19-1132

IN THE

United States Court of Appeals

FOR THE FIRST CIRCUIT

DANELL TOMASELLA, on behalf of herself and all others similarly situated,

Plaintiff-Appellant,

—v.—

THE HERSHEY COMPANY, a Delaware corporation; HERSHEY CHOCOLATE & CONFECTIONERY CORPORATION, a Delaware corporation,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS, BOSTON

BRIEF FOR DEFENDANTS-APPELLEES

STEVEN A. ZALESIN
JONAH M. KNOBLER
PATTERSON BELKNAP WEBB
& TYLER LLP
1133 Avenue of the Americas
New York, New York 10036
(212) 336-2000

Attorneys for Defendants-Appellees

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

The labor practices that Appellant Danell Tomasella describes in her Complaint are appalling, and Hershey strongly condemns them. But this appeal is not about human rights. It is about how far creative plaintiffs' lawyers may stretch Massachusetts' consumer-protection law, Mass. Gen. Laws ch. 93A ("Chapter 93A"), without breaking it—and, in the process, upending commerce in this State.

Tomasella argues that Hershey has committed an "unfair trade practice" by failing to note, on the wrappers of its chocolate products, that some of the cocoa beans that it purchases originate on farms in Côte d'Ivoire where child labor (including forced child labor) is sometimes used. These practices are a matter of widespread public record, and Hershey has repeatedly disclosed them on its website and elsewhere. Moreover, offensive as they are, these overseas labor practices do not affect the finished products in any objective way.

Tomasella, however, insists that Chapter 93A requires manufacturers and sellers ***to affirmatively state in their product labeling every piece of information that might impact a consumer's purchase decision***. This duty applies, according to Tomasella, not just to

information about the product's objective safety or functionality, but to *any* fact about the company or its business practices—or, as here, those of its indirect suppliers—that a consumer could find offensive, unethical, or otherwise relevant.

No court in Massachusetts or any other American jurisdiction has ever held that consumer-protection laws impose such an obligation. And for good reason: the space available on a product's package is limited, but the information that might sway consumers' purchase decisions is literally infinite. For example, in the past few weeks alone:

- Consumers boycotted Equinox gyms and SoulCycle spin studios after it was revealed that the chairman of the holding company that owned them was planning a fundraiser for Donald Trump's reelection.

- Consumers who support gun control boycotted Wal-Mart for continuing to sell ammunition after the El Paso shooting; then, after Wal-Mart reversed course, consumers who oppose gun control boycotted Wal-Mart for its change of heart.

- Consumers boycotted CVS pharmacies after they made changes to their reimbursement rates that allegedly made it more difficult for women to access birth control.

- Consumers boycotted Nike for recalling a shoe with a "Betsy Ross" American flag design in response to accusations that the colonial-era flag was a symbol of white supremacy.

- Consumers boycotted Amazon over working conditions in its warehouses and the government's use of Amazon face-recognition technology to track undocumented immigrants.

- Consumers boycotted the Disney movie *Mulan* after its star spoke out in support of Hong Kong police in connection with recent pro-democracy protests.

This is just the tip of the iceberg: according to one recent survey, a third of Americans had boycotted a company or product for some political, moral, or ethical reason in the past year.[1]

Under Tomasella's view of the law, *all* of these boycott-worthy facts—and innumerable others—would have to be disclosed *on product packaging*. Vital health-and-safety warnings that consumers actually need to see would be drowned out. And even then, manufacturers would not be safe from liability, because every news cycle brings new outrages and new facts to disclose. Courts would be overrun by consumers who suffered no tangible losses but regret patronizing companies that they deem complicit in immoral or offensive conduct.

As the District Court correctly held, this is not—and cannot be—the law. "[A]lthough [Chapter] 93A [is] broad[]," it "is not without limits." *Mass. Sch. of Law v. ABA*, 952 F. Supp. 884, 890 n.4 (D. Mass.

[1] Matt Schulz, *1 in 3 Millennials Have Boycotted A Company or Product In The Past Year,* Comparecards, Jan. 29, 2019, https://bit.ly/2lKilG4.

1997). Never in its 50-year history has the statute been interpreted in the manner Tomasella urges. Federal courts in California have already turned aside a series of identical lawsuits by Tomasella's counsel, noting the "stunning breadth" of the unprecedented legal duty Tomasella asserts. The Ninth Circuit unanimously affirmed each of those decisions. This Court should do the same.

To be sure, Hershey appreciates that child labor is a serious problem. It has spent considerable effort and resources on this issue, and it remains on pace to source 100% "certified" (fair-labor) cocoa by next year. If Tomasella wishes to accelerate these efforts, she may engage in public advocacy, support human-rights organizations, or lobby her political representatives. Indeed, at this very moment, the federal government is considering action that would moot the issue by banning importation of cocoa from Côte d'Ivoire. Whatever the right solution to this complex sociopolitical issue may be, a judge-made revolution in Massachusetts consumer-protection law is not the answer.

COUNTERSTATEMENT OF THE ISSUES

1. Whether the District Court correctly held that Tomasella failed to state a plausible claim under Chapter 93A, because:

(a) the allegedly "undisclosed" information was, in fact, widely disclosed by Hershey and others;

(b) the information was strictly of moral or ethical import, and did not relate to the goods' safety or performance; and/or

(c) the alleged nondisclosure was neither deceptive nor unfair?

2. Whether the District Court correctly held that the failure of Tomasella's Chapter 93A claim also required dismissal of her derivative claim for unjust enrichment?

3. Whether Massachusetts' imposition of a duty to speak under these circumstances would violate the First Amendment?

COUNTERSTATEMENT OF THE CASE

A. Child Labor Exists In Hershey's Supply Chain, But Hershey Is Working To Improve The Situation.

Hershey sources cocoa from countries including Côte d'Ivoire, the Dominican Republic, Ecuador, Ghana, Indonesia, Nigeria, and Peru. JA064. Tomasella alleges that *some* cocoa from *one* of these countries—Côte d'Ivoire—is grown and harvested on farms that use child labor, in-

cluding forced child labor. JA011-15, ¶¶ 5-8. Crippling poverty is the main reason why child labor is endemic in Côte d'Ivoire,[2] but non-Western cultural norms regarding the role of children also contribute.[3]

As the Complaint recognizes, Hershey is "not able to trace all the cocoa beans that make up its Chocolate Products back to the cocoa plantations on which they are grown" in order to tell which beans were produced using these labor practices. JA015, ¶ 12. This is because Ivorian cocoa originates in "literally thousands of villages" and reaches Hershey only after beans from many villages have been consolidated and re-consolidated via a multi-level supply chain. JA027, ¶ 47; JA028, ¶ 49. The difficulty of policing labor practices on thousands of farms an ocean away is self-evident. And ongoing violence and political instability in Côte d'Ivoire have only added to the inherent challenges.[4]

Nonetheless, Hershey is doing its part. It has committed to sourcing 100% "certified" cocoa (*i.e.*, cocoa guaranteed by independent audi-

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[2] *See* Norimitsu Onishi, *The Bondage of Poverty That Produces Chocolate*, N.Y. Times, July 29, 2001, Section 1 at 1.

[3] *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).

[4] George, *supra*, at 63-64.

tors to have been produced using the highest labor and environmental standards) by 2020. JA022, ¶33; JA032 ¶ 51. As of 2014, at least 50% of Hershey's cocoa was certified, JA022, ¶ 33; by 2017, that portion had increased to 75%. JA186; JA235. For consumers who prefer to steer clear of the possibility of child labor in their chocolate, Hershey offers several product lines (not at issue here) that already contain 100% certified cocoa, and are labeled as such. JA032, ¶ 51.

Hershey has also made major investments in the well-being of cocoa farmers in West Africa. It is a founding member of CocoaAction, a program that aligns the world's leading cocoa and chocolate companies, the governments of Côte d'Ivoire and Ghana, and key stakeholders on cocoa-sustainability matters. JA238. It supports the International Cocoa Initiative, which has performed thousands of community-development projects in West Africa, benefiting over a million people. JA242. And through its Cocoa For Good program, Hershey is investing $500 million to improve the lives of cocoa farmers and combat child labor. JA235.

B. Tomasella Concedes That The Presence Of Child Labor In The Cocoa Supply Chain Is Widely Known.

As the Complaint recognizes, "Hershey [has] acknowledge[d]" on many occasions, stretching back almost 18 years, the possibility of "child and slave labor in its Ivorian supply chain." JA018-19, ¶ 23.

