# Corporate Sustainability Disclosures in American Case Law: Purposeful or Mere "Puffery"?

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*Recent years have shown an uptick in lawsuits involving sustainability disclosures, or lack thereof, by companies. In the United States, litigation involving sustainability disclosures has primarily arisen in two statutory contexts: securities fraud (federal law) and consumer protection or consumer fraud (state and federal law). Essentially, these cases involve allegations that a company has either provided false and misleading information, or omitted information, about corporate sustainability practices. Misleading or omitted information may occur in the context of formal securities filings or less formal disclosures, such as sustainability or corporate social responsibility reports, human rights documents, employer codes of conduct, or ethics and integrity statements. Plaintiffs in both securities and consumer fraud cases must generally show that the misleading or omitted information at issue was "material" to the plaintiff and that the plaintiff relied upon that information (or lack thereof) when making an investment or purchasing decision.*

*In cases involving sustainability disclosures, there seems to be a difference in the latitude given to plaintiffs with respect to "materiality" and "reliance" based on at least one of three factors: (1) the statutory scheme and the type of interest the plaintiff seeks to protect (that is, investors' versus consumers' interests); (2) the location in which the sustainability-related disclosure occurs*

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*or should have occurred (that is, a formal securities filing versus a less formal sustainability statement); or (3) the form in which the sustainability disclosure is presented to the public, for example, whether information appears to be an affirmative statement of fact or an aspirational promise to engage in sustainable practices. Based on a close examination of existing U.S. case law, this Article takes the position that the third factor seems most important to judges when deciding if liability may be imposed in a sustainability case. As sustainability disclosure liability seems to stem from the form in which disclosures are presented, meaningful criteria are needed to help all stakeholders distinguish a "concrete" and "affirmative" sustainability disclosure from one that is merely "prospective" and "aspirational."*

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## INTRODUCTION

Much has been written about the changing landscape of sustainability reporting requirements for publicly traded companies in the United States partly as a result of increased shareholder and investor demand for corporate sustainability information.[1] Additionally, research suggests that many consumers today are more socially conscious, demanding "greener" products and

1. *See, e.g.*, Ravi Dhar, et al., *Does Sustainability Matter to Consumers?*, YALE INSIGHTS (May 8, 2010), http://insights.som.yale.edu/insights/does-sustainability-matter-to-consumers; Nicholas G. Terris, *Some Liability Considerations Relating to ESG Disclosures*, K&L GATES HUB (May 2017), http://www.klgateshub.com/details/?pub=Some-Liability-Considerations-Relating-to-ESG-Disclosures-05-01-2017.

more transparency on corporate practices.[2] But there is little literature addressing whether these shifts in investor and consumer sensitivity toward sustainability have actually increased litigation risks for companies. Thus, many companies are still left guessing about their potential liability for failing to report sustainability-related risks.

Recent years have shown an uptick in lawsuits involving sustainability disclosures,[3] or lack thereof, by companies. There are many theories under which these lawsuits about sustainability information could be and have been brought.[4] However, litigation involving sustainability disclosures has primarily arisen in two statutory contexts to date: securities fraud (under federal law) and consumer protection or consumer fraud (under state and federal law). These cases often involve allegations that a company has either provided false and misleading information or omitted information about corporate sustainability practices in formal securities filings *or* less formal disclosure formats, such as sustainability or corporate social responsibility (CSR) reports, human rights documents, employer codes of conduct, or ethics and integrity statements.[5] In cases where information is either misleading or omitted, a plaintiff in either a securities or consumer fraud case must generally show that the information at issue was "material" to the plaintiff and that the plaintiff "relied" upon that information when making an investment or purchasing decision.[6]

The legal concepts of "materiality" and "reliance" are at issue in both types of cases, though they are more implicit in state consumer cases[7] compared with securities cases, where "materiality" is an explicit element of a claim that an investor must demonstrate in order for his or her complaint to survive a motion

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2. Dhar, *supra* note 1; Terris, *supra* note 1 ("Although [economic, environmental, and social] issues often do not have an obvious, quantifiable effect on a company's financial statements, many consumers and investors may consider them important. Many consumers may prefer purchasing from companies that they believe are socially and environmentally conscious[.]").

3. *See* Sara K. Orr & Bart J. Kempf, *Voluntary Sustainability Disclosure and Emerging Litigation*, 19(1) CLIMATE CHANGE, SUSTAINABLE DEV., AND ECOSYSTEMS COMM. NEWSLETTER (2015), https://www.lw.com/thoughtLeadership/voluntary-sustainability-disclosure-and-emerging-litigation. Sustainability "disclosures" refers both to formal disclosures contained in financial filings submitted by publicly traded companies, as well as disclosures in the form of sustainability reports, sustainable impact statements, or similar public statements by companies regarding sustainability.

4. *See generally* Terris, *supra* note 1.

5. Jason Meltzer et al., *Corporate Social Responsibility Statements—Recent Litigation and Avoiding Pitfalls*, GIBSON DUNN (Mar. 9, 2017), http://www.gibsondunn.com/publications/Pages/Corporate-Social-Responsibility-Statements—Recent-Litigation—Avoiding-Pitfalls.aspx.

6. Matrixx Initiatives, Inc. v. Siracusano, 563 U.S. 27, 37–38 (2011); Ruiz v. Darigold, Inc./Nw. Dairy Ass'n, No. C14-1283RSL, 2014 WL 5599989, at *3 (W.D. Wash. Nov. 3, 2014).

7. Materiality and reliance are not "elements" of a claim as such, but are still important concepts in demonstrating fraud under state consumer protection laws like the California Consumers Legal Remedies Act (CLRA). *See, e.g.*, Daniel v. Ford Motor Co., 806 F.3d 1217, 1225 (9th Cir. 2015) ("That one would have behaved differently can be presumed, or at least inferred, when the omission is material. An omission is material if a reasonable consumer 'would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question.'") (citation omitted).

to dismiss.[8] However, plaintiffs in both securities and consumer cases generally must allege either that they relied on and were deceived by a company's affirmative representations as to material sustainability-related issues, *or* that the company was under a legal duty to disclose those issues and failed to do so.[9] In either type of case, plaintiffs must allege injury as a result of the misleading, fraudulent, or omitted information either because they paid for a product or security they would not otherwise have paid for (securities fraud), or because they purchased a product they would not otherwise have purchased (consumer protection, consumer fraud) absent the misrepresentation or omission.[10]

The case law on sustainability disclosures to date—primarily securities and consumer cases—remains thin. However, examining the cases that *do* exist produces interesting results. There seems to be a difference in the latitude given to plaintiffs with respect to "materiality" and "reliance" based on at least one of three factors: (1) the statutory scheme and the type of plaintiff interest being protected (that is, investors' interests versus consumers' interests); (2) the location in which sustainability-related disclosure occurs or should have occurred (that is, a formal securities filing versus a less formal sustainability statement); or (3) the *form* in which the sustainability disclosure is presented to the public (that is, whether information looks more like an affirmative statement of fact or an aspirational promise to engage in sustainable practices).

Based on a close examination of existing case law, this Article takes the position that the third factor seems most important to judges when deciding if and when liability may be imposed in a sustainability disclosure case. Courts in sustainability disclosure cases seem to take a broader, more plaintiff-friendly view of "materiality" and "reliance" when sustainability disclosures are concrete, repetitive, and fact based, but a more restrictive view when similar disclosures contain "vague" and "aspirational" language. But what makes a misleading sustainability statement too "aspirational" to be actionable? Courts have not yet produced any meaningful criteria to make the distinction clear with respect to corporate sustainability disclosures.

Our preliminary research suggests that courts seem less likely to dismiss cases involving misrepresentations or omissions if they occur, or should have occurred, in formal securities filings designed to inform investors about material risks to business. Similarly, courts seem to give plaintiffs more latitude where a

8. *Compare Ruiz*, 2014 WL 5599989, at *6 (explaining, in a consumer protection case, that a "*material* fact is fraudulent only if there is a duty to disclose" when analyzing fraudulent concealment claims under California, Washington, and Oregon law) (emphasis added), *with* Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, Inc., 552 U.S. 148, 157 (2008) (holding respondents had no duty to disclose); *see also* Terris, *supra* note 1 ("Materiality is a crucial concept under the securities laws. There is generally no liability for failure to disclose immaterial information, and even false statements typically are not actionable unless they are material.").

