

# MITIGATING RISK, ERADICATING SLAVERY

RAMONA L. LAMPLEY\*

*For U.S. companies with forced labor or child labor in the supply chain, litigation is on the rise. This Article surveys the current litigation landscape involving forced labor in the supply chain. It ultimately concludes that domestic corporations that source from international suppliers should adopt the Model Contract Clauses drafted by the ABA Business Law Section Working Group to Draft Human Rights Protections in International Supply Contracts (“Working Group”). This Article traces the origins of cases involving supply chain forced labor, beginning with the early employee negligence cases that form the backdrop of existing case law and the cornerstone of the Model Contract disclaimers. Part III turns to the evolving consumer class actions based on deceptive trade practices. Part IV addresses the complexities of employee-based cases alleging violations of the ATS, and by comparison, this Part also illustrates why the Trafficking Victims Protection Reauthorization Act (TVPRA) extraterritorial jurisdictional grant may*

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\* Ramona L. Lampley is a Professor of Law at St. Mary’s University School of Law in San Antonio, Texas. She teaches sales, secured transactions, civil procedure, modern litigation practice, e-discovery, and commercial paper. Professor Lampley has been published in the *Washington Law Review*, *BYU Law Review*, *Cornell’s Journal of Law and Public Policy*, and *ESSENTIALS OF E-DISCOVERY*. Professor Lampley is chair of the Article 2 subcommittee of the ABA’s Business Law Section UCC Committee. She is also a member of the Working Group to Draft Human Rights Protections in International Supply Contracts and co-author of *TEXAS PRACTICE SERIES: CONSUMER RIGHTS AND REMEDIES* (West 2019). She owes deep gratitude to Randy Jeffries and Katina Zampas for their thorough research and deep concern over the issues discussed in this piece. She also would like to thank David Snyder and Susan Maslow for spear-heading the Working Group, Chris Johnson for providing her with initial research leads, all members of the Working Group for providing a platform where this work has come to fruition, Stephen Ware and Christopher Drahozal for their detailed comments, and the members of the University of Kansas School of Law faculty who provided thoughtful feedback and a warm forum for discussion. Finally, the author thanks Nicholas T. Hillman and the members of the *American University Law Review* for hosting the symposium and for their diligent work in publishing this set of works.

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I. FORCED LABOR IN THE SUPPLY CHAIN?  
DOMESTIC RETAILERS BEWARE

Domestic retailers beware. Is there forced labor or slave labor in your supply chain? If so, your vulnerability as a target for litigation is on the rise. Recent changes in federal law make it more likely that such causes of action, whether brought by an individual or as a class, will be successful. Consider the consumer who buys a bag of chocolate for distributing to her neighborhood children on Halloween. Would that person have bought the same chocolate had she known it was the product of child labor? Is that a material fact that ought to have been disclosed to the ultimate purchaser, much like an ingredient that now taints the product? Should the manufacturer bear civil liability to consumers for failing to disclose the probability of child labor in its supply chain, even if it did not force the hand of the laborers?<sup>1</sup> It is no stretch to say that some states' consumer protection laws, at a minimum, prohibit giving a false impression that one sells ethically sourced products.<sup>2</sup>

Forced labor in the United States is illegal.<sup>3</sup> It exists, but it is heavily regulated, at least in comparison to other developing

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1. See, e.g., Class Action Complaint, *Tomasella v. Hershey Co.*, No. 1:18-cv-10360 (D. Mass. Feb. 26, 2018), 2018 WL 1051865; Class Action Complaint, *Tomasella v. Mars, Inc.*, No. 1:18-cv-10359 (D. Mass. Feb. 26, 2018), 2018 WL 1051861; Class Action Complaint, *Tomasella v. Nestle USA, Inc.*, No. 1:18-cv-10269 (D. Mass. Feb. 12, 2018), 2018 WL 823151. See generally *Hodsdon v. Mars, Inc.*, 162 F. Supp. 3d 1016 (N.D. Cal. 2016), *aff'd*, 891 F.3d 857 (9th Cir. 2018); *McCoy v. Nestle USA, Inc.*, 173 F. Supp. 3d 954 (N.D. Cal. 2016), *aff'd*, 730 F. App'x 462 (9th Cir. 2018) (mem.); *Dana v. Hershey Co.*, 180 F. Supp. 3d 652 (N.D. Cal. 2016), *aff'd*, 730 F. App'x 460 (9th Cir. 2018) (mem.); see also *Wirth v. Mars, Inc.*, No. SA CV 15-1470-DOC (KESx), 2016 WL 471234 (C.D. Cal. Feb. 5, 2016), *aff'd*, 730 F. App'x 468 (9th Cir. 2018) (mem.); *Sud v. Costco Wholesale Corp.*, No. 15-cv-03783-JSW, 2016 WL 192569 (N.D. Cal. Jan. 15, 2016), *amended by* 229 F. Supp. 3d 1075 (N.D. Cal. 2017), *aff'd*, 731 F. App'x 719 (9th Cir. 2018) (mem.); *Barber v. Nestle USA, Inc.*, 154 F. Supp. 3d 954 (C.D. Cal. 2015), *aff'd*, 730 F. App'x 464 (9th Cir. 2018) (mem.).

2. See *Nat'l Consumers League v. Wal-Mart Stores, Inc.*, No. 2016 CA 007731 B, 2016 WL 4080541 (D.C. Super. Ct. July 22, 2016) (holding that under Washington D.C.'s Consumer Protection Procedures Act, in-depth descriptions and detailed purchasing statistics of the supplier auditing process can influence the reasonable consumer's purchasing decisions and give rise to an actionable false impression); see also *infra* Section III.A.

3. See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), Pub. L. No. 110-457, 122 Stat. 5044 (codified as amended in scattered sections of 8, 18, and 22 U.S.C.). Under the TVPRA, forced labor means providing or obtaining labor or services by force, physical restraint, serious harm, or threats of such; by abuse of the law or legal process, or threats of such; or by "any scheme, plan, or pattern intended to cause the person to believe that, if that person

countries.<sup>4</sup> The problem is heightened when domestic entities acquire products or supplies from an international supply chain because labor is subject to a different set of rules and regulations, which may not be enforced.<sup>5</sup> Some of the inexpensive products we buy come with a cost, a cost unknown to many of us. Domestic litigation is about, in part, exposing those external costs. In 2016, Professor David Snyder formed the Working Group to Draft Human Rights Protections in International Supply Contracts (“Working Group”), a part of the ABA Business Law Section.<sup>6</sup> In the early stages of the Working Group, I was asked to research domestic litigation, in whatever form, involving the use of forced labor in the supply chain. We began with one case: *Rahaman v. J.C. Penney Corp.*<sup>7</sup> But in the months and weeks that passed, the amount and complexity of the litigation involving these issues escalated. Research revealed an increasing mass of consumer class actions brought by those who were defrauded by the knowing, or at best, willfully ignorant use of forced labor in the supply chain. At the same time, viable legal theories

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did not perform such labor or services, that person or another person would suffer serious harm or physical restraint.” 18 U.S.C. §§ 1589(a)(1)–(4) (2012). My use of “forced labor” in this piece includes both this definition in the TVPRA and slave labor. In contrast, using the term child labor invites a conversation as to whether it is illegal or legal child labor and under which jurisdiction’s laws. That discussion, while meritorious, is beyond the scope of this piece. The use of the term “child labor” in this piece is based on an understanding that the labor practices involved would violate social norms and, at a minimum, U.S. labor laws.

4. *E.g.*, 18 U.S.C. § 1581 (imposing severe criminal penalties and civil liability for those who engage in forced labor practices); *see also Forced Labor*, END SLAVERY NOW, <http://www.endslaverynow.org/learn/slavery-today/forced-labor> (last visited June 1, 2019) (detailing the prevalence of forced labor in the United States). *Cf.* Free the Slaves and the Human Rights Center of the University of California, Berkeley, *Hidden Slaves Forced Labor in the United States*, 23 BERKELEY J. INT’L L. 47 (2005).

5. *See, e.g.*, Galit A. Sarfarty, *Shining Light on Global Supply Chains*, 56 HARV. INT’L L.J. 419, 423 (2015) (explaining the challenges with regulating multi-national and multi-tiered supply chains through domestic regulations).

6. Additional commentary by members of the Working Group on international supply chains and the MCCs can be found in this symposium issue. *See generally* E. Christopher Johnson Jr. et al., *The Business Case for Lawyers to Advocate for Corporate Supply Chains Free of Labor Trafficking and Child Labor*, 68 AM. U. L. REV. 1555 (2019); David V. Snyder, *The New Social Contracts in International Supply Chains*, 68 AM. U. L. REV. 1869 (2019); *see also* Jennifer S. Martin, *Private Law Remedies, Human Rights, and Supply Contracts*, 68 AM. U. L. REV. 1781 (2019); Jonathan C. Lipson, *Something Else: Specific Relief for Breach of Human Rights Terms in Supply Chain Agreements*, 68 AM. U. L. REV. 1751 (2019). *But see* Sarah Dadush, *Contracting for Human Rights: Looking to Version 2.0 of the ABA Model Contract Clauses*, 68 AM. U. L. REV. 1519 (2019).

7. No. N15C-07-174MMJ, 2016 WL 2616375 (Del. Super. Ct. May 4, 2016).

brought by employees of foreign suppliers were developing under the Trafficking Victims Protection Reauthorization Act (TVPRA)<sup>8</sup> and the Alien Tort Statute (ATS).<sup>9</sup> The research revealed that many businesses would benefit from a model agreement designed to warrant against the use of forced labor in the supply chain and address remedies for breach.

In 2018, the work of the Working Group came to fruition with the publication of Model Contract Clauses (“MCCs”) for domestic buyers to use in their international purchase agreements to guard against the use of forced labor in the supply chain.<sup>10</sup> Every domestic company that sources from international entities should consider adopting the MCCs in some form.<sup>11</sup> David Snyder and Susan Maslow have discussed the MCCs in their work, *Human Rights Protections in International Supply Chains—Protecting Workers and Managing Company Risk*.<sup>12</sup>

This Article discusses the emerging trends in domestic litigation involving forced labor in the supply chain and how the disclaimers that appear in MCCs were drafted with the intent of reducing litigation risk for the domestic entities that adopt them. Recent litigation against domestic retailers of goods involving alleged human trafficking in the supply chain generally falls into two areas: employee cases and consumer deceptive advertising cases. Part II of this Article traces the origin of these cases beginning with the early employee negligence cases that form the backdrop of existing case law and the cornerstone of the Model Contract disclaimers. Part III turns to the evolving consumer class actions based on deceptive trade practices. Part IV addresses the complexities of employee-based cases alleging violations of the ATS, and by comparison, this Part also illustrates why the TVPRA extraterritorial jurisdictional grant may

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8. Pub. L. No. 110-457, 122 Stat. 5044 (codified as amended in scattered sections of 8, 18, and 22 U.S.C.).

9. 28 U.S.C. § 1350 (2012). The ATS, enacted in 1789, provides: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” *Id.*

10. David Snyder & Susan Maslow, *Human Rights Protections in International Supply Chains—Protecting Workers and Managing Company Risk: 2018 Report and Model Contract Clauses from the Working Group to Draft Human Rights Protections in International Supply Contracts*, 73 BUS. LAW. 1093 (2018) [hereinafter *Model Contract Clauses*].

11. Cf. E. Christopher Johnson Jr., *Business Lawyers Are in a Unique Position to Help Their Clients Identify Supply-Chain Risks Involving Labor-Trafficking and Child Labor*, 70 BUS. LAW. 1083, 1102–03 (2015) (encouraging businesses to adopt the ABA’s Model Principles for Labor Trafficking and Child Labor, including supply chain monitoring).

12. *Model Contract Clauses*, *supra* note 10, at 1093.

provide fertile ground for domestic litigation involving foreign forced labor in the supply chain. Finally, Part V discusses the origin of the disclaimer clauses in the MCCs proposed by the Working Group, and the arguments in favor of using the MCCs as a foundation for reducing abusive labor practices in the supply chain, even for those brought under the TVPRA. The Article concludes that the threat of domestic liability is on a steady upward trajectory, and businesses are well-advised to begin incorporating contractual rights and remedies to deal with the problem of forced labor in the supply chain, but in a way that does not increase the potential for domestic liability.

Some may claim that the MCCs go too far in protecting domestic entities, which often wield all or most of the bargaining power with their international suppliers. This may be so, but the goal at this point is to persuade domestic entities to adopt and enforce the contractual agreements in an effort to eradicate forced labor in the supply chain.<sup>13</sup> Companies would be hard-pressed to adopt a contract that could open them up to liability in the form of duty assumption or control. Therefore, the disclaimers that are part of the MCCs protect, rather than make vulnerable, adopting companies from more liability than they would face otherwise.<sup>14</sup>

Overall, domestic litigation over forced labor has met with limited success until very recently, although some cases discussed in this piece are pending appeal. But the act of asserting these cases, as in the California “chocolate” cases, attracts media attention and influences the domestic consumer market for these products. From a marketing standpoint, domestic manufacturers and retailers should be concerned about the market effect of these supply-side human trafficking cases. From a litigation risk perspective, developments in the extraterritorial reach of the TVPRA could prove to be extremely problematic for any company with reckless indifference to forced labor in its supply chain.

## II. WORKERS’ NEGLIGENCE-THEORY CASES

This section describes some of the fundamental cases behind the Model Contract Disclaimers—those brought by the workers against domestic purchasing companies alleging negligence in failure to

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13. See, e.g., Kishanthi Parella, *Outsourcing Corporate Accountability*, 89 WASH. L. REV. 747, 792 (acknowledging that “[p]rivate regulation through corporate codes of conduct and monitoring may actually be the only way that labor and environmental conditions are addressed in some developing countries”).