- In June 2001, "Hershey … acknowledged … that Ivory Coast slave labor was used to harvest some cocoa beans shipped to the United States." B. Fernandez, *Hershey: Slavery a 'shock'*, Phila. Inquirer, June 24, 2001, at A15 (JA315).[5]

- In 2005, Hershey and other industry members "issued a Joint Statement" reiterating that they were working to "eliminate the worst forms of child labor and forced labor in the cocoa fields and throughout the supply chain"—necessarily acknowledging that these practices existed. JA021-22, ¶ 31.

- In 2010, Hershey and other industry members "issued … another Joint Statement" estimating that "the worst forms of child labor … [would] be reduced by 70 percent" "[b]y 2020"—thereby acknowledging that these practices still existed in the cocoa supply chain and would continue to exist for more than a decade. JA022, ¶ 33.

- In 2012, Hershey publicly pledged to "accelerate its programs to help eliminate child labor in the cocoa regions of West Africa." JA018-19, ¶ 23; JA022, ¶ 33; *see also* R. Todt, *Hershey vows to*

[5] This Court may take judicial notice of the news articles that Hershey submitted below because their genuineness is neither in dispute nor reasonably disputable, and because Hershey offers them not for the truth of their contents, but merely to show "what information was in the public realm at the time." *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010).

use only certified cocoa by 2020, Associated Press, Oct. 3, 2012 (JA319-20).

- In its 2014 Corporate Responsibility Report, distributed on its public website, Hershey acknowledged "forced labor, [including] forced child labor, in our cocoa supply chain." JA018-19, ¶ 23.

- In its 2016 Corporate Responsibility Report, Hershey again discussed the "long-embedded challenges in the West Africa cocoa supply chain that perpetuate abusive labor practices," including "illegal and forced child labor." JA188.

- Since well before the class period began, Hershey's public website has contained a page discussing its efforts to combat forced labor in the cocoa supply chain. JA321.

The labor practices at issue have also been publicized extensively by others. In mid-2001—again, almost 18 years before Tomasella filed suit—the McClatchy news bureau published a series of articles on the subject. One of them began:

> There may be a hidden ingredient in the chocolate cake you baked, the candy bars your children sold for their school fund-raiser or that fudge ripple ice cream cone you enjoyed Saturday afternoon. Slave labor.
>
> Forty-three percent of the world's cocoa beans … come from … the Ivory Coast. And on some of the farms, the hot, hard work of clearing the fields and harvesting the fruit is done by boys who were sold or tricked into slavery. Most of them are between the ages of 12 and 16. Some are as young as 9….

S. Raghavan, *Slavery in the cocoa farms in the Ivory Coast*, McClatchy, June 24, 2001 (JA250-51). These articles were republished in Massachusetts and across the United States. *See, e.g.*, I. Watson, *Traffickers Lure Poor in Child Slavery Hub*, Boston Globe, Apr. 21, 2001 (JA259).[6]

Spurred by the resulting outcry, Congress debated legislation that would have required the Food and Drug Administration (FDA) "to develop labeling requirements indicating that no child slave labor was used in the growing or harvesting of cocoa" used in a particular product. 147 Cong. Rec. 12,269 (2001) (statement of Rep. Engel) (JA294). The FDA, however, opposed such labeling as "unrealistic," 148 Cong. Rec. 370 (2002) (statement of Sen. Harkin) (JA299), and the legislation did not pass. Instead, in October 2001, the U.S. cocoa industry, including Hershey, signed on to the Harkin-Engel Protocol, a voluntary public-private agreement intended to improve labor conditions in the cocoa

[6] *See also* A. Zavis, *Cocoa industry's bitter secret draws scrutiny: Slave trade flourishes in Ivory Coast*, Dallas Morning News, May 6, 2001 (JA263); P. Fearon, *Cocoa Farmers Harbor a Dark Secret: Slavery*, N.Y. Post, May 10, 2001, at 22 (JA268); S. Raghavan, *A Slave-Labor Force of Youths Keeps Chocolate Flowing West*, Philadelphia Inquirer, June 24, 2001, at A1 (JA272); S. Raghavan, *Child Slavery and the Chocolate Trade, A Tragic Secret Exposed*, San Jose Mercury News, June 24, 2001, at 1A (JA278); S. Raghavan, *It may be the 21st century, but slavery is still a reality in Ivory Coast*, St. Louis Post-Dispatch, June 26, 2001, at A5 (JA288).

supply chain over time. JA020-21, ¶ 29. The media covered these developments widely.[7]

Thereafter, child labor in the Ivorian cocoa sector continued to garner public attention. As the Complaint notes, it was reported on by a Tulane University institute devoted to the subject, JA023-24, ¶ 34-38; JA026-27, ¶ 41-44; in national television news, JA024-25, ¶ 39; and in publications by the U.S. Department of Labor and non-profit organizations, JA025, ¶ 40; JA026, ¶ 42; JA027, ¶ 45. Articles have been published in major national magazines, including *Newsweek* (JA325), *Forbes* (JA328), and *Fortune* (JA332), as well as in local Massachusetts newspapers.[8] A documentary film has even been released. JA345.

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[7] *See, e.g.*, Dow Jones Newswires, *US House OKs Measure to Prevent Slave Labor In Cocoa Harvest*, June 29, 2001 (JA303); S. Chatterjee, *Chocolate Industry To Help End Child Slavery*, San Jose Mercury News, Oct. 1, 2001, at 5A (JA306); Dow Jones Newswires, *US Lawmakers, Cocoa Industry Agree to Anti-Child Slavery Plan*, Oct. 1, 2001 (JA309); Chicago Tribune, *Chocolate-makers act to end child slavery*, Oct. 2, 2001, at 17 (JA312).

[8] *See, e.g.*, Boston Globe, *Audit says West Africa cocoa industry still exploiting children*, Oct. 9, 2010 (JA337); Boston Globe, *Child labor probed in cocoa fields*, Nov. 29, 2011 (JA339); L. Gutierrez, *Child laborers linked to many products Americans use*, Quincy Patriot Ledger, Mar. 14, 2016 (JA341).

As this appeal has been pending, public attention to the topic has continued to grow. In July 2019, citing concerns about "forced child labor," two U.S. Senators called for the Department of Homeland Security to exercise its authority under the Tariff Act to ban importation of cocoa from Côte d'Ivoire.[9] The Ivorian government has opposed the proposed ban, arguing that child labor is "rare" and that the ban "would harm Ivorian farmers" who are "struggling to survive."[10] As of this writing, the proposal remains under consideration.

C. Procedural History

1. The California Litigation

On the same day in September 2015, Tomasella's counsel, Hagens Berman, filed complaints in California federal court against Hershey, Nestlé, and Mars alleging that their failure to include information about child labor on the labels of their chocolate products violated California's consumer-protection statute.[11] Like Chapter 93A, that statute

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[9] Peter Whoriskey, *Senators seek to block cocoa tied to child labor*, Washington Post, July 17, 2019, at A-11.

[10] Peter Whoriskey, *Ivory Coast moving to avert U.S. cocoa ban*, Washington Post, Aug. 8, 2019, at A-14.

[11] *Dana v. Hershey Co.*, 3:15-cv-4453 (N.D. Cal. Sept. 28, 2015); *McCoy v. Nestlé USA, Inc.*, 3:15-cv-04451 (N.D. Cal. Sept. 28, 2015); *Hodsdon v. Mars, Inc.*, 3:15-cv-4450 (N.D. Cal. Sept. 28, 2015).

is modeled on the Federal Trade Commission Act and prohibits "deceptive" and "unfair" conduct. *See* Cal. Civ. Code § 17200, *et seq.* At roughly the same time, Hagens Berman filed four similar complaints against companies for failing to disclose forced labor in the supply chain of their seafood products[12] and a complaint against Sea World for failing to disclose the alleged mistreatment of its whales.[13] In each of these cases, Hagens Berman's client argued that sellers must disclose at the point of sale any fact that a reasonable consumer would deem "material" to her purchase decision.

