16-15789

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LAURA DANA,
on behalf of herself and all others similarly situated,

Plaintiff-Appellant,

—against—

THE HERSHEY COMPANY, a Delaware Corporation,
and HERSHEY CHOCOLATE & CONFECTIONERY CORPORATION,
a Delaware Corporation,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
CASE NO. 3:15-CV-04453-JCS
HONORABLE JOSEPH C. SPERO

BRIEF OF DEFENDANTS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Defendants-Appellees hereby certify that Hershey Chocolate & Confectionery Corporation is a wholly owned subsidiary of The Hershey Company, which is a publicly held company. Neither The Hershey Company nor Hershey Chocolate & Confectionery Corporation has any other parents, subsidiaries or affiliates that are publicly held. No publicly held entity (corporate or otherwise) owns 10% or more of the stock of The Hershey Company.

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INTRODUCTION

This appeal seeks an unprecedented expansion of California consumer-protection law. Plaintiff-Appellant Laura Dana asks this Court to hold that manufacturers must affirmatively disclose on their product labels *any information* that could influence a reasonable consumer's purchase decision—or, as here, cause her to regret a purchase after the fact. The District Court recognized that such a rule would impose a duty of "stunning breadth."

Many consumers view their shopping decisions as an expression of their ethical, religious, or political views. For example, some consumers choose not to purchase products on account of manufacturers' positions on social issues, political donations, environmental records, or—as alleged here—the labor practices of others in their ingredient supply chains. If Dana were to prevail, manufacturers would be required to anticipate *every* fact about their businesses (or those of their suppliers) that a reasonable consumer might deem important and disclose *all* of them on their product labels, or else face potentially massive liability.

Well-settled precedent bars that outcome. As this Court has recognized, "California courts have generally rejected a broad obligation to

disclose." *Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1141 (9th Cir. 2012). Just four narrow exceptions have been carved out from that general rule. This case does not fit within any of them.

The absence of any duty to disclose under California law is fatal to Dana's entire case. Should this Court disagree, however, the Complaint suffers from other fundamental defects that require affirmance:

- ***First***, the Complaint fails to plausibly allege essential elements of Dana's state-law claims.
- ***Second***, when it enacted the Transparency in Supply Chains Act of 2010, the California Legislature previously considered the issue of labor practices in manufacturers' supply chains and determined that *website* disclosures are sufficient to bring this information to consumers' attention. California's "safe harbor" doctrine precludes courts from second-guessing that legislative determination.
- ***Third***, Dana fails to satisfy Article III's injury-in-fact requirement because her Complaint concedes that forced labor *may not* have been used to manufacture the products that

she herself purchased (and that the answer to this question can never be known).

- ***Finally***, the label disclosures that Dana seeks to impose under California law would violate the First Amendment's prohibition against compelled speech.

The Hershey Company ("Hershey") well appreciates that forced labor is a serious problem, and is working to eradicate it from the global cocoa supply chain. Dana can join these efforts by engaging in advocacy, lobbying elected representatives, or supporting human-rights organizations. This misguided lawsuit, however, is not the answer.

STATEMENT OF JURISDICTION

Hershey agrees with Dana's jurisdictional statement, except that Dana lacks Article III standing to bring this lawsuit. (*Infra* at 59-66.)

COUNTERSTATEMENT OF THE ISSUES

1. Whether Hershey has an affirmative duty under California law to disclose on product labels that forced labor may have been used in the cocoa supply chain, when this fact does not relate to product safety and is already a matter of public knowledge.

2. Whether the District Court correctly held that the Complaint failed to state a claim under California's consumer-protection statutes because Hershey has no such duty in these circumstances; the labels of Hershey's products are not likely to mislead reasonable consumers; and Dana failed to identify any conduct that qualifies as an "unfair" business practice.

3. Whether Dana's claims are barred by California's "safe harbor" doctrine by virtue of the Legislature's determination, in enacting the Transparency in Supply Chains Act of 2010, that disclosures on a manufacturer's *website* are sufficient to convey information to consumers about labor practices in a product's supply chain.

4. Whether Dana alleged an injury-in-fact sufficient for Article III standing when the Complaint concedes that the Hershey products she purchased may not have been made with forced labor, and that the answer to this question can never be known.

5. Whether the duty that Dana seeks to impose would violate the First Amendment's prohibition against compelled speech.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent constitutional and statutory provisions are reproduced in an addendum to this brief.

COUNTERSTATEMENT OF THE CASE

A. Forced Labor In The Cocoa Supply Chain

Most of the world's cocoa is grown in developing nations near the Equator. (ER085.) The largest cocoa-producing region is West Africa, where 70% of the world's cocoa originates—primarily in the nation of Ivory Coast (Côte d'Ivoire). (ER041; ER091.)[1]

"Due to complex socioeconomic circumstances," child labor is a problem in West African agriculture, and cocoa is no exception. (ER091.) The main reason is crippling poverty. *See* Norimitsu Onishi, *The Bondage of Poverty That Produces Chocolate*, N.Y. TIMES (July 29, 2001), Section 1 at 1. Many children in Ivory Coast work in the cocoa fields as a matter of economic necessity. *See* Alexandra Zavis, *Cocoa industry's bitter secret draws scrutiny; Slave trade flourishes in Ivory Coast*, DALLAS MORNING NEWS (May 6, 2001) at 39A ("Western outrage

[1] Hershey also sources cocoa from the Dominican Republic, Ecuador, Indonesia, Malaysia, and Peru. (ER085.)

over 'chocolate slaves' is incomprehensible to many families who depend on their children's labor to survive."). Cultural norms regarding the role of children also contribute. *See* Erika George, *Incorporating Rights: Child Labor in African Agriculture and the Challenge of Changing Practices in the Cocoa Industry*, 21 U.C. DAVIS J. INT'L L. & POL'Y 59, 66-67 (2014).

Policing the worldwide cocoa supply chain is extraordinarily difficult. *See* David Smith, *Taste for chocolate is gone; Some African cocoa farms use child slaves*, ATLANTA JOURNAL-CONSTITUTION (Oct. 24, 2005) at 11A ("[W]ith so many tiny farms in remote locations and thousands of middlemen, certifying all cocoa is proving to be a nearly impossible task."). Violence and political instability in Ivory Coast have only added to the inherent challenges. *See id.*; George, *supra*, at 63-64.

As the Complaint conceded, "Hershey is … not able to trace [particular] cocoa beans … back to the cocoa plantations on which they are grown" to determine whether forced labor was used. (ER030.) This is because West African cocoa originates in "literally thousands of villages" and reaches Hershey only after beans from many villages have been consolidated during the multi-step chain of supply. (ER041.)

Hershey nevertheless has undertaken major efforts to combat human-rights violations in the cocoa supply chain. For example, Hershey and other industry members created the International Cocoa Initiative ("ICI"), a nonprofit foundation that oversees efforts to eliminate child labor in the cocoa sector. International Cocoa Initiative, *About Us*, http://www.cocoainitiative.org/about-ici/about-us. The ICI has supported thousands of community-development projects in West Africa, benefiting more than a million people and expanding educational access for 50,000 children. *See id.* Hershey was a co-founder of CocoaAction, a "groundbreaking pre-competitive collaboration with 10 other major cocoa-purchasing companies" that works to "improve the livelihoods of cocoa farmers" through the provision of training, labor monitoring, and educational opportunities. (ER073; ER092; ER130.)

Contrary to Dana's portrait of an indifferent company dragging its feet, Hershey's efforts have produced "movement in the right direction." George, *supra*, at 70. Last year, the Department of Labor observed "significant advancement in efforts to eliminate the worst forms of child labor" in Ivory Coast. Bureau of International Labor Affairs, U.S. Dep't of Labor, *Côte d'Ivoire: 2015 Findings on the Worst Forms of Child La-*

bor, http://www.dol.gov/ilab/reports/child-labor/cote_divoire.htm. As a result, Hershey is ahead of schedule in its goal to source 100% fair-labor certified cocoa by 2020. (ER073; ER165.)

B. The Existence Of Forced Labor In The Cocoa Supply Chain Is Widely Known

Dana asserts that the presence of forced labor in the cocoa supply chain is "[g]enerally unknown." (Dana Br. 7.) In fact, this issue has been the subject of widespread media coverage and public discussion stretching back more than 15 years before Dana instituted this action and more than a decade prior to the start of the alleged "class period."

1. *Disclosures By Hershey*

Hershey has publicly acknowledged the labor problems in the cocoa supply chain on its website, in press releases, and in numerous publications.[2] For example:

- By June 2001, "Hershey … acknowledged … that Ivory Coast slave labor was used to harvest some cocoa beans shipped to

[2] Several of these sources are quoted in the Complaint or incorporated into the Complaint by reference. The others are subject to judicial notice. *See Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010) (taking judicial notice of "various newspapers, magazines, and books" to "indicat[e] … what information was in the public realm at the time").

the United States." Bob Fernandez, *Hershey: Slavery a 'shock'; It will fund a study on labor practices*, PHILA. INQUIRER (June 24, 2001) at A15.

- Later that year, "Hershey was a signatory" to a public, industry-wide agreement that "acknowledged the problem of forced child labor in West Africa." (ER034-35; Dana Br. 11-12.)

- In 2005, Hershey and other industry members "issued a Joint Statement" acknowledging "the worst forms of child labor and forced labor in the cocoa fields and [in] the supply chain." (ER035; Dana Br. 13-14.)

- In 2010, Hershey and other industry members "issued … another Joint Statement" estimating that "the worst forms of child labor" in the cocoa supply chain would "be reduced by 70 percent" "[b]y 2020." (ER036; Dana Br. 14.)

- In 2012, Hershey issued a public pledge to "accelerate its programs to help eliminate child labor in the cocoa regions of West Africa." (ER032.) *See also* Ron Todt, *Hershey vows to use only certified cocoa by 2020*, ASSOCIATED PRESS (Oct. 3, 2012).

- Hershey's 2014 Corporate Social Responsibility Report, available on its website, stated that "there is a potential for human and labor rights abuses occurring within our supply chain," and recognized that "child labor in [the cocoa] supply chain" is an "industry-wide challenge." (ER091.)

- Hershey's website acknowledges that the company is "a major buyer of West African cocoa beans, primarily [from] Côte d'Ivoire and Ghana" (ER167); states that Hershey is working "to help eliminate child labor in the cocoa regions of West Africa" (ER032); and commits to "source 100 percent certified cocoa … by 2020." (*Id.*)

Hershey has *never* represented on its website, its product labels, or in any public materials that the cocoa supply chain is free of forced labor. And Dana has never alleged otherwise.