14. *Id.* at 1095, 1105.

prevent labor abuses in their supply chains. These early cases formed the building blocks for current employee cases.

A. *Rahaman v. J.C. Penney Corp.*

Our research began with a factory collapse, a humanitarian tragedy, and a lawsuit. On April 24, 2013, an eight-story commercial building that housed multiple garment factories in Bangladesh collapsed, killing over 1000 and injuring over 2500 people. Many victims were female workers and children.<sup>15</sup> An engineer inspected the building the day before the collapse and declared it unsafe.<sup>16</sup> In *Rahaman v. J.C. Penney Corp.*,<sup>17</sup> the plaintiffs filed a class action on behalf of other workers and those who died in the collapse against domestic retailers J.C. Penney, The Children's Place, and Wal-Mart.<sup>18</sup> The plaintiffs alleged negligence and wrongful death in the domestic retailers' failing to monitor their Bangladeshi clothing suppliers.<sup>19</sup> The complaint further alleged the retailer defendants knew of the unsafe working conditions in Rana Plaza and breached their duty to the suppliers' workers by failing to "implement standards and oversight mechanisms designed to ensure the health and safety of workers who manufactured clothing for their stores."<sup>20</sup>

The Delaware Superior Court dismissed the claims on two grounds.<sup>21</sup> First, the court held the claim was barred by the Bangladeshi one-year statute of limitations.<sup>22</sup> Although the court could have resolved this case on the statute of limitations issue, it went on to render a decision on the negligence claim.<sup>23</sup> The court likely resolved the negligence claim to set a precedent for supply-side human trafficking cases based on a tort duty to monitor.

The court held the plaintiffs failed to state a claim for negligence because the retailer defendants had no duty to monitor factory

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15. *Id.*; see also Complaint ¶ 3, *Rahaman v. JC Penney Corp.*, No. 1:15-cv-00619 (D.D.C. Apr. 23, 2015) [hereinafter *Rahaman* Complaint].

16. *Rahaman* Complaint, *supra* note 15, ¶ 3.

17. No. N15C-07-174MMJ, 2016 WL 2616375 (Del. Super. Ct. May 4, 2016).

18. *Id.* at \*1. The complaint was originally filed in the U.S. District Court for the District of Columbia, and it named Bangladesh as a defendant. See *Rahaman* Complaint, *supra* note 15. The plaintiffs withdrew the case from federal court and refiled in Delaware Superior Court.

19. *Rahaman*, 2016 WL 2616375, at \*1.

20. *Rahaman* Complaint, *supra* note 15, ¶¶ 5–6.

21. *Rahaman*, 2016 WL 2616375, at \*7, \*10.

22. *Id.* at \*7.

23. *Id.* at \*10.

conditions.<sup>24</sup> Under Delaware law, “[i]n negligence cases alleging nonfeasance, or an omission to act, there is no general duty to others without a ‘special relationship’ between the parties.”<sup>25</sup> The plaintiffs argued they—as workers—fell within an exception to this no-duty rule because they were employed as independent contractors for the defendant.<sup>26</sup> Under the peculiar risk doctrine, an employer of an independent contractor is subject to liability when an independent contractor is hired to do work the employer should see is likely to create a peculiar risk of harm without special precautions.<sup>27</sup> The court rejected this argument for several reasons.

The court first rejected the existence of a duty on behalf of the retailer defendants because there were no allegations establishing a “peculiar risk.”<sup>28</sup> “The risk contemplated by the doctrine is ‘peculiar to the work to be done, and arising out of . . . the place where it is to be done, against which a reasonable [person] would recognize the necessity of taking special precautions.’”<sup>29</sup> The court held that inadequacies in the construction of Rana Plaza were not peculiar to the business in which the defendants engaged, and the defendants could not reasonably be expected to take precautions against a building collapse when sourcing garments from Bangladesh.<sup>30</sup>

The court also held the peculiar risk doctrine did not apply to this class of plaintiffs because they were employees of the garment factories, not of the defendants.<sup>31</sup> Under Delaware statutory law, “[an] employer of an independent contractor is not liable for physical harm caused to another by an act of omission of the contractor or his servants.”<sup>32</sup> In other words, the defendants were shielded from liability because they indirectly acquired the goods from the supplier.

There are exceptions to the general rule that a contractor does not have a duty to protect an independent contractor’s employees from

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24. *Id.* at \*9.

25. *Id.* at \*8; *see also* RESTATEMENT (SECOND) OF TORTS § 314 (AM. LAW INST. 1965). There is no duty to act for the protection of a third party unless there is a special relationship. A special relationship exists between socially recognized relations such as parent and child, employer and employee, and innkeeper and guest. §§ 314–15.

26. *Rahaman*, 2016 WL 2616375, at \*8.

27. *Id.*; *see also* RESTATEMENT (SECOND) OF TORTS § 413.

28. *Rahaman*, 2016 WL 2616375, at \*9.

29. *Id.* at \*8 (quoting *Bryant v. Delmarva Power & Light Co.*, No. 89C-08-070, 1995 WL 653987, at \*1, \*6 (Del. Super. Ct. Oct. 2, 1995)).

30. *Id.* at \*9.

31. *Id.* at \*8.

32. *Id.*; RESTATEMENT (SECOND) OF TORTS § 409.

foreseeable hazards. The exceptions exist “when the general contractor; (1) actively controls the manner and method of performing the contract work; (2) voluntarily undertakes the responsibility for implementing safety measures; or (3) retains possessory control over the work premises during work.”<sup>33</sup> The court held that none of these exceptions applied because the retail defendants’ only contact with the garment factories was through indirect sourcing.<sup>34</sup> *Because the defendants did not undertake any safety responsibilities and did not control the work being done*, these limited exceptions to the no-duty rule did not apply.<sup>35</sup>

The plaintiffs also made a basic foreseeability argument, contending the defendants were aware of the long history of injuries and fatalities due to the poor working conditions.<sup>36</sup> But the court held that even if the defendants knew or should have known of the risks at the garment warehouse, knowledge would not establish a duty of care when the defendants had neither asserted control over the work nor assumed responsibility for safety measures.<sup>37</sup> The court also rejected the somewhat tangential argument that the defendants’ ethical sourcing statements established a duty of care.<sup>38</sup>

Finally, the plaintiffs argued the defendants owed a duty of care under the illegal-conduct exception, which “imposes liability on the employer of an independent contractor where ‘the employer causes or knows of and sanctions illegal conduct.’”<sup>39</sup> The court found no evidence that the plaintiffs were required to engage in illegal conduct to manufacture the garments and no provision in the supply contracts to source garments from factories in which the work was performed illegally.<sup>40</sup>

Thus, the court resoundingly rejected all arguments that the retail defendants, as remote purchasers, owed a duty to the suppliers’ employees, even if the retail defendants had knowledge of unsafe working conditions.<sup>41</sup> The plaintiffs did not appeal.

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33. *Rahaman*, 2016 WL 2616375, at \*9.

34. *Id.*

35. *Id.* Note the importance of this conclusion in terms of the contractual disclaimers discussed *infra* Part V. From the drafting perspective, it will likely be important to purchasing entities that any contract does not establish the control or responsibility that would meet these exceptions.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* (quoting *Colon v. Gannett Co.*, No. 180, 2013, 2013 WL 5819666, at \*1 (Del. Oct. 28, 2013)).

40. *Id.*

41. *Id.* at \*10.

B. *Doe I v. Wal-Mart Stores, Inc.*

In reaching the “no duty” decision in *Rahaman*, Judge Johnston relied on the decision in *Doe I v. Wal-Mart Stores, Inc.* (“Doe I”),<sup>42</sup> which bears important implications for any company faced with potential forced labor in the supply chain. In *Doe I*, the plaintiff-employees of foreign companies filed a class action against Wal-Mart alleging Wal-Mart had breached its supplier code of conduct (“Standards for Suppliers”) in failing to adequately monitor and correct the unsafe working conditions of its suppliers.<sup>43</sup> The standards were incorporated into supply contracts with foreign suppliers.<sup>44</sup> They required the suppliers to “adhere to local laws and local industry standards regarding working conditions like pay, hours, forced labor, child labor and discrimination.”<sup>45</sup> The contracts also included a right to unannounced inspections.<sup>46</sup>

The plaintiffs alleged Wal-Mart knew its suppliers often violated the Standards and did not adequately monitor the working conditions.<sup>47</sup> They also alleged the short deadlines and low prices in Wal-Mart’s supply contracts actually force suppliers to violate the Standards to meet the terms of the contract.<sup>48</sup> The plaintiffs advanced four theories of liability: (1) they were third-party beneficiaries of these standards; (2) Wal-Mart was a joint employer; (3) Wal-Mart negligently breached a duty to monitor suppliers’ working conditions; and (4) Wal-Mart was unjustly enriched by the plaintiffs’ mistreatment.<sup>49</sup>

Following district court dismissal for failure to state a claim, the plaintiffs appealed.<sup>50</sup> The Ninth Circuit affirmed and held that the standards did not create a third-party beneficiary cause of action because it only gave Wal-Mart the *right* to inspect the suppliers, not a duty to inspect them.<sup>51</sup> Although the contract imposed consequences on the supplier for failure to comply with inspections—potential cancellation or loss of business—there were no comparable adverse consequences that would inure to Wal-Mart for failure to inspect.

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42. 572 F.3d 677 (9th Cir. 2009).

43. *Id.* at 679–80. The employees were from suppliers based in China, Bangladesh, Indonesia, Swaziland, and Nicaragua.

44. *Id.* at 680.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 681.

50. *Id.* at 679–80.

51. *Id.* at 681–82.

Thus, the court held that Wal-Mart made no promise to monitor, and no such promise flowed to the plaintiffs as third-party beneficiaries.<sup>52</sup> The court also rejected the plaintiffs' arguments that they could sue Wal-Mart based on the suppliers' breach of the contractual duty to maintain certain working conditions because a donee third-party beneficiary may only recover against the promisor, not the promisee.<sup>53</sup>

Whether Wal-Mart was an "employer" of the foreign employees hinged on whether Wal-Mart had a right to control and direct activities of the supplier, or the manner and method in which the work is performed.<sup>54</sup> Citing *Bell Atlantic Corp. v. Twombly*<sup>55</sup> and *Ashcroft v. Iqbal*,<sup>56</sup> the court held the plaintiffs provided no factual allegations that Wal-Mart exercised day-to-day control over operations.<sup>57</sup> Further, the court held that supply contract terms such as deadlines, quality of products, and price do not constitute sufficient day-to-day control over a supplier's employees as to create an employment relationship between the purchaser and the supplier's employees.<sup>58</sup> The Ninth Circuit also held that Wal-Mart did not owe the plaintiffs a common-law duty to monitor its suppliers or prevent the plaintiffs' mistreatment.<sup>59</sup> This "no duty" holding was based on (1) the absence of a contractual duty, as discussed above; (2) the absence of factual allegations that Wal-Mart exercised significant control over work conditions and affirmatively contributed to the plaintiffs' injuries; and (3) the court's rejection of a common-law duty to monitor suppliers to protect their employees.<sup>60</sup>

The court also rejected the unjust enrichment claim because there was no prior relationship between the plaintiffs and Wal-Mart.<sup>61</sup> The plaintiffs argued that Wal-Mart was unjustly enriched by profiting from its relationships with suppliers at the plaintiffs' expense.<sup>62</sup> But, according to the court, "a party generally may not seek to disgorge another's profits unless a 'prior relationship between the parties'" gave

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52. *Id.* at 682.

53. *Id.*

54. *Id.*

55. 550 U.S. 544 (2007).

56. 556 U.S. 662 (2009).

57. *Doe I v. Wal-Mart*, 572 F.3d at 683.

58. *Id.*

59. *Id.*

60. *Id.* at 684.

61. *Id.* at 684–85.

62. *Id.* at 685.

rise to the unjust benefit.<sup>63</sup> The court had already held that Wal-Mart did not exert control over the plaintiffs and was not the employer. It observed that there is no “plausible basis upon which the employee of a manufacturer, without more, may obtain restitution from one who purchases goods from that manufacturer.”<sup>64</sup>

*Doe I* provides a useful guide in tailoring the MCCs to one’s own business needs to avoid unintentionally exposing the business to domestic liability (for the acts of its supplier) through assumption of control over that supplier.<sup>65</sup> Even under Wal-Mart’s Standards for Suppliers, which imposed a supplier obligation to provide local industry-standard working conditions and gave Wal-Mart a right of inspection, the court found no contract, tort, or equitable cause of action. The false advertising cases take a different strategy to supply-side human trafficking instances.

### III. CONSUMERS’ FALSE ADVERTISING CLAIMS BASED ON FAILURE TO DISCLOSE ABUSIVE LABOR PRACTICES IN THE SUPPLY CHAIN

Another set of cases involving abusive labor practices in the supply chain assert consumer protection claims, usually class claims, for false advertising against domestic retailers. Most recently, plaintiffs have filed deceptive advertising and unjust enrichment cases in the United States District Court for the District of Massachusetts based on forced labor in the supply of domestic chocolate.<sup>66</sup> Another very recent case

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63. *Id.* (quoting *Smith v. Pac. Props. & Dev. Corp.*, 358 F.3d 1097, 1106 (9th Cir. 2004)).