Five different district judges considered these complaints and dismissed each one. They were unanimous in their alarm at the "stunning breadth" of the plaintiffs' theory, *Dana v. Hershey Co.*, 180 F. Supp. 3d 652, 665-66 (N.D. Cal. 2016), and its lack of a "meaningful limiting principle," *Wirth v. Mars, Inc.*, 2016 U.S. Dist. LEXIS 14552, at *14 (C.D. Cal. Feb. 5, 2016). The Ninth Circuit unanimously affirmed each dismissal, holding that "the California consumer protection laws

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[12] *Barber v. Nestlé USA, Inc.*, 8:15-cv-1364 (C.D. Cal. Aug. 27, 2015); *Wirth v. Mars, Inc.*, 8:15-cv-1470 (C.D. Cal. Sept. 10, 2015); *Hughes v. Big Heart Pet Brands*, 2:15-cv-8007 (C.D. Cal. Oct. 12, 2015); *De Rosa v. TriUnion Seafoods, LLC*, 2:15-cv-7540 (C.D. Cal. Sept. 25, 2015).

[13] *Hall v. Sea World Entm't, Inc.*, 3:15-CV-660 (S.D. Cal. Mar. 25, 2015).

do not obligate [businesses] to label their goods as possibly being produced by child or slave labor." *Hodsdon v. Mars, Inc.*, 891 F.3d 857, 860 (9th Cir. 2018) (lead decision). "In the absence of any affirmative misrepresentations," the Ninth Circuit concluded, a manufacturer need only disclose "safety hazard[s]" or "physical defects that affect the central function of the … product[.]" *Id.*

2. Tomasella's Complaint

After striking out in California, in February 2018, Hagens Berman refiled the three cocoa cases in Massachusetts federal court. The complaints were materially identical to the California cocoa complaints, except that they substituted Tomasella as the named plaintiff and Chapter 93A as the relevant consumer-protection statute.

In this case, Tomasella alleged that she "purchased Hershey Chocolate Products … at various retail stores … [in] Massachusetts, from 2014 through the present." JA016-17, ¶ 15. She maintained that she "would not have purchased … or paid as much for them had Hershey disclosed" on its product packaging "the truth about the child and slave labor in [its] supply chain." *Id.* Tomasella sought certification of

a statewide class of consumers; more than $5 million in damages; and injunctive relief. JA017, ¶¶ 15, 18; JA037 ¶ 66.

3. Hershey's Motion And The District Court's Decision

Hershey moved to dismiss, raising four main arguments. *First*, because child labor and forced labor in Côte d'Ivoire had been widely disclosed by Hershey and others, Tomasella did not plausibly plead any "failure to disclose" in the first place. *Second*, even if Hershey had not disclosed these practices, a company's mere silence about the labor practices in its supply chain does not violate Chapter 93A. *Third*, even if Hershey's conduct violated Chapter 93A, Tomasella failed to plead any objective pecuniary injury of the sort that the statute requires. And *fourth*, the First Amendment protects Hershey's right not to speak about labor conditions in Côte d'Ivoire in its product labeling.

The District Court restricted its analysis to whether Chapter 93A requires a business "to disclose the labor practices of its suppliers on its product packaging at the point of sale." JA354-55. Finding that the answer is "no," the District Court "decline[d] to address whether [Tomasella's] Complaint state[d] a cognizable injury under Chapter 93A or whether the First Amendment bars her claim." JA367 n.14.

The District Court recognized that "[a] business may … violate [Chapter] 93A through an omission." JA360-61. However, it noted, the omissions alleged here belong to a different category than those in an ordinary consumer-protection case. They "have nothing to do with the central characteristics of the chocolate products sold, such as their physical characteristics, price, or fitness for consumption." *Id.* Rather, they involve information of strictly moral or ethical interest. Citing Federal Trade Commission precedent, as Chapter 93A instructs, the District Court held that the failure to affirmatively disclose such information in product labeling is neither deceptive nor unfair. *Id.* at 362 (citing *In re Int'l Harvester Co.*, No. 9147, 1984 FTC LEXIS 2 (1980)).

Since Tomasella could not state a Chapter 93A claim, the District Court concluded that her "parallel claim for unjust enrichment" must also fail. JA367-68 (quoting *Shaulis v. Nordstrom, Inc.*, 120 F. Supp. 3d 40, 56 (D. Mass. 2015), *aff'd*, 865 F.3d 1 (1st Cir. 2017)). Accordingly, the District Court granted Hershey's motion and dismissed Tomasella's Complaint with prejudice. This appeal followed.

SUMMARY OF ARGUMENT

Tomasella's Chapter 93A claim failed for at least four reasons.

First, Tomasella did not plausibly allege that Hershey "failed to disclose" anything in the first place. As the Complaint itself details, Hershey has publicly acknowledged child labor and forced labor in its cocoa supply chain for almost 18 years. The issue has been broadly discussed in government and the media for just as long. Tomasella argues that a disclosure only counts for purposes of Chapter 93A if it appears *on a product label*, but that is incorrect: disclosures suffice if they are "readily available" to the public—and Hershey's are.

Second, because the information at issue is strictly of moral or ethical concern, Chapter 93A did not require its disclosure. This Court has rejected a similar claim involving the nondisclosure of animal cruelty in a company's supply chain. In the real-estate context, Massachusetts' high court has analogously limited Chapter 93A's disclosure obligation to tangible property defects. Federal Trade Commission precedent, which Chapter 93A adopts, holds that actionable omissions are limited to those involving objective product safety or functionality. And precedent aside, this is just common sense: if manufacturers had to

cram onto their product labels all facts about their businesses that might offend someone, commerce could not function.

Third, the alleged omission is not actionable under Chapter 93A because it is neither "deceptive" nor "unfair." It is not deceptive because *reasonable* consumers would not conclude from a chocolate manufacturer's silence that its supply chain is guaranteed to be free of problematic labor practices. And it is not unfair because there is no "established" statutory or common-law requirement that manufacturers disclose their suppliers' labor practices on product labels, and Hershey's disclosure of this information in a different location does not rise to the level of "immoral" or "substantially injurious" conduct.

Fourth, even if Tomasella had alleged *conduct* that violates Chapter 93A, she failed to allege any cognizable *injury*. This Court has held that, to state a claim under the statute, a consumer must allege that "the [purchased] product itself was deficient in some objectively identifiable way." Offensive as it may be, the fact that child labor was used in harvesting an ingredient in a product is not an objective "deficien[cy]" in the "product itself." And even if it was, Tomasella did not allege that

any chocolate bar *she* purchased was actually tainted with child labor—merely that the practice exists somewhere in Hershey's "supply chain."

Because the District Court correctly dismissed Tomasella's Chapter 93A claim, it was also correct to dismiss her unjust enrichment claim. As this Court has held, a plaintiff may not pursue an unjust enrichment claim based on the same allegations that underlie a dismissed Chapter 93A claim.

Finally, even if Tomasella's complaint stated a claim under Massachusetts law, the First Amendment would bar that claim. It is well-settled that product-disclosure requirements trigger First Amendment scrutiny. Where the required disclosure is controversial and potentially misleading—as it is here—it is subject to intermediate scrutiny at minimum. But Tomasella's desired disclosure cannot satisfy intermediate scrutiny, because there are more direct ways for the government to combat child labor in Côte d'Ivoire without compelling any private party to carry the government's message.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DISMISSED TOMASELLA'S CHAPTER 93A CLAIM.

Tomasella failed to state a claim under Chapter 93A for two reasons. First, as the District Court correctly held, she did not plausibly allege any conduct by Hershey that violates the statute. Additionally, she did not allege any cognizable injury.

A. Tomasella Failed To Plausibly Plead Any Conduct By Hershey That Violated Chapter 93A.

Chapter 93A prohibits "unfair or deceptive acts or practices in the conduct of any trade or commerce." M.G.L. 93A § 2. "[T]he boundaries of what may qualify for consideration as a [Chapter] 93A violation is a question of law" for the court. *Arthur D. Little, Inc. v. Dooyang Corp.*, 147 F.3d 47, 54 (1st Cir. 1998). Here, the District Court correctly exercised that gatekeeping function, holding that the Complaint alleges no conduct that so "qualif[ies]."

Importantly, Tomasella did not allege that Hershey made any false affirmative misstatement on which she relied. Nor did she allege that Hershey spoke any "half-truths" that were misleading absent corrective disclosures. Her claim was based on a "pure omission" theory:

that Hershey "*fail[ed] to disclose* the use of child and slave labor in [its] supply chain[]." JA010, ¶ 1; JA040-42 ¶¶ 83-90 (emphasis added).[14]

This allegation failed to state a claim under Chapter 93A for at least three reasons. First, Tomasella's own Complaint concedes that Hershey *did* disclose this phenomenon. Second, Chapter 93A does not require sellers to disclose information that does not bear objectively on product safety or functionality, merely because it may be of moral or ethical interest to some consumers. Finally, in any event, the purported nondisclosure at issue is neither "deceptive" nor "unfair" as courts have defined those terms.