2. ***Disclosures By Others***

Hershey is not the only source of public information about labor conditions in the West African cocoa region. For example, in 2001, a major California newspaper ran a "Special Report" titled "Cocoa in California," including a front-page exposé. Sudarsan Raghavan & Sumana

Chatterjee, *Child Slavery and the Chocolate Trade, A Tragic Secret Exposed: Some West African Children Work on Ivory Coast Farms as Slaves, Harvesting Cocoa Beans*, SAN JOSE MERCURY NEWS (June 24, 2001) at 1A. This article was part of wave of media coverage on this topic that spread across the country.[3]

Spurred by the resulting public outcry, the U.S. House of Representatives quickly passed legislation that would have required the U.S. Food and Drug Administration ("FDA") "to develop labeling requirements indicating that no child slave labor was used in the growing or harvesting of cocoa" in a particular chocolate product. 147 Cong. Rec. 12,269 (2001) (statement of Rep. Engel); *see, e.g.*, DOW JONES NEWSWIRES, *US House OKs Measure to Prevent Slave Labor In Cocoa Harvest* (June 29, 2001). The FDA, however, opposed such labeling as "unrealis-

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[3] *See, e.g.*, CHICAGO TRIBUNE, *If you knew a product you loved was made by child labor, would you stop buying it?* (April 24, 2001) at C3; Alexandra Zavis, *Cocoa industry's bitter secret draws scrutiny: Slave trade flourishes in Ivory Coast*, DALLAS MORNING NEWS (May 6, 2001) at 39A; Peter Fearon, *Cocoa Farmers Harbor a Dark Secret: Slavery*, N.Y. POST (May 10, 2001) at 22; Sudarsan Raghavan & Sumana Chatterjee, *A Slave-Labor Force of Youths Keeps Chocolate Flowing West*, PHILA. INQUIRER (June 24, 2001) at A1; Sudarsan Raghavan, et al., *It may be the 21st century, but slavery is still a reality in Ivory Coast*, ST. LOUIS POST-DISPATCH (June 26, 2001) at A5.

tic and impossible to attain." 148 Cong. Rec. 370 (2002) (statement of Sen. Harkin). The legislation died before reaching the Senate. (Dana Br. 12.)

Nevertheless, in October 2001, the U.S. cocoa industry, including Hershey, signed on to the Harkin-Engel Protocol, a voluntary agreement developed in partnership with Senator Tom Harkin and Representative Eliot Engel. (Dana Br. 11-13.) Under the Protocol, Hershey and other signatories "acknowledged the problem of forced child labor in West Africa" and committed to address it. (ER034; Dana Br. 13.) The media covered these efforts extensively.[4]

In July 2005, three former West African child slaves sued chocolate manufacturers in California district court pursuant to the Alien Tort Statute. *See Doe v. Nestlé S.A.*, CV 05-5133 SVW (JTLx) (C.D. Cal. filed July 14, 2005), *on appeal at* 766 F.3d 1013, 1016 (9th Cir. 2014),

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[4] *See, e.g.*, Sumana Chatterjee, *Chocolate Industry To Help End Child Slavery, Boys Exploited in Ivory Coast*, SAN JOSE MERCURY NEWS (Oct. 1, 2001) at 5A; DOW JONES NEWSWIRES, *US Lawmakers, Cocoa Industry Agree to Anti-Child Slavery Plan* (Oct. 1, 2001); CHICAGO TRIBUNE, *Chocolate-makers act to end child slavery* (Oct. 2, 2001) at N17. Although Dana is critical of Hershey's efforts under the Protocol, she has acknowledged that the industry's efforts to comply with the Protocol are matters of public record. (*See* Dana Br. 15 ("The chocolate industry's non-compliance with [the Protocol] did not go unnoticed.").)

reh'g en banc denied, 788 F.3d 946 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 798 (2016). That lawsuit, now in its eleventh year, has been covered by the media at every stage.[5]

In 2010, the California Legislature passed the Transparency in Supply Chains Act of 2010 ("Supply Chains Act"), CAL. CIV. CODE § 1714.43, requiring manufacturers to post on their websites information about forced labor in their supply chains. In enacting that statute, the Legislature took express notice of the "prevalen[ce]" of "forced labor" in the cocoa supply chain. (ER176.)

Public awareness continued to grow. According to the Complaint, forced labor in the cocoa supply chain has been covered by the national TV news (ER038; Dana Br. 17); reports have been published by the U.S. Department of Labor (ER039; Dana Br. 17); and academic studies have been conducted by Tulane University (ER036-37, 039-40; Dana Br. 15-17).[6] A documentary film has been released.[7] Features have been pub-

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[5] *See, e.g.*, L.A. TIMES, *Human Rights Group Sues Three U.S. Firms* (July 16, 2005) at C3; Maura Dolan, *Ivory Coast cocoa importers liable to slavery suits*, L.A. TIMES (June 11, 2015) at C4.

[6] This Court has previously recognized that the issue of forced labor in the cocoa supply chain has been examined in "[s]tudies by International

lished in major magazines.[8] As of this writing, a Lexis search in the "Mega News, Major Publications" database yields 553 stories on this topic—526 of them published before this lawsuit was filed.[9]

C. This Lawsuit And The Decision Below

On September 28, 2015, Dana filed her Complaint. Dana is a California citizen who "has purchased [unspecified] Hershey Chocolate Products at various retail stores … from 2011 through 2014."[10] (ER031.) She allegedly "would not have purchased [them] or paid as much for them" had she known of the *possibility* (in her words, the "likelihood")

Labour Organization, UNICEF, the Department of State, and numerous other organizations." *Doe*, 766 F.3d at 1016-17.

[7] *See* IMDB, *The Dark Side of Chocolate (2010),* http://www.imdb.com/title/tt1773722/.

[8] *See, e.g.*, Tom Masland, *Plight of the 'Child Slaves'*, NEWSWEEK (Apr. 29, 2001); Deborah Orr, *Slave Chocolate?*, FORBES (Apr. 24, 2006); Christian Parenti, *Chocolate's bittersweet economy*, FORTUNE (Feb. 15, 2008).

[9] The search query used was (cocoa OR chocolate) w/25 ("child labor" OR "slave labor" OR "forced labor") w/25 (africa! OR "ivory coast" OR "cote d'ivoire").

[10] Dana's definition of Hershey's "Chocolate Products" apparently includes all Hershey snack bars, baking bars, syrups, and spreads containing "cocoa beans from the Ivory Coast." (ER028.) The definition excludes "Hershey's Bliss, Dagoba and Scharffen Berger products," which are expressly certified as free of forced labor. (ER045.)

that they were "made with child and slave labor." (ER030-31.) Dana conceded that Hershey and others have widely disclosed the potential for forced labor in the cocoa supply chain, but faulted Hershey for not *also* disclosing the problem "on the packaging" of its products "at the point of purchase." (ER041-46.)

On this theory, Dana asserted claims under California's Unfair Competition Law ("UCL"), CAL. BUS. & PROF. CODE § 17200 *et seq*.; False Advertising Law ("FAL"), CAL. BUS. & PROF. CODE § 17500 *et seq*.; and Consumers' Legal Remedies Act ("CLRA"), CAL. CIV. CODE § 1750 *et seq*. Dana purported to represent a class consisting of "[a]ll consumers who purchased Hershey Chocolate Products in California" since September 2011 (ER048), and sought restitution, injunctive relief, and attorney's fees (ER031; ER053; ER055).

Hershey moved to dismiss. (ER060-64.) It argued that California's consumer-protection statutes impose no duty to disclose information about suppliers' labor practices on product labels. It also argued that California's "safe harbor" doctrine barred Dana's claims in light of the Supply Chains Act; that Dana lacked Article III standing to bring

her claims; and that the disclosures she sought to impose would violate the First Amendment.

Dana opposed Hershey's motion. (D. Ct. Dkt. 25.) In her opposition, Dana expressly waived any theory of liability involving "affirmative misrepresentations" or "partial misrepresentations," and clarified that her claims are premised *solely* on Hershey's purported "omission[s]." (*Id.* at 13 n.58.)

On March 29, 2016, the District Court granted Hershey's motion to dismiss. (ER001-24.) Although it held that Dana had standing to sue, it joined "[e]very court to consider the issue" in holding that California law does not "require[] corporations to inform customers of [their suppliers' labor practices] on their product packaging." (ER001.) It recognized that, under this Court's decision in *Wilson*, "an obligation to disclose … extends only to matters of product safety." (ER014.)

The District Court further held, as an independent ground for dismissal, that a duty to disclose cannot arise unless the seller has "exclusive knowledge" of the omitted fact. (ER016.) Here, the exact opposite was true: "by Dana's own allegations," Hershey has publicly recog-

nized the existence of forced labor in the cocoa supply chain, as have the U.S. Government, Tulane University, and many others. (ER016.)

The District Court concluded that, absent a duty to disclose, and absent "exclusive knowledge" on Hershey's part, none of Dana's statutory claims could survive. Accordingly, the District Court "d[id] not resolve" Hershey's remaining arguments for dismissal. (ER022.) Dana did not request leave to amend the Complaint, but the District Court nevertheless recognized that "leave to amend would be futile." (ER024.) The District Court dismissed the Complaint with prejudice.

D. Related Cases

This is one of several cases recently filed by Dana's counsel premised on the same unprecedented theory. Three cases, including this one, concern the alleged duty to disclose forced labor in the West African cocoa fields.[11] Four other cases concern the alleged duty to disclose abusive labor practices on Thai fishing boats.[12] One additional case con-

[11] *See also McCoy v. Nestlé USA, Inc.*, 3:15-cv-04451 (N.D. Cal. filed Sept. 28, 2015), *on appeal*, No. 16-15794; *Hodsdon v. Mars, Inc.*, 3:15-cv-4450 (N.D. Cal. filed Sept. 28, 2015), *on appeal*, No. 16-15444.

[12] *Barber v. Nestlé USA, Inc.*, 8:15-cv-1364 (C.D. Cal. filed Aug. 27, 2015), *on appeal*, No. 16-55041; *Wirth v. Mars, Inc.*, 8:15-cv-1470 (C.D. Cal. filed Sept. 10, 2015), *on appeal*, No. 16-55280; *Hughes v. Big Heart*

cerns the alleged duty to disclose the treatment of whales at Sea World.[13] Each of these cases was dismissed with prejudice at the district-court level and is now on appeal to this Court.

SUMMARY OF ARGUMENT

1. California courts have long "rejected a broad obligation to disclose." *Wilson*, 668 F.3d at 1141. Dana argues that her case comes within an exception to this rule, but that exception applies only when (1) the defendant has "exclusive knowledge" of a fact; (2) that fact is "material"; and (3) the defendant knows that fact is material to the plaintiff and that it is inaccessible to her. None of these elements is satisfied here.

