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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ELAINE MCCOY,
Plaintiff,
v.
NESTLE USA, INC,
Defendant.

Case No. [15-cv-04451-JCS](#)

ORDER GRANTING MOTION TO DISMISS

Re: Dkt. No. 16

I. INTRODUCTION

“The use of child slave labor in the Ivory Coast is a humanitarian tragedy.” *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1016 (9th Cir. 2014). The fact that major international corporations source ingredients for their products from supply chains involving slavery and the worst forms of child labor raises significant ethical questions. The issue before this Court, however, is whether California law requires corporations to inform customers of that fact on their product packaging and point of sale advertising. Every court to consider the issue has held that it does not. This Court agrees.

This is a putative class action in which Plaintiff Elaine McCoy claims that Defendant Nestlé USA, Inc. (“Nestlé”) violated California’s Unfair Competition Law (“UCL,” Cal. Bus. & Prof. Code §§ 17200–17210), Consumers Legal Remedies Act (“CLRA,” Cal. Civ. Code §§ 1750–1784), and False Advertising Law (“FAL,” Cal. Bus. & Prof. Code §§ 17500–17509) by failing to disclose on the packaging of Nestlé’s chocolate products that some of the cocoa used therein originated at farms in Côte d’Ivoire (also known as the Ivory Coast) that use slave labor and the worst forms of child labor. Nestlé moves to dismiss all claims. The Court held a hearing

United States District Court
Northern District of California

1 on March 18, 2016.¹ For the reasons stated below, Nestlé’s Motion is GRANTED, and this action
2 is dismissed with prejudice.²

3 **II. BACKGROUND**

4 **A. Allegations of the Complaint³**

5 Côte d’Ivoire is the world’s largest producer of cocoa beans, the raw ingredient for
6 chocolate, and supplies 40% of global cocoa production and 47% of total imports to the United
7 States. Compl. (dkt. 1) ¶¶ 20, 51. Slave labor and the worst forms of child labor are common in
8 Ivorian cocoa production, as is well documented by United States government agencies, academic
9 studies, nonprofit organizations, investigative journalists, and former laborers. *Id.* ¶¶ 5–9, 24–26,
10 33–47. Children are frequently injured in the course of dangerous work involving machetes,
11 chemicals, and heavy loads, and workers (both children and adults) may be beaten, whipped, and
12 locked in to prevent escape. *Id.* ¶¶ 24–26. The Ninth Circuit has also acknowledged the existence
13 of such conditions. *Id.* ¶ 27; *Doe I*, 766 F.3d at 1016.

14 Nestlé is one of the largest food companies in the United States and sells a number of
15 popular chocolate products. *Id.* ¶ 3. In 2001, members of the United States chocolate industry
16 including Nestlé signed a voluntary protocol, negotiated by Representative Eliot Engel and
17 Senator Tom Harkin, to develop standards for certifying chocolate produced without labor abuses.
18 *Id.* ¶ 28. After failing to meet the initial 2005 deadline, the industry extended the self-imposed
19 deadline to 2008, then to 2010, and then to 2020. *Id.* ¶¶ 30–32.

20 Despite adopting “Corporate Business Principles” that require ethical business practices in
21 its supply chain and a “Supplier Code” that “strictly prohibit[s]” child labor and forced labor,
22 Nestlé sources much of its chocolate from Côte d’Ivoire through a multi-level supply chain of
23 independent growers, cooperatives, distributors, and other intermediaries. *Id.* ¶¶ 4, 11, 21, 50, 52,
24 60–66, 52. Nestlé acknowledges child and slave labor in its Ivorian supply chain, including

26 ¹ The Court also heard argument in *Dana v. The Hershey Company*, No. 15-cv-4453, which
27 involves different parties but substantially similar claims and arguments. A separate order has
28 been published concurrently in that case.

² The parties have consented to the jurisdiction of the undersigned magistrate judge for all
purposes pursuant to 28 U.S.C. § 636(c).

³ McCoy’s allegations are taken as true in the context of a motion to dismiss.

1 children engaged in unsafe work, but does not disclose the existence of those labor abuses on its
2 product labels. *Id.* ¶¶ 21, 53. Certain Nestlé products also advertise that Nestlé “works with [a
3 certification program that does not permit child labor] to help improve the lives of cocoa farmers.”
4 *Id.* ¶¶ 54–55. Although McCoy disputes the accuracy of that certification, her claims here are
5 based only on Nestlé’s omissions, not on any affirmative misrepresentations. *Id.* ¶ 57; Opp’n (dkt.
6 18) at 12 n.64.

7 McCoy “has purchased Nestlé Chocolate Products at various retail stores including Sam’s
8 Club and Safeway in and around Vacaville, and Fairfield, California from 2011 through present.”
9 *Id.* ¶ 14. Citing studies showing that consumers will pay a premium for ethically produced coffee,
10 clothing, and seafood, *id.* ¶¶ 67–71, McCoy alleges that she and other customers “would not have
11 purchased Nestlé’s Chocolate Products or paid as much for them” if Nestlé had disclosed labor
12 violations on the product labels. *Id.* ¶ 11, *see also id.* ¶¶ 14, 49, 78, 93, 107, 118.

13 The Complaint includes three claims, under the UCL, the CLRA, and the FAL,
14 respectively. The UCL claim is based on three separate theories arising from Nestlé’s failure to
15 disclose labor abuses in its supply chain on the packaging of its chocolate products: (1) the
16 omission is “unlawful,” because it violates the CLRA, *id.* ¶ 86; (2) the omission is “unfair,”
17 because the abusive labor practices themselves are immoral and the failure to disclose them
18 impairs competition and prevents consumers from making informed decisions, *id.* ¶ 87; and (3) the
19 omission is “fraudulent” because it is likely to deceive a reasonable consumer and the true facts
20 would be material to reasonable consumer, *id.* ¶ 88. The CLRA claim asserts that Nestlé’s failure
21 to disclose labor abuses in its supply chain constitutes a misrepresentation of the “source,
22 characteristics, and standard” of the products. *Id.* ¶ 103, *see also id.* ¶¶ 100–02 (citing Cal. Civ.
23 Code § 1770(a)(2), (5), (7)). The FAL claim asserts that Nestlé had a duty to disclose the labor
24 abuses in its supply chain because it had superior knowledge as compared to customers, and
25 because it made “partial representations and/or misrepresentations to the contrary.” *Id.* ¶ 114. In
26 her Opposition, McCoy disclaims any theory of an obligation to disclose arising from partial
27 misrepresentations. Opp’n at 12 n.64.
28

1 **B. Procedural History**

2 McCoy filed this action on September 28, 2015, seeking to represent herself and other
3 similarly situated consumers who purchased Nestlé chocolate products in the last four years. *See*
4 *generally* Compl. McCoy’s counsel also represents plaintiffs who filed similar actions against two
5 other large chocolate manufacturers, Mars and Hershey. *See Hodsdon v. Mars, Inc.*, No. 3:15-cv-
6 04450-RS (N.D. Cal.); *Dana v. The Hershey Company*, No. 3:15-cv-04453 (N.D. Cal.).
7 Defendants moved to dismiss in all three cases. Judge Seeborg granted the motion to dismiss in
8 *Hodsdon*, as discussed in detail below. The undersigned heard argument on Hershey’s motion in
9 *Dana* concurrently with Nestlé’s motion in the present case.⁴

10 **C. Parties’ Arguments**

11 Nestlé argues that the case must be dismissed for several reasons, starting with the safe
12 harbor doctrine, which provides that plaintiffs cannot use California’s consumer protection laws to
13 pursue relief that is foreclosed by other, more specific statutes. Mot. (dkt. 16) at 8–11. According
14 to Nestlé, the California Transparency in Supply Chains Act of 2010 (the “Supply Chains Act”)
15 bars McCoy’s claims because it regulates disclosures related to labor abuses in supply chains and
16 does not require the disclosures McCoy seeks. *Id.* McCoy responds that the Supply Chains Act
17 does not specifically permit Nestlé’s omissions or bar McCoy’s claims, and that the labor
18 violations addressed by that statute (slavery and human trafficking) do not encompass all of the
19 violations at issue here (which also include dangerous but non-slave child labor). Opp’n at 3–8.