9. *Matrixx Initiatives*, 563 U.S. at 37–38; *Ruiz*, 2014 WL 5599989, at *3; Terris, *supra* note 1 ("Even if [economic, environmental, and social] information is material, at least under federal law, companies need not disclose it unless there is a legal duty to do so.").

10. *See Matrixx Initiatives*, 563 U.S. at 37–38; *Ruiz*, 2014 WL 5599989, at *3.

corporation or its representative has made affirmative statements of fact concerning sustainability that it *knew* to be false when made.[11] However, a less formal sustainability disclosure statement—such as a commitment to treat workers ethically and in accordance with all relevant labor laws made in an online CSR report—is often not deemed "material" by courts because it does not fit within the strict parameters of the information that can be governed by the narrow statute at issue (this occurs in the state consumer protection context).[12] With these types of statements, even if a fact is "material" to a plaintiff, courts often hold that such statements are presented in such an "aspirational," "vague," or "optimistic" manner that a "reasonable" consumer or investor simply could not rely on them as a matter of law.[13] Sustainability statements of this type are called "greenwashing" or corporate "puffing" statements.[14]

The problem is that courts in these cases do not provide a succinct definition of what distinguishes an affirmatively false, thus actionable, sustainability statement from one that is merely "aspirational" in nature, even when the "aspirational" statement is grossly misleading as to a company's actual sustainability practices. This inquiry raises several important questions about the overall landscape of sustainability disclosure liability. If we are correct that sustainability disclosure liability really stems from the *form* in which disclosures are presented, what meaningful criteria distinguish a "concrete" or "affirmative" sustainability disclosure from one that is merely "prospective," "aspirational," and "puffery"? It could easily be argued that most sustainability disclosures and public sustainability commitments from companies are, at least in some sense, "aspirational." After all, corporate sustainability goals are almost always forward

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11. Terris, *supra* note 1. It should be noted that if sustainability-related risks are disclosed with *specificity* in securities filings, companies can actually insulate themselves from liability in securities litigation.

> The Private Securities Litigation Reform Act of 1995 affords companies a safe harbor from liability for forward-looking statements. The safe harbor eliminates liability for a forward-looking statement in certain circumstances, including when the forward-looking statement is accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ from those in the forward-looking statement.

*Id.* (citation omitted).

12. *See, e.g.*, *Ruiz*, 2014 WL 5599989, at *3–6.

13. *See id.* at *4; *In re* BP P.L.C. Sec. Litig., 843 F. Supp. 2d 712, 748 (S.D. Tex. 2012). Many courts considering sustainability information under state consumer protection laws have specifically limited "materiality" to apply only to issues of product safety and/or product defects; anything else that is important to consumers when deciding to buy a product is not taken into account. *See, e.g.*, Hall v. Sea World Entm't, Inc., No. 3:15-cv-660-CAB-RBB, 2015 WL 9659911, at *7 (S.D. Cal. Dec. 23, 2015).

14. Terris, *supra* note 1 ("The securities laws generally also require that, when companies do elect to speak on a subject, they must provide enough information to avoid misleading investors. This rule is not limited to SEC filings. It often extends to statements in less formal contexts, such as press releases and perhaps even sustainability reports and advertising. But most courts recognize an important exception that likely eliminates liability for many vague corporate 'green' slogans. They hold that so-called soft 'puffing' statements are not actionable under the securities laws.").

looking.[15] If aspirational sustainability statements are never actionable, there are clear implications for litigants—consumers, shareholders, and investors—seeking to redress grievances related to corporate sustainability representations, as well as for corporations seeking to limit liability risks.

Part I of this Article first provides an overview of the common statutory bases plaintiffs have used thus far to bring lawsuits based on misleading or omitted sustainability disclosures to date. It then explains the legal definition of "materiality" according to current U.S. case law. Part II provides a litigation overview of both securities fraud and consumer protection cases involving sustainability disclosures. Part II further examines and provides insight into how courts view legal "materiality" in both of these contexts, as well as the level of "reliance" on said disclosures that the courts deem to be "reasonable." Part II also attempts to shed light on the way in which courts seem to decide cases differently based on *how* the sustainability disclosures are expressed or presented, either as factual statements or mere "aspirational" promises. This Article concludes by providing a summary of the Article's findings and suggests two avenues for moving forward in this field: either for new legal frameworks to define sustainability disclosure liability, or for judicial clarity on a process or threshold as to when sustainability statements by companies may be actionable. Additionally, this Article provides a roadmap for continued research to monitor for new litigation developments that might supplement or contradict the conclusion presented here.

## SCOPE

This Article focuses on American litigation trends relating to sustainability disclosures, which generally center on cases brought under federal securities laws and state consumer protection laws. Thus, the scope of this Article is limited to an examination of American case law through August 2018, and the preliminary conclusions concern American legal trends only. The cases cited herein do not constitute an exhaustive list of all cases filed involving sustainability information, nor are securities fraud and consumer protection liability frameworks the only possible ways in which liability could be imposed on a company for failure to disclose sustainability information.[16] This Article focuses on securities fraud and consumer protection laws because they seem to be the vehicles plaintiffs have used most frequently in attempts to hold

15. *See*, *e.g.*, EXXONMOBIL, CORPORATE CITIZENSHIP REPORT 6 (2016) https://cdn.exxonmobil.com/~/media/global/files/corporate-citizenship-report/2016_ccr_full_report.pdf (citing the United Nations' Sustainable Development Goals, and stating that ExxonMobil will help "achieve progress" on seventeen goals and specific targets that will inform countries' sustainability planning through 2030).

16. *See* Terris, *supra* note 1 (discussing economic, environmental, and social cases under securities laws and state Unfair Deceptive Acts and Practices statues, but mentioning other possible remedies for plaintiffs, including state corporate laws, proxy lawsuits by shareholders, etc.).

companies liable on the basis of sustainability disclosures or sustainability-related omissions.

## DEFINITION OF "SUSTAINABILITY"

The "sustainability information" referenced in this Article encompasses several economic, environmental, and social factors. Each case cited within Part II was selected because the allegedly misleading or omitted information at issue involved one or multiple sustainability factors. In order to define what constitutes a category of sustainability, this Article uses the Global Reporting Initiative's (GRI) topic-specific sustainability categories from its 2018 Consolidated Set of GRI Sustainability Reporting Standards.[17] This Article also includes animal welfare as a sustainability category. The GRI includes animal welfare in sector-specific guidance documents instead of its main standards, however various organizations and companies consider animal welfare to be a key facet of sustainability evidenced by, for example, including animal welfare sections in corporate sustainability reports.[18]

The GRI's sustainability standards are divided into three main categories—economic, environmental, and social.[19] Economic factors include: economic performance, market presence, indirect economic impacts, procurement practices, anticorruption, and anticompetitive behavior.[20] Environmental factors include: materials, energy, water and effluents, biodiversity, emissions, effluents and waste, environmental compliance, and supplier environmental assessment.[21] Finally, social factors include: employment, labor/management relations, occupational health and safety, training and education, diversity and equal opportunity, nondiscrimination, freedom of association and collective bargaining, child labor, forced or compulsory labor, security practices, rights of indigenous peoples, human rights assessment, local communities, supplier social assessment, public policy, customer health and safety, marketing and labeling, customer privacy, and socioeconomic compliance.[22]

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17. GLOBAL REPORTING INITIATIVE, CONSOLIDATED SET OF GRI SUSTAINABILITY REPORTING STANDARDS 3 (2018), https://www.globalreporting.org/standards/gri-standards-download-center/?g=1401f316-ae12-4bc1-a9a0-4e0cec6f7b28 [hereinafter 2018 CONSOLIDATED STANDARDS].

18. *GRI G4 Sector Disclosures*, GLOBAL REPORTING INITIATIVE, https://www.globalreporting.org/information/sector-guidance/Pages/default.aspx (last visited Feb. 5, 2019) (detailing that many sectors have unique sector-specific sustainability impacts that are not covered by the GRI Standards, such as noise pollution around airports or animal welfare in the food processing industry). *See also, e.g.*, *Animal Welfare at the Heart of Sustainability*, FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS (Nov. 6, 2014), http://www.fao.org/ag/againfo/home/en/news_archive/2014_Animal_Welfare_at_the_Heart_of_Sustainability.html; SUSTAINING OUR WORLD: SUSTAINABILITY REPORT, TYSON FOODS 36–37 (2017), https://www.tysonsustainability.com /_pdf/tyson_2017_csr.pdf.