This Court addressed the "materiality" element in *Wilson* and held that, in a consumer-protection case such as this one, materiality requires a nexus with *product safety*. Dana has never alleged that Her-

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Pet Brands, 2:15-cv-8007 (C.D. Cal. filed Oct. 12, 2015), *on appeal*, No. 16-55212; *De Rosa v. TriUnion Seafoods, LLC*, 2:15-cv-7540 (C.D. Cal. filed Sept. 25, 2015), *on appeal*, No. 16-55211.

[13] *Hall v. Sea World Ent'mt, Inc.*, No. 3:15-CV-660 (S.D. Cal. filed Mar. 25, 2015), *on appeal*, No. 16-55845.

shey's products are unsafe as a result of any alleged omissions. The judgment should be affirmed for this reason alone.

Aware that *Wilson* dooms this appeal, Dana asks the Court to limit that decision or overrule it. But a panel of this Court is not empowered to do so absent an intervening decision by the California Supreme Court. No such decision exists. Dana instead relies on two *intermediate* state-court decisions, but these opinions—to the extent they are even in tension with *Wilson*—concerned physical defects that rendered a product entirely non-functional. They did not recognize a duty to disclose under the circumstances present here.

Dana also cannot satisfy the "exclusive knowledge" element. Hershey does not have exclusive knowledge of the problem of forced labor in the cocoa supply chain. On the contrary, the Complaint acknowledged that this issue has been front-page news; debated by government authorities; extensively studied by academics and others; and publicly disclosed by Hershey on its website and in numerous publications.

Nor can Dana satisfy the third element. In fact, Dana failed to plead that Hershey *knew* the information omitted from its labels was

material to her, or that Hershey *knew* this information was inaccessible to her (which, in any event, it was not).

The District Court recognized that adopting Dana's view would open the floodgates to a wave of novel "consumer-protection" suits based on business practices that offend the sensibilities of some consumers but bear no nexus with product safety or quality. Dana attempts to reassure this Court that a "limiting principle" exists, but fails to articulate one that makes any sense.

2. The District Court correctly held that the Complaint failed to state a claim under California's consumer-protection statutes because Hershey's product labels cannot be "deceptive," "unlawful," or "unfair" for not including information that Hershey has no legal duty to disclose. The Complaint failed to state a claim for other reasons as well:

a) To maintain a claim under the CLRA, FAL, and the UCL's "fraudulent" prong, a plaintiff must plausibly allege that reasonable consumers are likely to be misled. Reasonable consumers viewing Hershey's product labels are not likely to be misled to think that *no* forced labor exists in the cocoa supply chain. Indeed, because there are no affirmative statements about this topic on Hershey's labels, the labor

practices in the cocoa supply chain would not even occur to a reasonable consumer.

b) Dana's CLRA claim fails because that statute prohibits only specifically enumerated categories of misrepresentations concerning, for example, a product's "source," "ingredients," "benefits," or "quantities." None of these categories includes labor practices in a manufacturer's supply chain.

c) Dana's FAL claim is not viable because that statute prohibits only affirmative misrepresentations in advertising. An FAL claim cannot be based on pure omissions.

d) Dana cannot satisfy either test for liability under the UCL's "unfair prong." First, it is not "immoral" or "oppressive" for Hershey not to disclose the existence of forced labor in the cocoa supply chain on its *product labels*, especially when Hershey has publicly acknowledged the problem and posts information about it on its *website*. Second, Dana's allegations are not "tethered" to any "legislatively declared policy" that manufacturers must disclose the labor practices in their supply chains on product labels.

3. Even if Dana could state a *prima facie* claim for relief under California's consumer-protection laws, her claims are barred by the "safe harbor" doctrine. That doctrine shields manufacturers from liability where "the Legislature has … considered a situation and concluded no action should lie." Here, the Legislature considered whether and how consumers should be informed about the labor practices in manufacturers' supply chains when it enacted the Supply Chains Act. The Legislature determined that disclosures on *websites* are sufficient to "ensure [that] interested consumers have reasonable access" to this information. In making that judgment, the Legislature necessarily "concluded no action should lie" against manufacturers who make true and complete website disclosures merely because they do not *also* disclose this information on product labels.

4. Dismissal of Dana's claims was appropriate because she lacks Article III standing. As the Supreme Court recently admonished, Article III requires an injury-in-fact that is *both* "concrete" *and* "particularized." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1545 (2016). Dana's alleged injury is not "concrete" because she concedes that there is no way to know whether the Hershey products *she* purchased were made

using cocoa from West Africa—let alone cocoa produced using forced labor. A consumer who allegedly overpays for a product that is actually misrepresented can satisfy Article III's concreteness requirement. But courts have refused to find concrete injury where a plaintiff alleges that she "overpaid" because a product she bought *might have been* misrepresented. This case falls squarely in the latter category.

The District Court avoided reaching this result by recasting Dana's theory of injury. According to the District Court, Dana's injury was not that she *received a product* that was somehow unsatisfactory, but that she regrets having *transacted business* with a company whose "supply chain involved … labor abuses." This theory of injury, even if "concrete," fails the "particularized" requirement of Article III standing.

Dana may regret her decision to buy Hershey products, but if the products she purchased were not made with cocoa obtained through forced labor, the use of such practices by Hershey's suppliers has not caused *her* any "injury" distinct from the moral offense felt by purchasers of other Hershey products (such as mints and gum) or concerned members of the public at large. Courts have held that such "generalized

grievances" are not sufficiently particularized to confer Article III standing.

6. Dana's claims abridge the First Amendment's protections against compelled commercial speech. Under Dana's interpretation of California law, manufacturers who say nothing about their suppliers' labor practices would be compelled to speak out about these issues on the labels of every product they sell. Compelled speech on controversial subjects, however, violates the First Amendment unless it directly and materially advances a substantial government interest and is narrowly tailored. The sweeping duty to disclose that Dana seeks to impose cannot meet that exacting test.

ARGUMENT

I. HERSHEY HAS NO DUTY TO DISCLOSE INFORMATION ABOUT ITS SUPPLIERS' LABOR PRACTICES ON ITS PRODUCT LABELS

This Court has recognized that "California courts have generally rejected a broad obligation to disclose." *Wilson*, 668 F.3d at 1141. Indeed, "the general rule" in California has long been "that a vendor is *under no obligation to speak* concerning the thing which he would sell." *Dyke v. Zaiser*, 80 Cal. App. 2d 639, 652 (1947) (emphasis added).

Four exceptions exist to this general rule. *See LiMandri v. Judkins*, 52 Cal. App. 4th 326, 336 (1997); *Heliotis v. Schuman*, 181 Cal. App. 3d 646, 651 (1986). (Dana Br. 32-33.) Three of them are clearly inapplicable here. There is no fiduciary relationship. Hershey is not alleged to have "actively concealed" any fact.[14] And before the District Court, and again on appeal, Dana has renounced any claim that Hershey made "partial representations" or spoke "half-truths" that triggered a disclosure obligation. (*Supra* at 16; *see* Dana Br. 30 (recognizing that this this is "a pure omissions case").)

Dana's case rests on the fourth exception. (*See* Dana Br. 33.) This exception applies "when the defendant ha[s] exclusive knowledge of material facts not known to the plaintiff." *Heliotis*, 181 Cal. App. 3d at 651. But that description of the test is incomplete. First, as discussed below, this Court has held that, in a consumer-protection case premised on omissions, "material" means *safety-related*. *Wilson*, 668 F.3d at

[14] "[T]o state a claim for active concealment, Plaintiff must allege specific 'affirmative acts … in hiding, concealing or covering up the matters complained of.'" *Herron v. Best Buy Co.*, 924 F. Supp. 2d 1161, 1176 (E.D. Cal. 2013).

1141. Second, the defendant *must have known* that the omitted fact was material to the plaintiff, and that it was inaccessible to her. *Walker v. KFC Corp.*, 728 F.2d 1215, 1221-22 (9th Cir. 1984).

The District Court correctly held that Hershey has no duty to disclose the existence of forced labor in the cocoa supply chain on its product labels because none of these elements is satisfied.

A. The Labor Practices Of Cocoa Suppliers Are Not "Material"

Dana urges this Court to apply a definition of "materiality" borrowed from cases involving affirmative misrepresentations. Under that definition, any fact is "material" if a "reasonable consumer … would want to know [it]." (Dana Br. 27.) This Court has recognized that such an amorphous definition of "materiality" is completely unworkable in cases involving alleged omissions.

1. *In Consumer-Protection Cases Based On Omissions, "Materiality" Is Limited To Safety Issues*

Four years ago, this Court held that, under California's consumer-protection statutes, a manufacturer has no "duty to disclose" facts unless they present "physical injury or … safety concerns" to the consumer. *Wilson*, 668 F.3d at 1141. In reaching that conclusion, this Court

expressly considered—and rejected—Dana's main argument on appeal: that even in omissions cases, any fact is "material" as long as it would have influenced the consumer's purchasing decision. *Id.* at 1142-43.

Since *Wilson* was decided, this Court has repeatedly reaffirmed its holding, upholding dismissals of consumer-protection claims premised on omissions that did not involve a product's safety. *See, e.g.*, *Kramer v. Toyota Motor Corp.*, 2016 U.S. App. LEXIS 16280, at *2-3 (9th Cir. Sept. 2, 2016) (failure to disclose issue with car's braking system that posed no "safety concerns"); *Hodges v. Apple, Inc.*, 640 F. App'x 687, 689-690 (9th Cir. 2016) (failure to disclose image quality issues with laptop screen); *Gray v. Toyota Motor Sales, U.S.A., Inc.*, 554 F. App'x 608, 609 (9th Cir. 2014) (failure to disclose car's poor fuel economy); *Smith v. Ford Motor Co.*, 462 F. App'x 660, 663 (9th Cir. 2011) (failure to disclose car's defective ignition lock); *Vitt v. Apple Computer, Inc.*, 469 F. App'x 605, 608 (9th Cir. 2012) (failure to disclose defective solder joints in computer); *Oestreicher v. Alienware Corp.*, 322 F. App'x 489, 491 (9th Cir. 2009) (failure to disclose defective heat removal system in computer); *cf. Daniel v. Ford Motor Co.*, 806 F.3d 1217, 1226 (9th Cir. 2015) (defect in car's tires was material under *Wilson* because it in-

volved a "safety risk").

The rule recognized in *Wilson* has deep roots. California's courts have long differentiated between disclosures concerning safety and those merely affecting a product's economic value or worth. This distinction stems from Chief Justice Traynor's famed opinion in *Seely v. White Motor Co.*, concerning "the nature of the responsibility a manufacturer must undertake in distributing his products" to the public. 63 Cal. 2d 9, 18 (1965). *Seely* explained:

> A consumer should not be charged … with bearing the risk of physical injury when he buys a product on the market. He can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer [expressly] agrees that it will.

Id.; *see also Vitt*, 469 F. App'x at 608-09 (citing this passage from *Seely* in support of the *Wilson* rule); *Bardin v. DaimlerChrysler Corp.*, 136 Cal. App. 4th 1255, 1270 (2006) (same).