20 Nestlé also argues that the Court should dismiss the case based on the doctrine of equitable
21 abstention, because: (1) the economic policies at issue are better suited for resolution by legislative

22
23 ⁴ Four other cases based on nondisclosure of supply chain labor violations, brought by
24 plaintiffs who also share counsel with McCoy, have been dismissed for failure to state a claim in
25 the Central District of California. *Wirth v. Mars Inc.*, No. SA CV 15-1470-DOC (KESx), 2016
26 WL 471234 (C.D. Cal. Feb. 5, 2016); *Barber v. Nestle USA, Inc.*, No. SA CV 15-01364-CJC
27 (AGRx), 2015 WL 9309553 (C.D. Cal. Dec. 9, 2015); *De Rosa v. Tri-Union Seafoods, LLC*, No.
28 CV 15-7540-CJC (AGRx), 2016 WL 524059 (C.D. Cal. Jan. 15, 2016) (summarily dismissing for
the reasons stated in *Barber*); *Hughes v. Big Heart Pet Brands*, No. CV 15-8007-CJC (AGRx),
2016 WL 524057 (C.D. Cal. Jan. 15, 2016) (same). Those cases, all of which concern seafood (or
pet food that includes seafood products) rather than chocolate, were decided at least in part based
on the safe harbor doctrine, which *Hodsdon*, *Dana*, and this Order decline to reach. The four
Central District cases are presently pending on appeal before the Ninth Circuit.

1 bodies or administrative agencies; (2) enforcement of injunctive relief would be unduly
 2 burdensome for the Court due to the need to monitor foreign labor conditions; and (3) the foreign
 3 relations issues implicated by McCoy’s claims require a uniform federal policy and should be
 4 entrusted to the legislative or executive branch. Mot. at 11–13. McCoy argues that the subject
 5 matter of the case falls within the experience and competence of the Court, and that overseeing an
 6 injunction requiring Nestlé to change its labeling would not be unduly burdensome. Opp’n at
 7 8–10.

8 Next, Nestlé argues that it has no duty to disclose labor conditions in its supply chain
 9 because the information at issue does not relate to product safety, and because Nestlé did not have
 10 exclusive knowledge, actively conceal the information, make misleading partial representations, or
 11 have a fiduciary relationship with McCoy. Mot. at 14–18. Nestlé contends that all of McCoy’s
 12 claims fail because, as a matter of law, reasonable consumers are not likely to be deceived by the
 13 omission of something that Nestlé had no duty to disclose—and even if it were legally possible,
 14 McCoy has not adequately alleged that consumers expect supply chains to be entirely free of labor
 15 abuses. *Id.* at 18–19. McCoy responds that the limitation of the duty to disclose to safety issues
 16 only applies in post-warranty product defect cases, which this is not, and that a duty arises from
 17 Nestlé’s superior (albeit not actually exclusive) knowledge of labor abuses in its supply chain.
 18 Opp’n at 10–14. She “does not here contend that Nestlé’s partial disclosures give rise to its duty
 19 to disclose.” *Id.* at 12 n.64. McCoy also argues that she has adequately pled that, absent
 20 disclosure to the contrary, consumers would expect that chocolate is not produced using slave
 21 labor or the worst forms of child labor, and that reliance is at least a question of fact. *Id.* at 14–16.

22 Turning to McCoy’s specific claims, Nestlé contends that the FAL only governs
 23 affirmative misrepresentations, not omissions. Mot. at 19. McCoy disputes that proposition and
 24 argues that some cases have allowed FAL claims to proceed based on omissions. Opp’n at 16.

25 Nestlé argues that McCoy’s CLRA claim fails because omissions regarding labor abuses
 26 do not fall within the statutory provisions she invokes—which govern representations regarding
 27 the “source, characteristics, and standard” of the chocolate, *see* Compl. ¶ 103—and that she
 28 therefore also cannot proceed on a UCL claim for “unlawful” conduct based on her CLRA claim.

1 Mot. at 17–18. McCoy contends that “Nestlé’s failure to disclose that its supply chain is not child
2 and slave free is likely to deceive a reasonable consumer regarding the chocolate’s source (from
3 plantations using child and slave labor) and characteristics/standard (produced by child and slave
4 labor).” Opp’n at 17.

5 As for “unfair” conduct under the UCL, Nestlé contends that McCoy cannot succeed under
6 any of the tests that courts have used, because she has not identified a legislative policy against
7 Nestlé’s non-disclosure, nor has she plausibly alleged that the harm caused was “substantial” or
8 that it outweighed the utility of Nestlé’s conduct. Mot. at 19–21. McCoy argues that the labor
9 abuses in Nestlé’s supply chain contravene legislatively declared policies in the form of United
10 Nations prohibitions of forced labor and the worst forms of child labor that the United States has
11 ratified, and that those abuses are immoral and unethical. Opp’n at 18–19. She also contends that
12 the harm of deceiving consumers outweighs the cost to Nestlé of changing its product labeling.
13 *Id.* at 19. Nestlé notes in reply that the United Nations sources that McCoy cites relate only to
14 labor practices, not product labeling. Reply (dkt. 27) at 12.

15 According to Nestlé, McCoy lacks both Article III and statutory standing to bring any of
16 her claims because she cannot trace the cocoa used in the specific chocolate products she bought
17 back to a specific plantation, and thus cannot know whether the products she bought were
18 produced with slave or child labor. Mot. at 21–22. Nestlé contends that without that knowledge,
19 whether the products McCoy bought were misrepresented (even under McCoy’s theory of
20 misrepresentation by omission) is uncertain, and if they were not, McCoy has not suffered any
21 cognizable injury. *Id.* McCoy responds that her injury and standing arise from misrepresentation
22 of the supply chain for the chocolate, and if Nestlé had better disclosed the labor abuses in the
23 supply chain, she would not have bought the products regardless of whether she knew the origin of
24 the cocoa in a specific item. Opp’n at 19–21. McCoy relies on case law holding that a consumer
25 who purchased or paid more for a product based on misrepresentations has both constitutional and
26 statutory standing to bring claims under California’s consumer protection laws. *Id.* at 20–21.
27 (citing *Hinojos v. Kohl’s Corp.*, 718 F.3d 1098 (9th Cir. 2013); *Kwikset Corp. v. Superior Court*,
28 51 Cal. 4th 310, 330 (2011)).

1 Nestlé also argues that McCoy lacks standing because she has not adequately alleged
2 reliance on any misrepresentation. Mot. at 22. According to Nestlé, McCoy has not alleged that
3 she saw or relied on any misleading affirmative representations, nor that she would have read the
4 disclosure she seeks on Nestlé’s product packaging. *Id.* McCoy contends that her claim is based
5 only on omission of material facts and that her Complaint adequately alleges that she would not
6 have bought Nestlé products if the packaging had disclosed severe labor abuses in Nestlé’s supply
7 chain. Opp’n at 20–21.

8 Next, Nestlé argues that McCoy’s Complaint does not satisfy the heightened pleading
9 standard of Rule 9(b) of the Federal Rules of Civil Procedure because it does not identify the
10 specific products McCoy purchased, provide a complete list of the products she is suing over,
11 include copies of packaging for all of the products at issue. Mot. at 23. McCoy argues that her
12 Complaint meets the pleading standard that courts have applied in fraudulent omission cases, and
13 that she need not list the specific products she purchased because “the omission is identical”
14 across Nestlé’s product line. Opp’n at 21–23.