64. *Id.*

65. Sometimes, the level of control or inspection is not entirely up to the domestic entity. For instance, the Federal Acquisitions Regulations (“FAR”) governs government contractors. FAR 52.222-50(h), Combating Trafficking in Persons, requires any contractor providing supplies acquired outside the United States (other than commercially available off the shelf items) or services performed outside the United States with an estimated value to exceed \$500,000 to maintain a compliance plan that includes “[p]rocedures to prevent agents and subcontractors *at any tier and at any dollar value* from engaging in trafficking in persons . . . and *to monitor, detect, and terminate any agents, subcontracts, or subcontractor employees* that have engaged in such activities.” FAR 52.222-50(h) (2016) (emphasis added). This means that for government contracts meeting the \$500,000 non-domestic supply requirement, the FAR necessitates a level of control beyond that which insulated Wal-Mart from liability in *Doe I* and is inconsistent with the disclaimers discussed in Part V. A business may have persuasive reasons for not adopting the disclaimers in their entirety, such as being subject to the FAR. But the business should do so aware of the potential risks involved in terms of assuming greater control over the indirect supplier’s employees.

66. *See generally* Class Action Complaint, *Tomasella v. Hershey Co.*, No. 1:18-cv-10360 (D. Mass. Feb. 26, 2018), 2018 WL 1051865 [hereinafter *Hershey Co. Class Action*].

in the District of Columbia narrowly survived a motion to dismiss.<sup>67</sup> The other consumer protection cases brought to date generally fall into two categories: the chocolate cases<sup>68</sup> and the fishermen cases.<sup>69</sup> While the Model Contract Disclaimers will have less impact on consumer protection actions, the cases illustrate how supply agreements affect consumer perception and, more importantly, the emerging litigation risk from consumer classes as consumers become more aware, and more appalled, over how their products are sourced. I begin with the case that probably signals the evolutionary path of consumer-based deceptive advertising litigation in this area.

#### A. National Consumers League v. Wal-Mart Stores, Inc.

In late 2015, the National Consumers League (NCL) filed suit against Wal-Mart, J.C. Penney, and The Children's Place ("Retailers" or "Retail Defendants") alleging the Retail Defendants' corporate social responsibility statements on their websites misled consumers regarding the use of forced labor or child labor in the supply chain, violating the District of Columbia's Consumer Protection Procedures Act (CPPA).<sup>70</sup> The plaintiff alleged that the Retail Defendants' websites discussed their efforts to impose a general code of conduct on their suppliers regarding the production of goods.<sup>71</sup> For example,

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Complaint]; Class Action Complaint, *Tomasella v. Mars, Inc.*, No. 1:18-cv-10359 (D. Mass. Feb. 26, 2018), 2018 WL 1051861 [hereinafter *Mars, Inc.* Class Action Complaint]; Class Action Complaint, *Tomasella v. Nestle USA, Inc.*, No. 1:18-cv-10269 (D. Mass. Feb. 12, 2018), 2018 WL 823151 [hereinafter *Nestle USA, Inc.* Class Action Complaint].

67. See *Nat'l Consumers League v. Wal-Mart, Inc.*, No. 2015 CA 007731 B, 2016 WL 4080541 (D.C. Super. Ct. July 22, 2016) (denying the defendants' joint motion to dismiss).

68. See *Hodsdon v. Mars, Inc.*, 162 F. Supp. 3d 1016 (N.D. Cal. 2016), *aff'd*, 891 F.3d 857 (9th Cir. 2018); *McCoy v. Nestle USA, Inc.*, 173 F. Supp. 3d 954 (N.D. Cal. 2016), *aff'd*, 730 F. App'x 462 (9th Cir. 2018) (mem.); *Dana v. Hershey Co.*, 180 F. Supp. 3d 652 (N.D. Cal. 2016), *aff'd*, 730 F. App'x 460 (9th Cir. 2018) (mem.).

69. See *Wirth v. Mars, Inc.*, No. SA CV 15-1470-DOC (KESx), 2016 WL 471234 (C.D. Cal. Feb. 5, 2016), *aff'd*, 730 F. App'x 468 (9th Cir. 2018) (mem.); *Sud v. Costco Wholesale Corp.*, No. 15-cv-03783-JSW, 2016 WL 192569 (N.D. Cal. Jan. 15, 2016), *amended by* 229 F. Supp. 3d 1075 (N.D. Cal. 2017), *aff'd*, 731 F. App'x 719 (9th Cir. 2018) (mem.); *Barber v. Nestle USA, Inc.*, 154 F. Supp. 3d 954 (C.D. Cal. 2015), *aff'd*, 730 F. App'x 464 (9th Cir. 2018) (mem.).

70. See *Nat'l Consumers League*, 2016 WL 4080541, at \*1. The NCL "provides government, businesses, and other organizations with the consumer's perspective on concerns including child labor, privacy, food safety, and medication information," and its mission is "to protect and promote social and economic justice for consumers and workers in the United States and abroad." *Mission*, NCL, <http://www.nclnet.org/mission> (last visited June 1, 2019).

71. *Nat'l Consumers League*, 2016 WL 4080541, at \*1.

Wal-Mart declared on its website “[t]he safety and well-being of workers across our supply chain is the Responsible Sourcing group’s top priority.”<sup>72</sup> Wal-Mart also stated in its “Sourcing Standards & Resources” and “Standards for Suppliers” that its suppliers are contractually required to sign its Standards for Suppliers prior to production, comply with all applicable laws and regulations, and provide workers with a safe and healthy work environment.<sup>73</sup> Wal-Mart further stated that it conducts facility compliance audits through a “multi-color auditing” system every six to twenty-four months to monitor supplier compliance with its standards.<sup>74</sup> The plaintiff alleged J.C. Penney and The Children’s Place had similar statements on their websites encouraging consumers to believe forced labor was not present in their supply chains because they used regularly implemented auditing procedures to detect and curb the use of forced labor.<sup>75</sup> The plaintiff relied on the Rana Plaza building collapse as evidence that the Retail Defendants failed to comply with their corporate statements and failed to follow their audit procedures, both in violation of the CPPA.<sup>76</sup>

As in the cases discussed below, the defendants moved to dismiss, arguing the corporate statements were aspirational and not actionable because no reasonable consumer would construe those statements as definitive promises of what the corporations will do.<sup>77</sup> The court agreed, for the most part, holding most of the statements relied on by the NCL were aspirational in nature.<sup>78</sup> Indeed, the court noted the reason the Retail Defendants have an auditing process is to check on

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72. Complaint at 2, *Nat’l Consumers League v. Wal-Mart Stores, Inc.*, No. 2015 CA 007731 B, (D.C. Super. Ct. Oct. 8, 2015), 2015 WL 11237102 [hereinafter *Nat’l Consumers League Complaint*].

73. *Nat’l Consumers League*, 2016 WL 4080541, at \*3; see also *Nat’l Consumers League Complaint*, *supra* note 72, at 3 (describing Wal-Mart’s purported auditing process to verify compliance with the Standards for Suppliers). The court went beyond some of the allegations in the plaintiff’s Complaint and examined the website of each defendant, finding that examining the corporate statements located online was similar to examining contracts attached to a complaint. *Nat’l Consumers League*, 2016 WL 4080541, at \*2 n.3.

74. *Nat’l Consumers League*, 2016 WL 4080541, at \*3.

75. *Id.* at \*2–4.

76. *Id.* at \*5.

77. *Id.* at \*7.

78. *Id.* at \*10–11. The court found that the plain language of the statements used qualifying language such as “expect,” “goal,” and “ask,” which demonstrated the aspirational nature of the statements, falling short of a consumer promise. *Id.* at \*11.

whether suppliers are following their corporate statements, which presumes the possibility that some suppliers will violate the standards.<sup>79</sup>

But the court denied the motion to dismiss as to the Retail Defendants' auditing statements. Under § 28-3904(e) of the CPPA, a false statement is not required to create actionable conduct; a false impression is sufficient.<sup>80</sup> The court held the "in-depth descriptions and detailed statistics of the auditing process can influence the reasonable consumer's purchasing decision. If in reality no audits were done, then representations about the auditing process would be misleading to consumers purchasing merchandise."<sup>81</sup> Further, the statements describing the auditing process were specific and verifiable, removing them from the realm of puffery.<sup>82</sup> Thus, the court denied the defendants' motion to dismiss in part as to the detailed descriptions of the supplier-auditing process. The court cautioned that summary judgment proceedings might reveal an auditing process existed sufficient to conclude the internet descriptions were not misleading.<sup>83</sup> As of the date of this publication, *National Consumers League* is the sole case based on my research that has survived a motion to dismiss based on false-advertising claims. It appears that the case may have resolved during discovery based on a joint consent motion for judgment.<sup>84</sup> The case is now closed.

### B. *The Chocolate Cases*

Consumer plaintiffs filed at least six class actions alleging false-advertising claims against domestic chocolate retailers for failing to disclose forced labor in their supply chain.<sup>85</sup> In early 2018, Danell

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79. *Id.* at \*13.

80. *Id.*

81. *Id.* at \*15.

82. *Id.* at \*16.

83. *Id.*

84. See Order Granting Consent Joint Motion for Judgment and Bar, Nat'l Consumers League v. Wal-Mart Stores, Inc., No. 2015 CA 007731 B (D.C. Super. Ct. July 14, 2017); see also *Statement on Resolution of Lawsuit Against Walmart, JC Penney, and The Children's Place*, NCL, [https://www.nclnet.org/resolution\\_walmart](https://www.nclnet.org/resolution_walmart) (last visited June 1, 2019).

85. In 2018, three actions were brought in the U.S. District Court for the District of Massachusetts. See *Hershey Co.* Class Action Complaint, *supra* note 66, at 1; *Mars, Inc.* Class Action Complaint, *supra* note 66, at 1; *Nestle USA, Inc.* Class Action Complaint, *supra* note 66, at 1. Previously, three actions were brought in the U.S. District Court for the Northern District of California in 2016. See generally *Dana v. Hershey Co.*, 180 F. Supp. 3d 652 (N.D. Cal. 2016); *McCoy v. Nestle USA, Inc.*, 173 F. Supp. 3d 954 (N.D. Cal. 2016); *Hodsdon v. Mars, Inc.*, 162 F. Supp. 3d 1016 (N.D.

Tomasella filed three class action lawsuits in the U.S. District Court for the District of Massachusetts against The Hershey Company, Nestlé USA, Inc., and Mars, Inc. alleging a violation of the Massachusetts Consumer Protection Act and unjust enrichment from failing to disclose the use of child and slave labor in their supply chains to the consuming public.<sup>86</sup> The district court granted the defendants' motion to dismiss these claims on the grounds that they have no duty to disclose forced labor in the supply chain, holding that "it is not *plausible* that Nestlé's failure to disclose information about the labor practices in its supply chain at the point of sale could have the 'capacity to mislead consumers, acting reasonably under the circumstances, to act differently from the way they otherwise would have acted.'"<sup>87</sup> As discussed below, this was also a successful argument in defeating the chocolate and fisherman failure-to-disclose class actions asserted under California law.<sup>88</sup> Given the logical fallacy in the court's opinion (that failure to disclose information in labor practices in the supply at point of sale could have the capacity to mislead consumers), it is not surprising that the cases have been appealed.<sup>89</sup> The open question before the U.S. Court of Appeals for the First Circuit will be whether, under Massachusetts's Consumer Protection Law, the failure to disclose the likely use of child or slave labor "possesses a tendency to deceive" and "could reasonably be found to have caused a person to act differently from the way he [or she] otherwise would have acted."<sup>90</sup>

Similarly, consumer-plaintiffs filed three California class actions against Mars, Nestlé, and Hershey Co. in 2016.<sup>91</sup> As discussed below,

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Cal. 2016). The Ninth Circuit affirmed the dismissal of each of the California Chocolate cases. *See generally* McCoy v. Nestle USA, Inc., 730 F. App'x. 462 (9th Cir. 2018) (mem.); Dana v. Hershey Co., 730 F. App'x. 460 (9th Cir. 2018) (mem.); Hodsdon v. Mars, Inc., 891 F.3d 857 (9th Cir. 2018).

86. *See Hershey Co. Class Action Complaint*, *supra* note 66, at 30–34; *Mars, Inc. Class Action Complaint*, *supra* note 66, ¶¶ 76–92; *Nestle USA, Inc. Class Action Complaint*, *supra* note 66, at 34–37.

87. *Tomasella v. Nestle USA, Inc.*, Nos. 18-cv-10269-ADB, 18-cv-10359, 18-cv-10360, 2019 WL 383884, at \*5 (D. Mass. Jan. 30, 2019) (emphasis added).

88. *See infra* Sections III.B, III.C.

89. *See Tomasella v. Hershey Co.*, No. 19-1132 (1st Cir. Feb. 4, 2019).

90. *Tomasella*, 2019 WL 383884, at \*5.