More recently, the California Supreme Court explained that, unlike the risk of physical injury, the risk of unmet economic expectations "better rests with buyers" because buyers have choices, and can opt to do business with "other sellers in the marketplace" who will promise to meet their particular expectations. *Robinson Helicopter Co. v. Dana*

Corp., 34 Cal. 4th 979, 997 (2004).

Here, for example, Hershey and others market specialty chocolate products made from cocoa that is certified to be free of forced labor, and the labels of those products tout that certification. (ER045.) If this issue was important to Dana, she could have purchased "certified" products. Instead, she chose to purchase products whose labels *said nothing* about labor practices. Bedrock principles of California law—on which *Wilson* stands—recognize that, in these circumstances, Dana can be "fairly charged with the risk" that her purchases ultimately would "not match" her subjective economic expectations. *Seely*, 63 Cal. 2d at 19; *Vitt*, 469 F. App'x at 608-09.

2. *The* Wilson *Rule Is Not Limited To Cases Involving Products That Manifest Defects For The First Time After The Warranty Period*

Dana argues that *Wilson* is "limited to [its] facts"—in other words, that the *Wilson* rule should apply only where a manufacturer has provided an express warranty against product defects, and a defect "manifest[s] after the expiration of the warranty." (Dana Br. 37, 40-41.) As Dana sees it, the point of the *Wilson* rule is solely to prevent "circumvent[ion of] a limited warranty." (*Id.* at 41.)

Dana's reading is inconsistent with what this Court actually said and did in *Wilson*. In explaining is holding, this Court noted that the *Wilson* rule flows from the principle that "California courts have generally rejected a broad obligation to disclose," 668 F.3d at 1141, and cited approvingly to a case that did not involve a product defect or a limited warranty, *see O'Shea v. Epson Am., Inc.*, 2011 U.S. Dist. LEXIS 85273 (C.D. Cal. July 29, 2011), *aff'd*, 566 F. App'x 605 (9th Cir. 2014). Moreover, this Court did not cabin its holding with any limiting language: It held that "for [an] omission to be material, [it] must … pose 'safety concerns.'" 668 F.3d at 1142.

Dana's reading of *Wilson* is also at odds with how that case has been applied. In subsequent decisions, this Court has never once suggested that *Wilson* is limited to product-defect cases in which a limited warranty has expired. *See, e.g.*, *Kramer*, 2016 U.S. App. LEXIS 16280, at *2-3 (no mention of limited warranty); *Gray*, 554 F. App'x at 609 (9th Cir. 2014) (no product defect; no mention of limited warranty). Nor have district courts applied *Wilson* in this manner. *See, e.g.*, *Hall v. Sea World Ent'mt, Inc.*, 2015 U.S. Dist. LEXIS 174294, at *26 n.10 (S.D. Cal. Dec. 23, 2015) (applying *Wilson* rule to claim alleging nondisclosure

of mistreatment of whales at Sea World); *Walsh v. Kindred Healthcare*, 2012 U.S. Dist. LEXIS 41012 (N.D. Cal. Mar. 26, 2012) (applying *Wilson* rule to claim alleging nondisclosure of inadequate staffing at nursing home); *accord Searle v. Wyndham Int'l*, 102 Cal. App. 4th 1327, 1335 (2002) (holding, pre-*Wilson*, that a hotel had no duty to disclose to guests "how it compensates its employees").[15]

Moreover, Dana's cramped reading of *Wilson* turns logic on its head. As another manufacturer explained in a related appeal:

> *Wilson* explained that the expiration of the warranty period was significant because imposing a post-warranty duty to disclose non-safety information "would eliminate term limits on warranties, effectively making them perpetual…." This same rationale applies [*a fortiori*] when the manufacturer never provided any warranty at all. Imposing [Dana's] proposed duty of disclosure would "circumvent" the fact that [Hershey] *never* made any promises in a warranty that could give rise to a duty of disclosure. Put another way, a

[15] To support her narrow reading of *Wilson*, Dana relies heavily on *Stanwood v. Mary Kay, Inc.*, 941 F. Supp. 2d 1212 (C.D. Cal. 2012). But *Stanwood* involved affirmative misrepresentations—a theory that Dana has renounced here. *See id.* at 1215 ("Plaintiffs allege that Defendant defrauded American consumers by marketing and advertising that they did not test any of their products on animals."). *Stanwood*'s reasoning also has been roundly criticized. *See, e.g.*, *Hodsdon v. Mars, Inc.*, 162 F. Supp. 3d 1016, 1025-26 (N.D. Cal. 2016) (noting that "*Stanwood* stands alone" and "declin[ing] to pick up *Stanwood*'s torch").

> manufacturer does not assume a broader duty of disclosure when it provides no warranty, compared to when it does provide a warranty.

Br. of Appellee (Dkt. 16-1) at 25, *Wirth v. Mars, Inc.*, No. 16-55280 (9th Cir. filed Sept. 15, 2016) (internal quotation marks and citation omitted).

3. ***Dana's Invitation To Overrule* Wilson *Must Be Rejected***

Recognizing that *Wilson* dooms her case, Dana urges this Court to overrule it. Specifically, according to Dana, two California intermediate-court opinions from 2011 and 2015 should "cause this Court to take a fresh look at" the *Wilson* rule. (Dana Br. 43 (citing *Collins v. eMachines, Inc.*, 202 Cal. App. 4th 249 (2011); *Rutledge v. Hewlett-Packard Co.*, 238 Cal. App. 4th 1164 (2015)).)

Dana misunderstands the circumstances in which a panel of this Court can overrule a prior panel's holding. As this Court recently reaffirmed, a panel cannot take this step "unless [the prior panel's] reasoning is inconsistent with the reasoning behind an intervening decision *by a court of last resort*." *Pakootas v. Teck Cominco Metals, Ltd.*, 2016 U.S. App. LEXIS 13662, at *26 (9th Cir. July 27, 2016) (emphasis added) (citing *Miller v. Gammie*, 335 F.3d 889, 899-900 (9th Cir. 2003) (en

banc)). *Collins* and *Rutledge* are not "decision[s] by a court of last resort."[16] Nor are they "intervening decisions": *Collins* was decided before *Wilson*, and this Court has reaffirmed *Wilson* multiple times since *Collins* and *Rutledge* were decided—including in *Daniel*, a published opinion. (*Supra* at 27-28.)

Moreover, this Court is especially wary of revising a prior panel's decision when doing so would not change the outcome of the case before it. *See Briceno v. Scribner*, 555 F.3d 1069, 1080-83 (9th Cir. 2009) (declining to revisit prior panel's construction of California law based on intervening state-court decisions because it was "not at all clear" that the state courts' construction would have made a difference "on the facts of th[at] case"). Here, *Collins* and *Rutledge* are of no help to Dana because they are factually distinguishable in at least two respects.

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[16] Dana may argue that this Court follows state intermediate-court decisions absent reason to think "that the state supreme court would decide differently." *Bills v. U.S. Fid. & Guar. Co.*, 280 F.3d 1231, 1234 n.1 (9th Cir. 2002). But that is true only when this Court faces a state-law question of first impression in this Circuit. It does not apply where, as here, there is already binding Circuit precedent on point. In any event, there is compelling evidence that the California Supreme Court would not find a duty to disclose here. *See Vitt*, 469 F. App'x at 608-09 ("We would be surprised if the California Supreme Court found such an extension in the consumer protection laws…."). (*Supra* at 28-29.)

First, *Collins* and *Rutledge* involved allegations of active concealment and/or affirmative misstatements. *See Collins*, 202 Cal. App. 4th at 253, 256 ("[t]he complaint … alleges active concealment"); *Rutledge*, 238 Cal. App. 4th at 1176 ("Appellants point to specific misrepresentations in HP's press releases and advertising that created a duty to disclose…."). Dana has expressly disavowed any reliance on the "active concealment" or "affirmative misrepresentation" exceptions to California's general rule against a duty to disclose. She relies solely on the "exclusive knowledge of material facts" exception. (*Supra* at 25.)

Second, *Collins* and *Rutledge* involved tangible defects that rendered the products in question entirely non-functional. *See Collins*, 202 Cal. App. 4th at 253, 258 (defect was "central to the function of a computer as a computer"); *Rutledge*, 238 Cal. App. 4th at 1174 (defect "obliterate[d] the function" of the product). This case involves labor practices in the cocoa supply chain that cause offense to some. It does not involve a physical defect "central and necessary to the function of [a candy bar] as a [candy bar]." *Id.* at 1175. Accordingly, even if *Collins* and *Rutledge* interpreted California law more broadly than *Wilson*, they do not support the sweeping duty on which Dana's case is premised.

B. Hershey Does Not Have "Sole Knowledge" Of Forced Labor In The Cocoa Supply Chain

Whatever the proper definition of "materiality," Dana concedes that "materiality … is just the first prerequisite to prevailing on an omissions claim." (Dana Br. 49.) Dana also must show that Hershey had "sole" or "exclusive knowledge" of the omitted facts. *Walker*, 728 F.2d at 1221-22 (quoting *Goodman v. Kennedy*, 18 Cal. 3d 335, 347 (1976)); *see also Warner Constr. Corp. v. City of Los Angeles*, 2 Cal. 3d 285, 294 (1970) (facts must have been "known or accessible only to defendant" and not "reasonably discoverable by the plaintiff"); *LiMandri*, 52 Cal. App. 4th at 336 (defendant must have had "exclusive knowledge" of omitted fact).

Hershey does not have sole or exclusive knowledge of the fact that forced labor exists in the cocoa supply chain. On the contrary, as the Complaint conceded, this problem has been widely publicized in print media, TV and movies for more than a decade; it has been openly debated in Congress and the California Legislature; it has been studied by academics and policymakers; it has been the subject of high-profile litigation; and Hershey has repeatedly acknowledged it in its own public statements and on its website. (*Supra* at 8-14.)

Faced with these undisputed facts, Dana attempts to lower the bar on the "exclusive knowledge" test by pointing to a few decisions in which district courts have remarked that exclusive knowledge "is analyzed *in part* by examining whether [the manufacturer] had *superior* knowledge." (Dana Br. 35 (quoting *Johnson v. Harley-Davidson Motor Co.*, 285 F.R.D. 573, 583 (E.D. Cal. 2012)) (emphasis added).) This "superior knowledge" formulation has no basis in California law, and it is entirely unclear what these courts meant. It surely cannot be enough for a plaintiff to allege that the seller has "superior knowledge" about its products or suppliers because, if that were the test, it would *always* be satisfied. *Cf. Daugherty v. Am. Honda Motor Co.*, 144 Cal. App. 4th 824, 830 (2006) ("Manufacturers *always* have knowledge regarding the effective life of particular parts and the likelihood of their failing within a particular period of time." (emphasis added)).