19. 2018 CONSOLIDATED STANDARDS, *supra* note 17, at 5.

20. *Id.* at 3.

21. *Id.*

22. *Id.*

### NOTE ON "MATERIALITY" AND "RELIANCE" IN DIFFERENT STATUTORY CONTEXTS

At the outset, it is important to note that the legal terms "materiality" and "reliance" are critical concepts in both securities law and state consumer protection case law, though they are presented differently in both types of cases.[23] "Materiality" and "reliance" are both specific elements of a section 10(b)[24] Securities Act claim, presented as elements of a legal "test" that plaintiffs must meet before their claims can move forward.[25] These same concepts are analyzed by courts in consumer protection cases, but are not necessarily presented as elements of a concise legal "test."[26] However, plaintiffs still must demonstrate "materiality" and "reliance" in order to advance their claims under the consumer laws used most commonly in the sustainability disclosure cases to date, such as the California Consumer Legal Remedies Act (CLRA).[27] This Article interrogates the ways in which "materiality" and "reliance" have been subjected to different limitations depending, at least in part, on the form in which a particular sustainability disclosure or statement is presented to the public.

### RESEARCH METHODOLOGY

This Article derives its conclusions from American case law through August 2018, researched using legal information and search tools, such as Westlaw and LexisNexis. As sustainability-related litigation constitutes a fairly recent trend, academic literature on the subject is very limited. Law firms and sustainability organizations, however, have produced short articles and client alerts that helped direct the research for this Article. Gibson, Dunn & Crutcher LLP, for example, published a client alert specifically shedding light on increasing consumer protection litigation related to sustainability disclosures.[28] K&L Gates LLP also produced an informative web article on liability considerations related to the disclosure of economic, environmental, and social criteria.[29] Lawyers at Latham & Watkins LLP, moreover, authored an article titled "Voluntary Sustainability Disclosure and Emerging Litigation" for inclusion in a newsletter of the American Bar Association Section of

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23. *See supra* notes 7–8.

24. 15 U.S.C. § 78j (2012).

25. Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, Inc., 552 U.S. 148, 157 (2008).

26. *See*, *e.g.*, Daniel v. Ford Motor Co., 806 F.3d 1217, 1225 (9th Cir. 2015) (consumer case brought under the California CLRA analyzing materiality and reliance).

27. CAL. CIV. CODE §§ 1750–1785 (West 2010). Based on our research, the California CLRA has been used by many plaintiff consumers suing companies based on false, misleading, and/or omitted sustainability information. *See, e.g.*, Dana v. Hershey Co., 180 F. Supp. 3d 652, 655–56 (N.D. Cal. 2016); Ruiz v. Darigold, Inc./Nw. Dairy Ass'n., No. 14-cv-1283, 2014 WL 5599989, at *3 (W.D. Wash. Nov. 3, 2014).

28. Meltzer et al., *supra* note 5.

29. *See generally* Terris, *supra* note 1.

Environment, Energy, and Resources.[30] These sources helped us identify additional cases and cross-check our independent case law research.

## I. THE LEGAL MEANING OF "MATERIALITY"

### *A. Statutory Bases for Sustainability Disclosure Liability*[31]

Litigation centered on the question of legal "materiality" arises in two primary contexts for the purposes of this Article: (1) federal U.S. securities laws and (2) state consumer protection laws. The term is used to mean the same thing in both types of cases—plaintiffs must, to some extent, show that a false or misleading sustainability statement or an omission was material either to a decision to invest in a security or purchase a product.[32]

Based on our survey of case law, most cases related to general questions of the legal "materiality" of sustainability disclosures are brought under the antifraud provisions of section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 promulgated thereunder.[33] The Exchange Act requires certain publicly traded companies to file publicly available periodic and current reports with the Securities and Exchange Commission (SEC), including annual reports on Form 10-K, quarterly reports on Form 10-Q, and current reports on Form 8-K (each, an "Exchange Act report").[34] Regulation S-K under the Securities Act of 1933 dictates the disclosures that must be included in these filings.[35] Form 10-K, in particular, requires a comprehensive overview of a company's business and financial condition, including financial statements.[36] As discussed below under subpart C, *Other Guidance on "Materiality*,*"* certain sustainability-related disclosures are specifically mandated by Regulation S-K securities filings. The Exchange Act generally prohibits companies from making false or misleading statements in their current and periodic reports, and also requires that companies disclose additional *material* information as may be needed to make required statements not misleading.[37] These and other reporting

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30. Orr & Kempf, *supra* note 3.

31. *See* Holley J. Gregory, *Corporate Social Responsibility, Corporate Sustainability, and the Role of the Board*, PRAC. L. J. (July/Aug. 2017), https://www.sidley.com/en/insights/publications/2017/07/corporate-social-responsibility-corporate-sustainability-and-the-role-of-the-board.

32. *See*, *e.g.*, Terris, *supra* note 1.

33. 15 U.S.C. §§ 78a–78qq (2012); *id.* § 78j.

34. *See* 15 U.S.C. §§ 78m, o(d).

35. 17 C.F.R. § 229 (2012); *see also id.* § 229.10(a).

36. 17 C.F.R. § 229 (2012); *see also id.* § 229.10(a).

37. 17 C.F.R. § 240.12(b)-20 (2012) ("In addition to the information expressly required to be included in a statement or report, there shall be added such *further material information*, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made not misleading.") (emphasis added).

requirements are meant to further the overall goal of the Exchange Act: to promote transparency, confidence, and investor trust in U.S. financial markets.[38]

What this means for sustainability disclosures, however, remains unclear, as companies are still given wide latitude to determine whether, or to what extent, sustainability information fits within their overall financial disclosure frameworks. Congress did decide, however, to require disclosures for certain sustainability-related factors by statute,[39] for example through section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, also known as the "Conflict Minerals" section of the Exchange Act.[40] In an effort to curb corporate exploitation of violence and war in the Democratic Republic of the Congo and neighboring countries, section 1502 requires that companies disclose whether any mineral essential to a company's business or production originated in select African countries.[41] This Exchange Act provision is an outlier, however, in that congressional requirements for sustainability-specific disclosures have not been mandated more broadly.

State consumer protection laws are another common legal theory under which plaintiffs bring sustainability-based lawsuits when companies either disseminate false and misleading information, or fail to disclose "material" information, to consumers. In cases brought under such laws, the concept of "materiality" appears more implicitly in courts' reasoning, in that "materiality" does not always constitute an explicit element of a claim but is relevant to the overall claims of fraud or unfair business practices.[42] California has some of the

38. 15 U.S.C. § 78(b) (2010) ("For the reasons hereinafter enumerated, transactions in securities as commonly conducted upon securities exchanges and over-the-counter markets are effected with a national public interest which makes it necessary to provide for regulation and control of such transactions . . . to insure the maintenance of fair and honest markets[.]").

39. Terris, *supra* note 1 (discussing the Iran Threat Reduction and Syria Human Rights Act, 15 U.S.C. § 78m(r) (2012), which requires companies to disclose dealings with Iran under certain circumstances).

40. Dodd-Frank Wall Street Reform and Consumer Protection Act § 1502, Pub. L. No. 111-203, 124 Stat. 1376, 2213-18 (2010) (codified at 12 U.S.C. §§ 5301–5641).

41. Section 1502 states:

> Not later than 270 days after the date of the enactment of this subsection, the Commission shall promulgate regulations requiring any person described in paragraph (2) to disclose annually, beginning with the person's first full fiscal year that begins after the date of promulgation of such regulations, whether conflict minerals that are necessary as described in paragraph (2)(B), in the year for which such reporting is required, did originate in the Democratic Republic of the Congo or an adjoining country and, in cases in which such conflict minerals did originate in any such country, submit to the Commission a report . . . [.]