91. *See Dana v. Hershey Co.*, 180 F. Supp. 3d 652, 655 (N.D. Cal. 2016), *aff'd*, 730 F. App'x 462 (9th Cir. 2018) (mem.); *McCoy v. Nestle USA, Inc.*, 173 F. Supp. 3d 954, 957 (N.D. Cal. 2016), *aff'd*, 730 F. App'x 460 (9th Cir. 2018) (mem.); *Hodsdon v. Mars, Inc.*, 162 F. Supp. 3d 1016, 1020 (N.D. Cal. 2016), *aff'd*, 891 F.3d 857 (9th Cir. 2018).

those cases were dismissed because under California law there is no duty, as of yet, to disclose forced labor in the supply chain.<sup>92</sup>

The factual background for all of the chocolate cases deserves some attention here. The district court's opinion in *Hodsdon v. Mars, Inc.*, granting the defendants' motion to dismiss begins with this acknowledgement: "That children and forced laborers pick cocoa beans on a daily basis is indisputably an international tragedy."<sup>93</sup> According to the complaint, cocoa beans used to make the defendants' (here Mars, Inc.) chocolate come from the Ivory Coast, where children and forced laborers "wield dangerous tools, transport heavy loads, and face exposure to toxic substances."<sup>94</sup> Children often arrive at these farms having been sold to, or kidnapped by, traffickers. According to the complaint, "[t]he working conditions on the farms are deplorable."<sup>95</sup> Workers often do not receive pay, sleep in locked quarters, and fear physical abuse as punishment.<sup>96</sup>

The domestic chocolate industry is aware of these abuses and has taken illusory measures to eradicate the worst forms of child labor on the cocoa farms.<sup>97</sup> According to the complaint, the defendants acknowledge their failure to achieve a certification system to eradicate the worst forms of child labor and have an aspirational goal of achieving certified sourcing by 2020.<sup>98</sup> Mars does not disclose this information about its chocolate suppliers on the labels or advertisements of most of its chocolate products, such as M&M's, Snickers, and Milky Way bars.<sup>99</sup>

The plaintiffs in the three California cases asserted class action claims under California's Unfair Competition Law (UCL), Consumers Legal Remedies Act (CLRA), and False Advertising Act (FAL) based on the allegation that he or she would not have purchased, or paid as much money for, the defendants' chocolate products had the labels included disclosures about the labor practices of the defendants'

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92. See *infra* notes 100–26 and accompanying text.

93. *Hodsdon*, 162 F. Supp. 3d at 1019. *Hodsdon* is the seminal decision in the chocolate cases, but similar claims have been asserted against the other major chocolate retailers in the United States.

94. *Id.* at 1020.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. Mars does make Dove chocolates, which state the cocoa is purchased from Rainforest Alliance Certified farms. See *id.*

suppliers.<sup>100</sup> The cases were dismissed for failure to state a claim under California's consumer protection laws.<sup>101</sup> The courts agreed the plaintiffs had standing to pursue these claims even though the plaintiff could not trace any of the purchased chocolate to a specific farm, and the plaintiff did not allege he relied on the omitted information in purchasing the product.<sup>102</sup> The *Hodsdon* court held the plaintiff's allegation that he would not have purchased, or would have paid less for the product, had he known that cocoa harvested by children and forced laborers was in the supply chain was sufficient to satisfy the requirement that he suffer an injury in fact.<sup>103</sup>

The mainstay of the court's dismissal of the UCL, CLRA, and FAL claims was the court's holding that there is no duty to disclose information about labor practices in the a supply chain.<sup>104</sup> California courts have generally rejected a broad obligation to disclose, except for omissions needed to correct a representation made by the defendant or when the non-disclosure posed a safety risk or concerned a product defect.<sup>105</sup> The duty to disclose does not extend to situations where the information may persuade the customer to make a different purchasing decision.<sup>106</sup> Here, there was no misrepresentation about forced labor in the defendants' supply chain; to the contrary, information regarding the potential child-labor practices is readily available on Mars's website.<sup>107</sup> And while sourcing products derived from child labor may be deplorable, the plaintiff did not allege it posed a safety risk to consumers or constituted a product defect. Thus, there was no duty to disclose.

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100. See *Dana v. Hershey Co.*, 180 F. Supp. 3d 652, 655–56 (N.D. Cal. 2016), *aff'd*, 730 F. App'x 462 (9th Cir. 2018) (mem.); *McCoy v. Nestle USA, Inc.*, 173 F. Supp. 3d 954, 957 (N.D. Cal. 2016), *aff'd*, 730 F. App'x 460 (9th Cir. 2018) (mem.); *Hodsdon*, 162 F. Supp. 3d at 1019.

101. See *Dana*, 180 F. Supp. 3d at 670; *McCoy*, 173 F. Supp. 3d at 972; *Hodsdon*, 162 F. Supp. 3d at 1029.

102. See *Dana*, 180 F. Supp. 3d at 660–61, 663; *McCoy*, 173 F. Supp. 3d at 962, 964; *Hodsdon*, 162 F. Supp. 3d at 1022.

103. *Hodsdon*, 162 F. Supp. 3d at 1022; *accord Dana*, 180 F. Supp. 3d at 663 (“It is plausible that a consumer would place less value on a product produced from a supply chain involving severe labor abuses.”); *McCoy*, 173 F. Supp. 3d at 964 (“[I]f a customer has paid a premium for an assurance that a product meets certain standards, and the assurance turns out to be meaningless, the premium that the customer has paid is an actual, personal, particularized injury . . .”).

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

105. *Id.* at 1025–26.

106. *Id.* at 1026.

107. *Id.* at 1027.

The plaintiffs appealed.<sup>108</sup> In *Hodsdon v. Mars, Inc.*,<sup>109</sup> the U.S. Court of Appeals for the Ninth Circuit affirmed the dismissal of the plaintiffs' claims. The court held that manufacturers do not have a duty, under California law, to disclose forced labor or child labor, "even though they are reprehensible, because they are not physical defects that affect the central function of the chocolate products."<sup>110</sup> The court, somewhat begrudgingly, acknowledged that California state court precedent suggested that a duty to disclose is not limited to (1) correcting a misrepresentation, or (2) a safety hazard.<sup>111</sup> However, in analyzing those more expansive cases, the Ninth Circuit concluded that in the absence of an affirmative misrepresentation, there is a duty to disclose only when the defect goes to the central function of the product.<sup>112</sup> Even assuming that child labor in the supply chain is material to consumers, the court held that the lack of disclosure about child labor is "not a physical defect at all, much less one related to the chocolate's function as chocolate."<sup>113</sup> As the court noted: "A computer chip that corrupts the hard drive, or a laptop screen that goes dark, renders those products incapable of use by any consumer; some consumers of chocolate are not concerned about the labor practices used to manufacture the product."<sup>114</sup> Thus, the manufacturers had no duty to disclose under the CLRA or the FAL.

California's UCL prohibits unlawful, unfair, or fraudulent business acts or practices.<sup>115</sup> The plaintiffs alleged unsuccessfully that the defendant violated the unlawful business act prong of the UCL through its violation of the CLRA, which, as discussed above, failed.<sup>116</sup>

They also argued the failure to disclose child labor in the supply of cocoa beans violated the unfair business practice prong of the UCL.<sup>117</sup>

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108. The chocolate cases and the fisherman cases discussed below were consolidated for oral argument. *See, e.g.,* *Wirth v. Mars, Inc.*, 730 F. App'x 468, 468 n.1 (9th Cir. 2018) (mem).

109. 891 F.3d 857 (9th Cir. 2018).

110. *Id.* at 860.

111. *Id.* at 863.

112. *Id.* The court noted that the duty might be even more limited, such that the defect goes to the central function of the product and will arise during the warranty period. *Id.* The court also acknowledged that there may be a separate duty to disclose safety hazards that do not go to the product's central function. *Id.* at 863 n.3.

113. *Id.* at 864.

114. *Id.*

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

116. *Hodsdon*, 891 F.3d at 865.

117. *Id.* at 866.

The court also rejected this argument.<sup>118</sup> The *Hodsdon* court noted that the precise contours of an “unfair” business practice under the UCL are in flux, setting forth two definitions of an “unfair” business practice. Something is “unfair” when it (1) “offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers,”<sup>119</sup> or (2) is tethered to a constitutional, statutory, or regulatory provision.<sup>120</sup> The court applied both tests.

Under the “tethering” test, the plaintiffs argued that the claims were tied to the United Nations’ Universal Declaration of Human Rights and the International Labour Organization’s (ILO) Convention 182 (“Worst Forms of Child Labour Convention”)—the former forbidding slavery and the latter forbidding the worst forms of child labor.<sup>121</sup> But the court held that the labeling of products is “too far removed from the UN and ILO policies to serve as the basis for a UCL claim. As such, the UN Convention and the Worst Forms of Child Labour Convention do not provide a tether here.”<sup>122</sup> Further, the court hypothesized that requiring Mars to place labels on its products could impinge on California’s Supply Chains Act, which requires that companies disclose on their websites efforts to monitor for forced labor in the supply chain but does not require product labels.<sup>123</sup>

The court also held Mars’s alleged failure to disclose its chocolate likely contained products harvested by child labor and forced labor was not immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers.<sup>124</sup> The court remarked,

While the labor practices themselves are clearly immoral, it is doubtful that failing to disclose on the label that a product may be tainted by such labor practices is itself immoral, especially when there is no specific duty to disclose this information and the information is otherwise disclosed under the Supply Chains Act.<sup>125</sup>

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118. *Id.* at 867.

119. *Id.* at 866 (quoting *Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1169 (9th Cir. 2012)).

120. *Id.* (citing *Davis*, 691 F.3d at 1169–70).

121. *Id.*

122. *Id.* at 867.

123. *Id.* California’s Supply Chains Act requires retailers and manufacturers with more than \$100,000,000 in gross receipts to disclose their efforts to eradicate slavery and human trafficking from their direct supply chain for tangible goods. CAL. CIV. CODE § 1714.43 (West 2018).

124. *Hodsdon*, 891 F.3d at 867.

125. *Id.*

Further, the failure to disclose was not substantially injurious because, as mentioned above, information about slave and child labor is public knowledge and accessible on Mars' website—pursuant to the Supply Chains Act.<sup>126</sup>

### C. *The Fishermen Cases*

The fishermen cases alleged similar legal claims to those in the chocolate cases.<sup>127</sup> According to the complaints, small fishing boats in waters between Thailand and Indonesia were reported by the U.S. Department of Labor for implementing forced labor.<sup>128</sup> These small ships—“ghost ships”—deliver payloads of fish to “motherships” operated by Thai Union Frozen Products PCL, the Thai partner to the defendants in the fisherman cases.<sup>129</sup> The Thai Union then uses the fish either as feed (e.g., for prawn food), or delivers the fish to the U.S. companies directly (e.g., for use in cat food or tuna fish).<sup>130</sup> The plaintiffs in these cases alleged dangerous and inhumane working conditions on the small fishing vessels carrying payloads to the Thai Union motherships, and that they would not have purchased the defendants' products if they knew of the labor abuses.<sup>131</sup>

In *Sud v. Costco*,<sup>132</sup> the court dismissed for lack of standing without needing to reach the false advertising claims.<sup>133</sup> The plaintiffs alleged prawns purchased from Costco were fed with fish sourced from Thai suppliers committing labor abuses.<sup>134</sup> The *Sud* court held the plaintiffs had not rebutted evidence put forth by the defendant that the prawns

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126. *Id.*

127. See *Wirth v. Mars, Inc.*, No. SA CV 15-1470-DOC (KESx), 2016 WL 471234, at \*1 (C.D. Cal. Feb. 5, 2016), *aff'd*, 730 F. App'x 468 (9th Cir. 2018) (mem.); *Sud v. Costco Wholesale Corp.*, No. 15-cv-03783-JSW, 2016 WL 192569, at \*1 (N.D. Cal. Jan 15, 2016), *amended by* 229 F. Supp. 3d 1075 (N.D. Cal. 2017), *aff'd*, 731 F. App'x 719 (9th Cir. 2018) (mem.); *Barber v. Nestle USA, Inc.*, 154 F. Supp. 3d 954, 956 (C.D. Cal. 2015), *aff'd*, 730 F. App'x 464 (9th Cir. 2018) (mem.).

128. See *Wirth*, 2016 WL 471234, at \*1; *Sud*, 2016 WL 192569, at \*1; *Barber*, 154 F. Supp. 3d at 956–57.

129. See *Wirth*, 2016 WL 471234, at \*1; see also *Barber*, 154 F. Supp. 3d at 957.

130. See *Wirth*, 2016 WL 471234, at \*1; *Sud*, 2016 WL 192569, at \*1; *Barber*, 154 F. Supp. 3d at 956–57.

131. See *Wirth*, 2016 WL 471234, at \*1; *Sud*, 2016 WL 192569, at \*1, \*3; *Barber*, 154 F. Supp. 3d at 957.

132. No. 15-cv-03783-JSW, 2016 WL 192569 (N.D. Cal. Jan 15, 2016).

133. *Id.* at \*3.

134. *Id.* at \*1.

purchased as the basis for the plaintiffs' claim were not sourced in Thailand.<sup>135</sup> The Ninth Circuit affirmed.<sup>136</sup>

In *Wirth v. Mars, Inc.*,<sup>137</sup> the court reached a similar holding on the false advertising claims as the courts addressing the chocolate cases: there is no duty to disclose information concerning the likelihood of forced labor in the supply chain when defendants have not made a false representation and the omission does not concern product safety.<sup>138</sup> The Ninth Circuit affirmed this decision based on *Hodsdon*.<sup>139</sup>

Finally, the plaintiffs in *Barber v. Nestle USA, Inc.*<sup>140</sup> alleged Nestlé's online statements about its supply-chain principles were misleading.<sup>141</sup> For example, Nestlé's website had the statement, "Nestlé requires its supplies [sic], agents, subcontractors and their employees to demonstrate honesty, integrity and fairness, and to adhere to the Nestlé Supplier Code of Conduct."<sup>142</sup> Nestlé responded by arguing these statements are aspirational, and that it acknowledges not all suppliers will immediately meet these requirements.<sup>143</sup> The court held no reasonable consumer who reads the documents in context could conclude Nestlé's suppliers comply with Nestlé's requirements in all circumstances; to the contrary, the guidelines suggest Nestlé anticipates a certain level of noncompliance.<sup>144</sup> Therefore, the court held the plaintiffs failed to state a misrepresentation claim on the basis of these statements. The Ninth Circuit affirmed the dismissal on the basis of *Hodsdon*.<sup>145</sup>

The next set of cases involves claims asserted by the actual workers, as opposed to consumer statements based on false advertising.