15 Finally, Nestlé argues that requiring the labeling McCoy seeks would compel speech in
16 violation of the First Amendment. Mot. at 23–25. McCoy contends that laws against misleading
17 advertising are constitutional, and that a mere rational basis is required to support laws compelling
18 affirmative factual product labeling to avoid misleading consumers. Opp’n at 23–25 (citing, *e.g.*,
19 *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985)). Nestlé responds that McCoy
20 has not alleged any misleading affirmative representations that require labeling to redress
21 consumer confusion, and that the disclosure McCoy seeks is not “purely factual and
22 uncontroversial.” Reply at 13–15 (quoting *Zauderer*, 471 U.S. at 651).

23 **D. *Hodsdon v. Mars, Inc.***

24 In *Hodsdon*, Judge Seeborg granted a motion by chocolate manufacturer Mars, Inc. to
25 dismiss claims very similar those in the case at hand. *Hodsdon v. Mars, Inc.*, ___ F. Supp. 3d ___,
26 No. 15-CV-04450-RS, 2016 WL 627383 (N.D. Cal. Feb. 17, 2016). As a preliminary matter, the
27 court held that the plaintiff had standing because: (1) “California law permits litigants to pursue
28 claims under the UCL, CLRA, and FAL if they show . . . that ‘the consumer paid more than he or

1 she actually valued the product”); (2) the plaintiff adequately alleged that the use of forced labor in
2 the supply chain caused him to devalue the product even if he could not prove that forced labor
3 was used to produce the specific chocolate products that he purchased; and (3) the plaintiff
4 adequately alleged that he saw the product labels before he purchased the products. *Id.* at *3
5 (quoting *Hinojos*, 718 F.3d at 1104). Turning to the merits, however, the court held that the
6 plaintiff failed to state a claim under California law.

7 With respect to the FAL claim, the court reconciled cases holding that omissions were not
8 actionable with others that allowed FAL claims based on omissions to proceed, ultimately
9 determining that omissions accompanying misleading incomplete statements are actionable, but
10 omissions with no corresponding statements are not. *Id.* at *4. *Compare Norcia v. Samsung*
11 *Telecomms. Am., LLC*, No. 14-CV-00582-JD, 2015 WL 4967247, at *8 (N.D. Cal. Aug. 20, 2015)
12 (“There can be no FAL claim where there is no ‘statement’ at all.”), and *Stanwood v. Mary Kay,*
13 *Inc.*, 941 F. Supp. 2d 1212, 1222 (C.D. Cal. 2012) (same), with *In re Sony Gaming Networks &*
14 *Customer Data Sec. Breach Litig.*, 996 F. Supp. 2d 942, 991 (S.D. Cal. 2014) (denying motion to
15 dismiss where defendant claimed to have taken steps to secure information but failed to disclose
16 security deficiencies), and *Tait v. BSH Home Appliances Corp.*, No. SACV 10-00711 DOC
17 (ANx), 2011 WL 3941387, at *2 (C.D. Cal. Aug. 31, 2011) (denying a motion to dismiss where
18 the defendant marketed a washing machine as “sanitary” but failed to disclose its tendency to
19 accumulate mold). Because the plaintiff in *Hodsdon* “asserted the former type of claim, i.e., that
20 Mars violated the FAL by failing to issue any statement at all,” the court dismissed the claim.
21 *Hodsdon*, 2016 WL 627383, at *4.

22 Next, the court turned to the plaintiff’s CLRA claim and his claim under the “unlawful”
23 prong of the UCL, which was based on the purported CLRA violation. *Id.* at *5–6. Noting the
24 Ninth Circuit’s holding that “California courts have generally rejected a broad obligation to
25 disclose,” the court looked to whether Mars had any such obligation. *Id.* at *5. The court held
26 that despite one case to the contrary, “the overwhelming majority of courts to consider the issue”
27 have held that omissions are only actionable under the CLRA if they relate to product safety or
28 defects. *Id.* at *5–6. Because the omissions at issue related instead to “admittedly horrific labor

1 practices” in the supply chain, the court dismissed the plaintiff’s CLRA claim and the “unlawful
2 conduct” aspect of the UCL claim that derived from it. *Id.* at *6.

3 The plaintiff also brought UCL claims based on the “fraudulent” and “unfair” prongs of the
4 statute. The court followed two California appellate decisions holding that omissions cannot
5 satisfy the “fraudulent” prong unless there was a duty to disclose, and therefore dismissed that
6 claim. *Id.* at *6 (citing *Berryman v. Merit Prop. Mgmt., Inc.*, 152 Cal. App. 4th 1544, 1557
7 (2007); *Daugherty v. Am. Honda Co.*, 144 Cal. App. 4th 824, 838 (2006)). As for the “unfair”
8 prong, the court held that the plaintiff’s complaint did not satisfy any of the tests used by
9 California courts to assess such claims: (1) unlike the underlying labor conditions themselves, the
10 lack of disclosure could not be said to be “immoral, unethical, oppressive, unscrupulous or
11 substantially injurious to consumers,” because the harm was merely the purchase of a chocolate
12 bar and the information that was absent from the packaging was readily available elsewhere; and
13 (2) again unlike the underlying labor conditions, the harm from lack of disclosure was not tied to
14 any established public policy expressed in “specific constitutional, statutory, or regulatory
15 provisions.” *Id.* at *7 (quoting *S. Bay Chevrolet v. Gen. Motors Acceptance Corp.*, 72 Cal. App.
16 4th 861, 887 (1999); *McVicar v. Goodman Glob., Inc.*, 1 F. Supp. 3d 1044, 1054 (C.D. Cal.
17 2014)). The court therefore dismissed the UCL claim in its entirety.

18 Because the plaintiff failed to state a claim for the reasons summarized above, the court did
19 not reach Mars’s argument that the Supply Chains Act creates a safe harbor, but expressed doubt
20 that any such harbor is as broad as Mars contended. *Id.* at *8–9. The court found that amendment
21 would be futile and denied leave to amend. *Id.* at *9. Hodsdon’s appeal of Judge Seeborg’s
22 decision is currently pending before the Ninth Circuit.

23 **III. ANALYSIS**

24 **A. Legal Standard**

25 A complaint may be dismissed for failure to state a claim on which relief can be granted
26 under Rule 12(b)(6) of the Federal Rules of Civil Procedure. “The purpose of a motion to dismiss
27 under Rule 12(b)(6) is to test the legal sufficiency of the complaint.” *N. Star Int’l v. Ariz. Corp.*
28 *Comm’n*, 720 F.2d 578, 581 (9th Cir. 1983). Generally, a plaintiff’s burden at the pleading stage

1 is relatively light. Rule 8(a) of the Federal Rules of Civil Procedure states that “[a] pleading
2 which sets forth a claim for relief . . . shall contain . . . a short and plain statement of the claim
3 showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a).

4 In ruling on a motion to dismiss under Rule 12(b)(6), the court analyzes the complaint and
5 takes “all allegations of material fact as true and construe[s] them in the light most favorable to the
6 non-moving party.” *Parks Sch. of Bus. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995).
7 Dismissal may be based on a lack of a cognizable legal theory or on the absence of facts that
8 would support a valid theory. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir.
9 1990). A complaint must “contain either direct or inferential allegations respecting all the material
10 elements necessary to sustain recovery under some viable legal theory.” *Bell Atl. Corp. v.*
11 *Twombly*, 550 U.S. 544, 562 (2007) (citing *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101,
12 1106 (7th Cir. 1984)). “A pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation
13 of the elements of a cause of action will not do.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)
14 (quoting *Twombly*, 550 U.S. at 555). “Nor does a complaint suffice if it tenders ‘naked
15 assertion[s]’ devoid of ‘further factual enhancement.’” *Id.* (quoting *Twombly*, 550 U.S. at 557).
16 Rather, the claim must be “‘plausible on its face,’” meaning that the plaintiff must plead sufficient
17 factual allegations to “allow[] the court to draw the reasonable inference that the defendant is
18 liable for the misconduct alleged.” *Id.* (quoting *Twombly*, 550 U.S. at 570).