*Id.* The precise requirements of conflict mineral disclosure have been the subject of litigation. *See generally* Nat'l Ass'n of Mfrs. v. SEC, No. 1:13-cv-0635-KBJ, 2017 WL 3503370, at *1 (D.D.C. Apr. 3, 2017) (finding that certain disclosure requirements under the statute violate the First Amendment, remanding the case back to the SEC for further guidance). *See also* Michael R. Littenberg & Emily K. Burke, *Case Closed! – The Conflict Minerals Rule Litigation is Over, but the Drama Continues*, ROPES & GRAY (Apr. 4, 2017), https://www.ropesgray.com/en/newsroom/alerts/2017/04/Case-Closed-The-Conflict-Minerals-Rule-Litigation-is-Over-But-the-Drama-Continues.

42. *See* Stanwood v. Mary Kay, Inc., 941 F. Supp. 2d 1212, 1222–23 (C.D. Cal. 2012) (holding that Mary Kay "has a duty to disclose material information. In order for non-disclosed information to be

stronger consumer protection laws of any state in the country, though some have more "teeth" than others.[43] For example, the California Transparency in Supply Chains Act of 2010 requires that every retail seller and manufacturer doing business in the State of California and having worldwide annual receipts of $100 million USD or more disclose specific company actions to eradicate slavery and human trafficking in their direct supply chains.[44] The same law also requires disclosure of this information on company websites, though critics argue that the law does not do enough to catalyze meaningful sustainability disclosure.[45]

The most common consumer statutory bases for sustainability disclosure liability appear to be California's CLRA,[46] Unfair Competition Law (UCL),[47] and False Advertising Law (FAL).[48] Each of these laws have been invoked on multiple occasions by plaintiffs seeking remedies for false, misleading, or omitted sustainability-related information in either securities filings and public corporate statements, or public corporate statements only.[49] Many of the relevant consumer protection cases analyzed for this Article involved these three California statutes (sometimes in tandem with other state laws), arguably limiting our evaluation of how sustainability disclosure cases are dealt with under state consumer laws more broadly. Nevertheless, plaintiffs are increasingly relying on these specific statutory theories to challenge companies on their sustainability disclosures, perhaps due to the fact that California has, at least in theory, some of the strongest consumer protection laws.[50] The extent to which plaintiffs can succeed with these claims, however, is less clear.

### *B. Guidance on "Materiality" from U.S. Securities Law*

Disclosure liability in the securities context hinges on the definition of "material." But today, the definition of "materiality" provides, at best, a rough

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material, a plaintiff must show that had the omitted information been disclosed, [a consumer] would have been aware of it and behaved differently." "Materiality, for CLRA claims, is judged by the effect on a reasonable consumer.") (citations and quotations omitted); *but see* Dana v. Hershey Co., 180 F. Supp. 3d 652, 664–65 (N.D. Cal. 2016) (holding that for a duty to disclose to be imposed under the California CLRA, Dana would have to show affirmative misrepresentation of a "material" fact, but holding also that the definition of "materiality" should be limited to avoid imposing "stunning breadth" of liability for companies, "given the difficulty of anticipating exactly what information some customers might find material to their purchasing decisions and wish to see on product labels").

43. *See* Jennie Lee Anderson et al., *Four Views of Consumer Fraud*, 42 FORUM, no. 3, May/June 2012, at 28, https://www.girardgibbs.com/media/files/55_sharp-caoc-consumer-fraud.pdf.

44. CAL. CIV. CODE § 1714.43 (West 2010).

45. Meltzer et al., *supra* note 5; Nicola Phillips, *Lessons from California: Why Compliance is Not Enough*, GUARDIAN (Sept. 19, 2013), https://www.theguardian.com/global-development-professionals-network/2013/sep/19/why-compliance-isnt-enough ("On its own, it is not nearly far-reaching enough to change global supply chains for the better and deter trafficking and slavery in the global economy.").

46. CAL. CIV. CODE §§ 1750–1785 (West 2010).

47. CAL. BUS. & PROF. CODE §§ 17200–17210 (West 2010).

48. *Id.* § 17500.

49. *See, e.g.*, Sud v. Costco Wholesale Corp., 229 F. Supp. 3d 1075, 1079 (N.D. Cal. 2017); *Hodsdon v. Mars, Inc.*, 162 F. Supp. 3d 1016, 1019 (N.D. Cal. 2016).

50. *See* Anderson et al., *supra* note 43, at 28.

guideline for companies, given that courts in securities cases have left ample room for businesses to make their own determinations about what constitutes "material" information. Thus, guidance on what "materiality" actually means in any given case is drawn from a combination of Supreme Court and federal court securities case law precedent, administrative guidance, and guidelines promulgated by outside advisory organizations, such as the Sustainability Accounting Standards Board (SASB).[51]

According to the U.S. Supreme Court in *TSC Industries v. Northway, Inc.*, an omitted fact is "material" if there is a

> substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. . . . What the standard does contemplate is a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder. . . . [T]here must be substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having *significantly altered the "total mix" of information made available*.[52]

Later, in *Matrixx Initiatives, Inc. v. Siracusano*, the Supreme Court specifically affirmed the "total mix" test, explaining that the Court was "'careful not to set too low a standard of materiality,' for fear that management would 'bury the shareholders in an avalanche of trivial information.'"[53]

Many jurisdictions have developed their own legal tests incorporating this Supreme Court guidance. For example, the Fourth Circuit adopted the following standard for assessing the "materiality" of any alleged misrepresentation:

> a fact stated or omitted is material if there is a substantial likelihood that a reasonable purchaser or seller of a security (1) would consider the fact important in deciding whether to buy or sell the security or (2) would have viewed the total mix of information made available to be significantly altered by disclosure of the fact.[54]

Lower federal courts have been left to apply these guidelines on a case-by-case basis to determine whether a particular piece of information or omission was, in fact, "material." For example, in *Castellano v. Young & Rubicam, Inc.*, a section 10(b) securities fraud case, the Second Circuit reversed a district court grant of summary judgment, finding among other things that questions of fact remained as to the "materiality" of a corporation's failure to disclose merger negotiations as well as negotiations for recapitalization.[55] In *City of Monroe*

51. *Standards Overview*, SASB, https://www.sasb.org/standards-overview/ (last visited Jan. 13, 2019).

52. 426 U.S. 438, 449 (1976) (emphasis added).

53. 563 U.S. 27, 38 (2011) (citing Basic Inc. v. Levinson, 485 U.S. 224, 231 (1988)).

54. Longman v. Food Lion, Inc., 197 F.3d 675, 683 (4th Cir. 1999).

55. 257 F.3d 171, 179–86 (2d Cir. 2001). Plaintiffs also raised claims under 15 U.S.C. § 78j and New York common law. *Id.* at 177.

*Employees Retirement System v. Bridgestone Corp.*, the Sixth Circuit reversed in part a dismissal by the district court, finding that in a securities case,

> a complaint may not properly be dismissed on the ground that the alleged misstatements or omissions are not material unless they are *so obviously* unimportant to a reasonable investor that reasonable minds could not differ on the question of their unimportance.[56]

The court subsequently found that statements made by the defendant in its Annual Report regarding the safety of its tires and the non-impairment of its corporate assets were in fact "material" enough for the case to survive a motion to dismiss.[57]

Additionally, the Ninth Circuit in *SEC v. Global Express Capital Real Estate Investment Fund, I, LLC* affirmed in part a grant of summary judgment in favor of the Securities and Exchange Commission (SEC), finding that investors were materially misled because the defendant company's securities offering materials did not warn investors that the majority of loans and deeds of trust accepted, purchased, or funded by defendant Global Capital were actually nonperforming.[58] Similarly, the same offering materials led investors to believe that they would receive a return on their investment and that the company was profitable—statements that were patently false.[59]

These are only a few examples of the many securities cases applying the "materiality" framework set forth by the Supreme Court in *Basic*, *TSC Industries*, and *Matrixx*, but each illustrates that "materiality" is an inherently case-specific determination.

### *C. Other Guidance on "Materiality"*

Other organizations and administrative agencies have attempted to refine the definition of "materiality" in an effort to give publicly traded companies even more concrete guidance as to what information companies should disclose in order to avoid litigation risks. The SEC, for example, has issued several guidance documents aimed at eliminating uncertainty among companies reporting to the SEC while still leaving the fact-specific "materiality" determination to companies themselves.

