020) (emphasizing that consumer concerns are "infinite," leaving the seller no direction to decide which disclosures must be included over others).

324. See *supra* Part V.A.2 for discussion on the advent of the socially conscious consumer.

325. See *supra* Part III.D.2 for a discussion of numerous class action lawsuits in the Ninth Circuit. See *supra* Section IV for discussion on the recent *Tomasella* decision in the First Circuit.

326. CAL. CIV. CODE § 1714.43 (West 2020). See *supra* Part III.D.1 for discussion of the shortcomings of the California Transparency in Supply Chains Act.

327. *See* Appellant's Reply Brief at 1, Tomasella v. Nestlé USA, Inc. (*Tomasella II*), 962 F.3d 60 (1st Cir. 2020) (No. 19-1130).

328. *See* CAL. BUS. & PROF. CODE § 17200 (West 2020); MASS. GEN. LAWS ch. 93A § 2(a) (West 2020).

329. Tomasella v. Nestlé USA, Inc. (*Tomasella II*), 962 F.3d 60, 81–82.

330. See *supra* Part III.A for discussion on the international community's condemnation of child and forced labor schemes.

331. See *supra* Part III.B.2 for discussion on the Tariff Act.

332. See *supra* Part III.B.1 for discussion on the Trafficking Victims Protection Act.

labor is immoral, unethical, and illegal, it is not a stretch to mandate disclosure of flagrant human rights abuse under the "unfair" category of state consumer protection laws. With such disclosure in place, the consumer can make an informed choice not to support such practices by purchasing that product.[333]

2. The Glaring Need for Federal Regulation of Business Behavior

A federal statute that directly outlaws corporate financial benefit from forced or child labor schemes, regardless of whether the abuse occurs overseas and is directly perpetrated by a supplier, is a straightforward solution to this issue. Federal rather than state legislation would help avoid the issue of corporations moving to other states to avoid compliance.[334] Further, the United States as a whole has the responsibility of addressing its human rights obligations internationally, and a federal regulatory program is a clear way to maintain that responsibility.[335]

If the ability to sell cheaper goods with lower labor costs is keeping slave and child labor alive, legislation should impose monetary penalties that no longer make it profitable.[336] For example, the Brazilian government maintains a list of companies found to use or profit from forced labor, and these companies must remain on the list for a two-year period.[337] This list directly impacts a company's ability to obtain financing and do business with other companies who have taken a pact to abstain from using slave labor.[338] A direct impact on a business's finances could serve as an impetus for compliance with federal law.

Further, the United States has a potential regulatory solution in place through the Tariff Act.[339] The answer to helping end modern-day slavery in supply chains may be as "simple" as more rigorous enforcement of detaining tainted goods at the border, and this has already been called for by legislators.[340] Under the Tariff Act, the CBP has the authority to impose civil penalties against importers of goods produced by forced labor

333. *See* Jessi Baker, *The Rise of the Conscious Consumer: Why Businesses Need To Open Up*, GUARDIAN (Apr. 2, 2015, 4:30 PM), http://www.theguardian.com/women-in-leadership/2015/apr/02/the-rise-of-the-conscious-consumer-why-businesses-need-to-open-up [http://perma.cc/822A-D7PZ] (describing the rise of conscious consumerism and the increasing importance of social issues affecting purchasing decisions).

334. *See* Leslie Wayne, *How Delaware Thrives as a Corporate Tax Haven*, N.Y. TIMES (June 30, 2012), http://www.nytimes.com/2012/07/01/business/how-delaware-thrives-as-a-corporate-tax-haven.html [http://perma.cc/7GZL-MV6Y] (describing how Delaware's favorable tax laws cause a large share of corporations to incorporate in Delaware over other states).

335. *See* Pati, *supra* note 47, at 1849.

336. *See* Ezell, *supra* note 72, at 508–09 (discussing how business pressure to reduce costs and maximize profits incentivizes businesses to use trafficked labor without stronger penalties attached).

337. Kelly, *supra* note 51.

338. *Id.* Monetary fines are also imposed. *Id.*

339. See *supra* notes 83–88 for a discussion of the Tariff Act as well as the Trade Facilitation and Trade Enforcement Act that together empower federal agents to stop tainted goods at the border.

340. Peter Whoriskey, *Senators Call for Crackdown on Cocoa Imports Made with Forced Child Labor*, WASH. POST (July 16, 2019, 8:40 PM), http://www.washingtonpost.com/business/2019/07/16/senators-call-dhs-crack-down-cocoa-imports-made-with-forced-child-labor/ [http://perma.cc/USF3-3F7R] (discussing a letter written by Senators Sherrod Brown and Ron Wyden calling for cocoa imports to be stopped at the border through the Tariff Act).

and detain the goods.[341] The CBP fined Pure Circle (manufacturer of Stevia) $575,000 for importing goods made with forced labor and vowed to "hold companies accountable" for doing so.[342]

However, during the 2019 fiscal year, the CBP issued only six new Withhold Release Orders against foreign manufacturers to stop goods worth a total of $1.2 million at the border.[343] The CBP receives the largest portion of funding from the Department of Homeland Security's budget,[344] but critics have noted that the value of tainted goods detained is merely a "drop in the bucket" of the total amount of tainted goods coming into the United States.[345]

Critics have also pointed to CBP's forced labor division being "massively understaffed and underfunded," which could explain the low number of detained goods.[346] Notably, there are no orders in place to detain cocoa bean imports from West Africa, and the chocolate industry giants in the *Tomasella II* case have yet to be fined.[347] The work done to detain these imported goods deriving from slave labor should be applauded but expanded to undetected sources escaping penalty. If corporations faced a concrete threat of detained imports and monetary fines, perhaps more lasting change would result.