19 Rule 9(b) of the Federal Rules of Civil Procedure sets a heightened pleading standard for
20 claims based on fraud. “In alleging fraud or mistake, a party must state with particularity the
21 circumstances constituting fraud or mistake.” Fed. R. Civ. P. 9(b). The Ninth Circuit has held
22 that in order to meet this standard, a “complaint must specify such facts as the times, dates, places,
23 benefits received, and other details of the alleged fraudulent activity.” *Neubronner v. Milken*, 6
24 F.3d 666, 672 (9th Cir. 1993); *see also McMaster v. United States*, 731 F.3d 881, 897 (9th Cir.
25 2013). The heightened standard does not apply to “[m]alice, intent, knowledge, and other
26 conditions of a person’s mind.” Fed. R. Civ. P. 9(b).

27 Nestlé also moves to dismiss under Rule 12(b)(1) on the basis that the Court lacks
28 jurisdiction because McCoy lacks Article III standing. *See Mot.* at 8. Where, as here, a

1 jurisdictional challenge is based on the allegations of a plaintiff's complaint rather than on
2 extrinsic evidence, courts "assume [the plaintiff's] allegations to be true and draw all reasonable
3 inferences in his favor." *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). "[T]he inquiry is
4 therefore much like a Rule 12(b)(6) analysis." *Animal Legal Def. Fund v. HVFG LLC*, 939 F.
5 Supp. 2d 992, 997 (N.D. Cal. 2013).

6 **B. Standing**

7 Nestlé argues that McCoy lacks Article III and statutory standing to pursue these claims
8 because she does not and cannot allege that the specific products she purchased were made from
9 cocoa produced with the labor abuses at issue in this case—slave labor or the worst forms of child
10 labor—and therefore fails to allege an actual, particularized injury. Mot. at 21–22. The parties
11 agree that Nestlé currently cannot trace the cocoa used in a particular Nestlé chocolate product to a
12 specific plantation, and there is thus no way to know what labor practices were used in its
13 production. See Compl. ¶ 11; Mot. at 22. McCoy argues that she has standing because she would
14 have either not purchased or paid less for Nestlé's products if she had known that the *supply chain*
15 involved the labor abuses at issue, regardless of where the cocoa in a particular chocolate bar
16 originated. Opp'n at 20–21. Judge Seeborg held that the plaintiff in *Hodsdon* had standing under
17 similar circumstances, and the Court agrees that McCoy has standing here. See *Hodsdon*, 2016
18 WL 627383, at *3.

19 The issue of Article III standing is straightforward. "[W]hen, as here, 'Plaintiffs contend
20 that class members paid more for [a product] than they otherwise would have paid, or bought it
21 when they otherwise would not have done so' they have suffered an Article III injury in fact."
22 *Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1104 (9th Cir. 2013) (quoting *Mazza v. Am. Honda*
23 *Motor Co.*, 666 F.3d 581, 595 (9th Cir. 2012)) (second alteration in original).

24 McCoy also has standing under the California statutes at issue. The UCL and FAL require
25 that private plaintiffs "ha[ve] suffered injury in fact and ha[ve] lost money or property as a result
26 of the unfair competition" or false advertising. *Hinojos*, 718 F.3d at 1103 (quoting Cal. Bus. &
27
28

1 Prof. Code § 17204 (UCL); citing *id.* § 17535 (FAL)) (alterations in original).⁵ In *Hinojos*, the
 2 Ninth Circuit examined the California Supreme Court’s decision in *Kwikset Corp. v. Superior*
 3 *Court*, which held that a ““consumer who relies on a product label and challenges a
 4 misrepresentation contained therein can satisfy the standing requirement of [the UCL and the
 5 FAL] by alleging . . . that he or she would not have bought the product but for the
 6 misrepresentation,”” and that “such allegations are sufficient to establish economic injury within
 7 the meaning of [those statutes].” *Id.* at 1105 (quoting *Kwikset*, 51 Cal. 4th 310, 330 (2011))
 8 (ellipsis in original).

9 In both *Kwikset*, where the defendant marketed locks as “Made in U.S.A.” despite some
 10 foreign components and assembly work, and *Hinojos*, where the defendant allegedly advertised its
 11 normal prices as “reduced,” plaintiffs who relied on those representation had standing to sue under
 12 the UCL and FAL. *Id.* at 1107; *Kwikset*, 51 Cal. 4th at 330. Those courts also listed a number of
 13 other scenarios where a plaintiff’s reliance on false advertising could give rise to standing: “meat
 14 falsely labeled as kosher or halal, wine labeled with the wrong region or year, blood diamonds
 15 mislabeled as conflict-free, and goods falsely suggesting they were produced by union labor.”
 16 *Hinojos*, 718 F.3d at 1105 (citing *Kwikset*, 51 Cal. 4th at 328–29). McCoy’s claim that she would
 17 have paid less for (or declined to purchase) Nestlé’s products but for Nestlé’s misrepresentations
 18 of the labor practices in its supply chain fits well within these examples.

19 The Ninth Circuit’s decision in *Birdsong v. Apple, Inc.*, 590 F.3d 955 (9th Cir. 2009)—
 20 which Nestlé does not discuss in its briefs but which Hershey relies on to make a similar argument
 21 in *Dana*—does not deprive McCoy of standing. In that case, the plaintiffs alleged that Apple
 22 violated the UCL by selling iPods that were capable of producing dangerous volume levels and
 23 thus causing hearing loss. *Id.* at 957. The Ninth Circuit affirmed the district court’s holding that
 24 the plaintiffs failed to show a particularized and actual injury sufficient for standing under the
 25 UCL—despite the plaintiffs’ argument that the risk of hearing loss diminished the value of the

26
 27 ⁵ The CLRA allows a consumer who has suffered “any damage” to sue, and “any plaintiff who
 28 has standing under the UCL’s and FAL’s ‘lost money or property’ requirement will, *a fortiori*,
 have suffered ‘any damage’ for purposes of establishing CLRA standing.” *Hinojos*, 718 F.3d at
 1107–08.

1 iPods—in part because “the alleged loss in value . . . rests on a hypothetical risk of hearing loss to
2 other consumers who may or may not choose to use their iPods in a risky manner,” and the
3 plaintiffs did “not claim that they, or anyone else, have suffered or [were] substantially certain to
4 suffer hearing loss from using an iPod.” *Id.* at 959–62. Here, in contrast, McCoy alleges that the
5 value of the chocolate products was diminished because consumers did not wish to support a
6 supply chain that included severe labor abuses. The alleged damage was therefore done *by the*
7 *purchase itself*, not by any contingency that might happen after the purchase.

8 Nestlé argues, essentially, that a UCL claim based on misrepresentation of labor practices
9 can only succeed where a plaintiff is *certain* that the objectionable practice was used to produce
10 the specific item that the plaintiff purchased. *See* Mot. at 21–22. Stepping back from the fact
11 pattern of this case, that argument would dictate that even if Nestlé had—hypothetically—
12 concealed Ivorian labor conditions from its customers, falsely labeled all of its chocolate as
13 certified to be free of child labor, and run a fraudulent national ad campaign touting its child-
14 labor-free chocolate, a customer who relied on that false promotion would lack standing to sue for
15 fraudulent business practices and false advertising so long as some fraction of Nestlé’s cocoa met
16 those descriptions and the customer was unable to tell what labor conditions produced the cocoa in
17 the actual product he or she purchased. Such a result would undermine the holding of *Hinojos* and
18 *Kwikset*. The difference between that hypothetical scenario and McCoy’s allegation of mere
19 omission is critical to the outcome of the present motion, as discussed in the sections below, but it
20 is a difference relevant to the merits of the claims, not to standing.