For example, Item 303 of Regulation S-K requires, among other things, that registrants "describe any known trends or uncertainties that have had or that the registrant reasonably expects will have a *material* favorable or unfavorable impact on net sales or revenues or income from continuing operations."[60] A 1999 SEC guidance document titled "Staff Accounting Bulletin No. 99" specifically

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56. 399 F.3d 651, 681 (6th Cir. 2005) (quoting Helwig v. Vencor, Inc., 251 F.3d 540, 563 (6th Cir. 2001)) (emphasis added).
57. *Id.* at 690–92.
58. 289 F. App'x 183, 186–87 (9th Cir. 2008).
59. *Id.* at 187.
60. 17 C.F.R. § 229.303(a)(3)(ii) (2012) (emphasis added).

dispelled the notion that "materiality" could be determined using numerical or quantitative thresholds.[61] The guidance pointed out, in relevant part, that

> quantifying, in percentage terms, the magnitude of a misstatement is only the beginning of an analysis of materiality; *it cannot appropriately be used as a substitute for a full analysis of all relevant considerations*. Materiality concerns the significance of an item to users of a registrant's financial statements. A matter is "material" if there is a substantial likelihood that a *reasonable* person would consider it important.[62]

In 2010, the SEC issued another guidance document, this time addressing "materiality" in a sustainability-specific context—climate disclosures.[63] The document was issued in response to increasing shareholder demand for risk disclosures related to climate change, as well as an increased recognition that climate change and its effects pose a material risk to business operations globally.[64] The guidance document described several items within Regulation S-K that may require disclosure of risks posed by climate change, such as Item 503(c), "Risk Factors," Item 103, "Material Pending Legal Proceedings," and Item 303, "Management's Discussion and Analysis of Financial Condition and Results of Operations."[65] The guidance then provided companies with a list of events that may trigger these disclosure requirements, including the "impact of legislation and regulation," "international accords," "indirect consequences of regulation or business trends," and "physical impacts of climate change."[66] The SEC then promised to monitor the state of disclosure requirements as part of its ongoing disclosure review program,[67] although no new interpretive releases on climate risk disclosure specifically have been issued since.

Other organizations, such as the Financial Accounting Standards Board,[68] the SASB, and the International Accounting Standards Board[69], have also weighed in on the issue of how to better define "materiality" for companies and provide clear standards for disclosures. The Financial Accounting Standards Board Statement of Financial Accounting Concepts No. 8, for example, states

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61. Staff Accounting Bulletin No. 99, 64 Fed. Reg. 45,150, 45,151 (Aug. 19, 1999) (codified at 17 C.F.R. § 211).

62. *Id.* (emphasis added).

63. Commission Guidance Regarding Disclosure Related to Climate Change, 75 Fed. Reg. 6290, 6290 (Feb. 8, 2010) (codified at 17 C.F.R. §§ 211, 231, 241). Climate change itself is not a sustainability category recognized by the GRI. Instead, it is considered a separate sustainability issue entirely, the effects of which implicate multiple GRI categories. *See Beyond Carbon, Beyond Reports*, GLOBAL REPORTING INITIATIVE, https://www.globalreporting.org/information/current-priorities/Pages/Climate-change.aspx (last visited Mar. 8, 2019).

64. Commission Guidance Regarding Disclosure Related to Climate Change, 75 Fed. Reg. at 6291.

65. *Id.* at 6293–95.

66. *Id.* at 6295–97.

67. *Id.* at 6297.

68. *About Us*, FASB, https://www.fasb.org/jsp/FASB/Page/LandingPage&cid=1175805317407 (last visited Jan. 13, 2019).

69. *International Accounting Standards Board (IASB)*, IAS PLUS, https://www.iasplus.com/en/resources/ifrsf/iasb-ifrs-ic/iasb (last visited Jan. 13, 2019) (IASB issues the International Financial Reporting Standards).

that "[i]nformation is material if omitting it or misstating it could influence decisions that users make on the basis of the financial information of a specific reporting entity."[70]

Regardless of the guidance that does exist, "materiality" remains a flexible concept, requiring the use of judgment and forcing companies to assume possible legal risk vis-à-vis investors, consumers, and other stakeholders when making these determinations. But a question remains as to whether this flexibility in interpreting "materiality" has resulted in a disservice to investors, consumers, and other stakeholders seeking to understand and rely upon reports of corporate sustainability performance.

## II. LITIGATION INVOLVING SUSTAINABILITY DISCLOSURES

Increased shareholder and consumer interest in corporate sustainability practices has had real implications for companies. There has been a steady increase in the number of lawsuits filed alleging that companies have either provided misleading sustainability information or omitted sustainability information that was material to either an investor's investment decision or a consumer's purchasing decision.[71]

As an initial matter, it is important to note that the timing of sustainability-related impacts does not appear to be relevant for the materiality determination in either securities or consumer cases. This makes sense because the economic, environmental, and social impacts of corporate sustainability behaviors are not always easy to quantify for liability purposes. For example, the effects of corporate greenhouse gas emissions or poor waste disposal protocols might not be physically visible, or culminate in actual financial loss, for many years.

To that end, the Supreme Court in *Basic Inc. v. Levinson* stated that "materiality" in the context of contingent and/or speculative information will depend on "a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity."[72] Similarly, the SASB conducted an analysis of U.S. case law in order to define "materiality" for the purpose of its own standard setting and determined that sustainability issues—*including those with future effects not yet felt*—met legal "materiality" thresholds.[73] Thus, while plaintiff success in sustainability-related lawsuits is questionable, companies are nevertheless facing increased litigation pressure stemming from sustainability issues.[74]

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70. FASB, STATEMENT OF FINANCIAL ACCOUNTING CONCEPTS NO. 8: CONCEPTUAL FRAMEWORK FOR FINANCIAL REPORTING 17 (Sept. 2010), http://www.fasb.org/jsp/FASB/Document_C/DocumentPage?cid=1176157498129&acceptedDisclaimer=true.

71. *See generally* Meltzer et al., *supra* note 5.

72. 485 U.S. 224, 238 (1988) (quoting SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 849 (2d Cir. 1968)).

73. SASB, SASB'S APPROACH TO MATERIALITY FOR THE PURPOSE OF STANDARDS DEVELOPMENT 8 (SB002-07062017), https://library.sasb.org/materiality_bulletin/ (login required).

74. Meltzer et al., *supra* note 5.

### *A. U.S. Securities Litigation Involving Sustainability Disclosures*

As explained above, section 10(b) of the Exchange Act is one of the most common bases for nondisclosure liability vis-à-vis investors in U.S. cases, but few cases have raised the question of sustainability disclosures specifically. According to a recent report on emerging issues related to sustainability disclosures published by SASB:

> The risk of a successful lawsuit based on an allegedly false or misleading sustainability-related disclosure under Rule 10b-5 . . . is likely very small, but it is not non-existent; although lawsuits in this area would likely be dismissed, like almost all that have been filed thus far, litigation is inherently expensive and disruptive.[75]

This SASB report also notes, however, that "[t]here is considerable evidence that investors are interested in certain sustainability information and that such information *is 'material' under the federal securities laws*."[76] The report states that while it is true that securities lawsuits involving sustainability disclosures have not yet proven particularly successful for plaintiffs, the increasing interest of socially-conscious investors and activists may give rise to other unconventional remedies—such as injunctive relief actions and shareholder proxy requests—being used to enforce disclosure requirements in the sustainability space outside traditional securities laws.[77]

Still, many plaintiffs have used section 10(b) in their attempts to hold companies accountable for misleading disclosures and/or nondisclosures, and courts seem open to the idea that overtly misleading sustainability-related disclosures or omissions from financial reports targeting investors can give rise to liability. In any section 10(b) action, a plaintiff must show: (1) a *material* misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) *reliance* upon the misrepresentation or omission; (5) economic loss; and (6) loss causation.[78] Because our findings indicate that liability depends most on the form in which a sustainability disclosure occurs, the "materiality" and "reliance" prongs of the test above are where plaintiffs have the most difficulty in adequately pleading their cases.