The cases cited by Dana stand, at most, for the proposition that "the 'exclusive knowledge' standard" should not be applied with absolute "rigidity." (Dana Br. 35.) For example, a manufacturer might have a duty to disclose a safety-related defect in a car, even if a purchaser technically could have learned about it by scouring consumer com-

plaints on some obscure corner of the Internet. *See Falk v. Gen. Motors Corp.*, 496 F. Supp. 2d 1088, 1097 (N.D. Cal. 2007).

That is hardly the situation here. As the District Court correctly recognized, given the widespread public attention that forced labor in the cocoa supply chain has received, it is "difficult to see how *any* definition of 'exclusive knowledge' could" be met in this case. (ER016.) Indeed, if the facts of this case do not demonstrate a lack of "exclusive knowledge," no set of facts ever could. *Cf. Gray v. Toyota Motor Sales, U.S.A.*, 2012 U.S. Dist. LEXIS 15992, at *24-26 (C.D. Cal. Jan. 23, 2012) (deeming "absurd" the idea "that Toyota could have retained exclusive, or even superior knowledge" of a defect given substantial "mainstream-media attention to the topic").

In another attempt to lower the bar, Dana asserts that a consumer "has no obligation to investigate" facts before making her purchases. (Dana Br. 33.) This is incorrect. As discussed above, California law expects consumers to exercise care in seeking out products that meet their particular economic needs. (*Supra* at 28.) Consequently, a duty of disclosure cannot arise unless the consumer's inquiries would have been futile. *See Warner*, 2 Cal. 3d at 294 (duty to disclose arises where facts

are not "reasonably discoverable by the plaintiff"); *Sime v. Malouf*, 95 Cal. App. 2d 82, 99 (1949) (duty to disclose arises where plaintiff "could not have discovered" omitted facts).

The one California case that Dana cites in support of this argument—*Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496 (2003)—is inapposite. That case recognized that buyers are entitled to rely on the *affirmative* statements that manufacturers make about their products, and that consumers therefore have no duty to investigate the "merits" of those "advertising claims" prior to purchase. *Id.* at 504. It says nothing about a consumer's obligation to make reasonable inquiries when the manufacturer has made no affirmative statements whatsoever.

C. In Any Event, Hershey Did Not Know That The Allegedly Omitted Facts Were Material To Dana, Or That They Were Inaccessible To Her

Even if Hershey's alleged omission qualified as "material," and even if Hershey had "exclusive knowledge" of that information, a duty to disclose still would not arise. Dana also must show "that [Hershey] *knew*" (1) "the materiality of the omitted matters" to her; and (2) the fact "that they were inaccessible to [her]." *Goodman*, 18 Cal. 3d at 347; *see also Walker*, 728 F.2d at 1221-22. Dana cannot possibly do so.

The California Supreme Court's *Goodman* decision is squarely on point. There, the plaintiffs alleged that the defendant had failed to disclose certain information about a proposed stock purchase. 18 Cal. 3d at 339. Because their claim was "grounded solely on omissions," the plaintiffs were required to "establish some duty of disclosure." *Id*. at 346-47. The court held that the plaintiffs failed meet this burden because their complaint alleged "[i]nsufficient facts" to "establish that defendant knew the materiality of the omitted matters" to them, or that the defendant had "knowledge that the omitted matters were not known to or reasonably discoverable by [them]." *Id*. at 348.

The same is true here. The Complaint did not allege that Hershey *knew* the presence of forced labor in its supply chain was material to Dana, or that Hershey *knew* that Dana had no way of discovering information on that subject. Nor could Dana have plausibly made such an allegation: the Complaint concedes that Dana "had [other] readily apparent and available sources of information" about forced labor in African cocoa regions. *Id*.

D. Dana's Response To The "Slippery Slope" Concern Is Wholly Inadequate

In rejecting the duty of disclosure that Dana seeks to impose, the

District Court was rightly concerned about the slippery slope posed by an obligation of such "stunning breadth." (ER015.) This Court raised the same concern in *Wilson*, recognizing that, if manufacturers had a duty to disclose all facts that a reasonable consumer might want to know, "litigation would become as widespread as manufacturing itself." 668 F.3d at 1143; *see also* Jonathan H. Adler, *Compelled Commercial Speech and the Consumer "Right to Know,"* 58 ARIZ. L. REV. 421, 444 (2016) (noting that "there is, quite literally, no end to the disclosures that [could] be mandated" under such a rule).

Dana dismisses these concerns as "overblown." (Dana Br. 28.) But the District Court was right when it observed that shoppers today choose not to purchase goods for "countless" reasons. (ER016.) These reasons may include a manufacturer's positions on social issues;[17] its support for or opposition to legislation;[18] its political donations;[19] its en-

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[17] *See, e.g.*, FORBES, *Chick-fil-A CEO Cathy: Gay Marriage Still Wrong, But I'll Shut Up About It And Sell Chicken* (Mar. 19, 2014), http://www.forbes.com/sites/clareoconnor/2014/03/19/chick-fil-a-ceo-cathy-gay-marriage-still-wrong-but-ill-shut-up-about-it-and-sell-chicken/.

[18] *See, e.g.*, *Second Amendment Check Boycott List*, http://www.2acheck.com/the-boycott-list/.

[19] *See, e.g.*, *People are boycotting PayPal after Peter Thiel donated to*

vironmental record;[20] its employment practices;[21] or its ties to certain foreign nations or regimes.[22] "[C]ourts are not suited to determine" which facts, among the many that a reasonable consumer could conceivably care about, "should occupy the limited surface area of a chocolate wrapper." (ER016.)

Dana responds to these concerns by citing two supposed "limiting principles." (Dana Br. 48.) Both are illusory. First, Dana points out that "materiality" alone is not enough to create a duty to disclose and that a further showing is required. (*Id.* at 49.) But as discussed above, Dana's position is that a plaintiff can satisfy this further showing merely by alleging that the manufacturer had "superior knowledge" of the

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Trump's campaign—here's where they went wrong, RARE NEWS (Oct. 17, 2016), http://rare.us/story/people-are-boycotting-paypal-after-peter-thiel-donated-to-trumps-campaign-heres-where-they-went-wrong/.

[20] *See, e.g.*, The Conversation, *Boycotts are a crucial weapon to fight environment-harming firms* (Apr. 6, 2014), http://theconversation.com/boycotts-are-a-crucial-weapon-to-fight-environment-harming-firms-25267.

[21] *See, e.g.*, Popular Resistance, *Wal-Mart workers on strike; Consumers Should Join Them and Boycott Wal-Mart* (Oct. 10, 2012), https://www.popularresistance.org/wal-martworkersonstrikeconsumersshouldjointhemandboycottwal-mart/.

[22] *See, e.g.*, Karl Vick, *This is Why It's Hard to Boycott Israel*, TIME (June 5, 2015), http://time.com/3910835/israel-boycott/.

omitted fact, which will *always* be the case. (*Supra* at 36.) Second, Dana argues that "materiality itself provides a limitation." (*Id.*) The District Court recognized, however, that some plaintiffs (or their lawyers) will perceive materiality in almost anything. (ER460-61.)

Finally, Dana argues that the District Court's concerns about the "slippery slope" are misplaced because "the California Supreme Court has specifically recognized that labeling regarding human rights violations and labor practices is material to consumers." (Dana Br. 49-50.) The case Dana is referring to—*Kwikset Corp. v. Superior Court*, 246 P.3d 877 (Cal. 2011)—involved an affirmative misrepresentation, not an omission. But in any event, *Kwikset* does not suggest that "human rights violations" or "labor practices" are unique in this respect, or that a duty of disclosure could be cabined to these particular subjects.

The California Supreme Court in *Kwikset* noted that "consumers will choose one product over another … based on … *various tangible and intangible qualities*." *Id.* at 889 (emphasis added). Human rights may matter to some people, but other consumers may have comparable concerns regarding, *inter alia*, a product's "environmental" impact; whether it was "manufactured by union workers"; or even whether its

ingredients are "from one valley [or] another nearby." *Id.* at 889-90. *Kwikset* thus only goes to show that, if the materiality standard from affirmative misrepresentation cases were imported to cases like this one, a manufacturer's duty of disclosure would know no bounds.

* * *

"Although [California consumer-protection law's] scope is sweeping, it is not unlimited." *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 182 (1999). Sellers in California, of course, are held to the affirmative representations they make about their products. But for compelling policy reasons, California law imposes a duty to *disclose* factual information only in narrow circumstances. Those circumstances do not exist where, as here, the allegedly omitted fact has no nexus to product safety and concerns a matter of public record. Recognizing a duty of disclosure in these circumstances would impose a sweeping and unprecedented burden on sellers in California. The District Court correctly refused to create such a novel duty.

II. DANA FAILS TO STATE A CLAIM FOR RELIEF UNDER THE CLRA, FAL, OR UCL

The District Court correctly held that Dana failed to state a claim for relief under California's consumer-protection statutes because all of

her claims rest on a duty of disclosure that does not exist. The Complaint also failed to plausibly allege other essential elements of Dana's claims.

A. The Lack Of A Duty Of Disclosure Compels Dismissal Of Dana's Claims

As discussed above, Dana asserted claims under the CLRA, FAL, and all three "prongs" of the UCL. None of these claims can stand in the absence of a duty of disclosure.

Dana's CLRA, FAL, and UCL "fraudulent"-prong claims are "governed by the 'reasonable consumer' test." *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008). To satisfy that test, a plaintiff must plausibly allege that it is "probable that a significant portion of the general consuming public … could be misled." *Lavie*, 105 Cal. App. 4th at 508. Numerous courts, however, have recognized that "a failure to disclose a fact" that "one has no affirmative duty to disclose is [not] 'likely to deceive' anyone." *In re Adobe Sys., Inc. Privacy Litig.*, 66 F. Supp. 3d 1197, 1229 (N.D. Cal. 2014); *see Wilson*, 668 F.3d at 1145 n.5 (same); *Daugherty*, 144 Cal. App. 4th at 838 (same).

Dana's UCL "unlawful"-prong claim is premised exclusively on Hershey's alleged violation of the CLRA. (ER051.) Because the lack of

any duty to disclose is fatal to her CLRA claim, her UCL "unlawful"-prong claim necessarily fails as well. *See Daugherty*, 144 Cal. App. 4th at 837.

That leaves Dana's UCL "unfair"-prong claim. As discussed below, it is presently unclear which legal standard governs such claims. But that question is academic here because, under *either* of the standards that courts have applied, "the failure to disclose a fact that a manufacturer does not have a duty to disclose … does not constitute an unfair … [business] practice." *Wilson*, 668 F.3d at 1145 n.5; *see also Daugherty*, 144 Cal. App. 4th at 839 & n.9 (failure to disclose in the absence of a duty is not unfair under "any of the tests").