It is likely that a stricter approach would be criticized as overregulation of business, but the operational investments the law would force could cause better business practice.[348] The regulation may spark business innovation, and compliance will earn the trust of the consumer, only pushing American business ahead.[349]

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341. CBP, *CBP Collects $575,000*, *supra* note 88.

342. *Id.*

343. U.S. CUSTOMS & BORDER PROT., CBP TRADE AND TRAVEL REPORT: FISCAL YEAR 2019, at 1, 10 (2020) [hereinafter CBP TRADE AND TRAVEL REPORT 2019]; DEP'T HOMELAND SECURITY, FY 2021 BUDGET IN BRIEF 24 (2021). As of this writing, the CBP maintains thirty-six active investigations against importers of goods tainted by forced labor. CBP TRADE AND TRAVEL REPORT 2019, *supra*, at 10.

344. DEP'T HOMELAND SECURITY, *supra* note 343, at 7 (reporting that CBP will receive 24% of the total $49.8 billion Department of Homeland Security funding in fiscal year 2021).

345. Jason Fields, *U.S. Ban on Slave-Made Goods Nets Tiny Fraction of $400 Billion Threat*, REUTERS (Apr. 8, 2019, 2:28 AM), http://www.reuters.com/article/us-trade-slavery/u-s-ban-on-slave-made-goods-nets-tiny-fraction-of-400-billion-threat-idUSKCN1RK0H8 [http://perma.cc/Y4SP-R9DX] (discussing how the goods detained in 2016 amount to only 0.0015% of the estimated amount of tainted goods and calling for more funding).

346. *Id.*

347. *Withhold Release Orders and Findings List*, U.S. CUSTOMS & BORDER PROT., http://www.cbp.gov/trade/programs-administration/forced-labor/withhold-release-orders-and-findings [http://perma.cc/X7N7-7PK6] (last visited Apr. 1, 2022).

348. Ofer Garnett, *The Critical Role Regulation Plays in Business Success*, FORBES (June 1, 2018, 7:30 AM), http://www.forbes.com/sites/forbestechcouncil/2018/06/01/the-critical-role-regulation-plays-in-business-success/?sh=5ad95447243a [http://perma.cc/AK3J-927L] (discussing how the General Data Protection Regulation in Europe has pushed European businesses ahead of others by mandating personal information regulation).

349. *Id.* ("Most businesses implement internal regulations to serve their company more directly, but these often fail to be comprehensive, and compliance wanes over time. Thus, diligent governance provides accountability and encourages good practice."); *see also* JAMES LARDNER, GOOD RULES: 10 STORIES OF SUCCESSFUL REGULATION 5 (2011) ("When rules address problems of wide public concern, they help establish bonds of trust between buyers and sellers; over time, that benefits businesses as well as their customers, workers, and neighbors.").

Regulation can be a tool to serve social policy without crippling businesses.[350] The chocolate industry could develop a lasting solution to its supply chain problems when it is not merely encouraged but required to do so by reliably enforced legislation. The *Tomasella II* defendants and other corporations have consistently demonstrated they cannot be trusted to end slave and child labor without being required to take action.[351] Direct regulation of supply chain practice is needed to drive meaningful participation of the chocolate and other food industries and end American corporations profiting from modern-day slavery.

VI. CONCLUSION

By focusing on the "very narrow question" of whether a corporation must disclose the use of tainted labor in its supply chain,[352] the *Tomasella II* court practiced restraint but thwarted needed progress. The court's fear of expanded liability led to a rigid application of state consumer protection law that ignores the concerns of the modern consumer in today's marketplace.[353] Further, the lack of mandated disclosure will inhibit the increased consumer awareness that can help pressure businesses to adopt more ethical practices.[354] *Tomasella II* is only the latest in a string of disappointments that allow America's largest corporations to knowingly profit from the debilitating and dehumanizing work performed by unknown, exploited individuals.[355]

However, *Tomasella II* brings to mind an important question: Why should consumers have to bring class action complaints to attempt to force change? While consumer awareness should be encouraged, the ultimate solution to the modern-day slavery that pervades our transactional world will not be in the courts. The responsibility lies with the corporations to have full awareness of their supply chains. However, demonstrated by the Harkin-Engel Protocol, businesses will act in their own self-interest, and voluntary business commitments to improve will not suffice.[356] The legislature must step in to ensure compliance.

"'We haven't eradicated child labor because no one has been forced to,'"[357] and it is time for the United States government to force this change.

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350. *See generally* LARDNER, *supra* note 349. Regulating businesses to further important social goals is not a new concept. For example, the Americans with Disabilities Act (ADA) mandates adapting employment practices, products, and public spaces for those with physical disabilities. There were concerns that complying with the ADA would be extremely costly, but compliance has not substantially burdened businesses. *Id.* at 12. The law has resulted in critical benefits for disabled individuals in access and employment while imposing only modest costs. *Id.*

351. See *supra* Part III.C for a discussion of the Harkin-Engel Protocol, which shows that voluntary business action is not a reliable solution to end child labor.

352. Tomasella v. Nestlé USA, Inc. (*Tomasella II*), 962 F.3d 60, 65 (1st Cir. 2020).

353. *See id.* at 73 (noting the "literally infinite" concerns of consumers (quoting Int'l Harvester Co., 104 F.T.C. 949, 1059–60 (1984))).

354. See *supra* Part V.B for a discussion on the important role consumer pressure can play in effectuating more ethical business behavior.

355. See *supra* Part III.D.2 for an examination of unsuccessful class action lawsuits aiming to compel disclosure of tainted labor practices on product labels.

356. *See supra* Part III.C.

357. Whoriskey & Siegel, *supra* note 6.