In 2016, a large group of shareholders sued ExxonMobil ("Exxon"), one of the largest publicly traded companies in the world, over a failure to disclose climate risks to investors in *Ramirez v. Exxon Mobil Corp.*[79] The shareholders

75. SASB & HARV. L. SCH., LEGAL ROUNDTABLE ON EMERGING ISSUES RELATED TO SUSTAINABILITY DISCLOSURE 18 (Nov. 2017), https://library.sasb.org/legal-roundtable-emerging-issues-related-sustainability-disclosure/.

76. *Id.* at 11 (emphasis added).

77. *Id.* at 12; *see also* Terris, *supra* note 1 (discussing corporate liability considerations under laws other than securities statutes, such as consumer protection laws, corporate laws, etc.).

78. Matrixx Initiatives, Inc. v. Siracusano, 563 U.S. 27, 37–38 (2011).

79. Complaint at 1–2, Ramirez v. Exxon Mobil Corp., No. 3:16-cv-03111-L (N.D. Tex. Nov. 7, 2016).

brought suit against Exxon seeking remedies under sections 10(b) and 20(a) of the Exchange Act and SEC Rule 10b-5.[80] The plaintiffs' complaint alleged that Exxon internally recognized the financial risks posed to the value of its oil and gas assets by climate change and the changing regulatory environment, and that given these risks, the company knew a portion of its assets would potentially not be extractable.[81] Those assets, plaintiffs alleged, were "stranded assets" for which stock prices should have been, but were not, written down,[82] thereby causing deception and financial loss to investors.[83]

The plaintiffs further alleged that Exxon *knew* that the information it disseminated publicly about climate change was false and misleading based on Exxon's longstanding internal research, and that those misrepresentations were "material" and influenced reasonable investors' decisions to purchase Exxon common stock.[84] Thus, plaintiffs alleged both that Exxon made public misrepresentations *and* failed to disclose "material" facts about the value of its assets in light of a changing regulatory environment in violation of federal securities law.[85] Exxon pledged to disclose climate change-related risks to its business after 62 percent of its shareholders voted for a proposal requiring it to do so in 2017.[86] In a recent major ruling, the Dallas-based federal court denied Exxon's motion to dismiss, allowing the massive class action to move forward toward trial.[87] This case should be watched closely following publication of this Article, as it may have major implications for companies' obligations to disclose climate-related risks to business.

Another oil and gas giant, BP P.L.C., also found itself involved in shareholder litigation (among numerous other claims) after the 2010 Deepwater Horizon oil spill killed eleven workers and dumped approximately 4.9 million barrels of oil into the Gulf of Mexico.[88] The plaintiffs sued under section 10(b) of the Exchange Act, among other claims.[89] Investors who had purchased stock after the disaster alleged that BP misled them by failing to accurately depict the

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80. *Id.* at 1.

81. *Id.*

82. "Writing down" a stock involves a reduction in the value of an asset to offset losses or expenses associated with that stock. Will Kenton, *Write-Down*, INVESTOPEDIA (Jul. 13, 2018), https://www.investopedia.com/terms/w/writedown.asp.

83. Complaint at 3, *Ramirez*, No. 3:16-cv-03111-L.

84. *Id.*

85. *Id.* at 7–21.

86. Diane Cardwell, *Exxon Mobil Shareholders Demand Accounting of Climate Change Policy Risks*, N.Y. TIMES (May 31, 2017), https://www.nytimes.com/2017/05/31/business/energy-environment/exxon-shareholders-climate-change.html.

87. Ramirez v. Exxon Mobil Corp., 334 F. Supp. 3d 832, 839 (N.D. Tex. 2018); Tom Korosec, *Exxon Must Face Class-Action Suit Over Climate Change Accounting*, BLOOMBERG (Aug. 14, 2018), https://www.bloomberg.com/news/articles/2018-08-14/exxon-must-face-class-action-suit-over-climate-change-accounting; *Climate Case Chart*, SABIN CTR. FOR CLIMATE CHANGE L., http://climatecasechart.com/case/ramirez-v-exxon-mobil-corp/ (created in collaboration with Arnold & Porter Kaye Scholer LLP).

88. *In re* BP P.L.C. Sec. Litig., 843 F. Supp. 2d 712, 721–22 (S.D. Tex. 2012).

89. *Id.* at 723–24.

magnitude of the disaster's financial effect on the company, and that the company "lowballed" the oil flow rate and resulting environmental damages and cleanup costs after the explosion.[90] This misleading sustainability information, the plaintiffs argued, was indeed "material" to their investment decisions.[91] The Texas district court analyzed upwards of forty-six allegedly misrepresentative statements by BP in corporate securities filings, public statements, and other less formal disclosures.[92] The court found that some,[93] but not all, of the statements were actionable. In particular, the court held that the plaintiffs pleaded with sufficient particularity *material* company misrepresentations regarding the following: BP's implementation of the "Baker Report"[94] recommendations; BP's ability to respond to an oil spill in the Gulf of Mexico; retaliation against employees voicing safety concerns; and post-spill estimates of exact spill volume into the Gulf.[95]

In defining its application of "materiality," the district court held that "'[g]eneralized, positive statements about the company's competitive strengths, experienced management, and future prospects' are immaterial."[96] Moreover,

> [v]ague, loose optimistic allegations that amount to little more than corporate cheerleading are "puffery," projections of future performance not worded as guarantees, and are not actionable . . . because no reasonable investor would consider such vague statements material and because investors and analysts are too sophisticated to rely on vague expressions of optimism rather than specific facts.[97]

The court explained its take on "materiality" further by stating that while "generalized positive statements" about a company's progress are not a basis for liability, statements that are "predictive" can be a basis for liability, but only if they were "false when made."[98] In 2016, after nearly six years of litigation, BP agreed to pay $175 million USD in a settlement with these shareholder plaintiffs.[99]

The BP case seems to indicate that the *form* of a sustainability statement itself matters more than the statute under which "materiality" and "reliance" are being analyzed, or where the disclosure occurs. The BP case was a section 10(b)

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90. *Id.* at 742–44.
91. *Id.* at 775–76.
92. *Id.* at 750.
93. *Id.* at 775–76.
94. The "Baker Report" was a safety improvement mandate following the Deepwater Horizon rig incident. *Id.* at 724–26.
95. *Id.*
96. *Id.* at 775 (citing Rosenzweig v. Azurix Corp., 332 F.3d 854, 869 (5th Cir. 2003)).
97. *Id.* (citing *In re* Sec. Litig. BMC Software, Inc., 183 F. Supp. 2d 860, 888 (S.D. Tex. 2001)).
98. *Id.* at 748 (citations omitted).
99. Diane Craft & Vishal Sridhar, *BP Agrees to Pay $175 Million to Settle Claims with Shareholders*, REUTERS (June 2, 2016), https://www.reuters.com/article/us-bp-spill-settlement/bp-agrees-to-pay-175-million-to-settle-claims-with-shareholders-idUSKCN0YP099 ("the company said in a statement this settlement does not resolve other securities-related litigation in connection with the spill").

securities action that involved several sustainability-related statements *not* included in the company's securities filings.[100] The court held that "vague" statements of "optimism" or "puffery" are not actionable, but that "predictive" statements could be.[101] For example, the court found that BP's public representations that it was not retaliating against employees voicing safety concerns, when in fact there were several reports of such retaliation, were affirmative, concrete, and predictive enough to be actionable.[102] But the average sustainability report or corporate sustainability statement arguably has both "optimistic" and "predictive" qualities, and courts have not yet grappled with this reality.

*In re Massey Energy Co. Securities Litigation* is a case in which plaintiffs brought a securities fraud class action claim against Massey Energy, the fourth-largest American coal company, alleging that over a period of time Massey provided false and misleading information related to its mine safety record and mine safety improvement procedures following a 2006 mine disaster, thereby artificially inflating the value of Massey common stock and causing financial loss to investors.[103] The misrepresentations, offered through securities filings, press releases, public statements by company officials, and investor presentations, concerned three pieces of information: (1) continuous false and misleading statements as to the company's nonfatal days lost, (2) misleading statements as to the company's commitment to and focus on safety, and (3) the company's misleading statements that "violations [of policies] during mining operations [only] occur from time to time" and that the company's costs and liabilities were impacted by "increasingly strict federal, state, and local environment, health and safety and endangered species laws, regulations and enforcement policies," omitting the frequency with which the company overtly violated mining regulations.[104] The court in *Massey* denied defendant's motion to dismiss, and found that the plaintiffs had adequately pleaded the specific facts necessary to show that the company provided "materially" false and misleading information concerning occupational safety issues to the public in violation of section 10(b).[105]

By contrast, the Sixth Circuit affirmed a lower court's dismissal of a similar case because the amended complaint failed to allege facts that were objectively false or misleading in light of the information later known, and therefore failed

100. *BP Sec. Litig.*, 843 F. Supp. 2d at 746–48.