21 Similarly, to use some of the examples given in *Hinojos* and *Kwikset*, it would be a bizarre
22 result if sellers advertising food as halal or kosher, diamonds as conflict-free, or products as union-
23 made could knowingly mix compliant and non-compliant products with impunity so long as there
24 was no way for a buyer to trace the specific item he or she purchased back to the source. The
25 Eighth Circuit has nevertheless adopted that rule. *See Wallace v. ConAgra Foods, Inc.*, 747 F.3d
26 1025, 1030–31 (8th Cir. 2014) (holding that customers lacked Article III standing to bring a claim
27 based on allegedly false advertising of a product as using 100% kosher beef, where the plaintiffs
28 could not show that the specific products they purchased contained non-kosher beef). This Court

1 respectfully disagrees with that result. In this Court’s view, if a customer has paid a premium for
 2 an assurance that a product meets certain standards, and the assurance turns out to be meaningless,
 3 the premium that the customer has paid is an actual, personal, particularized injury that is
 4 cognizable under Article III. *See Hinojos*, 718 F.3d at 1104.

5 “For a significant segment of the buying public, labor practices do matter in making
 6 consumer choices.” *Kwikset*, 51 Cal. 4th at 329 (quoting *Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 969
 7 (2002)). It is plausible that a consumer would place less value on a product produced from a
 8 supply chain involving severe labor abuses. McCoy alleges that she purchased products or paid a
 9 higher price for them because she was deceived regarding the labor practices in the supply chain.
 10 That actual, particularized injury is sufficient to establish standing.

11 Nestlé also argues that McCoy lacks standing because she has not sufficiently alleged
 12 reliance. Mot. at 22. The Court agrees with McCoy that, at least for the purpose of Article III
 13 standing, McCoy adequately pleads reliance by alleging that she saw the product labeling and
 14 would not have purchased the products if labor abuses in the supply chain had been disclosed. *See*
 15 Compl. ¶ 14. Whether Nestlé had a duty to disclose those conditions, *see* Mot. at 22, is relevant to
 16 whether the Complaint states a claim on which relief can be granted, but is not an issue of
 17 standing.

18 C. CLRA Claim

19 The CLRA prohibits certain enumerated “unfair methods of competition and unfair or
 20 deceptive acts or practices undertaken by any person in a transaction intended to result or which
 21 results in the sale or lease of goods or services to any consumer.” Cal. Civ. Code § 1770(a).
 22 McCoy argues that Nestlé’s failure to disclose labor abuses on its packaging violates subsection
 23 (a)(2) by “[m]isrepresenting the source” of the chocolate, subsection (a)(5) by “[r]epresenting that
 24 goods . . . have . . . characteristics . . . which they do not have,” and subsection (a)(7) by
 25 “[r]epresenting that goods . . . are of a particular standard.” *Id.* § 1770(a)(2), (5), (7); *see* Compl.
 26 ¶¶ 100–03; Opp’n at 17. In her Opposition, McCoy makes clear that these theories are based on
 27 “Nestlé’s omission of known child and slave labor in its supply chain,” and that she “does not here
 28 contend that Nestlé’s partial misrepresentations give rise to its duty to disclose.” Opp’n at 12

1 n.64.

2 “[A]lthough a claim may be stated under the CLRA in terms constituting fraudulent
3 omissions, to be actionable the omission must be contrary to a representation actually made by the
4 defendant, or an omission of a fact the defendant was obliged to disclose.” *Daugherty v. Am.*
5 *Honda Motor Co.*, 144 Cal. App. 4th 824, 835 (2006). “California courts have generally rejected
6 a broad obligation to disclose” *Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1141 (9th
7 Cir. 2012). In *Wilson*, the Ninth Circuit held that, absent affirmative misrepresentations, an
8 obligation to disclose under California law extends only to matters of product safety. *Id.* at
9 1141–43 (examining *Daugherty*, 144 Cal. App. 4th at 836, and subsequent decisions); *see also*
10 *Oestreicher v. Alienware Corp.*, 322 F. App’x 489, 493 (9th Cir. 2009) (unpublished and non-
11 precedential) (“A manufacturer’s duty [of disclosure] to consumers is limited to its warranty
12 obligations absent either an affirmative misrepresentation or a safety issue.”).

13 At least one district court decision has limited *Wilson* to cases where a product was
14 covered by a warranty that expired before the defect became apparent. *Stanwood v. Mary Kay,*
15 *Inc.*, 941 F. Supp. 2d 1212, 1221 (C.D. Cal. 2012). Central to the Central District’s holding was
16 its determination that “[t]he Ninth Circuit acknowledged that its requirement of a safety issue does
17 not necessarily apply outside the products defect context where warranty protections are not
18 available,” and that *Wilson* “list[ed] cases where a safety issue was not required to trigger a duty to
19 disclose.” *Id.* (citing *Wilson*, 668 F.3d at 1142). The Court respectfully disagrees with
20 *Stanwood*’s reading of *Wilson*. The cases listed at the page cited in *Wilson* by *Stanwood* do not
21 support *Stanwood*’s holding: four cases explicitly based the materiality of an omission at least in
22 part on whether it related to safety,⁶ and the Ninth Circuit characterized the remaining two⁷ as

23 _____
24 ⁶ *O’Shea v. Epson Am., Inc.*, No. CV 09–8063 PSG (CWx), 2011 WL 3299936, at *7–9
25 (C.D.Cal. July 29, 2011); *Smith v. Ford Motor Co.*, 749 F. Supp. 2d 980, 987 (N.D. Cal. 2010)
26 (“[F]or the omission to be material, the failure must pose ‘safety concerns’”), *aff’d*, 462 F.
27 App’x 660 (9th Cir. 2011); *In re Sony Grand Wega KDF–E A10/A20 Series Rear Projection*
28 *HDTV Television Litig.*, 758 F. Supp. 2d 1077, 1095 (S.D. Cal. 2010); *Oestreicher v. Alienware*
Corp., 544 F. Supp. 2d 964, 971 (N.D. Cal. 2008), *aff’d*, 322 F. App’x 489 (9th Cir. 2009); *Falk v.*
Gen. Motors Corp., 496 F. Supp. 2d 1088, 1096 n.*. (N.D. Cal. 2007) (“Moreover, plaintiffs
successfully allege that the potential for failed speedometers constitutes a safety hazard.”).

⁷ *Cirulli v. Hyundai Motor Co.*, No. SACV 08-0854 AG (MLGx), 2009 WL 5788762
(C.D.Cal. June 12, 2009); *Bristow v. Lycoming Engines*, No. CIV. S-06-1947 LKK GGH, 2007

1 having “arguably concerned safety issues.” *Wilson*, 668 F.3d at 1142 & n.2. Accordingly, the
 2 Court does not agree that *Wilson* is limited to cases where a warranty once existed but has since
 3 expired. There are cases holding that a manufacturer has a greater duty to disclose defects that
 4 arise *during* a product’s express warranty period. *E.g.*, *Collins v. eMachines, Inc.*, 202 Cal. App.
 5 4th 249, 257–58 (2011); *see also Wilson*, 668 F.3d at 1142 n.1 (discussing *Tietsworth v. Sears,*
 6 *Roebuck & Co.*, 720 F. Supp. 2d 1123 (N.D. Cal. 2010)). But there is no allegation that Nestlé
 7 made any warranty of its chocolate products that would be relevant in this case.⁸