1. There Was No Failure To Disclose In The First Place.

The Complaint itself concedes that, for almost 18 years, Hershey has publicly "acknowledged … child and slave labor in [the] Ivorian supply chain for [Hershey's] Chocolate Products." JA018, ¶ 23; JA020-22,¶¶ 29-33; *supra* at 8-12. The phenomenon has been debated in Con-

[14] The Complaint does allege that Hershey made aspirational statements about its plans to decrease and eventually eliminate labor abuses in its supply chain. *See, e.g.*, JA021-22 ¶¶ 31-33. But these statements were not alleged to have been knowingly false when made, and Tomasella has never asserted that she saw them at all—let alone that she was misled or injured by them. Thus, they cannot form the basis of a Chapter 93A claim. Tomasella has never argued otherwise.

gress and widely reported in the media—both locally and nationally—for equally as long. *Id.* Both the District Court and the California courts recognized as much. *See* JA366 ("[Tomasella] concedes … that Hershey has disclosed that its supply chain likely is impacted by child and slave labor" and "made [this] information readily available to consumers on its website"); *Dana*, 180 F. Supp. 3d at 665, 667 (detailing numerous "public disclosures" of child and forced labor in Hershey's African cocoa supply chain).

This, standing alone, defeats Tomasella's claim. It is axiomatic that there can be no liability under Chapter 93A for purported nondisclosure where the plaintiff "could have … learned" the relevant facts through "public information readily available." *Heller Fin. v. Ins. Co. of N. Am.*, 573 N.E.2d 8, 11-13 (Mass. 1991); *see also* Michael C. Gilleran, LAW OF CHAPTER 93A (2d ed.) § 4.13 at 158 (no liability "where the 'information was discoverable by the exercise of due diligence on the part of the buyer'"). As every court to consider Tomasella's allegations has concluded, the relevant information was readily available to consumers.

Tomasella argues that these widespread disclosures are insufficient because Hershey did not include this information *in its product*

labels—i.e., "at the point of sale." JA016, ¶ 13. But nothing in Chapter 93A or the relevant case law requires a seller to make every disclosure in the *labeling* of its products, as opposed to some other "readily available" location. *Heller*, 573 N.E.2d at 11-13; *see, e.g.*, *Gossels v. Fleet Nat'l Bank*, 902 N.E.2d 370, 379 (Mass. 2009) (defendant bank complied with Chapter 93A by offering "a dedicated telephone number" that consumers could call "to learn [its] daily retail currency exchange rates"). The absence of authority for Tomasella's labels-only rule makes good sense, as there "[t]here are countless issues that may be legitimately important" to purchasers, but only so much "surface area o[n] a chocolate wrapper" in which to disclose them. *Dana*, 180 F. Supp. 3d at 664-65.

2. Chapter 93A Does Not Obligate Sellers To Disclose Facts Of Strictly Moral Or Ethical Concern.

Even if Hershey *had* failed to disclose the presence of child labor in its supply chain, that could not form the basis of a Chapter 93A claim. As the California federal courts and the Ninth Circuit held with respect to California's similar consumer-protection statute, Chapter 93A does not require preemptive disclosure of facts that bear no objective relation to product safety or functionality, merely because consumers would find them morally or ethically concerning. This is clear based

on precedent interpreting Chapter 93A; decisions of the Federal Trade Commission; and fundamental public policy.

a. Case Law Interpreting Chapter 93A Does Not Require Sellers To Disclose Facts Of Strictly Moral Or Ethical Concern.

In the 50-year history of Chapter 93A, no court has ever imposed liability on a manufacturer or seller for failing to disclose information of strictly moral or ethical concern. That "lack of historical precedent" is "[p]erhaps the most telling indication" that such a claim is beyond the statute's scope. *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 505 (2010).

It appears that only one Chapter 93A claim resembling Tomasella's has ever been brought—and the courts made short work of it. *See Animal Legal Defense Fund, Inc. v. Provimi Veal Corp.*, 626 F. Supp. 278, 278-79 (D. Mass. 1986), *aff'd*, 802 F.2d 440 (1st Cir. Aug. 12, 1986). There, the plaintiff organization alleged that a veal producer had violated Chapter 93A by failing "to tell retail consumers how [its] calves … are raised"—information that "would offend their 'moral and aesthetic beliefs.'" Prefiguring Tomasella's allegations here, the plaintiff argued that "[n]ot telling consumers about this cruelty is unfair and deceptive because it denies to consumers information they might consider im-

portant in deciding whether to buy [defendant's] veal." 626 F. Supp. at 279-80. The district court dismissed the complaint as "well-intentioned" but "misdirected," concluding that the plaintiff "should concentrate its estimable advocacy urging public officials … to proper action." *Id.* at 281. This Court summarily affirmed, apparently deeming the plaintiff's liability theory too far-fetched to merit discussion. 802 F.2d at 440.[15]

Also instructive is *Urman v. South Boston Savings Bank*, 674 N.E.2d 1078 (Mass. 1997). There, the plaintiff homebuyers sued their seller under Chapter 93A for "fail[ing] to disclose … that a toxic waste contamination problem had [previously] existed on a nearby property." *Id.* at 1080. As here, the plaintiffs alleged that this was a "fact[] the disclosure of which may have influenced [them] not to enter into the transaction." *Id.* at 1081 (quoting 940 C.M.R. § 3.16(2)). The Supreme Judicial Court (SJC) affirmed the dismissal of their claim "as a matter of law." *Id.* at 1082.

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[15] Below, Tomasella argued that this case is distinguishable because its holding rested on federal preemption. That was true of Part II of the district court's opinion, which addressed the *separate* claim that the defendant's use of "antibiotic[s]" was a "violation of federal … regulations." 626 F. Supp. at 281-82. But preemption is not even mentioned in Part I, which addressed the nondisclosure of animal cruelty.

"*In appropriate circumstances*," the SJC explained, Chapter 93A may require disclosure of facts "of sufficient materiality to affect the habitability, use, or enjoyment of [a] property…." *Id.* at 1082 (quoting *Strawn v. Canuso*, 657 A.2d 420, 431 (N.J. 1995)) (emphasis added). But the former existence of nearby contamination did not objectively impede the purchased property's use, and it presented no "demonstrable future danger." *Id.* *Urman* teaches that Chapter 93A does not require sellers to disclose *every* fact that might disturb the buyer and dissuade her from purchasing—only those facts that bear objectively on the property's safety or usefulness. There is no reason to think the SJC would treat personal property differently from real property in this respect.[16]

Notably, *Urman* quoted and endorsed the New Jersey Supreme Court's reasoning in *Strawn v. Canuso*, which distinguished between "physical conditions" and other facts of interest to purchasers:

> *The duty [of disclosure] that we recognize is not unlimited.* We do not hold that sellers … have a duty to investigate or disclose transient social conditions in the community that arguably affect

[16] Below, Tomasella argued that *Urman* holds only that sellers cannot be held liable for failing to disclose facts that they do not know. But the seller in *Urman* "was aware of" the information that allegedly should have been disclosed—*i.e.*, "that there had been a contamination problem in the neighborhood." 674 N.E.2d at 1080-81.

> the value of property. In the absence of a purchaser communicating specific needs, [sellers] should not be held to decide whether the changing nature of a neighborhood, the presence of a group home, or the existence of a school in decline are facts material to the transaction. Rather, we root in the land the duty to disclose … conditions that are material to the transaction.

657 A.2d at 431-32 (emphasis added); *see also Urman*, 674 N.E.2d at 1082 & n.8 (quoting this passage with approval). Under this same SJC-endorsed reasoning, manufacturers like Hershey "should not be held to decide" whether "social conditions" half a world away are "material to the transaction"; any duty to disclose must be physically "root[ed] in" the product's safety or performance. *Accord Hodsdon*, 891 F.3d at 860.

Tomasella does not argue that any court has actually interpreted Chapter 93A to require disclosures of the type at issue here. Instead, she cobbles together out-of-context quotations from plainly distinguishable cases in a misguided attempt to portray Chapter 93A's disclosure obligation as unlimited.