101. *Id.* at 748.

102. *Id.* at 766 ("[P]laintiffs' facts support their contention that BP retaliated against workers—both its own and those of its contractors—who reported safety concerns, . . . contradicting BP's representations that it did not retaliate against workers for reporting safety concerns[.]").

103. 883 F. Supp. 2d 597, 601–09 (S.D. W.Va. 2012).

104. *Id.* at 614.

105. *Id.* After the defendant's motion to dismiss was denied, the parties engaged in settlement proceedings. *See generally* Order Granting Preliminary Approval of Class Action Settlement, *In re* Massey Energy Co. Sec. Litig., No. 5:10-cv-00689-ICB, 2014 WL 10750743 (S.D. W.Va. Feb. 19, 2014).

to meet the first and second elements required for a section 10(b) action.[106] In *Bondali v. Yum! Brands, Inc.*, plaintiffs sued under section 10(b), alleging that it was false or misleading for Yum! not to disclose to regulators that batches of chicken supplied to a Chinese subsidiary company from two Chinese suppliers had tested positive for drug and antibiotic residue—an event that eventually led to a 17 percent drop in stock price.[107]

The court first found that information Yum! presented in its corporate risk statements accompanying public securities filings and its code of conduct regarding food safety standards were *not* misleading because they were merely statements of "aspiration,"[108] rather than objective assertions of fact.[109] Second, the court determined that Yum!'s responses to negative publicity were also not false or misleading because the company *did* take steps to mitigate the risks of contaminated chicken—to the extent that the company did not take all the steps the plaintiffs would have liked, the court held that the issue was one of corporate management rather than investor deception.[110] Third, the plaintiffs argued that Yum!'s risk disclosures were false or misleading because they stated that food safety issues "have occurred in the past, and *could* occur in the future."[111] The plaintiffs contended that because the risk disclosures failed to mention the two specific instances of chicken contamination, the reports were false and misleading because they presented the risk as one of *possibility*, rather than an actual harm that had already occurred.[112] The Sixth Circuit rejected this argument, however, because "cautionary statements are 'not actionable to the extent plaintiffs contend defendants should have disclosed risk factors 'are' affecting financial results rather than 'may' affect financial results.'"[113]

Importantly, the court held that "[t]o treat a corporate code of conduct as a statement of what a corporation will do, rather than what a corporation *aspires* to do, would turn the purpose of a code of conduct on its head."[114] It went on to explain that "[r]isk disclosures . . . are inherently *prospective* in nature," and that they "warn . . . investor[s] of what harms *may* come to their investment. They are not meant to educate investors on what harms are currently affecting the company."[115] The court also rejected an argument that it should focus on the "overall impression" created by Yum!'s statements, stating that the complaint

106. Bondali v. Yum! Brands, Inc., 620 F. App'x 483, 489–93 (6th Cir. 2015) (explaining that plaintiffs failed to meet the materiality and scienter requirements for a section 10(b) action).

107. *Id.* at 485–93, 489.

108. *Id.* at 489–90 (referring to Yum!'s general statements touting its food safety standards and protocols).

109. *Id.* at 490 ("As the district court properly explained, a code of conduct is not a guarantee that a corporation will adhere to everything set forth in its code of conduct. Instead, a code of conduct is a declaration of corporate aspirations.").

110. *See id.*

111. *Id.* (emphasis added).

112. *Id.* at 490.

113. *Id.* at 489 (quoting *In re* FBR Inc. Sec. Litig., 544 F. Supp. 2d 346, 362 (S.D.N.Y. 2008)).

114. *Id.* at 490 (emphasis added).

115. *Id.* at 491.

"must demonstrate that a *particular statement*, when read in light of all the information then available to the market, or a failure to disclose particular information, conveyed a false or misleading impression."[116]

The *BP*, *Massey*, and *Bondali* cases seem to indicate that the *form* of a sustainability statement will be determinative of whether a court will be open to imposing liability in a sustainability disclosure case. Specifically, courts seem less likely to allow fraud cases to proceed past the motion to dismiss phase where the material misleading statement or omission occurs in a less formal "aspirational" sustainability disclosure, like the code of conduct at issue in *Bondali*.[117] By contrast, courts *will* allow cases to proceed beyond the motion to dismiss phase and are open to imposing liability where the statement is "affirmative" and can be measured against a tangible set of guidelines, like the repetitive, false statements in *Massey*.[118]

The problem, however, is that none of these cases offer a clear sense of what constitutes a "predictive" or "affirmative" representation as opposed to a mere "optimistic," "aspirational," or "puffing" statement, let alone what to do with a statement that includes both "predictive" and "puffing" components. How courts have looked at this issue is also indicative of which type of plaintiff—investor or consumer—is more likely to succeed in a sustainability disclosure case. If "aspirational" statements are more likely to occur in less formal disclosure formats, such as a company's voluntary sustainability report, consumer plaintiffs may be disadvantaged when compared with investor plaintiffs who may be more likely to look at and rely on "concrete" sustainability-related information that companies submit in securities filings. However, the cases above illustrate that even investor plaintiffs face barriers if they made investment decisions based on sustainability disclosures that were "aspirational," further illustrating that the *form* more than the place or location of disclosure seems to matter most when determining whether a particular sustainability statement is actionable or not.

### *B. Consumer Protection Litigation*

Another area where sustainability-related lawsuits have become more common is in state (and occasionally federal) consumer protection cases. While many of these lawsuits have been dismissed, the recent frequency of filings seems to indicate a growing interest in suing over sustainability disclosures made to consumers in less formal corporate statements (such as corporate codes of conduct). The most common statutes invoked for these purposes to date have been the California CLRA, the UCL, the FAL, and other common law fraud and deceit statutes.

Occasionally, sustainability-related claims have been brought under federal consumer protection laws. In 2016, for example, the Federal Trade Commission

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116. *Id.* at 492 (citing *In re* Oracle Corp. Sec. Litig., 627 F.3d 376, 390 (9th Cir. 2010)).
117. *Id.* at 490.
118. *In re* Massey Energy Co. Sec. Litig., 883 F. Supp. 2d 597, 613–19 (S.D. W.Va. 2012).

(FTC) brought an action against auto manufacturer Volkswagen Group of America (VW) claiming that, during a seven-year period, VW deceived consumers by selling or leasing more than 550,000 diesel cars based on false, affirmative claims that the vehicles were low emission, met emissions standards, were environmentally friendly, and would have a high resale value due to those features.[119]

The FTC sought compensation for consumers defrauded by VW's deceptive marketing practices as to the environmental standards of its vehicles.[120] The concept of "materiality" appeared in the complaint, where the FTC alleged that "Defendant's failure to disclose the *material* information . . . constitutes a deceptive act or practice in violation of Section 5 of the FTC Act, 15 U.S.C. 45(a)."[121] This case, however, was resolved as part of a $14.7 billion USD settlement that covered not only this set of the FTC's claims, but also allegations by the Environmental Protection Agency, California Attorney General's Office, and California Air Resources Board.[122]

### *1. Misleading Sustainability Information*

Under state consumer protection laws, courts have not only narrowed the definition of "material" information to that concerning product defect or product safety, but also the *type* or *form* of corporate statements a consumer may permissibly rely upon. For example, in *Ruiz v. Darigold, Inc./Northwest Dairy Ass'n*, plaintiffs brought an action against Darigold under the California CLRA, UCL, and FAL (among other laws), claiming that the company failed to disclose material information related to actual labor and wage issues in Darigold's workplace.[123] In short, the California CLRA, UCL, and FAL all generally prohibit promotional material that misrepresents or omits facts in a way that is likely to mislead or deceive a reasonable consumer.[124] Plaintiffs allege that they relied on statements made in the company's CSR report about the ethical treatment of workers and dairy cows when choosing to purchase Darigold products.[125] Plaintiffs brought their lawsuit after discovering that workers at one Darigold dairy had previously sued the company for violations of Washington's

119. Complaint at 5, 6–11, 13–14, FTC v. Volkswagen USA, No. 3:16-cv-01534 (N.D. Cal. 2016).

120. *Id.* at 4.