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135. *Id.* The defense presented evidence the prawn feed at issue was sourced in Vietnam or Indonesia. *Id.* The plaintiffs were alleging the labor abuses were within a Thai supply line. *Id.*

136. 731 F. App'x 719 (9th Cir. 2018).

137. No. SA CV 15-1470-DOC (KESx), 2016 WL 471234 (C.D. Cal. Feb. 5, 2016), *aff'd*, 730 F. App'x 468 (9th Cir. 2018) (mem.).

138. *Id.* at \*5.

139. *Wirth v. Mars, Inc.*, 730 F. App'x 468, 468 (9th Cir. 2018) (mem.).

140. 154 F. Supp. 3d 954 (C.D. Cal. 2015), *aff'd*, 730 F. App'x 464 (9th Cir. 2018) (mem.).

141. *Id.* at 956.

142. *Id.* at 963 (alterations omitted).

143. *Id.*

144. *Id.* at 964.

145. *Barber v. Nestle USA, Inc.*, 730 F. App'x 464, 465 (9th Cir. 2018) (mem.).

IV. EMPLOYEE CASES: THE VIABILITY OF THE ALIEN TORT STATUTE  
AND THE TRAFFICKING VICTIMS PROTECTION REAUTHORIZATION ACT  
AGAINST DOMESTIC ENTITIES

More recent employee/plaintiff cases have asserted claims under the ATS and the TVPRA. These cases involve employees of a supplier in the downside supply chain suing a U.S. entity who allegedly benefitted from the supplier's use of forced labor. But jurisdiction under the ATS is virtually closed to claimants seeking to recover for foreign acts that occurred under foreign soil,<sup>146</sup> or those seeking to recover against foreign corporations.<sup>147</sup> The TVPRA, in contrast, has an expansive and explicit extraterritorial jurisdictional grant.<sup>148</sup>

A. *The Alien Tort Statute as a Basis for Liability Against Domestic Corporations*

The ATS provides, “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>149</sup> The Supreme Court has limited application of the ATS in several ways, but for our purposes, the most significant limitation is that imposed by the presumption against extraterritoriality.<sup>150</sup> *Doe I v. Nestle USA, Inc.*<sup>151</sup> demonstrates the legal wrangling under the ATS.<sup>152</sup> The *Nestle* plaintiffs filed suit in 2005 against domestic cocoa purchasers alleging they aided and abetted child slavery by providing assistance to farmers on the Ivory Coast in violation of the ATS.<sup>153</sup>

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146. See *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124 (2013) (barring claims asserted under the ATS when the violations occurred outside the United States, due to the presumption against extraterritoriality).

147. *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1408 (2018) (“For these reasons, judicial deference requires that any imposition of corporate liability on foreign corporations for violations of international law must be determined in the first instance by the political branches of the Government.”).

148. 18 U.S.C. § 1596 (2012).

149. 28 U.S.C. § 1350.

150. *Kiobel*, 569 U.S. at 117.

151. 766 F.3d 1013 (9th Cir. 2014).

152. *Id.* at 1027–28.

153. *Id.* at 1016. The court summarized the allegations:

The plaintiffs in this case are three victims of child slavery. They were forced to work on Ivorian cocoa plantations for up to fourteen hours per day six days a week, given only scraps of food to eat, and whipped and beaten by overseers. They were locked in small rooms at night and not permitted to leave the plantations, knowing that children who tried to escape would be beaten or tortured. Plaintiff John Doe II witnessed guards cut open the feet

The plaintiffs alleged the defendants provided money, equipment, and training to Ivorian farmers, knowing these provisions would facilitate the use of forced child labor.<sup>154</sup> The district court granted the defendants' motion to dismiss, concluding that corporations could not be sued under the ATS and that the plaintiffs failed to allege a claim for aiding and abetting slave labor.<sup>155</sup> The plaintiffs appealed.

Under Supreme Court precedent, federal courts are available to hear tort claims based on violations of international law: “[F]ederal common law creates tort liability for violations of international legal norms, and the ATS in turn provides federal courts with jurisdiction to hear these hybrid common law—international law tort claims.”<sup>156</sup> The Ninth Circuit permitted this case to go forward against the corporate defendants (as opposed to states), in holding “the prohibition against slavery is universal” and does not only apply to nation-states.<sup>157</sup> But the defendants argued that the plaintiffs' claim sought an extraterritorial application of federal law barred by the Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum Co.*<sup>158</sup> This is potentially the strongest defense to ATS claims based on supply-side forced labor. In *Kiobel*, the Court held prudential concerns about judicial interference in foreign policy are particularly strong in ATS litigation and concluded that the presumption against extraterritoriality thus constrains courts exercising their power under the ATS.<sup>159</sup> But here, the claims were asserted against domestic corporations.

Rather than attempt to elucidate the Supreme Court's precedent on the proper test for extraterritorial restraint under the ATS, the

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of children who attempted to escape, and John Doe III knew that the guards forced failed escapees to drink urine.

*Id.* at 1017. The plaintiffs also raised claims under the Torture Victim Protection Act (TVPA) and state law negligence and unjust enrichment claims. *See Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057, 1063 (C.D. Cal. 2010), *rev'd*, 766 F.3d 1013 (9th Cir. 2014). The plaintiffs conceded the state law claims were foreclosed by *Doe I v. Wal-Mart Stores*. *Id.* at 1120–21 (citing 572 F.3d 677 (9th Cir. 2009)). The court dismissed the TVPA claims because (1) the Plaintiff failed to allege sufficient facts from which it could infer that the Defendants aided and abetted torture; (2) corporations could not be held liable under the TVPA (an issue that was in conflict in the courts); and (3) the complaint failed to allege facts from which it could be reasonably inferred that the Ivorian farmers acted under “color of law.” *Id.* at 1120.

154. *Doe I v. Nestle*, 766 F.3d at 1017.

155. *Id.* at 1018.

156. *Id.*

157. *Id.* at 1022.

158. 569 U.S. 108 (2013); *Doe I v. Nestle*, 766 F.3d at 1027.

159. *Kiobel*, 596 U.S. at 116, 124.

Ninth Circuit remanded the case to allow the plaintiffs to amend their complaint in light of *Kiobel*.<sup>160</sup> But the district court then dismissed the plaintiff's complaint, based on the two-step framework for the extraterritorial analysis of claims imposed by the Supreme Court in *RJR Nabisco, Inc. v. European Community*<sup>161</sup>:

*Morrison* and *Kiobel* reflect a two-step framework for analyzing extra-territoriality issues. At the first step, we ask whether the presumption against extraterritoriality has been rebutted—that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially. We must ask this question regardless of whether the statute in question regulates conduct, affords relief, or merely confers jurisdiction. If the statute is not extraterritorial, then at the second step we determine whether the case involves a domestic application of the statute, and we do this by looking to the statute's "focus." If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad; but if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory.<sup>162</sup>

Applying the "focus test" under the second step of the analysis, the district court found that the conduct relevant to the focus of the ATS—the child-slave labor in the chocolate industry—occurred in the Ivory Coast.<sup>163</sup> The court rejected the theory that corporate supervision of those foreign acts was sufficient to rebut the presumption against extraterritoriality.<sup>164</sup>

The plaintiffs appealed again to the Ninth Circuit. During the pendency of the appeal, a plurality of the U.S. Supreme Court held, in *Jesner v. Arab Bank, PLC*,<sup>165</sup> that the ATS does not impose liability on foreign corporations for human rights violations.<sup>166</sup> This decision

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160. *Doe I v. Nestle*, 766 F.3d at 1028–29. *But see* *Adhikari v. Daoud & Partners*, 95 F. Supp. 3d 1013, 1018 (S.D. Tex. 2015) (precluding human trafficking claim under ATS based on extraterritorial action).

161. 136 S. Ct. 2090 (2016).

162. *Nestle v. Nestle, S.A.*, No. CV 05-5133-SVW-MRW, 2017 WL 6059134, at \*2 (C.D. Cal. Mar. 2, 2017) (quoting *RJR Nabisco, Inc.*, 136 S. Ct. at 2101), *rev'd sub nom.*, *Doe v. Nestle, S.A.*, 906 F.3d 1120 (9th Cir. 2018).

163. *Id.* at \*8.

164. *Id.*

165. 138 S. Ct. 1386 (2018).

166. *Id.* at 1408 ("For these reasons, judicial deference requires that any imposition of corporate liability on foreign corporations for violations of

forecloses ATS liability for forced labor abuses against foreign corporations but not domestic entities that profit from forced labor in the supply chain.<sup>167</sup> The *Nestle* plaintiffs, in this case that was filed over thirteen years ago, had alleged several foreign corporations as defendants and discussed the domestic and foreign defendants as a single block.<sup>168</sup> The Court's decision in *Jesner* required that those claims be dismissed. Thus, the Ninth Circuit reversed and remanded to allow the plaintiffs to amend their pleadings to accommodate the change in the law.<sup>169</sup>

But the Ninth Circuit also addressed the district court's decision that the principal against extraterritorial application of the ATS precluded the plaintiffs' claims.<sup>170</sup> The court agreed that *RJR Nabisco* requires a two-step inquiry for ATS claims.<sup>171</sup> Under the second step, the court must look to the statute's focus to determine whether the case involves a domestic application of the statute.<sup>172</sup> The court disagreed with the defendants' argument that the analysis should focus on the location where the principal offense or the injury occurred, rather than the location of where any aiding or abetting took place.<sup>173</sup> The court held that it must decide whether there is any domestic conduct (such as aiding or abetting) relevant to the statute's focus that occurred in the United States, which would be a permissible domestic application.<sup>174</sup>

The Ninth Circuit reversed the district court and held the plaintiffs had alleged domestic conduct sufficient to state a claim within the ATS's focus.<sup>175</sup> The specific domestic conduct that the court found sufficient was that the defendants allegedly provided "personal spending money to maintain the farmers' and/or the cooperatives'

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international law must be determined in the first instance by the political branches of the Government.").

167. *Doe v. Nestle, S.A.*, 906 F.3d 1120, 1126–27 (9th Cir. 2018).

168. See generally Complaint, *Doe v. Nestle, S.A.*, No. 2:05-CV-05133 (C.D. Cal. July 14, 2005).

169. *Doe v. Nestle*, 906 F.3d at 1127.

170. *Id.* at 1126–27.

171. *Id.* at 1124–25.

172. *Id.* at 1125. The court first asked whether the ATS "gives a 'clear, affirmative indication that it applies extraterritorially.'" *Id.* (quoting *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2094 (2016)). In *Kiobel*, the Supreme Court answered that question, holding that the "presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption." *Id.* (quoting *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124 (2013)).

173. *Id.*

174. *Id.*

175. *Id.* at 1125–26.

loyalty as an exclusive supplier.”<sup>176</sup> The court inferred that the spending money was outside the ordinary business contract and was given with the purpose of maintaining ongoing relationships with the farms “so the defendants could continue receiving cocoa at a price that would not be obtainable without employing child slave labor.”<sup>177</sup> Providing personal spending money to maintain a relationship was more akin to “kickbacks” than ordinary business conduct, reasoned the court.<sup>178</sup> Additionally, the defendants “had employees from their United States headquarters regularly inspect operations in the Ivory Coast and report back to the United States offices, where these financing decisions . . . originated.”<sup>179</sup> In sum, “the allegations paint[ed] a picture of overseas slave labor that defendants perpetuated from headquarters in the United States.”<sup>180</sup> Thus, the Ninth Circuit is the sole federal court of appeals to permit an ATS claim by foreign employees against domestic corporations to survive a motion to dismiss based on an analysis that domestic funding is sufficient to state a claim regarding domestic action. The case will be remanded to district court (unless the defendants seek certiorari to the U.S. Supreme Court) with leave for the plaintiffs to file an amended complaint. This case will be closely watched by those seeking to litigate claims based on forced labor in the supply chain.

Other courts have not interpreted the ATS as broadly as the Ninth Circuit. In *Adhikari v. Daoud & Partners*,<sup>181</sup> the families of thirteen Nepali citizens alleged defendants Kellogg, Brown, & Root (“KBR”) and Daoud & Partners engaged in a scheme to traffic the plaintiffs from Nepal to Iraq, where one KBR subsidiary served as a contractor with the U.S. government to perform specific duties at U.S. military facilities.<sup>182</sup>

According to the plaintiffs, the defendants “‘established, engaged and/or contracted with a network of suppliers, agents, and/or partners in order to procure laborers from third world countries.’”<sup>183</sup> The deceased plaintiffs were recruited from Nepal, after being told they would be working in a luxury hotel in Jordan or in an U.S.

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176. *Id.* at 1126.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. 95 F. Supp. 3d 1013 (S.D. Tex. 2015).

182. *Id.* at 1016.