Primarily, Tomasella relies on *V.S.H. Realty, Inc. v. Texaco, Inc.*, 757 F.2d 411 (1st Cir. 1985), where this Court predicted that Massachusetts would "allow[] a [Chapter 93A claim] even in the absence of a duty to disclose." *Id.* at 417. But she reads far too much into this 34-

year-old dictum. In context, the statement means only that Chapter 93A claims are likely not governed by the same "duty" analysis that governs in a "common law action for fraud." *Id.* Under that common-law standard, a seller need not disclose *anything at all* unless she is a "fiduciary" or has spoken "half truths" requiring corrective disclosures. *See Nei v. Burley*, 446 N.E.2d 674, 676-77 (Mass. 1983). That Chapter 93A may not employ this common-law "duty" analysis, however, does not mean that it imposes a *limitless* obligation to disclose. Indeed, *V.S.H.* involved the seller's failure to disclose "oil seepages" in a petroleum storage facility—a traditional physical defect that objectively impacted the property's use. 757 F.2d at 413-14. Because *V.S.H.* did not involve information of strictly moral or ethical concern, this Court had no opportunity to consider what rule might apply in such a case.

Further, whatever this Court may have meant in *V.S.H.*, the jurisprudence of Chapter 93A did not freeze in 1985. Ten years later, this Court observed that Chapter 93A "probably does *not* contain a general duty of disclosure." *Indus. Gen. Corp. v. Sequoia Pac. Sys. Corp.*, 44 F.3d 40, 44 (1st Cir. 1995) (emphasis added). And most recently, in *Gossels*, the SJC held that a bank had not violated Chapter 93A by fail-

ing to disclose certain facts, since "neither the common law nor the UCC require[d] any of these disclosures" and the bank "did not violate any of its duties of care." 902 N.E.2d at 378, 380. Thus, notwithstanding *V.S.H.*, it is clear that Chapter 93A does not impose an unlimited obligation to disclose whatever a purchaser may wish to know.

Tomasella also relies on language in *Underwood v. Risman*, 605 N.E.2d 832 (Mass. 1993), and *Exxon Mobil Corp. v. Att'y General*, 94 N.E.3d 786 (Mass. 2018), stating that "[a] duty exists under c. 93A to disclose material facts known to a party at the time of a transaction." *Id.* at 797 (quoting *Underwood*, 605 N.E.2d at 835). Again, however, these statements do not help Tomasella when read in context.

Underwood involved the "nondisclosure of the presence of lead-based paint" in a house. 605 N.E.2d at 835. That omission resulted in "a toxic level of lead in [the plaintiff's] bloodstream" and developmental harm to the child she was carrying. *Id.* at 834-35. The SJC therefore had no occasion to consider whether information of strictly moral or ethical import must be disclosed. In fact, the court cautioned *against* "unduly extend[ing] the reach of [Chapter 93A]." *Id.* at 836.

Exxon, meanwhile, simply affirmed the Attorney General's authority to issue a "civil investigative demand." 94 N.E.3d at 790. It did not even consider whether the Attorney General had plausibly pleaded a violation of Chapter 93A. Moreover, in that case, the defendant was alleged to have made affirmative false statements "undermin[ing] the evidence of climate change." *Id.* at 790; *see also id.* at 795 ("[T]he C.I.D. seek[s] documents to substantiate public statements made by Exxon … on the topic of climate change."). *Exxon*, therefore, sheds no light on the applicable standard in pure nondisclosure cases like this one.

Finally, Tomasella invokes an interpretive regulation promulgated in 1978 by the Attorney General, which states that a violation of Chapter 93A occurs if "any person … fails to disclose … any fact, the disclosure of which may have influenced the buyer … not to enter into the transaction." Read literally, this regulation may appear to support Tomasella. But Massachusetts courts have not followed this absolutist approach. Indeed, the SJC views this regulation as "add[ding] little, if anything," to the scope of the statute itself. *Underwood*, 605 N.E.2d at 836. It cannot fundamentally transform the statute, as Tomasella contends. *See McGonagle v. Home Depot, U.S.A., Inc.*, 915 N.E.2d 1083,

1090 (Mass. App. 2009) (holding that the Attorney General's interpretive regulations may not "expand the boundaries" of Chapter 93A beyond what the statute otherwise prohibits, or else they are *ultra vires*).

Thus, in *Urman*, the SJC rejected the plaintiffs' Chapter 93A claim—even though they cited this same regulation and claimed that the undisclosed fact (*i.e.*, "that there had been a contamination problem in the neighborhood") was one "the disclosure of which [would] have influenced [them] … not to enter into the transaction." 674 N.E.2d at 1081-82 (quoting 940 C.M.R. § 3.16(2)). As discussed above, this was insufficient: since the undisclosed fact did not concern the property's objective safety or usefulness, "the [seller was] not liable under [Chapter] 93A, *as interpreted by 940 Code Mass. Regs. § 3.16(2)*, for the failure to disclose [it]." *Id.* at 1082 (emphasis added). So too here.

b. FTC Precedent Does Not Require Sellers To Disclose Facts Of Strictly Moral Or Ethical Concern.

As the District Court recognized, Hershey's view of Massachusetts law is bolstered by precedent from the Federal Trade Commission (FTC), which Chapter 93A incorporates by reference. *See* M.G.L. ch. 93A, § 2 ("It is the intent of the legislature that in construing [this stat-

ute], the courts will be guided by the interpretations given by the Federal Trade Commission … interpreting [the FTC Act]").

The FTC has rejected Tomasella's argument that "pure omissions" are unfair or deceptive merely because they involve facts that "may be material to consumers." *In re Int'l Harvester Co.*, No. 9147, 1984 FTC LEXIS 2, at *245 (1980). Rather, the FTC has held that "pure omissions" can violate the FTC Act only in narrow circumstances—chiefly, where the product contains "gross safety hazards" or fails to meet "the irreducible minimum performance standards of [the] particular class of good." *Id.* at *241. As the FTC has noted, because "[t]he number of facts that may be material to consumers … is literally infinite," a contrary rule would be "impractical"—even "perverse." *Id.* at *245.

Tomasella urges this Court not to follow *International Harvester*, noting that, in one Chapter 93A case, the SJC "looked to" a different FTC decision "for guidance." Appellant's Opening Br. ("AOB") 34. But that case, *Aspinall v. Philip Morris Cos.*, 813 N.E.2d 476 (Mass. 2004), did not involve "pure omissions." It concerned allegations that a manufacturer had made false affirmative claims about its product's safety. *Id.* at 479. Unsurprisingly, therefore, *Aspinall* cited an FTC decision

addressing false affirmative claims. This gives no reason to think that the SJC would reject *International Harvester* in a case involving "pure omissions," where it is actually relevant.

Tomasella next objects that *International Harvester* was "subject to a vigorous dissent." AOB 35. But the "dissent" in that case helps Hershey, not Tomasella. It recognized that "the [FTC] has applied the doctrine of deception by nondisclosure only to a few *narrow* categories of *particularly significant* omissions, such as those involving *safety matters*…." 1984 FTC LEXIS 2, at *291 (emphasis added). The dissenting member departed from the majority only because she believed that the "omission" at issue involved "a latent safety hazard in [the defendant's] product." *Id.* at *272-73. Of course, there is no such allegation here.

Tomasella also argues that "[e]ven under *Int'l Harvester*, [her] claim should proceed." AOB 36. Her first theory is that chocolate is different from other products that are merely utilitarian, because its "central characteristic … is to provide pleasure" and "enjoyment." Thus, in her view, any knowledge that "diminish[es]" a consumer's subjective sense of "pleasure" or "enjoyment" when consuming chocolate undermines "a central characteristic" of the product. *Id.*

But *International Harvester* does not require disclosure of any fact that may "diminish" a consumer's subjective enjoyment of a product. It requires disclosure of defects that create "safety hazards" or cause the product to flunk "irreducible minimum performance standards." 1984 FTC LEXIS 2, at *241. *See Hodsdon*, 891 F.3d at 860 ("the labor practices in question … are not physical defects that affect the central function of the chocolate products"). Moreover, *many* consumer products—not just chocolate—are purchased, at least in part, to obtain "pleasure" or "enjoyment." If Tomasella's "enjoyment" argument had merit, little would remain of *International Harvester*.

Second, Tomasella argues that, under *International Harvester*, a seller must make disclosures if its silence would "constitute an implied but false representation." AOB 37. Hershey's silence about child labor, she argues, is "an implied … representation" that its products "are legally within the [United States]." *Id.* This representation is "false," she claims, because "[t]he Federal Tariff Act prohibits import[ation]" of "goods … produced … [with] forced labor." *Id.* Ergo, she concludes, *International Harvester* requires Hershey to correct consumers' misimpression that its products are "legally within" the country.