8 The Court agrees with Judge Seeborg’s conclusion that the weight of authority limits a
 9 duty to disclose under the CLRA to issues of product safety, unless disclosure is necessary to
 10 counter an affirmative misrepresentation. *See Hodsdon*, 2016 WL 627383, at *6 (declining to
 11 follow *Stanwood* in light of “overwhelming authority to the contrary,” and collecting cases). The
 12 Court also concludes that a plain reading of *Wilson* governs this case, and this “Court is not free to
 13 deviate from the Ninth Circuit’s construction of California law in *Wilson* absent a subsequent
 14 interpretation from California’s courts that the interpretation was incorrect.” *Rasmussen v. Apple,*
 15 *Inc.*, 27 F. Supp. 3d 1027, 1036 (N.D. Cal. 2014) (following *Wilson* despite concluding that its
 16 basis in California law is “subject to reasonable debate”) (citing *Kona Enters., Inc. v. Estate of*
 17 *Bishop*, 229 F.3d 887, 884 n.7 (9th Cir. 2000)). Further, the Court agrees with Judge Seeborg and
 18 Nestlé that some bright-line limitation on a manufacturer’s duty to disclose is sound policy, given
 19 the difficulty of anticipating exactly what information some customers might find material to their
 20 purchasing decisions and wish to see on product labels. *See Hodsdon*, 2016 WL 627383, at *6
 21 (“[*Stanwood*’s and *McCoy*’s] definition of a material omission has stunning breadth, and could
 22 leave manufacturers (chocolate or otherwise) little guidance about what information, if any, it
 23 must disclose to avoid CLRA or UCL liability.”); Reply at 8. There are countless issues that may
 24 be legitimately important to many customers, and the courts are not suited to determine which

26 WL 1106098 (E.D.Cal. Apr. 10, 2007).

27 ⁸ *Wilson* also acknowledges cases recognizing a broader duty of disclosure in the sale of
 28 services, rather than products. *Wilson*, 668 F.3d at 1143 (citing, *e.g.*, *In re Mediscan Research,*
Ltd., 940 F.2d 558 (9th Cir. 1991)). The chocolate products at issue in the present case are
 products, not services.

1 should occupy the limited surface area of a chocolate wrapper.

2 A duty to disclose under California law does not extend to all “information [that] may
3 persuade a consumer to make different purchasing decisions.” *Hodsdon*, 2016 WL 627383, at *6
4 (citing *Wirth*, 2016 WL 471234, at *5–6). Because McCoy does not allege any omission of
5 known dangers to the safety of customers, there is no duty to disclose applicable to this case, and
6 McCoy’s CLRA claim is therefore DISMISSED. A contrary result would create “a broad
7 obligation to disclose,” which “California courts have generally rejected.” *Wilson*, 668 F.3d at
8 1141.

9 Even if that were not so, the parties agree McCoy would still need to show one of the
10 following to support a duty to disclose: (1) a fiduciary relationship between Nestlé and McCoy;
11 (2) that Nestlé had “exclusive knowledge of material facts not known or reasonably accessible to”
12 its customers; (3) that Nestlé actively concealed a material fact; or (4) that Nestlé had made
13 misleading partial representations. Opp’n at 11 (quoting *Doe v. SuccessfulMatch.com*, 70 F. Supp.
14 3d 1066, 1076 (N.D. Cal. 2014)); Mot. at 15. McCoy relies solely on the “exclusive knowledge”
15 test. Opp’n at 12–14. But even if “courts do not apply ‘exclusivity’ with . . . rigidity,” see
16 *Johnson v. Harley-Davidson Motor Co. Grp.*, 285 F.R.D. 573, 583 (E.D. Cal. 2012), it is difficult
17 to see how *any* definition of “exclusive knowledge” could include a case where, by McCoy’s own
18 allegations: Nestlé acknowledges on a public website its suppliers’ use of slave labor and the
19 worst forms of child labor, Compl. ¶ 21; the industry acknowledged the issue in the Harkin-Engel
20 Protocol in 2001—more than *ten years* before the statute of limitations period for McCoy’s CLRA
21 claim—and has repeatedly admitted its failure to even develop a comprehensive certification
22 system in the years since, *id.* ¶¶ 28–32; and in 2006 the United States Department of Labor
23 commissioned Tulane University to publish reports detailing labor abuses in the chocolate
24 industry supply chain, *id.* ¶¶ 33–37; among other public disclosures detailed in the Complaint.

25 Further, even if McCoy could adequately plead that Nestlé had a duty to disclose the labor
26 abuses in its supply chain on its product labels, it is far from clear that such information falls
27 within the categories of representations governed by the CLRA. McCoy invokes provisions
28 barring misrepresentation of the “source,” “characteristics,” and “standard” of a product. Opp’n at

1 17 (citing Cal. Civ. Code § 1770(a)(2), (5), (7)). While the CLRA provides that it “shall be
 2 liberally construed and applied to promote its underlying purposes” of consumer protection, Cal.
 3 Civ. Code § 1760, it does not explicitly discuss representations regarding labor practices, *see id.*
 4 § 1770(a), and McCoy cites no authority holding that any of the enumerated categories she relies
 5 on are so broad as to encompass labor abuses. Because the Court holds that Nestlé did not have a
 6 duty to disclose labor abuses in its supply chain on its product labels, the Court declines to resolve
 7 whether misrepresentations regarding labor practices can fall within the scope of the CLRA.

8 **D. UCL Claim**

9 California’s UCL prohibits unfair competition, defined as “any unlawful, unfair, or
 10 fraudulent business act or practice.” Cal. Bus. & Prof. Code § 17200. McCoy brings her claim
 11 under each of these prongs, and Nestlé argues that each must be dismissed.

12 The “unlawful” prong of McCoy’s Complaint is based solely on Nestlé’s purported
 13 violation of the CLRA. Compl. ¶ 86. As discussed above, the Court holds that McCoy fails to
 14 state a CLRA claim. Nestlé’s Motion is therefore GRANTED as to this prong of McCoy’s UCL
 15 claim.

16 The “fraudulent” prong fails for similar reasons. As Judge Seeborg noted in *Hodsdon*,
 17 California courts have held that “[a]bsent a duty to disclose, the failure to do so does not support
 18 a claim under the fraudulent prong of the UCL.” *Hodsdon*, 2016 WL 627383, at *6 (quoting
 19 *Berryman v. Merit Prop. Mgmt., Inc.*, 152 Cal. App. 4th 1544, 1557 (2007)); *see also Daugherty*,
 20 144 Cal. App. 4th at 838 (“We cannot agree that a failure to disclose a fact one has no affirmative
 21 duty to disclose is ‘likely to deceive’ anyone within the meaning of the UCL.”). Because, as
 22 discussed above, the Court holds that Nestlé had no affirmative duty to disclose severe labor
 23 abuses in its supply chain on its product labels, Nestlé’s Motion is GRANTED as to the
 24 “fraudulent” prong of McCoy’s UCL claim.

25 That leaves the “unfair” prong, the test for which remains somewhat unsettled in the
 26 California courts. Courts previously held a practice to be “unfair” . . . when it offends an
 27 established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or
 28 substantially injurious to consumers.” *S. Bay Chevrolet v. Gen. Motors Acceptance Corp.*, 72 Cal.

1 App. 4th 861, 886–87 (1999) (citation and internal quotation marks omitted). “This test involves
2 balancing the harm to the consumer against the utility of the defendant’s practice.” *Lozano v.*
3 *AT & T Wireless Servs., Inc.*, 504 F.3d 718, 735 (9th Cir. 2007) (citing *S. Bay*, 72 Cal. App. 4th at
4 886). The California Supreme Court, however, found that the *South Bay* test was “too amorphous
5 and provide[d] too little guidance to courts and businesses” in a UCL case between competitors,
6 and held instead that:

7 When a plaintiff who claims to have suffered injury from a direct
8 competitor’s “unfair” act or practice invokes section 17200, the
9 word “unfair” in that section means conduct that threatens an
10 incipient violation of an antitrust law, or violates the policy or spirit
of one of those laws because its effects are comparable to or the
same as a violation of the law, or otherwise significantly threatens or
harms competition.

11 *Cel-Tech Commc’ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 185, 187. The *Cel-Tech* court
12 explicitly declined to decide what test applied to actions brought by consumers, as opposed to by
13 competitors. *Id.* at 197 n.12.