In sum, for all the reasons stated in Point I above, California law does not impose a duty to disclose in these circumstances. This is fatal to all of Dana's claims.

B. Dana Failed To Allege Other Essential Elements Of Her Claims

Even *assuming* Hershey had a duty to disclose, Dana's claims under the CLRA, FAL, and UCL fail for several independent reasons.

1. *Reasonable Consumers Are Not Likely To Be Deceived*

As discussed above, Dana's claims under the CLRA, FAL and UCL "fraudulent" prong require a showing that reasonable consumers are likely to be deceived. In an omissions case, this requires the plaintiff to plead and prove that, absent any affirmative statement by the seller, reasonable consumers would harbor an incorrect "expectation or … assumption" that a disclosure is needed to correct. *Bardin*, 136 Cal. App. 4th at 1275; *see also Collins*, 202 Cal. App. 4th at 258.

This is a separate question from whether an undisclosed fact is material. For example, as one court has observed, it may be important to consumers whether a car's exhaust manifold is made from cast iron or less sturdy tubular steel. But reasonable consumers are not likely to be *deceived* by a manufacturer's nondisclosure of that information, because—absent an affirmative statement one way or the other—consumers would not have any "expectation or … assumption" about what material was used to make a car's exhaust manifold. *Bardin*, 136 Cal. App. 4th at 1275; *cf. Collins*, 202 Cal. App. 4th at 258 (by contrast, "the public *would* expect or assume" that a computer is not missing

hardware "integral to the storage, access, and transport of accurate computer data" (emphasis added)).

The same is true here. Even assuming that forced labor in the cocoa supply chain is something consumers would care about, reasonable consumers viewing the labels of Hershey's products are not likely to be *deceived*, because—absent any affirmative statements about this issue—they would not have any expectation or assumption about the labor practices of suppliers in the cocoa supply chain. *Bardin*, 136 Cal. App. 4th at 1275. Dismissal of Dana's CLRA, FAL and UCL "fraudulent"-prong claims should be affirmed on this basis as well.

2. *The CLRA Does Not Cover Representations About Labor Practices*

Dana's CLRA claim was premised on alleged violations of CAL. CIV. CODE § 1770(a)(2), (5), and (7), which prohibit, respectively: "[m]isrepresenting the source, sponsorship, approval, or certification of goods or services"; "[r]epresenting that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have"; and "[r]epresenting that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another." (ER052-53.)

Hershey's alleged omission does not fit within any of these categories. The plain language of the CLRA does not encompass representations regarding a manufacturer's labor practices, let alone the labor practices of its suppliers. Indeed, as the District Court observed, no court—state or federal—has ever construed the CLRA as supporting a novel claim such as this one. (ER017 ("Dana cites no authority holding that any of [the CLRA's] enumerated categories … are so broad as to encompass labor abuses.").)

3. *The FAL Does Not Cover Pure Omissions*

Dana's FAL claim also fails for the simple reason that the statute does not encompass pure-omission claims. As the District Court recognized, "[t]he plain language of the statute—which prohibits *making*, *disseminating*, or *causing* the dissemination of false or misleading statements—does not encompass omissions." (ER020 (collecting cases).) The supposedly "contrary" cases cited by Dana are factually distinguishable because, as the District Court found, they all "involved some degree of affirmative misrepresentation." (ER021.)

4. *Dana's Allegations Do Not Amount To "Unfair" Conduct Under The UCL*

Two different standards have been applied to claims under the UCL's "unfair" prong. *See Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 735-37 (9th Cir. 2007). The Court need not resolve which is correct because, under any standard, it cannot be unfair to "omit" a fact as to which there is no duty to disclose. (*Supra* at 45.) Dana's UCL unfair-prong claim nevertheless fails both standards.

First, it is not "immoral, unethical, oppressive, unscrupulous, or substantially injurious" for a manufacturer not to disclose its suppliers' labor practices on product labels—especially when that information has been a matter of public record for years and is fully disclosed on the manufacturer's website. *S. Bay Chevrolet v. Gen. Motors Acceptance Corp.*, 72 Cal. App. 4th 861, 886-87 (1999). Indeed, the California Legislature has determined that disclosing this information on a website, as Hershey has done for years, is an effective way "to provide consumers with … easily accessible information" about forced labor in a company's supply chain. (ER173.) Following this mandate cannot be "unfair."

Second, under the so-called "tethering" test, Dana fails to cite any "legislatively declared policy" that Hershey's conduct has violated. *Cel-*

Tech, 20 Cal. 4th at 186. The Complaint was silent on this subject. But on appeal, Dana points to two United Nations directives that oppose child and slave labor. (Dana Br. 58-59.) The conduct challenged in this case, however, is not Hershey's "use of … child [or slave] labor," as Dana erroneously contends. (*Id.* at 64.) The challenged conduct is Hershey's use of *labels that do not disclose* that some cocoa suppliers may use forced labor. Neither of the U.N. directives cited by Dana addresses this conduct, let alone declares it unfair.

Remarkably, Dana goes on to suggest that her UCL "unfair"-prong claim is tethered to "California's Supply Chains Act." (Dana Br. 60.) But as discussed below, the Legislature *declined* to require disclosures on product labels when it enacted that statute. Whether or not the Supply Chains Act provides a safe harbor against UCL liability—which it does, for the reasons set forth below—it clearly does not express a "legislatively declared policy" *in favor of* redundant label disclosures. *See Ferrington v. McAfee, Inc.*, 2010 U.S. Dist. LEXIS 106600, at *35-36 (N.D. Cal. Oct. 5, 2010) (UCL "unfair" claim cannot be "tethered" to a policy that the enacting authority "has not chosen to extend to" the scenario in question).

III. DANA'S CLAIMS ARE BARRED BY THE "SAFE HARBOR" DOCTRINE

Dana's case is also barred in its entirety by California's "safe harbor" doctrine. This principle dictates that, where "the Legislature has … considered a situation and concluded no action should lie, courts may not override that determination" under the auspices of California's consumer-protection laws. *Cel-Tech*, 20 Cal. 4th at 182.

In 2010, the California Legislature responded to the public's concerns over reports of abusive labor practices in manufacturers' supply chains by passing the Supply Chains Act. At that time, the Legislature expressly "considered" the type and manner of disclosures that companies doing business in California should be required to make. As shown by the Act's legislative history, the Legislature's intent was "to provide consumers with … easily accessible information" about labor practices in manufacturers' supply chains in a manner that would enable interested consumers to avoid "inadvertently … purchas[ing] … goods and products" made with forced labor. (ER174; *see also* Br. of State of California as *Amicus Curiae*, *Hodsdon v. Mars, Inc.*, No. 16-15444 (9th Cir.), Dkt. 14 at 4.)

After weighing the costs and benefits of different approaches, the Legislature determined that this goal would be adequately served by website disclosures. It therefore mandated that manufacturers "post[] on [their] Internet Web site" specific information about forced labor in their supply chains. CAL. CIV. CODE § 1714.43(a)-(c). Such disclosures, the Legislature found, are sufficient to "ensure [that] interested California consumers have reasonable access" to the "information [necessary] to aid their purchasing decisions." (ER175; ER180.) Importantly, the Legislature chose *not* to require manufacturers "to do anything other than post [the] specified information on their web sites." (ER180.)

The Legislature's determination that website disclosures are *sufficient* to reach and inform California consumers interested in these matters is necessarily a rejection of the notion that truthful and complete website disclosures are *insufficient* for that same purpose. In other words, it is a determination that "no action should lie" on such a fundamentally inconsistent theory. *See Cel-Tech*, 20 Cal. 4th at 182. The safe harbor doctrine, therefore, bars Dana's claims that Hershey acted deceptively or unfairly by making truthful and complete disclosures online, yet not disclosing the same information on its product labels.

A. The Narrow Interpretation Of The Doctrine Urged By The Attorney General Is Incorrect

In a friend-of-the-court brief, California's Attorney General urges the Court not to apply the safe harbor doctrine because the text of the Supply Chains Act does not expressly state that manufacturers *may omit* disclosures from their product labels.[23] (Br. of State of California, *supra*, at 14 n.6.) The Attorney General's view is that the safe harbor doctrine applies only when the Legislature has granted an "express[] … privilege or immunity" in a statute's text. (*Id.* at 7.)

This is not a correct statement of the law. The California Supreme Court has also applied the doctrine where, as here, the Legislature's conclusion that "no action should lie" was apparent from a statute's structure and purpose. For example, in *Zhang v. Superior Court*, 57 Cal. 4th 364 (2013), the question was whether the safe harbor doctrine precludes UCL claims based on violations of California's Unfair

[23] The Attorney General also maintains that the safe harbor doctrine should apply only to UCL claims, and not to FAL or CLRA claims. (Br. of State of California, *supra*, at 8-9 & nn.3-4.) Not so. The California Supreme Court has applied the doctrine to CLRA claims, *see Loeffler v. Target Corp.*, 58 Cal. 4th 1081 (2014), and this Court has applied it to claims under all three statutes, *see, e.g.*, *Ebner v. Fresh, Inc.*, 818 F.3d 799, 803-04, *as modified*, 2016 U.S. App. LEXIS 17561 (9th Cir. Sept. 27, 2016); *Alvarez v. Chevron Corp.*, 656 F.3d 925, 933-34 (9th Cir. 2011).

Insurance Practices Act. *Id.* at 379 n.8. *Zhang* held that such claims were barred even though the statute did not expressly prohibit them.

The statutory scheme at issue in *Zhang* "contemplated only administrative enforcement by the Insurance Commissioner." *Id.* at 384. Based on the Legislature's choice of enforcement mechanism, *Zhang* found that the Legislature necessarily (if tacitly) "considered" private enforcement by consumers "and concluded that no [consumer] action should lie." *Id.* at 380 n.8. Two Justices disagreed on the grounds advocated by the Attorney General here, finding that legislative silence "is insufficient to preclude [a UCL] suit." *Id.* at 388-89 (opinion of Werdegar, J.). That view did not prevail.

Similarly, in *Loeffler v. Target Corp.*, 58 Cal. 4th 1081 (2014), the issue was whether the safe harbor doctrine precluded UCL and CLRA claims based on Target's representations regarding the portion of its prices that constitutes sales tax. *Loeffler* held that such claims were barred, even though the tax laws did not expressly prohibit them. It was enough that private suits by consumers were not "contemplate[d]" by "the tax code." *Id.* at 1127-30. Three Justices disagreed, noting that "[t]he plain text" of the tax code does not "immuniz[e] [businesses] from

liability under the consumer protection statutes." *Id.* at 1139, 1142 (opinion of Liu, J.). But that view, again, did not prevail.