This argument is deeply flawed. For starters, Tomasella never alleged in her Complaint, and never argued below, that she perceived in Hershey's silence any "implied representation" that its products complied with the Tariff Act or were "legally within the country." Nor did Tomasella plead or argue below that those products' compliance with the Tariff Act, or the "legal[ity]" of their presence "within the country," was material to her purchase decision. Tomasella cannot raise a completely new theory of deception and materiality on appeal.

Tomasella's "illegal product" theory also sweeps far too broadly. It would mean that consumers could sue manufacturers under Chapter 93A for their failure to comply with *any* regulation governing their business—not just the Tariff Act—since any violation, no matter how technical or obscure, may render the sale of their products "unlawful."

Further, Tomasella's theory has been resoundingly rejected by courts. *See, e.g.*, *Avon Prods., Inc. v. S.C. Johnson & Son, Inc.*, 984 F. Supp. 768, 796 (S.D.N.Y. 1997) ("[T]he law does not impute representations of government approval [for sale] … in the absence of explicit claims"). "Plaintiffs," these courts have held, "cannot circumvent" the requirements of consumer-protection law—such as a false representa-

tion and resulting reliance—"by simply pointing to a regulation … that [the manufacturer] violated" and "summarily claiming that the product is [therefore] illegal to sell." *Thomas v. Costco Wholesale Corp.*, 2014 U.S. Dist. LEXIS 46405, at *23 (N.D. Cal. March 31, 2014). Indeed, the Ninth Circuit has called this theory "outlandish." *Brazil v. Dole Packaged Foods, LLC*, 660 F. App'x 531, 534 (9th Cir. 2016). Nothing suggests the SJC would think otherwise.

In all events, Tomasella conceded below that she *is not* "alleg[ing] that the specific [Hershey] products *she* purchased were made from cocoa produced with the labor abuses at issue…." D. Ct. ECF No. 23 at 13 (emphasis added). Her complaint is that those "labor abuses" exist in Hershey's "supply chain." *Id.* And for good reason: it is undisputed that only *some* of Hershey's cocoa comes from Côte d'Ivoire; that only *some* Ivorian cocoa beans are produced with child labor; and that it is *impossible to know* which beans those are. *Supra* at 5-6. Thus, even if Hershey had made an "implied representation" that the chocolate products Tomasella purchased were "legally within the country," the Complaint does not allege beyond the speculative level that this "implied representation" was false.

c. Fundamental Public Policy Precludes A Duty To Disclose Facts Of Strictly Moral Or Ethical Concern.

Precedent aside, "sound policy" considerations require this Court to reject Tomasella's all-encompassing view of Chapter 93A and impose "some bright-line limitation on a manufacturer's duty to disclose." *Dana*, 180 F. Supp. 3d at 664.

Tomasella may be correct that child labor in a business's supply chain is an important consideration in some consumers' purchase decisions. But it is hardly unique in that respect: "countless issues … may be legitimately important to … customers" in deciding which businesses to patronize or which products to buy. *Dana*, 180 F. Supp. 3d at 664-65; *see also Int'l Harvester*, 1984 FTC LEXIS 2, at *245 ("The number of facts that may be material to consumers … is literally infinite."). Thus, if Tomasella's view of Chapter 93A were accepted, it would impose a duty of "stunning breadth." *Dana*, 180 F. Supp. 3d at 664.

Businesses would be required to cram into their product labels "every conceivable piece of information about [their] product[s] … or even about the company generally," because "inevitably some customer would find such information relevant." *Hall v. Seaworld Entm't, Inc.*,

2015 U.S. Dist. LEXIS 174294, at *25-26 (S.D. Cal. Dec. 23, 2015). As noted above, this would include "[their] positions on social issues; their support for or opposition to legislation; their political donations; their environmental record; their employment practices; and their ties to certain nations or regimes." *Dana*, 180 F. Supp. 3d at 664. Of course, because product labels have finite space, manufacturers would have to prioritize—so even the most conscientious manufacturer would be subject to potentially enormous liability.

Consumers would hardly benefit from this state of affairs. *See Int'l Harvester*, 1984 FTC LEXIS 2, at *245 (noting that a universal disclosure regime "would very possibly … harm … consumers"). "A surfeit of information can overwhelm consumers, leading them to attend to it selectively or to ignore it altogether." Lewis A. Grossman, *FDA and the Rise of the Empowered Consumer*, 66 Admin. L. Rev. 627, 631 (2014); *see also* Mario F. Teisl & Brian Roe, *The Economics of Labeling: An Overview of Issues for Health and Environmental Disclosure*, 27 Agric. & Res. Econ. Rev. 141, 148 (1998) ("[I]ncreasing the amount of information on a label may actually make any given amount of information harder to extract."). If the labels for even basic grocery products resem-

bled stock prospectuses—and, under Tomasella's view of the law, they would have to—then consumers would have no choice but to ignore them. At minimum, vital information like health-and-safety warnings would be drowned out in the sea of disclosures meant to protect consumers from moral or ethical offense.

In an analogous statutory context (civil RICO), this Court has noted that "[i]t would be a truly revolutionary change to [impose liability on] every salesman … who did not take the initiative to reveal" all information that a buyer might wish to know. *Bonilla v. Volvo Car Corp.*, 150 F.3d 62, 70 (1st Cir. 1998). Such a standard, this Court recognized, could well "bring business in the United States to a standstill." *Id.* There is no reason to think that, in enacting Chapter 93A, the Legislature intended that draconian result. *See Baker v. Goldman Sachs*, 771 F.3d 37, 50 (1st Cir. 2014) ("Chapter 93A was designed to encourage more equitable behavior in the marketplace," not to impose "an overly precise standard of ethical or moral behavior").

3. In Any Event, The Alleged Nondisclosure Was Neither "Deceptive" Nor "Unfair."

Even if (1) Hershey *had* failed to disclose the presence of child labor in its supply chain; and (2) the nondisclosure of purely moral or eth-

ical information *could* form the basis of a Chapter 93A claim, the particular nondisclosure alleged here would not violate the statute because it is neither "deceptive" nor "unfair."

a. The Alleged Nondisclosure Was Not "Deceptive."

Chapter 93A's prohibition of "deceptive" conduct encompasses only conduct that would deceive a consumer "acting *reasonably* under the circumstances." *Mayer v. Cohen-Miles Ins. Agency*, 722 N.E.2d 27, 33 (Mass. 2000) (emphasis added); *see also Edlow v. RBW, LLC*, 688 F.3d 26, 39 (1st Cir. 2012). This standard is "stricter … than a test which considers whether a practice had the capacity to deceive the general public, which 'includes the ignorant, [the] unthinking, and the credulous.'" JA386 n.5 (quoting *Aspinall*, 813 N.E.2d at 487-88); *see also Aspinall*, 813 N.E.2d at 487 ("This standard [is] more difficult to satisfy because it depends on the likely reaction of a reasonable consumer rather than an ignoramus.").

The District Court concluded that Hershey's alleged omission was not "deceptive" because *reasonable* consumers would not conclude from Hershey's silence that its supply chain is 100% free of abusive labor practices. JA386. That conclusion was correct. Even if they have no

specific knowledge of the situation in Côte d'Ivoire, reasonable consumers are aware that cocoa comes from overseas and that other nations' labor standards differ from our own. Reasonable consumers are also aware that some chocolate products—*but not the ones at issue*—make affirmative claims that they are "fair trade" (*i.e.*, humanely produced). Given these facts, as the District Court held, "it would not be objectively reasonable for a consumer to affirmatively form any preconception about the use of child or slave labor in Hershey's supply chain, let alone to make a purchase decision based on any such preconception." JA364.

In fact, this conclusion follows from the Complaint itself, which points out that consumers are "willing[] to pay a premium" as high as 45% for agricultural products that are affirmatively "certified to be free of human rights abuses," as compared to otherwise identical products that lack such certification. JA034-36, ¶¶ 57-61. Reasonable consumers would not pay that hefty premium for certification if they thought that products lacking such a certification—like the ones at issue here—were equally certain to be "free of human rights abuses." Thus, the Complaint's own allegations refute the notion that Hershey's silence deceives reasonable consumers about its products.

b. The Alleged Nondisclosure Was Not "Unfair."