14 In the years since *Cel-Tech*, some courts have continued to use the *South Bay* test for cases
15 brought by consumers, while others have followed *Cel-Tech*’s lead and “require[d] that the
16 unfairness be tied to a ‘legislatively declared’ policy,” *Lozano v. AT & T Wireless Servs., Inc.*, 504
17 F.3d 718, 736 (9th Cir. 2007), or in other words, ““that the UCL claim be tethered to specific
18 constitutional, statutory, or regulatory provisions,”” *Hodsdon*, 2016 WL 627383, at *7 (quoting
19 *McVicar v. Goodman Global, Inc.*, 1 F. Supp. 3d 1044, 1054 (C.D. Cal. 2014)). “Absent guidance
20 from the California courts about the proper definition of an ‘unfair’ business practice, federal
21 courts have applied both tests.” *Id.* (citing *Lozano*, 504 F.3d at 736).

22 The “legislative policies” on which McCoy relies are the United Nations’ International
23 Labor Convention No. 182 and the United Nations’ Universal Declaration of Human Rights—the
24 former forbidding the worst forms of child labor, the latter forbidding slavery, and both having
25 been ratified by the United States. Opp’n at 18–19. The crux of McCoy’s claim, however, is not
26 that Nestlé utilized slave labor or the worst forms of child labor, but rather that Nestlé does not
27 disclose the existence of those labor abuses in its supply chain on the packaging of its products.
28

1 McCoy has not identified any legislatively declared policy requiring such disclosure,⁹ nor does she
 2 cite any authority for the proposition that where some of a manufacturer's suppliers contravene a
 3 legislatively established policy, it is "unfair" within the meaning of the UCL for the manufacturer
 4 to fail to disclose those violations on its product packaging. The Court declines to make that leap.

5 At the hearing, McCoy's counsel suggested for the first time that McCoy could amend her
 6 UCL claim to tether the "unfair" prong to the Department of Labor's listing of goods produced
 7 with child labor and forced labor, *see* 22 U.S.C. § 7112(b), and to California's Supply Chains Act,
 8 which is discussed in more detail below in the context of Nestlé's safe harbor doctrine argument,
 9 *see* Cal. Civ. Code § 1714.43. Although both statutes call for certain disclosures related to labor
 10 conditions, neither expresses any policy of disclosure on product labels. Amending McCoy's
 11 Complaint to reference those statutes would not remedy the defects of her UCL claim.

12 Turning to the *South Bay* balancing test, the distinction between the underlying labor
 13 practices and the failure to disclose once again undermines McCoy's claim. The slave labor and
 14 child labor alleged in the Complaint would certainly qualify as "immoral, unethical, oppressive,
 15 [and] unscrupulous." *See S. Bay*, 72 Cal. App. 4th at 887. But can the same be said about the
 16 failure to disclose Nestlé's suppliers' labor abuses on Nestlé's product packaging? Considering
 17 this issue in *Hodsdon*, Judge Seeborg held as follows:

18 The harm at issue here is that Hodsdon may not have purchased
 19 Mars's chocolate products at all, or would have paid less for them,
 20 had he been aware of the prospect for child labor in Mars's supply
 21 chain. Such information is, in fact, readily available to consumers on
 22 Mars's website. Given that Hodsdon, like any other consumer, has
 23 access to information about the source of Mars's cocoa beans, the
 24 absence of such information on the packaging is not "substantially
 25 injurious to consumers" or necessarily immoral. Granting that the
 26 labor practices at issue are immoral, there remains an important
 27 distinction between them and the actual harm for which Hodsdon
 28 seeks to recover, namely his purchase of Mars's chocolate products
 absent any disclosure. Mars's failure to disclose information it had
 no duty to disclose in the first place is not substantially injurious,

9 While McCoy does not argue in the context of the "unfair" prong that either the CLRA or the
 FAL constitutes such a policy, her arguments that those statutes compel the disclosure she seeks
 could perhaps be transposed to this claim. For the reasons discussed above and below in the
 context of McCoy's CLRA and FAL claims, the Court holds that neither statute represents a
 policy requiring the disclosure of labor abuses in a supply chain on product labels.

1 immoral, or unethical, and Hodsdon’s UCL claim may therefore not
2 advance.

3 *Hodsdon*, 2016 WL 627383, at *7. This Court agrees. Because McCoy has not adequately
4 alleged a violation of either test for the “unfair” prong, or a violation of the “unlawful” or
5 “fraudulent” prongs, her UCL claim is DISMISSED.

6 **E. FAL Claim**

7 The FAL makes it unlawful for any person “to make or disseminate or cause to be made or
8 disseminated before the public . . . any statement . . . which is untrue or misleading, and which is
9 known, or which by the exercise of reasonable care should be known, to be untrue or misleading.”
10 Cal. Bus. & Prof. Code § 17500. The plain language of the statute—which prohibits *making*,
11 *disseminating*, or *causing* the dissemination of false or misleading statements—does not
12 encompass omissions. Several cases have therefore held that “[t]here can be no FAL claim where
13 there is no ‘statement’ at all”—or in other words that an omission, even of material facts, does not
14 violate the FAL. *Norcia v. Samsung Telecomms. Am., LLC*, No. 14-CV-00582-JD, 2015 WL
15 4967247, at *8 (N.D. Cal. Aug. 20, 2015); *see also Hodsdon*, 2016 WL 627383, at *4; *Stanwood*,
16 941 F. Supp. 2d at 1222.

17 McCoy cites three federal district court cases and two California appellate cases that
18 purportedly held to the contrary, allowing FAL claims to proceed based on omissions. Opp’n at
19 16 nn.92 & 95. One of those cases actually dismissed the plaintiff’s FAL claim to the extent that
20 it was based on affirmative misrepresentations, and did not address the FAL claim at all in its
21 discussion of the plaintiff’s fraudulent omission theory. *Elias v. Hewlett-Packard Co.*, 950 F.
22 Supp. 2d 1123, 1135–36, 1140 (N.D. Cal. 2013) (discussing only the CLRA, UCL, and common
23 law in the context of fraudulent omissions, and granting leave to amend only as to those claims).
24 Both of the California cases were based on claims that print, television, and/or telephone
25 advertising campaigns—which inherently consist of affirmative statements—were misleading for
26 failure to disclose fees associated with financial products or limitations on the use of coupons.
27 *People v. JTH Tax, Inc.*, 212 Cal. App. 4th 1219, 1224 (2013) (“The lawsuit claimed there were
28 misleading or deceptive statements in print and television advertising . . .”); *People v. Toomey*,
157 Cal. App. 3d 1, 17 (1984) (“We encounter little difficulty concluding that Holiday’s telephone

1 solicitations and newspaper advertisements were likely to deceive consumers.”). One of the other
 2 cases, which Judge Seeborg considered in *Hodsdon*, also involved some degree of affirmative
 3 misrepresentation. *See Hodsdon*, 2016 WL 627383, at *4. There, the defendant allegedly
 4 “misrepresented that it would take ‘reasonable steps’ to secure Plaintiffs’ Personal Information
 5 [stored on or transmitted via the defendant’s network], and that [it] use[d] industry-standard
 6 encryption to prevent unauthorized access to sensitive financial information,” but failed to disclose
 7 that its safeguards were inadequate and network intrusions occurred. *In re Sony Gaming Networks*
 8 *& Customer Data Sec. Breach Litig.*, 996 F. Supp. 2d 942, 990–91 (S.D. Cal. 2014) (quoting the
 9 plaintiffs’ complaint; final alteration in original).¹⁰ That leaves only a decision by the Southern
 10 District of California, which held without analysis that the FAL’s prohibition of untrue or
 11 misleading statements also “requires a duty to disclose” in at least certain circumstances. *Cortina*
 12 *v. Goya Foods, Inc.*, 94 F. Supp. 3d 1174, 1192 (S.D. Cal. 2015) (holding that the plaintiffs
 13 plausibly stated a claim under the FAL where the defendant failed to disclose a “potentially
 14 dangerous substance” in the beverages it sold).