183. *Id.*

camp.<sup>184</sup> None of the men were led to believe their work would be in a dangerous area.<sup>185</sup> They were promised a salary of \$500 per month.<sup>186</sup> After they were recruited, the deceased plaintiffs were transferred to a Jordanian job brokerage company where they first learned they were being sent to work in Iraq.<sup>187</sup> They also learned they would be paid a fraction of what they were initially promised.<sup>188</sup> Although they wanted to return home to Nepal, the men were compelled to proceed to Iraq because of the debts their families had assumed to pay the brokers.<sup>189</sup> Daoud transported the victims to Iraq via automobile caravan, where they were captured by an Iraqi insurgent group.<sup>190</sup> The insurgent group posted internet pictures of the victims' capture, and those images were broadcast on Nepali television.<sup>191</sup> The deceased plaintiffs described being "captives in Jordan" and not knowing when they would die.<sup>192</sup> The insurgent group executed the men while videotaping the executions.<sup>193</sup> Their families saw the videos.<sup>194</sup> Their bodies were never found.<sup>195</sup>

The plaintiffs, families of the victims, asserted Racketeer Influenced and Corrupt Organizations Act (RICO), TVPRA, ATS, and negligence claims against the defendants.<sup>196</sup> The court dismissed the negligence claims as barred by the statute of limitations.<sup>197</sup> The court granted summary judgment in favor of both defendants on the RICO and ATS claims based on the presumption against extraterritoriality, and in favor of defendant Daoud on the TVPRA claim because it was never present in the United States, meaning it is not within the TVPRA's extraterritoriality jurisdiction provision.<sup>198</sup>

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184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* at 1016–17.

191. *Id.* at 1017.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *See Adhikari v. Daoud & Partners*, No. 09-cv-1237, 2013 WL 4511354, at \*1–3 (S.D. Tex. 2013).

197. *Id.* at \*3.

198. *Id.* at \*7–9; *see also Adhikari*, 95 F. Supp. 3d at 1022 (denying rehearing on ATS and TVPRA claims against KBR and reaffirming finding of preclusion based on extraterritoriality principles). The TVPRA portion of the case is discussed *infra* Section IV.B.

The United States Court of Appeals for the Fifth Circuit affirmed the grant of summary judgment in favor of the defendants on the ATS and TVPRA claims.<sup>199</sup> The court held the principle against extraterritoriality precluded the ATS claims, and affirmed the district court's denial of leave to amend the pleadings to allege domestic-based conduct.<sup>200</sup> The court held that, for the deceased plaintiffs,

the recruitment, transportation, and alleged detention . . . all occurred in Nepal, Jordan, and Iraq . . . . Thus, none of this overseas conduct relevant to their trafficking claim—even assuming . . . it can be imputed to KBR—could support the conclusion that Plaintiffs seek to apply the ATS domestically.<sup>201</sup>

The plaintiffs argued that the U.S. based conduct rebutting the presumption against extraterritoriality included the following: KBR's payment to Daoud, the contractor who hired the deceased plaintiffs and Plaintiff Gurung; and Houston-based employees' awareness of allegations of human trafficking at KBR's worksites.<sup>202</sup> In an application that differs starkly from the Ninth Circuit's decision in *Doe*, the Fifth Circuit held that the ATS's focus is the violation of international law—here all the conduct comprising the international law violations happened in a foreign country.<sup>203</sup> The plaintiffs did not connect the financial payments to the human trafficking or demonstrate that the U.S. based employees actually engaged in the trafficking.<sup>204</sup> The court found the allegation that U.S. employees may have known of allegations of human rights abuse insufficient to raise an issue of genuine fact that the employees were directly liable for violating international law.<sup>205</sup> Thus, *Adhikari* creates a schism with *Doe* for a case in which financial benefit domestically was not sufficient to provide the predicate domestic act to overcome the presumption against extraterritorial application for ATS claims.

Judge Graves dissented from the majority's decision on the ATS claims, opining that the majority misinterpreted the applicable

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199. *Adhikari v. Kellogg Brown & Root, Inc.*, 845 F.3d 184, 190 (5th Cir. 2017), *cert. denied*, 138 S. Ct. 134 (2017).

200. *Id.* at 199–200.

201. *Id.* at 195. The court also decided that KBR's conduct on Al Asad, a military base, did not constitute domestic conduct relevant to the ATS claims. *Id.* at 197.

202. *Id.*

203. *Id.*

204. *Id.* at 198.

205. *Id.*

relevant conduct under the “focus” test.<sup>206</sup> Judge Graves aptly noted the defendant was a U.S. corporation, which should have some pertinence in determining whether domestic conduct is at issue.<sup>207</sup> In the words of Judge Graves:

Given the proliferation of international agreements condemning human trafficking and forced labor, surely these foreign policy concerns are no less pertinent in the present day. Among several international accords concerning trafficking, the United States has signed and ratified a treaty that asks signatories to hold their citizens responsible for transnational trafficking. Human trafficking has been condemned as a modern-day form of slavery. The slave trader, like the pirate, is “*hostis humani generis*, an enemy of all mankind.” And just as a nation that harbored pirates provoked the concern of other nations in past centuries, so harboring ‘common enemies of all mankind’ provokes similar concerns today.

These foreign policy concerns are particularly heightened where, as here, the defendant’s conduct directly implicates the United States and its military. KBR was one of the largest U.S. military contractors operating in Iraq. While KBR was allegedly exploiting trafficked labor at Al Asad, the U.S. government and military were engaged in an aggressive anti-trafficking campaign. “Contractors provide crucial support for the U.S. military and are perceived internationally as an extension of the military.” Congress repeatedly expressed concern that failure to hold U.S. military contractors accountable for human trafficking overseas undermines U.S. foreign policy.

This case substantially implicates the interests of the United States, both domestically and abroad. While these considerable connections to the United States may not be dispositive to the extraterritoriality inquiry, they are of critical importance to analyzing the focus of the ATS. At a minimum, they counsel a hard look at any domestic conduct alleged on the part of the defendant. It simply contravenes the *focus* of the ATS to disregard these facts entirely.<sup>208</sup>

Judge Graves essentially makes the argument that a domestic company can engage in conduct abroad that should give rise to extraterritorial application of the ATS. The Supreme Court denied certiorari on October 2, 2017.<sup>209</sup>

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206. *Id.* at 207–08.

207. *Id.* at 209.

208. *Id.* at 210–11.

209. *Adhikari v. Kellogg Brown & Root*, 138 S. Ct. 134 (2017).

Similarly, in *Ratha v. Phatthana Seafood Co.*,<sup>210</sup> the plaintiffs, Cambodian seafood factory workers, asserted TVPRA and ATS claims against Thai seafood suppliers Phatthana Seafood Co. and S.S. Frozen Food Co.; United States seafood distributor Rubicon Resources LLC, which allegedly distributed seafood as part of a single enterprise for Phatthana; and Wales & Co. Universe Ltd., a Thai company registered to do business in California.<sup>211</sup> The plaintiffs alleged they were deceived into forced labor and unsanitary working conditions through fraudulent promises of good jobs and forced into servitude when Thai factory managers confiscated their passports.<sup>212</sup> The defendants filed a motion to dismiss, arguing the TVPRA's extraterritorial jurisdiction does not extend to these defendants and is limited to criminal prosecutions.<sup>213</sup> The defendants also argued the court lacked jurisdiction over the ATS claims, and that the plaintiffs failed to state a claim under the TVPRA or ATS.<sup>214</sup>

The district court denied the motion to dismiss regarding the TVPRA claims and, not surprisingly, granted it as to the ATS claims.<sup>215</sup> The court held the presumption against extraterritoriality limited the reach of ATS jurisdiction, following *Kiobel v. Royal Dutch Petroleum Co.*<sup>216</sup> Despite an alleged degree of corporate presence for the two domestic defendants, all of the alleged activities forming the basis of the ATS claims occurred in Cambodia and Thailand.<sup>217</sup> Thus, the court held it did not have jurisdiction under the ATS.<sup>218</sup> The court explained,

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210. No. CV 16-4271-JFW (ASX), 2017 WL 8292922 (C.D. Cal. Dec. 21, 2017).

211. *Id.* at \*1–2.

212. Complaint at 1, *Ratha v. Phatthana Seafood Co.*, No. 2:16-cv-04271 (C.D. Cal. June 15, 2016). The workers allege they were paid less than promised and had fees deducted for housing, fees and other charges. *Id.* They also allege they worked long hours and were packed into unsanitary and crowded housing. When the villagers tried to return home, they could not get their passports back. Some workers could not make enough money after working six days a week to afford food and were forced to eat seafood that had washed up on the beach. Those who returned home faced more extreme poverty for losing the land they had put up as collateral. *Id.* at 1–2.

213. *Ratha v. Phatthana Seafood Co.*, No. CV 16-4271-JFW (ASx), 2016 WL 11020222, at \*1 (C.D. Cal. Nov. 9, 2016).

214. *Id.* at \*4.

215. *Id.* at \*8. For a discussion on the resolution of the TVPRA claims, see *infra* Section IV.A.

216. See *Ratha*, 2016 WL 11020222, at \*7–8 (citing *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013)).

217. *Id.* at \*6.

218. *Id.* at \*8.

In this case, the alleged tort is human trafficking which occurred in Cambodia and Thailand. Even assuming that all of the Defendants have some corporate presence in the United States (either directly or through the joint venture and agency relationship between the Defendants), the activities at issue in this action—allegedly recruiting and then entrapping third country nationals as cheap labor for Thai seafood factories—unquestionably occurred on foreign soil. This is the type of case—where all the allegedly tortious conduct took place on foreign soil and the only connection to the United States is a defendant’s “mere corporate presence”—which the Supreme Court held in *Kiobel* is insufficient to rebut the presumption against extraterritoriality.<sup>219</sup>

In contrast to the ATS claims, the plaintiffs have generally fared better in overcoming jurisdictional obstacles by stating claims under the TVPRA.

#### *B. Trafficking Victims Protection Reauthorization Act Claims*

More recently, employee-victims are asserting foreign forced labor claims under the TVPRA in conjunction with Alien Tort Statute (ATS) claims. The TVPRA is a criminal statute that also carries a private right of action for a civil remedy. The TVPRA, in contrast to the ATS, has a known purpose coupled with a broad jurisdictional grant. The TVPRA’s objectives are to combat the growing issue of human trafficking in the commercial sex industry, modern slavery, and forced labor.<sup>220</sup> The TVPRA provides criminal penalties for:

Whoever knowingly benefits, financially or by receiving anything of value, from participation in a venture which has engaged in the providing or obtaining of labor or services by any of the means described in subsection (a) [enumerating acts of forced labor], knowing or in reckless disregard of the fact that the venture has engaged in the providing or obtaining of labor or services by any of such means . . . .<sup>221</sup>

The TVPRA criminalizes other conduct, such as child sex trafficking,<sup>222</sup> trafficking or engaging in forced labor, slavery, involuntary servitude or peonage,<sup>223</sup> and possession or destruction of passports or government documents in furtherance of those acts.<sup>224</sup> The key provision that would concern most domestic companies that

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219. *Id.*

220. See 22 U.S.C. § 7101(a) (2012) (outlining the purpose of the Trafficking Victims Protection Act).

221. 18 U.S.C. § 1589(b).

222. § 1591.

223. § 1590.

224. § 1592(a).

have known forced labor or child labor in the supply chain should be § 1589. That section, set forth above, makes it a criminal act to knowingly benefit financially from participation in a venture engaged in forced labor, if that participation was in knowing or reckless disregard of the fact that the venture had engaged in the unlawful act.<sup>225</sup> The TVPRA provides victims of these criminal acts a civil remedy against a perpetrator or “whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of [the TVPRA].”<sup>226</sup>

In 2008, Congress amended the TVPRA to give it an extraterritorial application. Section 1596, titled “Additional jurisdiction in certain trafficking offenses,” states:

(a) IN GENERAL.—In addition to any domestic or extra-territorial jurisdiction otherwise provided by law, the courts of the United States have extra-territorial jurisdiction over any offense (or any attempt or conspiracy to commit an offense) under section 1581, 1583, 1584, 1589, 1590, or 1591 if—

(1) an alleged offender is a national of the United States or an alien lawfully admitted for permanent residence (as those terms are defined in section 101 of the Immigration and Nationality Act (8 U.S.C. 1101)); or

(2) an alleged offender is present in the United States, irrespective of the nationality of the alleged offender.<sup>227</sup>

One of the enumerated predicates for jurisdiction under § 1596 is § 1589, which, set forth above, makes actionable mere benefit, instead of active procurement of forced labor or child labor.<sup>228</sup>

This express grant of extraterritorial application means that, at least facially, the TVPRA should not face the same extraterritorial obstacles in holding domestic entities liable for profiting from reckless disregard of forced labor practices in a foreign country as did the ATS. So far, courts have permitted a TVPRA claim based on allegations of foreign forced labor to move forward whereas the ATS claim could not.<sup>229</sup>

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225. § 1589(b).

226. § 1595(a).

227. § 1596.

228. § 1589(b).

229. *See, e.g., Adhikari v. Kellogg Brown & Root, Inc.*, 845 F.3d 184, 204 (5th Cir. 2017) (“Prior to § 1596, a private party could not maintain a civil cause of action under the TVPRA for forced labor or human trafficking that occurred overseas. . . . After

Take, for example, *Ratha v. Phatthana Seafood Co.*<sup>230</sup> Although the district court dismissed the ATS claims based on the presumption against extraterritorial reach, it denied the motion to dismiss the TVPRA claims.<sup>231</sup> The defendants argued (1) the TVPRA's extraterritorial jurisdictional grant is limited to criminal actions; (2) the jurisdictional grant applies only to individuals, not corporations;<sup>232</sup> and (3) the presumption against extraterritoriality deprived the court of subject-matter jurisdiction because all the alleged violations occurred off domestic soil (Cambodia and Thailand).<sup>233</sup>

The district court rejected each argument as to the TVPRA claims. The court noted that Congress added the jurisdictional expansion to the 2008 reauthorization only after two courts considering TVPRA suits had held the provisions were not intended to be extraterritorial. According to the court, "Congress has clearly indicated that it intends the TVPRA . . . to be a unified statutory scheme of interlocking provisions that provides extraterritorial jurisdiction over specific predicate offenses and further expressly provides for restitution and a civil remedy whenever a court in the United States has that jurisdiction."<sup>234</sup> In rejecting the defendants' argument that the extraterritorial grant applies only to criminal conduct, the court noted that argument has been "overwhelmingly rejected by the courts."<sup>235</sup>

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§ 1596's enactment, a TVPRA defendant in a civil suit could no longer rely on a previously available defense: the presumption against extraterritoriality."), *cert. denied*, 138 S. Ct. 134 (2017). The Fifth Circuit held that the *Adhikari* plaintiffs could not state a claim under the TVPRA because the events occurred prior to the 2008 extraterritorial grant added to the TVPRA and because it did not have retroactive effect. *Id.* at 204–06.