A practice is "unfair" within the meaning of Chapter 93A if "(1) … [it] is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) … it is immoral, unethical, oppressive, or unscrupulous; and (3) … it causes substantial injury to consumers." *Young v. Wells Fargo Bank, N.A.*, 828 F.3d 26, 33 (1st Cir. 2016). The conduct "must be not only wrong, but also egregiously wrong." *Baker*, 771 F.3d at 50. The District Court correctly held that the Complaint failed to plausibly satisfy this demanding standard.

First, there is no "common-law, statutory, or other established" requirement that manufacturers disclose on their product labels the labor practices of their indirect suppliers. JA365-66. The District Court correctly rejected Tomasella's invocation of two United Nations human-rights declarations and the federal Tariff Act in an attempt to identify an "established" standard of unfairness. Those United Nations declarations "condemn child or slave labor," *id.*, and the Tariff Act prohibits the importation of certain products manufactured with forced labor. But none of those sources says anything about the actual legal issue in this case: what *disclosures* a manufacturer must make *on its product labels*.

Id.; *see also Hodsdon*, 891 F.3d at 866-67 (rejecting plaintiff's reliance on the same United Nations declarations as the predicate for an "unfairness" claim in an identical case about chocolate).

On appeal, Tomasella attempts to broaden her liability theory to bring it within the scope of the United Nations declarations. She now asserts that her claims are not just about "Hershey's failure to disclose," but also about its "*utilization* of [an] abusive supply chain" *per se*. AOB 41-42 (emphasis added). True, her Complaint contains plenty of background about human-rights abuses in Côte d'Ivoire. But when it comes to what "unfair practice" Hershey allegedly committed *vis-à-vis Tomasella*, the Complaint's allegations sound exclusively in nondisclosure. *See* JA041, ¶ 86 ("Defendants' *material omissions* in the labeling of its Chocolate Products is … unfair to consumers."); JA042, ¶ 89 ("Plaintiff … lost money as a result of Hershey's *material omissions*").

Likewise, in her briefing below, Tomasella argued only that "Hershey's *omission* is unfair." D. Ct. ECF No. 23 at 2 (emphasis added); *see also id.* at 9 ("Hershey's … sale of chocolate products … *without disclosing at the point of sale* the child and slave labor in its supply chain is unfair"). It is far too late for Tomasella to broaden her liability theory

now. Moreover, if Tomasella *were* challenging the underlying labor practices themselves, her claims would fall outside the scope of Chapter 93A, which applies only to "wrongful conduct occurr[ing] … 'primarily and substantially' in Massachusetts." *Zyla v. Wadsworth*, 360 F.3d 243, 255 (1st Cir. 2004) (quoting M.G.L. ch. 93A, §11).

As a final attempt at an "established" standard, Tomasella invokes "common-law unjust enrichment." AOB 40 (citing *Mass. Eye & Ear Infirmary v. QLT Phototherapeutics, Inc.*, 552 F.3d 47, 69 (1st Cir. 2009)). But merely *claiming* "unjust enrichment" is insufficient; Tomasella must point to some "established" way in which Hershey's retention of her money is "unjust." In *Massachusetts Eye & Ear*, for example, this Court held that the plaintiff had a valid Chapter 93A "unfairness" claim under an "unjust enrichment" theory where the defendant "induced" the plaintiff to cede a valuable patent by "promising compensation" that it ultimately "did not pay." *Id.* at 62-67; *see also id.* at 69 (defendant "avoid[ed] payment in accordance with prior promises"). This quasi-contract theory lies at the heart of "common-law unjust enrichment." Tomasella's theory does not: again, at common law, sellers were

not required to disclose *anything at all* unless they were fiduciaries or had uttered deceptive "half-truths." *Supra* at 28.

Independently, Hershey's alleged omission—as opposed to child labor itself, which is not at issue in this case—"is not immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." JA366. In so concluding, the District Court stressed that "Hershey has disclosed" the labor abuses at issue, albeit not on its product labels. "Where Hershey has made such information readily available to consumers" who are interested in such matters, "the absence of such information on [Hershey's] actual product packaging" does not rise to the requisite level of immorality or injuriousness. *Id.*; *see also Hodsdon*, 891 F.3d at 867 (reaching same conclusion under California consumer-protection statute).

B. Tomasella Failed To Plausibly Plead An Injury Cognizable Under Chapter 93A.

Even if the Complaint had plausibly alleged conduct that violates Chapter 93A, Tomasella was also required to plead "that she … suffered a distinct injury or harm … aris[ing] from the claimed unfair or decep-

tive act." *Shaulis v. Nordstrom, Inc.*, 865 F.3d 1, 8 (1st Cir. 2017). Her failure to do so is an independent basis for affirmance.[17]

To plead an injury under Chapter 93A, it is not enough to allege that the defendant's violation "induced" the plaintiff to purchase a product. *Id.* at 11. Nor is it enough that the plaintiff "subjective[ly] belie[ves]" that, as a result of the violation, the product she purchased is "worth less than the selling price." *Id.* at 12. Rather, the plaintiff must plausibly plead that "the [purchased] product itself was deficient in some objectively identifiable way." *Id.*

In *Shaulis*, for example, the plaintiff alleged that she was led to purchase a sweater by Nordstrom's misrepresentation that it was marked down. While this Court agreed that Nordstrom's misstatement violated Chapter 93A, it found no cognizable injury. Objectively speaking, the sweater she received was exactly what she was promised; there was no claim that it "was manufactured with shoddy materials or inferior workmanship, that it [was] of an inferior design, or that it [was] otherwise defective." *Id.* The plaintiff's "subjective belief" that the

[17] Although the District Court did not reach this issue (or Hershey's First Amendment argument, *infra*), it was fully briefed below, and this Court "may affirm on any basis apparent in the record." *Debnam v. FedEx Home Delivery*, 766 F.3d 93, 96 (1st Cir. 2014).

sweater was "worth less than the selling price" was insufficient to provide her with a cause of action. *Id.* at 11-12.

Shaulis controls here. Tomasella alleges that Hershey's purported nondisclosure "enticed reasonable consumers to purchase the Chocolate Products when they would not have had they known the truth." JA041, ¶ 85. But this "enticed purchase" theory is identical to the "induced purchase" theory that *Shaulis* rejected. 865 F.3d at 11; *see also Pershouse v. L.L. Bean, Inc.*, 368 F. Supp. 3d 185, 191 (D. Mass. 2019) ("The mere fact that [Plaintiff] may have been deceived when he bought the slippers does not establish a cognizable injury….").

Tomasella's alternative theory of injury is that consumers "would not have … paid as much for" Hershey's products "had they known the truth." JA042, ¶ 89. Again, however, *Shaulis* holds that a consumer's "subjective belief" that she "overpa[id]" is not enough. 865 F.3d at 12; *see also Bellermann v. Fitchburg Gas & Elec. Light Co.*, 54 N.E.3d 1106, 1108 (Mass. 2016). Tomasella was required to plead that the Hershey products she purchased were "deficient in some objectively identifiable way"—*e.g.*, that they contained impurities, omitted a promised ingredient, or did not provide a promised benefit. *Shaulis*, 865 F.3d at 12.

This she did not do: the labor practices used to produce a product's ingredients are not an "objectively identifiable" "deficien[cy]" in the finished product, any more than the marketing scheme that the *Shaulis* defendant used to promote its sweater. Both may offend the consumer, but *Shaulis* makes clear that is insufficient.

In fact, even if this Court were to accept that a product is "deficient in [an] objectively identifiable way" merely because it was produced using improper labor practices, Tomasella would *still* fail to plead a cognizable injury. Again, she concedes that she is not "alleg[ing] that the specific [Hershey] products *she* purchased were made from cocoa produced with the labor abuses at issue," D. Ct. ECF No. 23 at 13 (emphasis added), and that it is *impossible to tell* whether that is the case. JA015-16, ¶ 12. Rather, her complaint is with the presence of those practices in Hershey's "supply chain" writ large—"regardless of where the cocoa in [her] particular chocolate bar[s] originated." D. Ct. ECF No. 23 at 13 (emphasis in original). But *Shaulis* makes clear that a Chapter 93A plaintiff must "identif[y] [an] objective injury traceable to *the purchased item itself*"—one that stems from "*th[at] item's* specific

qualities." 865 F.3d at 11 (emphasis added). That unsavory practices may exist in a company's global supply chain, *per se*, does not suffice.