As *Zhang* and *Loeffler* demonstrate, the absence of an express safe harbor in a statute's text does not preclude application of the doctrine. Rather, the Legislature's intent that "no action should lie" may be inferred from the structure and purpose of the statute. Here, the Supply Chains Act's structure and purpose compel the inference that, when manufacturers truthfully disclose information about their supply chains on their websites, further disclosures on product labels are not required.

Put another way, no rational legislator could simultaneously believe both (1) that website disclosures "ensure [that] interested California consumers" like Dana "have reasonable access" to the information about manufacturers' supply chains needed to guide their purchase decisions (ER175; ER180), and (2) that truthful website disclosures *do not* achieve this objective. Indeed, if the Legislature believed that manufacturers had a duty to disclose supply-chain information on product labels under existing consumer-protection laws, one wonders why they bothered to pass the Supply Chains Act at all.

This is not to say that the Supply Chains Act precludes *all* suits that relate to forced labor in supply chains. The Attorney General correctly points out that the Act provides no safe harbor where a manufacturer's website disclosures are "couched in … a manner that is likely to mislead." (Br. of State of California, *supra*, at 11.) Nor does the Act provide a safe harbor for manufacturers that affirmatively misrepresent their suppliers' labor practices. That is because these legal theories are not fundamentally at odds with the structure and intent of the Act.

But Dana's legal theory is. She alleges that, even though Hershey provides true and complete information on its website in compliance with the Act, and has never made any false or misleading statements, it has nonetheless acted "deceptively" or "unfairly" toward consumers by not making redundant disclosures *on its product labels*. This theory cannot be squared with the Act and the findings that underpin it.[24]

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[24] Dana relied below on CAL. CIV. CODE § 1714.43(d) in opposing Hershey's safe-harbor argument. That provision states that the Supply Chains Act does not "limit remedies available for a violation of any other state or federal law." It means only that the Legislature did not intend the Act to occupy the entire field of forced-labor regulation. It does not prohibit courts from consulting the Act's structure and legislative history to determine whether there has been a consumer-protection "violation" *at all*, as the safe harbor doctrine demands.

B. The District Court's Skepticism Of Safe Harbor Was Misplaced

Because it found no duty to disclose, the District Court did not reach Hershey's safe-harbor argument. In *dicta*, the District Court nevertheless expressed "skepticism" about whether the doctrine applies in light of this Court's decision in *Ebner v. Fresh, Inc.*, 818 F.3d 799, *as modified*, 2016 U.S. App. LEXIS 17561 (9th Cir. Sept. 27, 2016). (ER024.)

Hershey's position is entirely consistent with *Ebner*. The plaintiff in *Ebner* alleged that the defendant's packaging violated California's consumer-protection laws because it contained less usable product than the mandatory "net weight" statement on the packaging suggested. This Court held that, under the safe harbor doctrine, the plaintiff was barred from challenging the defendant's "net weight" statement. *Id.* at *8-9. But the Court also held that the plaintiff's claims could proceed "based on [the manufacturer's] omission of any *supplemental or clarifying statement* about" how much of the product's net weight was truly "accessib[le]." *Id.* at *9 (emphasis altered).

This Court concluded that the safe harbor doctrine did not bar the *Ebner* plaintiff's entire case because the Legislature, in mandating net

weight disclosures, did not intend for "no action to lie" against manufacturers who use those disclosures *to affirmatively mislead*. This case is very different. Dana has never argued that the mandatory disclosures Hershey includes on its website pursuant to the Supply Chains Act are "half-truths" that are misleading without further clarification. Indeed, in the District Court, Dana expressly waived any claim that Hershey had *ever* made a misleading affirmative statement.

The District Court also expressed doubts about applying the safe harbor doctrine because "the subject matter of the Supply Chains Act" is "slavery and human trafficking," while Dana's claims embrace "other forms of abusive child labor." (ER023 (brackets omitted).) That is a curious reading of the Complaint, which drew no such distinction and, in fact, was replete with allegations concerning the "abduct[ion]" of children, their "s[ale] … into slavery," their being "held against their will," and their exploitation for "forced labor." (ER027-29.)[25]

But even assuming that slave labor and "other forms of abusive child labor" are distinguishable, the District Court was wrong to as-

[25] Meanwhile, Dana's brief in this Court uses the words "slave" (or its derivatives) 36 times; "forced" 10 times, and "trafficking" (or its derivatives) seven times.

sume that the Supply Chains Act dealt only with the former. The Act's legislative history shows that the Legislature was acting out of concerns over *both* "forced labor" *and* "child labor." (ER243.) Moreover, the Legislature relied upon a U.S. Department of Labor report concerning "exploitive child labor" in the Ivorian cocoa regions. (ER292-93.) The Legislature thus had in mind all of the labor practices cited in Dana's Complaint when it enacted the Supply Chains Act.

IV. DANA LACKS ARTICLE III STANDING

Irrespective of the statutory and safe harbor issues discussed above, the dismissal of Dana's claims was appropriate because she lacks standing under Article III of the U.S. Constitution. "[A]t the pleading stage, the plaintiff must clearly … allege facts demonstrating each element" of standing. *Spokeo*, 136 S. Ct. at 1547 (internal quotation marks and citation omitted). Standing requires an "injury in fact" that is "both 'concrete *and* particularized.'" *Id.* at 1545. To be "concrete," an injury must be "'real,' and not 'abstract,'" *id.* at 1548-49, or merely "speculative" or "possible," *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013). "For an injury to be 'particularized,' it 'must affect the plaintiff in a personal and individual way.'" *Spokeo*, 136 S. Ct. at 1548.

Dana's Complaint alleged that she was injured because she spent money on chocolate products whose true economic value was less than the amount she paid for them. (ER031.) This type of economic loss can give rise to standing in some cases. For example, a plaintiff who allegedly overpaid for a product that does not perform as promised, or does not have the advertised features or characteristics, has standing. *See, e.g.*, *Kwikset*, 51 Cal. 4th at 327-28 (locksets labeled "Made in U.S.A." but manufactured overseas).

Not every allegation of "overpayment," however, will suffice. A plaintiff's "alleged loss in value does not constitute a distinct and palpable injury" sufficient for standing when it "rests on a hypothetical risk," *Birdsong v. Apple, Inc.*, 590 F.3d 955, 960-62 (9th Cir. 2009), as where the plaintiff allegedly "overpaid" for a product that "*might* not be" as it was represented, *Wallace v. ConAgra Foods, Inc.*, 747 F.3d 1025, 1030-31 (8th Cir. 2014). Such economic injuries are not "concrete": they are too "conjectural and hypothetical," and insufficiently "actual or imminent," to confer Article III standing. *Birdsong*, 590 F.3d at 960-61; *cf. Clapper*, 133 S. Ct. at 1150-51 (plaintiff's expenditure of money to avoid

feared government surveillance did not create standing where threat of surveillance was "not certainly impending").

For example, in *Wallace*, the plaintiffs sued a manufacturer that labeled its hotdogs as "100% Kosher," alleging that "some meat from cows that [do] not qualify [as] kosher … ends up being … used" in the products. 747 F.3d at 1028. The plaintiffs maintained that they "paid too much for [the hotdogs] based on [the manufacturer's] misleading representations." *Id.* at 1029. But the plaintiffs "admit[ted]" that not all packages of the hotdogs were affected, and that it was "impossible … to detect" whether the packages they received actually contained non-kosher meat. *Id.* at 1030, 1033.

The Eighth Circuit held that the plaintiffs failed to allege an Article III injury-in-fact. Taking the Complaint's allegations as true, *Wallace* found that "the particular packages" of hotdogs that the plaintiffs purchased might well have been truthfully represented. *Id.* Article III, however, requires that "the alleged injury … affect the plaintiff in a *personal and individual* way." *Id.* (emphasis in original) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 n.1 (1992)). Absent any "reason to think the [plaintiffs'] own packages of [hotdogs] actually exhi-

bited the alleged non-kosher defect, the [plaintiffs] lack[ed] Article III standing to sue[.]" *Id.* at 1030-31.

This Court and others have found a lack of standing on similar facts. *See, e.g.*, *Birdsong*, 590 F.3d at 960-61 (no standing where "plaintiffs merely assert[ed] that *some* iPods ha[d] the 'capability' of producing unsafe levels of sound," but did not allege that *their* iPods had done so (emphasis added)); *Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315, 319-20 (5th Cir. 2002) (no standing where challenged drug injured "other patients," but plaintiff *herself* was not injured, experienced relief, and thus obtained "the benefit of her bargain"); *In re Whole Foods Mkt. Grp., Inc. Overcharging Litig.*, 167 F. Supp. 3d 524, 532 (S.D.N.Y. 2016) (no standing where plaintiffs "claim[ed] generally that overweighting … was common at Whole Foods stores," but "d[id] not allege that any particular purchase *they* made was affected by this practice" (emphasis added)).

Dana lacks standing for the same reason: her "injury" is not concrete, but conjectural. As discussed above, it is undisputed that only *some* of the cocoa that Hershey uses to make its chocolate products comes from West Africa, and only *some* of the cocoa sourced from West

Africa is produced using forced labor. (*Supra* at 5-6.) Moreover, as Dana admitted in her Complaint, it is impossible to "trace [particular] cocoa beans … back to the cocoa plantations on which they are grown" to determine whether cocoa produced with forced labor was used in a given chocolate bar. (ER030.) This case, therefore, is no different from *Wallace*, *Whole Foods* and others where courts found no standing because it could *never* be determined whether the particular product purchased by the plaintiff had the alleged defect or was misrepresented.[26]

The District Court disagreed. In its view, Dana's alleged injury did not stem from the purchase of a (potentially) misrepresented product, but instead from *doing business with a company* whose "supply chain involved … labor abuses." (ER010.) (emphasis omitted). In other words, "regardless of [whether] the cocoa in [any] particular chocolate bar" was misrepresented, the District Court found that Dana suffered an Article III injury-in-fact because she "did not wish to support" a

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[26] That Dana filed on behalf of a putative class and *some* members of the class likely purchased chocolate products affected by the challenged labor practices changes nothing: the "named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong." *Spokeo*, 136 S. Ct. at 1547 n.6 (internal quotation marks omitted).

company that allegedly condones abusive labor practices. (ER010, ER012.)

By recasting Dana's injury in this manner, the District Court merely traded one standing problem for another: Unless the challenged labor practices impacted *her* in some direct and personal way, Dana's objection to those practices is not a "particularized" injury. It is a "generalized grievance" that any member of the public concerned about human rights issues could assert. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662 (2013). Such generalized grievances do not confer standing, no matter how strongly felt. *See id.* at 2663 ("Article III standing is not to be placed in the hands of concerned bystanders, who will use it simply as a vehicle for the vindication of value interests.") (internal quotation marks and citation omitted); *Lujan*, 504 U.S. at 573-78 (Article III does not bestow the right to vindicate the "public interest" on "a subclass of citizens who suffer no distinctive concrete harm").