230. See *supra* notes 210–20 and accompanying text (providing the facts of *Ratha*).

231. *Ratha v. Phatthana Seafood Co.*, No. CV 16-4271-JFW (ASx), 2016 WL 11020222, at \*8 (C.D. Cal. Nov. 9, 2016).

232. In *Mohamad v. Palestinian Authority*, the Supreme Court held that the term "individual," as used in the Torture Victim Protection Act (not to be confused with the Trafficking Victim Protection Act), only imposed liability on natural persons and not on corporations. 556 U.S. 449, 451–52 (2012). The district court in *Doe v. Nestle, S.A.* dismissed the TVPA claims, in part, on this basis. 748 F. Supp. 2d 1057, 1116 (C.D. Cal. 2010), *rev'd*, 776 F.3d 1013 (9th Cir. 2013).

233. See *Ratha*, 2016 WL 11020222, at \*5, \*6 (addressing the defendants' three arguments).

234. *Id.* at \*5.

235. *Id.* at \*6 (citing *Aguilera v. Aegis Commc'ns Grp.*, 72 F. Supp. 3d 975, 979 (W.D. Mo. 2014); *Doe v. Howard*, No. 1:11-cv-1105, 2012 WL 383487, at \*2 (E.D. Va. Sept 4, 2012) ("entering default judgment for the plaintiff and allowing remedy pursuant to Section 1595 for trafficking in Yemen and Japan"); *Adhikari v. Daoud & Partners*, 697 F. Supp. 2d 674, 683 (S.D. Tex. 2009) (applying civil remedies)). *Doe v. Howard*, No. 1:11-cv-1105, 2012 WL 383487, at \*2 (E.D. Va. Sept 4, 2012); *Adhikari v. Daoud & Partners*, 697 F. Supp. 2d 674, 683 (S.D. Tex. 2009)).

The defendants' stronger argument was that the TVPRA's extraterritorial jurisdiction grant applies only to individuals. The court recognized § 1596(a)(1) is limited to individuals because it incorporates definitions of a U.S. national and an alien lawfully admitted.<sup>236</sup> But the court held § 1596(a)(2)'s use of the term "offender" (present in the United States) applied to individuals and corporations.<sup>237</sup> The court reasoned the use of the term "person" in the remainder of § 1596 confirms that corporations are covered by the statute.<sup>238</sup> Note, the emphasis on "present" in the United States could prove problematic for enforcement against non-domestic entities, as could the Supreme Court's recent activity limiting the exercise of personal jurisdiction over foreign companies.<sup>239</sup>

Finally, the district court rejected the argument that it lacked subject-matter jurisdiction because all the events occurred in other countries. Section 1596 requires only that an offender be "present" in the United States.<sup>240</sup> This applies to the Delaware corporation and was not disputed as to a defendant holding a California office. Additionally, the plaintiffs argued these two entities benefitted financially from the forced labor *in the United States*; thus, the court held that extraterritorial jurisdiction was not implicated.<sup>241</sup>

However, the defendants argued that each defendant must be present in the United States for the court to have subject-matter jurisdiction, and

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236. *Id.*

237. *Id.* at \*6–7.

238. *Id.* at \*7.

239. *See Daimler AG v. Bauman*, 571 U.S. 117, 122 (2014) (holding the due process clause of the Fourteenth Amendment prohibits the exercise of personal jurisdiction over a foreign corporation from conduct that occurred abroad unless "the corporation's affiliations with the State in which suit is brought are so constant and pervasive 'as to render [it] essentially at home in the forum State'" (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011))); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011) (limiting state exercise of personal jurisdiction over foreign corporations when the accident occurred overseas despite multiple contacts with the forum state); *see also* Gwynne L. Skinner, *Expanding General Personal Jurisdiction over Transnational Corporations for Federal Causes of Action*, 121 PENN ST. L. REV. 617, 656 (2017) ("If a victim, including one who is trafficked in the United States, brings suit against a foreign corporation under the TVPA [Trafficking Victims Protection Act], including against a [transnational corporation] doing significant business in the United States, the victim may well be out of luck even though Congress intended such victims to be able to obtain a remedy."). The jurisdictional problems that TVPRA claims are likely to face are the subject of a second work-in-progress by this author.

240. *Ratha*, 2016 WL 11020222, at \*6.

241. *Id.*

because two defendants, Phatthana and S.S. Frozen Foods, were not present in the United States, subject-matter jurisdiction did not exist.<sup>242</sup> The court held that even if all defendants must be present in the United States for subject-matter jurisdiction to exist, the non-domestic entities were present, based on the allegations in the complaint, through their joint enterprise with the domestic defendants and because the domestic defendants were agents of the foreign defendants.<sup>243</sup>

*Ratha* is significant to domestic entities because, unlike most ATS claims based on forced labor in the supply chain, the victim-employee's TVPRA civil claims survived the motions to dismiss. But on December 21, 2017, the district court granted summary judgment in favor of the defendants.<sup>244</sup> The case is presently on appeal to the Ninth Circuit.<sup>245</sup>

In granting judgment in favor of the defendants with a domestic presence, Rubicon and Wales, the court took an imposingly narrow view of the civil remedy provision, rejecting the argument that receipt of financial benefit is sufficient to satisfy the requirement that the beneficiary "participat[e] in a venture."<sup>246</sup>

According to the court, the undisputed facts demonstrated that:

Rubicon and Wales never had a business relationship with SSF. Although Rubicon had a business relationship with Phatthana, it was limited to ordering seafood products from Phatthana's Songkhla factory. Wales's involvement was limited to inspecting finished product ordered by Rubicon to ensure that product met Rubicon's customers' packaging specifications. With respect to working conditions and worker safety at all of the factories that Rubicon used as a source for its products, Rubicon relied on industry and government audits and certifications as well as customer visits, to ensure that the factories, including Phatthana's Songkhla factory, operated in compliance with all applicable standards, including those pertaining to worker safety and welfare as well as compliance with labor laws. Wales relied on Rubicon to ensure that those factories did not exploit workers.<sup>247</sup>

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242. *Id.* at \*7.

243. *Id.*

244. *Ratha v. Phatthana Seafood Co.*, No. CV 16-4271-JFW (ASx), 2017 WL 8293174, at \*1, \*6 (C.D. Cal. Dec. 21, 2017).

245. *See Ratha v. Phatthana Seafood Co.*, No. 18-55041 (9th Cir. Jan. 10, 2018).

246. *Ratha*, 2017 WL 8293174, at \*3. To reiterate, Section 1595(a) provides, "whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of [the TVPRA]." *Id.* This piece of the court's decision is hotly contested on appeal. *See infra* notes 258–68 and accompanying text.

247. *Id.* at \*2.

The court rejected the argument that the TVPRA criminalizes, and thus provides a civil remedy for, merely “passive” beneficiaries. Instead, the court was seeking some evidence that the domestic entities “‘took some action to operate or manage the venture,’ such as directing or participating in Phatthana’s labor recruitment, Phatthana’s employment practices, or the working conditions at Phatthana’s Songkhla factory.”<sup>248</sup> Finding no facts demonstrative of this level of involvement, the court held the defendants did not knowingly participate in human trafficking.<sup>249</sup>

The court also held that there was no evidence that the domestic defendants benefitted from the supplier’s human trafficking. It was “undisputed that [defendant] Rubicon never sold any product processed at Phatthana’s Songkhla factory during the time that any of the [p]laintiffs were employed there.”<sup>250</sup> The plaintiffs argued that Rubicon benefitted from the human trafficking because the factory at issue was a “primary source of supply”; but the court found that the defendant had been selling seafood long before the alleged abuses and “during the relevant time period was selling approximately thirty-five million pounds of seafood per year.” Accordingly, the court held that “the fourteen containers of seafood purchased and ultimately returned during the same time period hardly qualifies as a ‘primary source of supply.’”<sup>251</sup>

Finally, the plaintiffs argued that Rubicon and Wales knew or should have known that the supplier engaged in forced labor based on general reports about human trafficking in Thailand and reports and letters by human rights advocacy groups specifically criticizing the working conditions at the supplier factory.<sup>252</sup> But the court held that “Rubicon’s and Wales’s knowledge of forced labor—at a factory that they did not own, operate, or have any control over—cannot be based solely on conflicting and sometime unsubstantiated general reports.”<sup>253</sup> The court found no evidence that the defendants directed or participated in the offending supplier’s labor recruitment or employment practices, or that they were involved in establishing

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248. *Id.* at \*4 (quoting *Bistline v. Jeffs*, No. 2:16-CV-788 TS, 2017 WL 108039, at \*11 (D. Utah Jan. 11, 2017), *overruled in pertinent part sub nom.*, *Bistline v. Parker*, 918 F.3d 849 (10th Cir. 2019)).

249. *Id.* at \*5.

250. *Id.* at \*6.

251. *Id.*

252. *Id.* at \*5.

253. *Id.*

the working conditions at the factory.<sup>254</sup> Instead, defendant Rubicon relied on “industry and government audits and certifications” to ensure the factory met industry standards relating to worker safety and welfare.<sup>255</sup> Rubicon also returned the product after allegations of worker exploitation were made public.<sup>256</sup> Additionally, the court noted that Rubicon and Wales “actively sought to source product from companies that did not exploit their workers.”<sup>257</sup>

As with the employee-based negligence cases, the court’s order granting summary judgment in favor of defendants highlights that less control results in less of a legal duty to workers, which seems to directly contradict the purpose of the TVPRA.<sup>258</sup> The district court’s narrow interpretation of “participation in a venture” (the key phrase which gives rise to the civil remedy provision) is hotly contested on appeal. There are significant reasons it should be overturned. First, the case on which the district court relied in requiring “more than receipt of a passive benefit,”<sup>259</sup> *Bistline v. Jeffs*,<sup>260</sup> was subsequently overturned on appeal.<sup>261</sup> The U.S. Court of Appeals for the Tenth Circuit rejected the district’s court’s interpretation requiring “more than associating with or assisting an enterprise.”<sup>262</sup> Instead, the Tenth Circuit held that “complaisance” in response to exhibitions of TVPRA violations is sufficient to meet the “participate in a venture” requirement.<sup>263</sup>

Another reason the district court’s heightened activity requirement for “participate in a venture” is likely to be overturned by the Ninth Circuit is because the First Circuit has held that complaisance in response to several exhibitions of TVPRA violations is sufficient to satisfy the “participate in a venture” element. In

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254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. See Appellants’ Opening Brief at 2627, *Ratha v. Phatthana Seafood Co.*, No. 18-55041 (9th Cir. May 25, 2018) (discussing congressional intent behind the 2008 revisions to the TVPRA).

259. *Ratha*, 2017 WL 8293174, at \*4 (quoting *Bistline v. Jeffs*, No. 2:16-CV-788 TS, 2017 WL 108039, at \*11 (D. Utah Jan. 11, 2017), *overruled in pertinent part sub nom.*, *Bistline v. Parker*, 918 F.3d 849 (10th Cir. 2019)).

260. No. 2:16-CV-788 TS, 2017 WL 108039 (D. Utah Jan. 11, 2017), *overruled in pertinent part sub nom.*, *Bistline v. Parker*, 918 F.3d 849 (10th Cir. 2019).

261. See *Parker*, 918 F.3d at 873–76.

262. *Jeffs*, 2017 WL 108039, at \*10; see also *Parker*, 918 F.3d at 873–76.

263. *Parker*, 918 F.3d at 873–76. The Tenth Circuit relied heavily on *Ricchio v. McLean*, 855 F.3d 553, 557 (1st Cir. 2017), in interpreting “complaisance in response” to exhibitions of predicate violations as the requisite test for participation in a venture.

*Ricchio v. McLean*,<sup>264</sup> retired Supreme Court Justice Souter, sitting by designation, held that a hotel owner's exchange of high-fives and speaking of "getting this thing going again" with a male customer who repeatedly and visibly raped, starved and drugged the victim demonstrated "complaisance" in response to the violent and illegal acts. This, according to the First Circuit, was sufficient to allege "participation in a venture" under § 1595(a).<sup>265</sup> The defendants allegedly "benefitted" from this participation by receipt of the hotel payments.<sup>266</sup> Thus, leading precedent establishes, for now, that the *Ratha* district court's requirement of active conduct in the abusive labor practices or recruitment may have been unduly stringent.