* * *

In sum, no court has ever recognized either a violation of Chapter 93A, or an injury cognizable under that statute, in circumstances anything like these. To recognize a claim here for the first time would transform Chapter 93A from a "consumer protection" statute into an endless fount of litigation over corporate ethics and morals. The District Court properly declined to open that Pandora's box.

II. THE DISTRICT COURT CORRECTLY DISMISSED TOMASELLA'S CLAIM FOR UNJUST ENRICHMENT.

The District Court correctly held that the failure of Tomasella's Chapter 93A claim required dismissal of her tag-along claim for unjust enrichment.

It is settled in Massachusetts that "a party with an adequate remedy at law cannot claim unjust enrichment." *Shaulis*, 865 F.3d at 16 (citing *ARE-Tech Square, LLC v. Galenea Corp.*, 79 N.E.3d 1111 (Mass. App. 2017)). The "adequacy" of a legal remedy does not turn on whether the legal claim succeeds or fails—it is the "mere availability" of such a claim that "bars a claim for unjust enrichment." *Id.* (citation omitted).

Thus, a plaintiff whose Chapter 93A claim is dismissed may not continue to pursue an unjust enrichment claim premised on the same factual allegations. *See id.*; *Reed v. Zipcar, Inc.*, 883 F. Supp. 2d 329, 334 (D. Mass. 2012), *aff'd*, 527 F. App'x 20 (1st Cir. 2013).

Tomasella argues that *Shaulis* is inconsistent with earlier Circuit authority: namely, *Lass v. Bank of America, N.A.*, 695 F.3d 129 (1st Cir. 2012) and *Cooper v. Charter Communications Entertainments I, LLC*, 760 F.3d 103 (1st Cir. 2014). But there is no conflict. *Lass* and *Cooper* held that plaintiffs who were "*entitled to proceed* with [their] breach of contract and related claims" could pursue unjust enrichment in the "alternative." *Lass*, 695 F.3d at 131, 140-41 (emphasis added); *see also Cooper*, 760 F.3d at 112-13. Neither case held that a plaintiff may pursue a standalone unjust-enrichment claim based on allegations that lie outside the boundaries of what Chapter 93A prohibits.

III. IMPOSING LIABILITY HERE WOULD COMPEL SPEECH IN VIOLATION OF THE FIRST AMENDMENT.

Finally, even if Massachusetts law required Hershey to make the disclosure that Tomasella desires, that requirement would be inconsistent with the First Amendment—so it would be null and void. *See generally* Jonathan H. Adler, *Compelled Commercial Speech and the*

Consumer "Right to Know", 58 Ariz. L. Rev. 421, 444 (2016) (discussing the First Amendment limitations on compelled product disclosures).

The First Amendment protects "both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). When a law requires a manufacturer to include information in its product labels, that is compulsion of speech, and it is subject to First Amendment scrutiny. *See Am. Bev. Ass'n v. City & Cty. of San Francisco*, 916 F.3d 749, 753 (9th Cir. 2019) (en banc) (citing *NIFLA v. Becerra*, 138 S. Ct. 2361 (2018)); *Cigar Ass'n of Am. v. FDA*, 317 F. Supp. 3d 555, 558 (D.D.C. 2018) (also citing *NIFLA*).

If a law merely "require[s] the disclosure of 'purely factual and uncontroversial information,'" a somewhat relaxed form of scrutiny—the "*Zauderer* standard"—applies. *NIFLA*, 138 S. Ct. at 2372 (discussing *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985)); *see also Mass. Ass'n of Private Career Sch. v. Healey*, 159 F. Supp. 3d 173, 195 (D. Mass. 2016). Under *Zauderer*, disclosure requirements will be upheld if they are not "unduly burdensome" and are "reasonably related to the State's interest in preventing deception of consumers." *Id.* Otherwise, compelled product disclosures must survive at least "intermediate

scrutiny." *Id.* at 195-96; *see also Am. Bev. Ass'n*, 916 F.3d at 760 (Ikuta, J., concurring in the result) (*NIFLA* "did not decide whether strict scrutiny or intermediate scrutiny applies to government-compelled commercial disclosures that do not fall under the *Zauderer* exception").

Here, the compelled disclosure at issue falls outside the *Zauderer* exception because it is not "purely factual and uncontroversial." For starters, the responsibility of Western manufacturers for abetting human-rights abuses overseas is plainly a "controversial" subject. *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 "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"); *cf. NIFLA*, 138 S. Ct. at 2372 (disclosure requirement was not "purely factual and uncontroversial" because it concerned "abortion, [which is] anything but an 'uncontroversial' topic").

Additionally, the disclosure that Tomasella demands is not "purely factual" because it is one-sided and misleading. *See Am. Bev. Ass'n*, 916 F.3d at 764-67 (Christen, J., concurring) (misleading compelled disclosures are not "purely factual"); *Am. Meat Inst. v. U.S. Dep't of Agric.*,

760 F.3d 18, 27 (D.C. Cir. 2014) (disclosures may be "so one-sided … that they [do] not qualify as 'factual and uncontroversial'"). Tomasella's disclosure implies that Hershey actually *employs* child and slave labor, which is false. It intimates that a large portion of Hershey's cocoa is affected, which is false. It implies that each chocolate bar on which it is printed contains affected cocoa, which is false. And it paints Hershey as a villain—in Tomasella's words, as "*supporting and encouraging* [child and slave] labor," JA010, ¶ 1 (emphasis added)—when in fact, Hershey has made great efforts to combat these practices, which persist in Côte d'Ivoire for complex socioeconomic and political reasons.

Since the *Zauderer* exception does not apply, Tomasella's compelled disclosure must satisfy at least intermediate scrutiny. To do so, it must (1) "directly advance[]" (2) a "substantial" government interest and (3) "not [be] more extensive than is necessary to serve that interest." *Healey*, 159 F. Supp. 3d at 190; *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980). As the party seeking to compel speech, Tomasella "has the burden to prove" that this test is satisfied. *NIFLA*, 138 S. Ct. at 2377. Below, she did not even argue that she could meet this demanding test—and she plainly cannot.

In particular, to the extent the relevant government interest is combating human rights abuses in Côte d'Ivoire, there are more "direct" ways of doing so than forcing businesses several steps down the supply chain to include text on the labels of products sold half a world away. For example, the State could pressure the federal government to intervene directly with Ivorian authorities, or it could support human rights organizations that provide direct aid to Ivorian cocoa workers. Not only would these steps address labor conditions in Côte d'Ivoire more directly, they would do so "without burdening a speaker with unwanted speech." *Id.* at 2376.

To the extent the relevant government interest is merely *making consumers aware* of labor conditions in Côte d'Ivoire, it is doubtful that this informational interest qualifies as a "substantial" one. *See* Adler, 58 Ariz. L. Rev. at 426, 440-44 (arguing that "consumer[s'] desire for information" relevant to their "ethical, ideological, spiritual, or aesthetic" preferences "is not, in itself, a sufficiently substantial interest to justify compelling speech by others"); *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 73-74 (2d Cir. 1996) (holding that "consumer interest alone" is not "sufficient to justify requiring a product's manufacturers to publish

… a warning about a production method that has no discernable impact on a final product").

In any event, there is an "obvious[]" way in which the State could satisfy this putative informational interest without compelling any speech: it could "inform [consumers] itself with a public-information campaign." *NIFLA*, 138 S. Ct. at 2376. The State "could even post the information on public property near" places where chocolate products are sold. *Id.* What the State cannot do is "co-opt" Hershey's product labels and require it "to deliver [a controversial] message" on the State's behalf. *Id.*; *see* Adler, 58 Ariz L. Rev. at 447 (noting that the government may directly regulate labor conditions or "use [its own] speech to preach the virtues of 'fair' labor conditions," but it cannot "force private individuals to sing from the same hymnal").

CONCLUSION

For the reasons set forth above, the District Court's judgment dismissing the Complaint should be affirmed.

Dated: September 27, 2019

Respectfully submitted,

/s/ Steven A. Zalesin

Steven A. Zalesin
Jonah M. Knobler
PATTERSON BELKNAP WEBB & TYLER LLP
1133 Avenue of the Americas
New York, New York 10036
(212) 336-2000

Attorneys for Defendants-Appellees

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 11,154 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: September 27, 2019

/s/ Steven A. Zalesin

CERTIFICATE OF SERVICE

I hereby certify that, on September 27, 2019, the foregoing brief was filed with the Clerk of the Court using the Court's CM/ECF system. I further certify that counsel for all parties in this case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Dated: September 27, 2019

/s/ Steven A. Zalesin