15 Although the *Sony* decision did not cite the alleged misrepresentations as the reason for
 16 allowing the plaintiffs’ omissions claim to proceed, the Court agrees with Judge Seeborg’s
 17 conclusion that the outcome is consistent with a requirement that there be at least *some* affirmative
 18 misrepresentation to support a claim under the FAL. *See Hodsdon*, 2016 WL 627383, at *4. As
 19 for *Cortina*, and also to the extent that any of the other cases discussed above are not consistent
 20 with that rule, the Court respectfully disagrees with their interpretation of the FAL’s statutory
 21 language. Because McCoy bases her claims on pure omissions, Opp’n at 12 n.64, she fails to
 22 allege that Nestlé “ma[d]e or disseminate[d] or cause[d] to be made or disseminated” any false or
 23 misleading statement, and thus fails to state a claim under the FAL.¹¹

24
 25 ¹⁰ Judge Seeborg similarly distinguished a Central District decision allowing a claim to
 26 proceed under the FAL where the defendants advertised their washing machines as “Xtra
 27 Sanitary” and “high efficiency,” but allegedly concealed that the machines developed mold and
 28 were not efficient. *Hodsdon*, 2016 WL 627383, at *4 (discussing *Tait v. BSH Home Appliances*
Corp., No. SACV 10-00711 DOC (ANx), 2011 WL 3941387, at *1–3 (C.D. Cal. Aug. 31, 2011)).
¹¹ Moreover, even if the FAL allowed claims based on omissions, McCoy has not established
 any duty to disclose the information at issue, as discussed above in the context of her CLRA
 claim.

1 **F. Additional Defenses**

2 In light of the holdings above that each of McCoy’s claims must be dismissed, the Court
3 need not reach the parties’ arguments regarding Nestlé’s remaining defenses: that the California
4 legislature has created a “safe harbor” against McCoy’s claims by enacting the Supply Chains Act,
5 *see* Mot. at 8–11; that the equitable abstention doctrine requires dismissal, *id.* at 11–13; that the
6 Complaint falls short of the Rule 9(b) pleading standard, *id.* at 23; and that the relief McCoy seeks
7 would compel Nestlé’s speech in violation of the First Amendment, *id.* at 23–25. Although this
8 Order need not and does not resolve any of those issues, the Court briefly addresses the safe
9 harbor argument.

10 “[T]he reach of the UCL is broad, but it is not without limit and may not be used to invade
11 ‘safe harbors’ provided by other statutes.” *Loeffler v. Target Corp.*, 58 Cal. 4th 1081, 1125 (2014)
12 (citing *Cel-Tech*, 20 Cal. 4th at 182). “If the Legislature has permitted certain conduct or
13 considered a situation and concluded no action should lie, courts may not override that
14 determination.” *Id.* The California Supreme Court has described the scope of the doctrine as
15 follows:

16 A plaintiff may thus not “plead around” an “absolute bar to relief”
17 simply “by recasting the cause of action as one for unfair
18 competition.” (*Manufacturers Life Ins. Co. v. Superior Court* (1995)
19 10 Cal. 4th 257, 283, 41 Cal. Rptr. 2d 220, 895 P.2d 56.) The rule
20 does not, however, prohibit an action under the unfair competition
21 law merely because some other statute on the subject does not, itself,
22 provide for the action or prohibit the challenged conduct. To
23 forestall an action under the unfair competition law, another
24 provision must actually “bar” the action or clearly permit the
25 conduct.

26 *Cel-Tech*, 20 Cal. 4th at 182–83; *see also Loeffler*, 58 Cal. 4th at 1125 (emphasizing the
27 requirement that another statute “clearly permit” the challenged conduct).

28 The Supply Chains Act requires certain large corporations to disclose on their websites
their “efforts to eradicate slavery and human trafficking from [their] direct supply chain[s] for
tangible goods offered for sale.” Cal. Civ. Code § 1714.43(a)(1). The statute does not “actually
‘bar’” any action. *See Cel-Tech*, 20 Cal. 4th at 183. Nor does it “clearly permit” any conduct
except disclosure of efforts to eradicate slavery and human trafficking. *See id.*; *Loeffler*, 58 Cal.

1 4th at 1125. There are also discrepancies between the subject matter of the Supply Chains Act and
2 the disclosure McCoy seeks in this case. As Judge Seeborg noted in *Hodsdon*, the statute
3 “concerns slavery and human trafficking, not [other forms of abusive] child labor,” and “the
4 legislative history is silent about whether the legislature contemplated disclosure on labels.”
5 *Hodsdon*, 2016 WL 627383, at *9. Moreover, there is a difference between, on one hand,
6 advertising the steps a company has taken to reduce slavery in its supply chain (as the statute
7 requires), and on the other, disclosing that such slavery persists (as McCoy seeks here). That the
8 legislature mandated the former in certain instances does not necessarily indicate a conclusion that
9 the latter could never be required under existing consumer protection laws.

10 The Ninth Circuit very recently addressed the safe harbor doctrine in *Ebner v. Fresh, Inc.*,
11 a case alleging deception where a cosmetic product label disclosed the net weight of the product
12 contained in a tube but failed to disclose that “only 75% of that product is reasonably accessible.”
13 *Ebner*, ___ F.3d ___, No. 13-56644, Slip Op. at 8, 2016 WL 1056088, at *3 (9th Cir. Mar. 17, 2016).
14 The panel held that the disclosure of the actual net weight fell within the safe harbor because
15 “[b]oth federal and California law affirmatively require cosmetic manufacturers to include an
16 accurate statement of the net weight of included cosmetic product.” *Id.* The plaintiff also brought
17 an omission claim, however, arguing that failure to explain how much of the product was
18 accessible rendered the accurate weight disclosure “deceptive and misleading.” *Id.* The panel
19 held that “[u]nlike a claim seeking to alter the net weight declaration itself, this [omission] claim
20 does not fall within the safe harbor because there is no law expressly permitting the omission of
21 supplemental statements.” *Id.* Similarly, here, Nestlé has not identified any law “expressly
22 permitting the omission of” disclosures on product labels regarding slave labor and the worst
23 forms of child labor in a product’s supply chain. *See id.*

24 The Court recognizes that recent district court decisions have held that the Supply Chains
25 Act creates a safe harbor against claims based on non-disclosure of labor abuses in a supply chain.
26 *Wirth*, 2016 WL 471234, at *6–9; *Barber*, 2015 WL 9309553, at *2–5; *De Rosa*, 2016 WL
27 524059 (summarily dismissing for the reasons stated in *Barber*); *Hughes*, 2016 WL 524057
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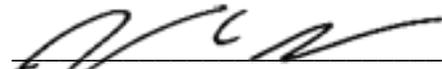
(same).¹² Because this Court holds for the reasons stated above that California’s consumer protection laws do not create any obligation to make the disclosures McCoy seeks, the question of whether the Supply Chains Act would shield against such a duty is ultimately moot, and the Court need not and does not resolve whether *Wirth* and *Barber* are correct or applicable to the case at hand. The Court nevertheless echoes Judge Seeborg’s skepticism that the safe harbor doctrine is as broad as Nestlé contends.

IV. CONCLUSION

For the reasons stated above, McCoy’s claims under the CLRA, the UCL, and the FAL fail to state a claim on which relief may be granted, and are therefore DISMISSED. McCoy has made clear that she does not intend to pursue a claim based on affirmative misrepresentations. *See* Opp’n at 12 n.64. The Court therefore finds that leave to amend would be futile, and dismisses this action with prejudice.

IT IS SO ORDERED.

Dated: March 29, 2016



JOSEPH C. SPERO
Chief Magistrate Judge

¹² Appeals of all of these cases are currently pending before the Ninth Circuit.