Another looming issue for those who would rely on the TVPRA's extraterritorial grant to police domestic entities' financial benefit from reckless disregard of forced labor in the supply chain is the Supreme Court's nuanced limits on extraterritorial application of domestic statutes to foreign activity, even, whereas here, the Congressional intent to reach that activity is clear. For example, in *RJR Nabisco, Inc. v. European Community*—a case arising out of allegations that RJR Nabisco violated RICO by participating in a global money-laundering scheme with various organized crime groups—the Court held that even though some of the RICO predicate offenses at issue in the case rebutted the presumption against extraterritorial application, the private right of action did not.<sup>267</sup> The Court noted, "providing a private civil remedy for foreign conduct creates a potential for international friction beyond that presented by merely applying U.S. substantive law to that foreign conduct."<sup>268</sup> It is possible that following *Nabisco*, challenges to the TVPRA's civil remedy provision could be construed to not have extraterritorial application because the extraterritorial jurisdictional grant, § 1596, does not specifically reference the civil remedy provision, § 1595. That would be a tortured interpretation of the 2008 amendments to the TVPRA as a whole, and to the specific extraterritorial grant outlined in § 1596.

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264. 855 F.3d 553 (1st Cir. 2017).

265. *Id.* at 557 (Souter, J., sitting by designation).

266. *Id.* ("It is likewise inferable that the Patels understood that in receiving money as rent for the quarters where McLean was mistreating Ricchio, they were associating with him in an effort to force Ricchio to serve their business objective.")

267. 136 S. Ct. 2090, 2106 (2016).

268. *Id.*

V. HOW ADOPTING THE MODEL CONTRACT CLAUSES TO IMPLEMENT HUMAN RIGHTS PROTECTIONS IN SUPPLY CONTRACTS CAN REDUCE THE THREAT OF LITIGATION

One thing the foregoing discussion of domestic litigation involving allegations in the supply chain demonstrates is that litigation efforts, whether consumer or employee, are gaining momentum. Consumer cases are developing through consumer protection statutes and an evolving understanding of what, if anything, about a product's development is a material fact that must be disclosed.<sup>269</sup> And employee-based claims are continuing to develop under both the TVPRA, with its broad jurisdictional grant,<sup>270</sup> and the ATS.<sup>271</sup> One employee-based ATS claim still ongoing in California has been in litigation since 2005, which is a long time to be facing protracted litigation.<sup>272</sup> But these lawsuits do more than seek money damages; they result in headlines and increased consumer awareness, which later becomes publicized in the marketplace. Studies have shown that the number of consumers who are willing to pay more for sustainable brands is on the rise.<sup>273</sup> That is where the MCCs to implement human rights protections in supply contracts come in. In 2018, Professor David Snyder and Susan Maslow published the proposed MCCs developed by the Working Group.<sup>274</sup> The language and intent of those MCCs are set forth in that work.

The cases discussed in this Article, however, laid the foundation for a specific part of those MCCs: the disclaimers. The Working Group

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269. See *supra* Part III (discussing *Nat'l Consumers League*, the chocolate cases, and the fishermen cases).

270. See, e.g., *Ratha v. Phatthana Seafood Co.*, No. CV 16-4271-JFW (ASx), 2016 WL 11020222, at \*6 (C.D. Cal. Nov. 9, 2016).

271. *Doe v. Nestle, S.A.*, 906 F.3d 1120, 1126–27 (9th Cir. 2018).

272. *Id.*; see also Complaint, *Doe v. Nestle, S.A.*, No. 2:05-CV-05133 (C.D. Cal. July 14, 2005).

273. See, e.g., CONSUMER REPORTS® NAT'L RESEARCH CTR., FOOD LABELS SURVEY 2 (2016), [http://greenerchoices.org/wp-content/uploads/2016/08/2016\\_CRFoodLabelsSurvey.pdf](http://greenerchoices.org/wp-content/uploads/2016/08/2016_CRFoodLabelsSurvey.pdf) (“Most consumers (79%) are willing to pay more per pound for fruits and vegetables produced by workers who earned a living wage and were treated fairly.”); NIELSEN, THE SUSTAINABILITY IMPERATIVE: NEW INSIGHTS ON CONSUMER EXPECTATIONS 2 (2015), <https://www.nielsen.com/content/dam/nielsen-global/dk/docs/global-sustainability-report-oct-2015.pdf> (last visited June 1, 2019) (“Sixty-six percent of consumers say they are willing to pay more for sustainable brands—up from 55% in 2014 and 50% in 2013.”); 2017 Cone Communications CSR Study, CONE <http://www.conecomm.com/research-blog/2017-csr-study> (last visited June 1, 2019) (finding that “87% [of consumers] will purchase a product because a company advocated for an issue they cared about and 76% will refuse to purchase a company's products or services upon learning it supported an issue contrary to their beliefs”).

274. *Model Contract Clauses*, *supra* note 10, at 1093–94.

sought to research case law both to determine how powerful the threat of litigation might be against domestic entities (it turns out it is significant), but also, to determine if the cases suggested any theories of liability that should be considered in the contract clause drafting. The goal of the Working Group, in part, was to encourage domestic corporate buyers to adopt the proposed contractual language. In that spirit, the Working Group was careful, at this stage, to use language that would disclaim purchaser control over supplier operations or responsibility for worker safety, otherwise the question of a duty on behalf of a domestic retailer may be fairly in question. This was the theory the courts rejected, based in part on the contractual language, in the employee-negligence cases.<sup>275</sup> Monitoring, inspecting, and requiring a supplier to comply should be a purchaser right, not a duty, consistent with the cases finding no contractual liability on behalf of a domestic purchaser, such as *Rahaman v. J.C. Penney* and *Doe I v. Wal-Mart Stores*.<sup>276</sup> Of course, what a retailer chooses to publish about these contractual rights to the public, as in *National Consumers League*, is a decision for corporate entities and not dictated by this Working Group.

The disclaimers proposed by the Working Group are:

- 5.7 Disclaimer Clauses. Notwithstanding anything contained herein:
- a. Buyer does not assume a duty to monitor Supplier or its Representatives, including, without limitation, for compliance with laws or standards regarding working conditions, pay, hours, discrimination, forced labor, child labor, or the like;
  - b. Buyer does not assume a duty to monitor or inspect the safety of any workplace of Supplier or its Representatives nor to monitor any labor practices of Supplier or its Representatives;
  - c. Buyer does not have the authority and disclaims any obligation to control (i) the manner and method of work done by Supplier or its Representatives, (ii) implementation of safety measures by Supplier or its Representatives, or (iii) employment or engagement of employees and contractors or subcontractors by Supplier or its Representatives;
  - d. There are no third-party beneficiaries to this Agreement; and

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275. See *supra* Part II.

276. See *Rahaman v. J.C. Penney Corp.*, No. N15C-07-174 MMJ, 2016 WL 2616375, at \*10 (Del. Super. Ct. May 4, 2016); *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 685 (9th Cir. 2009); see also *supra* Part II (discussing the rejection of both state-law negligence and unjust enrichment claims against employees based on lack of contractual control over the workplace).

e. Buyer assumes no duty to disclose the results of any audit, questionnaire, or information gained pursuant to this Agreement other than as required by applicable law.<sup>277</sup>

The disclaimers were drafted with the allegations of duty in *Rahaman* and *Doe I v. Wal-Mart Stores, Inc.* in mind, again with an eye towards protecting those business entities who would venture to adopt the MCCs from any interpretation that the agreement enhances control over their foreign suppliers or that might be used as a basis for a contractual duty to monitor foreign suppliers. Therefore, the MCCs specifically disclaim a duty to monitor the Supplier for compliance with the law or standards for working conditions, forced labor, or child labor, although the contract may give the Supplier the *right* to do so.<sup>278</sup> The disclaimers also disclaim a duty to monitor or inspect the safety of a Supplier workplace, and the Supplier labor practices.<sup>279</sup>

Likewise, the clauses disclaim any obligation to control the manner and method of the Supplier's work, implementation of safety measures or employment, and any duty to disclose the results of any information gained pursuant to certain *rights* of the Buyer under these MCCs.<sup>280</sup> Finally, the disclaimers explicitly reject the idea that the employees of a Contracting Supplier are third-party beneficiaries of the representations and warranties made in the MCCs.<sup>281</sup> Additionally, it appears that the level of control over the downside supplier may also be of factual importance in TVPRA civil liability claims.<sup>282</sup>

Some critics will argue that the disclaimers go too far to insulate U.S. corporations from knowingly engaging in supply-agreements that involved forced labor or child labor in the supply chain.<sup>283</sup> That

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277. *Model Contract Clauses*, *supra* note 10, at 1105 (footnotes omitted). The Working Group noted that some of these proposed disclaimers conflict with the requirements of the FAR. *See id.* at 1105 n.46–47. Additionally, the Working Group commented that 5.7(c) may conflict with other proposed MCCs and cautioned counsel to consider which clause would be more important to include in the contract. *See id.* at 1105 n.48. Finally, the Working Group reflected that 5.7(e) “emphasizes that Buyer is assuming no contractual duties to disclose although Buyer may have duties to disclose under other standards (legal or non-legal).” *Id.* at 1105 n.49.

278. *Id.*

279. *Id.*

280. *Id.*

281. *See id.*

282. *See* *Ratha v. Phatthana Seafood Co.*, No. CV 16-4271-JFW (ASx), 2017 WL 8293174, at \*4–5 (C.D. Cal. Dec. 21, 2017) (entering judgment in favor of defendants when there was no evidence of knowing participation or control over the entity allegedly engaged in the forced labor abuses).

283. *See, e.g.*, Sarah Dadush, *supra* note 6, at 1521.

argument has some merit in that the goal in drafting the disclaimers, at least from my perspective, was to incentivize domestic entities to adopt the MCCs and *not* to increase exposure to domestic liability. Nonetheless, the MCCs can only go so far in reducing the likelihood that a contractual duty to downside Supplier employees would arise out of increased monitoring or rights to terminate bad actors. The TVPRA, with its extraterritorial reach, still looms large as a check on domestic entities who knowingly benefit from engaging in a venture using forced labor, as does the ATS and consumer class-action fraudulent disclosure claims. The disclaimers cannot and should not insulate a company who knowingly benefits from TVPRA predicate acts from civil liability. To the contrary, in *Ratha's* summary judgment grant, the court looked instead to the efforts the defendant was taking to inspect and monitor for forced labor in holding that it had not engaged in a venture. In light of the traction these claims are gaining, both in courts and in the media, domestic entities would be well-advised to do more to detect and prevent forced labor in the supply chain even while contractually disclaiming a duty to remote supplier employees.

Moreover, there may be reasons why a business would not want to adopt all or any of the Model Contract Disclaimers proposed by the Working Group. One significant reason is that for entities who are governmental contractors, the disclaimers would likely run afoul of the Federal Acquisitions Regulation (“FAR”) for many contracts.<sup>284</sup> FAR 52.222-50(h), Combating Trafficking in Persons, requires any contractor providing supplies acquired outside the United States (other than commercially available off the shelf items) or services performed outside the United States with an estimated value to exceed \$500,000 to maintain a compliance plan that includes “[p]rocedures to prevent agents and subcontractors *at any tier and at any dollar value* from engaging in trafficking in persons . . . and *to monitor, detect, and terminate any agents, subcontracts, or subcontractor employees* that have engaged in such activities.”<sup>285</sup> This means that for government contracts meeting the \$500,000 non-domestic supply requirement, the FAR necessitates a level of control inconsistent with the disclaimers discussed in this Part. This conflict is indicated in the footnotes to the proposed disclaimers.<sup>286</sup>

Moreover, a business may determine that, based on its consumer base and business needs, it seeks more control over its suppliers.

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284. See *Model Contract Clauses*, *supra* note 10, at 1105 nn.46–47.

285. FAR 52.222-50(h)(3)(v) (2016) (emphasis added).

286. *Model Contract Clauses*, *supra* note 10, at 1105 nn.46–47.

Then, the disclaimers may not serve its business purpose. For instance, a business may want to retain the right to terminate employees of Suppliers who engage in abusive labor practices consistent with Model Clause 5.3(c). If so, that company might not want to include Model Contract Disclaimer 5.7(c). Any business, of course, would need to work with its own lawyer to consider its business needs, its own inspection and monitoring practices, the likelihood of forced labor or child labor in its supply chain and the risk of litigation. This may involve adopting some portions of the MCCs and eliminating others. What the Working Group has done is provide a foundational starting point for that process.

#### CONCLUSION

Litigation advanced against domestic retailers of goods produced using supply-side forced labor has not proven successful in the court system yet, but avenues for legal claims, such as the TVPRA or false advertising claims seem to be gaining momentum. The claims raised thus far rely on negligence, false advertising, ATS claims, and violations of the TVPRA, which has an explicit extraterritorial jurisdictional grant. The Ninth Circuit permitted the latest complaint alleging ATS violations by child-slave-labor plaintiffs to survive, remanding it to the district court with permission to amend the complaint. However, the Supreme Court's presumption against extraterritoriality may pose a barrier to those claims. Nonetheless, these lawsuits do more than seek money damages; they result in headlines and increased consumer awareness, which later becomes publicized in the marketplace. Studies have shown many consumers shop with a preference for goods not sourced from forced labor or child labor.<sup>287</sup> Domestic businesses that buy from international suppliers should implement contractual warranties and remedies to help guard against forced labor and child labor in the supply chain. The Working Group has proposed a set of MCCs designed to aid domestic companies in writing these contracts. Part of those clauses include strong disclaimers, drafted with the intent of shielding the domestic entity adopting the MCCs from increased liability based on the contract. In light of the changing expectations of consumers and evolving theories of liability (both contractual and statutory), domestic buyers are well-advised to consider taking significant action, including adoption of the MCCs, to detect and remediate sources of abusive labor practices in their supply chains.

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287. See, e.g., *supra* note 273.