The fact that Dana transacted business with Hershey, standing alone, does not give rise to a particularized injury. Unless the specific Hershey products *she* bought were made with forced labor—which Dana concedes is unknowable—she is no differently situated vis-à-vis the la-

bor practices at issue than any concerned bystander. *Cf. Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 134 (2011) (taxpayers lack standing to sue the Government for illegal actions that do not affect them personally, merely by virtue of their interest in "ensuring that [their taxes] are not *used* by the Government in [an unlawful] way"); *Hollingsworth*, 133 S. Ct. at 2662-63 (proponents of ballot measure lacked standing to defend it in court, even though they spent time and money getting it enacted; their interest in its legality was not "distinguishable from the general interest of every citizen").

The District Court's ruling on standing poses consequences that are nearly as sweeping as the state-law duty of disclosure it rejected. For example, if the District Court were correct, purchasers of Hershey's *fair-labor-certified* chocolate products would have standing to bring the same claims that Dana brought here—even though those products are undisputedly made without forced labor. Those consumers, too, may not "wish to support" a company that allegedly profits from forced labor not disclosed on its product labels. The same would be true of purchasers of Hershey's mints or bubble gum, even though those products contain no cocoa at all. Indeed, if the District Court were correct, then any

time a company sold a single defective or misrepresented unit of product, *any* of its customers would have standing to sue—including those who purchased non-defective, truthfully represented goods—on the theory that they do not "wish to support" a business that would injure or defraud *others*. That cannot be right.

The District Court's finding that Dana has standing was apparently driven by public-policy concerns. (*See* ER013 ("[I]t would be a bizarre result if sellers" could "mix compliant and non-compliant products with impunity").) This was error. State Attorneys General and other regulators may take action to stop allegedly deceptive trade practices, even if only some of the seller's products were defective or mislabeled. But in private suits by consumers, Article III's injury-in-fact requirement is an "irreducible constitutional minimum" that Dana does not meet. *Spokeo*, 136 S. Ct. at 1547; *see Hollingsworth*, 133 S. Ct. at 2667 ("[N]o matter its reasons, the fact that a State," or a court for that matter, "thinks a private party should have standing to seek relief … cannot override [Article III].").

V. THE DISCLOSURE THAT DANA SEEKS TO COMPEL WOULD VIOLATE THE FIRST AMENDMENT

If for no other reason, the District Court's decision should be af-

firmed because the disclosures that Dana seeks to mandate would violate the First Amendment.

It is well-established that the First Amendment protects not only the right to speak, but also the right *not* to speak. *See Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 966 (9th Cir. 2009), *aff'd sub nom. Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786 (2011). As such, "there is information about companies and products that consumers may wish to know that companies cannot be compelled to disclose in the context of commercial speech consistent with current [First Amendment] doctrine." Adler, *supra*, at 424-25.

The circumstances in which companies can be compelled to speak under the First Amendment are narrow. If a mandated disclosure conveys "purely factual and uncontroversial" information, it must be "reasonably related to the State's interest in preventing deception of customers." *Video Software Dealers*, 556 F.3d at 966 (citing *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985)). But in all other circumstances, the disclosure must directly and materially advance a substantial government interest and be narrowly tailored to that aim. *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1212 (D.C. Cir. 2012)

(citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980)), *overruled on other grounds by Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18 22-23 (D.C. Cir. 2014).

Dana bears the burden of showing that the disclosure she is seeking—i.e., a disclosure on Hershey's labels that its chocolate *may* have been "made with child and slave labor" (ER030)—is compatible with the First Amendment. *See Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 72-73 (2d Cir. 1996). She cannot do so.

First, in this case, heightened First Amendment scrutiny applies because the disclosure that Dana demands is not "purely factual and uncontroversial." It is speculative and clearly meant to stigmatize. *See Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 530 (D.C. Cir. 2015) (compelled disclosure that minerals were "not conflict free" was not "purely factual and uncontroversial," as it "convey[ed] moral responsibility for the Congo war" and "require[d] [the] issuer to tell consumers that its products are ethically tainted"); *Video Software Dealers*, 556 F.3d at 966-67 (compelled disclosure that video games were "violent" was not "purely factual and uncontroversial" because it conveyed "the State's [moral] opinion"); *R.J. Reynolds*, 696 F.3d at 1216 (compelled graphical

warnings on cigarette packages were not "purely factual and uncontroversial," but rather "inflammatory" and "provocative[]").

Second, applying heightened scrutiny, Dana cannot show that her requested disclosure is "narrowly tailored" to advance a "substantial" government interest. The government may have a substantial interest in actually *preventing* forced labor, but Dana's disclosure is many steps removed from that objective. *See R.J. Reynolds*, 696 F.3d at 1217-21 (graphic cigarette warning did not directly advance government's interest in reducing smoking rates). The direct objective of Dana's disclosure is to raise consumers' awareness about an issue that she believes is societally important. This is not a "substantial" government interest for First Amendment purposes. *See Amestoy*, 92 F.3d at 73 ("We are aware of no case in which consumer interest alone was sufficient to justify requiring a product's manufacturers to publish the functional equivalent of a warning about a production method that has no discernable impact on a final product."); Adler, *supra*, at 426, 440-44 ("The claim that consumers have a right to know whatever they believe is important" cannot be "a substantial government interest").

Even if Dana's agenda served a substantial government interest, a

requirement that manufacturers disclose information about their supply chains on every one of their product labels is not narrowly tailored. *See Cent. Hudson*, 447 U.S. at 570 (disclosure obligation not narrowly tailored because proponent failed to show why "more limited regulation of appellant's commercial expression" would not suffice). In fact, the Supply Chains Act—which requires only *website* disclosures—demonstrates that other, less burdensome alternatives exist to accomplish Dana's objective.

Under the doctrine of constitutional avoidance, these First Amendment concerns provide an independent reason why this Court should reject Dana's novel interpretation of California law and hold that California's consumer-protection statutes do not impose a duty to disclose here. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems…."). If Dana's interpretation of California law were unavoidable and correct, however, then the First Amendment would bar her claims.

CONCLUSION

For the reasons set forth above, the judgment should be affirmed.

Dated: New York, New York
December 9, 2016

Respectfully submitted,

/s/ Steven A. Zalesin

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STATEMENT OF RELATED CASES

In addition to the related cases identified by Dana, the following case also raises closely related issues: *Hall v. Sea World Ent'mt, Inc.*, No. 16-55845.

Dated: New York, New York
December 9, 2016

/s/ Steven A. Zalesin

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,814 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface (Century Schoolbook 14 point) using Microsoft Word 2010.

Dated: New York, New York
December 9, 2016

/s/ Steven A. Zalesin

CERTIFICATE OF SERVICE

U.S. Court of Appeals Docket No.: 16-15789

I, Steven A. Zalesin, certify that on December 9, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: New York, New York
December 9, 2016

/s/ Steven A. Zalesin

16-15789

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LAURA DANA,
on behalf of herself and all others similarly situated,

Plaintiff-Appellant,

—against—

THE HERSHEY COMPANY, a Delaware Corporation,
and HERSHEY CHOCOLATE & CONFECTIONERY CORPORATION,
a Delaware Corporation,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
CASE NO. 3:15-CV-04453-JCS
HONORABLE JOSEPH C. SPERO

STATUTORY ADDENDUM TO BRIEF OF DEFENDANTS-APPELLEES

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U.S. Const. amend. I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Cal. Bus. & Prof. Code § 17200

As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code.

Cal. Bus. & Prof. Code § 17500

It is unlawful for any person, firm, corporation or association, or any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services, professional or otherwise, or anything of any nature whatsoever or to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated before the public in this state, or to make or disseminate or cause to be made or disseminated from this state before

the public in any state, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatever, including over the Internet, any statement, concerning that real or personal property or those services, professional or otherwise, or concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof, which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading, or for any person, firm, or corporation to so make or disseminate or cause to be so made or disseminated any such statement as part of a plan or scheme with the intent not to sell that personal property or those services, professional or otherwise, so advertised at the price stated therein, or as so advertised. Any violation of the provisions of this section is a misdemeanor punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding two thousand five hundred dollars ($2,500), or by both that imprisonment and fine.

Cal. Civ. Code § 1714.43

(a) (1) Every retail seller and manufacturer doing business in this state and having annual worldwide gross receipts that exceed one

hundred million dollars ($100,000,000) shall disclose, as set forth in subdivision (c), its efforts to eradicate slavery and human trafficking from its direct supply chain for tangible goods offered for sale.

(2) For the purposes of this section, the following definitions shall apply:

(A) "Doing business in this state" shall have the same meaning as set forth in Section 23101 of the Revenue and Taxation Code.

(B) "Gross receipts" shall have the same meaning as set forth in Section 25120 of the Revenue and Taxation Code.

(C) "Manufacturer" means a business entity with manufacturing as its principal business activity code, as reported on the entity's tax return filed under Part 10.2 (commencing with Section 18401) of Division 2 of the Revenue and Taxation Code.

(D) "Retail seller" means a business entity with retail trade as its principal business activity code, as reported on the entity's tax return filed under Part 10.2 (commencing with Section 18401) of Division 2 of the Revenue and Taxation Code.

(b) The disclosure described in subdivision (a) shall be posted on the retail seller's or manufacturer's Internet Web site with a conspicuous and easily understood link to the required information placed on the business' homepage. In the event the retail seller or manufacturer does not have an Internet Web site, consumers shall be provided the written disclosure within 30 days of receiving a written request for the disclosure from a consumer.

(c) The disclosure described in subdivision (a) shall, at a minimum, disclose to what extent, if any, that the retail seller or manufacturer does each of the following:

(1) Engages in verification of product supply chains to evaluate and address risks of human trafficking and slavery. The disclosure shall specify if the verification was not conducted by a third party.

(2) Conducts audits of suppliers to evaluate supplier compliance with company standards for trafficking and slavery in supply chains. The disclosure shall specify if the verification was not an independent, unannounced audit.

(3) Requires direct suppliers to certify that materials incorporated into the product comply with the laws regarding slavery and human trafficking of the country or countries in which they are doing business.

(4) Maintains internal accountability standards and procedures for employees or contractors failing to meet company standards regarding slavery and trafficking.

(5) Provides company employees and management, who have direct responsibility for supply chain management, training on human trafficking and slavery, particularly with respect to mitigating risks within the supply chains of products.

(d) The exclusive remedy for a violation of this section shall be an action brought by the Attorney General for injunctive relief. Nothing in this section shall limit remedies available for a violation of any other state or federal law.

(e) The provisions of this section shall take effect on January 1, 2012.

Cal. Civ. Code § 1770(a)

The following unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer are unlawful:

***

(2) Misrepresenting the source, sponsorship, approval, or certification of goods or services.

***

(5) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he or she does not have.

***

(7) Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another.

Respectfully submitted,

/s/ Steven A. Zalesin

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