121. *Id.* at 15 (emphasis added); *see also id.* at 13 (stating generally that "[m]isrepresentations or deceptive omissions of material fact constitute deceptive acts or practices prohibited by Section 5(a) of the FTC Act").

122. FTC, *Volkswagen to Spend up to $14.7 Billion to Settle Allegations of Cheating Emissions Tests and Deceiving Customers on 2.0 Liter Diesel Vehicles* (June 28, 2016), https://www.ftc.gov/news-events/press-releases/2016/06/volkswagen-spend-147-billion-settle-allegations-cheating.

123. No. C14-1283RSL, 2014 WL 5599989, at *3 (W.D. Wash. Nov. 3, 2014); Complaint at 15–25, *Ruiz*, 2014 WL 55999989.

124. *Ruiz*, 2014 WL 5599989, at *1.

125. *Id.* at *3 (noting the statements at issue in the 2010 CSR Report were that the company's "member dairies treated their workers and cows well" and that the company "treats its workers and cows with respect and in compliance with the law.").

wage and labor laws and raised other questions about the treatment of Darigold workers and cows.[126] The information contained in Darigold's CSR report, plaintiffs argued, had been "material" to their decision to purchase Darigold products.[127]

In dismissing this case, the district court held that a fair reading of Darigold's CSR report would not have given the plaintiffs the impression that *all* cows used for milk production were healthy, or that *all* employees were treated fairly and with respect in full compliance with the law.[128] Furthermore, the court held that statements in CSR reports are "forward-looking" and designed to broadly address company-recognized shortfalls, and thus could not be reasonably interpreted as a promise that Darigold had put in place measures that addressed all problems with 100 percent effectiveness.[129] Because CSR statements alone formed the basis of the plaintiffs' grievances, the court held that the plaintiffs simply failed to allege any misrepresentation or omission that would likely deceive a reasonable consumer—to the extent that the plaintiffs relied on statements made in the CSR report, such reliance on "aspirational" statements was unreasonable.[130]

Similarly, in *Barber v. Nestlé USA, Inc.*, consumer plaintiffs sued on the grounds that Nestlé failed to disclose that some of the seafood used in "Fancy Feast" cat food actually originated from small fishing boats operating in the waters of Thailand and Indonesia that used forced labor.[131] The plaintiffs accordingly brought suit under the California CLRA, UCL, and FAL.[132] The plaintiffs argued that Nestlé made a number of public statements online that would lead a reasonable consumer to believe that forced labor was not present in Nestlé supply chains *to the best of the company's knowledge*.[133] In addition to dismissing the action on the basis that the claims were barred by the safe harbor doctrine as created by the California Transparency in Supply Chains Act,[134] the court also dispensed with plaintiffs' misrepresentation argument.[135] As in *Ruiz*, the court sided with Nestlé and held that website statements addressing forced labor practices in supply chains were simply "aspirational," and thus could not

126. *Id.*

127. *Id.*

128. *Id.* at *3–4.

129. *Id.* at *4.

130. *See id.* at *3–5.

131. 154 F. Supp. 3d 954, 956–57 (C.D. Cal. 2015) (noting that both parties acknowledged the existence of some forced labor practices among small suppliers, but admitted that it is almost impossible to determine how prevalent the problem is/was).

132. *Id.* at 957.

133. *Id.* at 962–63 (pointing to eight statements contained in four separate documents that were allegedly misleading, including: (1) "[Nestlé] require[s] [its] supplies, agents, subcontractors and their employees to demonstrate honesty, integrity and fairness, and to adhere to [the Nestlé Supplier Code of Conduct]"; (2) "[t]he Supplier must under no circumstances use, or in any other way benefit from, forced labour"; (3) "[Nestlé] reserves the right to verify compliance with the [Supplier] Code").

134. CAL. CIV. CODE § 1414.43 (West 2010).

135. *Nestlé*, 154 F. Supp. 3d at 959–64.

be reasonably relied upon by consumers as fact.[136] The court explained that Nestlé's Supplier Code is "replete with evidence that its requirements represent an ideal, and not necessarily a reality" and proceeded to explain that "no reasonable consumer . . . could conclude that Nestlé's suppliers comply with Nestlé's requirements in all circumstances."[137] Despite its holding, however, the court also acknowledged that "[t]here is little question that at times, Nestlé's online documents set forth firm requirements for suppliers."[138] The court dismissed plaintiffs' claims, echoing the same negative judicial attitude toward less formal "aspirational" sustainability disclosure as seen in *Ruiz* and previous securities cases, such as *Bondali*.[139]

### 2. *Omission of "Material" Sustainability Information*

While the previous cases dealt primarily with whether reliance on *existing* sustainability disclosures in nonfinancial formats was proper, similar cases have grappled with the question of whether sustainability information was "material" such that it need be disclosed at all.

In *Hall v. Sea World Entertainment, Inc.*, for example, plaintiffs who had purchased SeaWorld tickets brought several consumer fraud claims, alleging that SeaWorld made material misrepresentations and omissions concerning the "happ[iness] and health[]" of its killer whales that plaintiffs relied upon when purchasing their tickets.[140] The court dismissed the plaintiff's claims, which were based on both affirmative misrepresentation and omission theories, for failure to make detailed allegations pursuant to Federal Rule of Civil Procedure 9(b).[141] With the exception of one statement, the court held that the plaintiffs failed to allege what statements, if any, were actually relied upon by the plaintiffs before they purchased SeaWorld tickets.[142] Therefore, the plaintiffs' pleadings simply did not demonstrate reliance on affirmative misrepresentations.[143]

Additionally, and in line with similar cases, the court discussed the reasoning behind limiting the application of "materiality" with respect to the

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136. *Id.* at 964.

137. *Id.* at 963–64.

138. *Id.*

139. Bondali v. Yum! Brands, Inc., 620 F. App'x 483, 490 (6th Cir. 2015) ("a code of conduct is not a guarantee that a corporation will adhere to everything set forth in its code of conduct. Instead, a code of conduct is a declaration of corporate aspirations").

140. 3:15-cv-660-CAB-RBB, 2015 WL 9659911, at *1, *4 (S.D. Cal. Dec. 23, 2015) (alleging generally that over a few years and in various contexts, including park posters, securities filings, and its website, SeaWorld made statements about its killer whales, but failing to show which statements were misleading and relied upon by consumers before tickets were purchased).

141. *Id.* at *1, *4–5 (noting that plaintiffs failed to plead with specificity the facts surrounding the misrepresentation and omissions claims, but even if plaintiffs had met the specificity standard of F.R.C.P. 9(b), SeaWorld had no duty to disclose information about the "health" of whales).

142. *Id.* at *3–8 (highlighting the failure to provide a specific date for many of the alleged misrepresentations, but most of the specific dates that were included were after plaintiffs purchased their tickets, making proving reliance impossible).

143. *Id.*

allegedly omitted information and SeaWorld's duty to disclose said information.[144] Even assuming that killer whale "happ[iness] and health[]" were objectively measurable metrics and that the plaintiffs had alleged with specificity where they should have seen this omitted information, the court held that these "defects" in SeaWorld's disclosures were not "material" in a way that would make them actionable *because they posed no problem for consumer safety at SeaWorld parks*.[145] Barring specific allegations of measurable false statements, SeaWorld simply had no general duty to disclose facts concerning the health or welfare of the whales in captivity to consumers.[146] Accordingly, the court held that the plaintiffs could not have relied on any omissions about the health or condition of the whales, given that there was no duty to disclose that kind of information.[147]

The court went on to explain why it felt obligated to limit the definition of "materiality." The court held that requiring disclosure

> simply because Plaintiffs allege that information about the whales' conditions and health, had it been disclosed, would have been material to them, would effectively require any company selling any product or service to affirmatively disclose every conceivable piece of information . . . because inevitably some customer would find such information relevant to his or her purchase.[148]

Interestingly, the *Hall* court went on to compare the facts of this case to one in which a consumer finds out that a company from which they purchase products treats its employees poorly.[149] The court held that holding a company liable simply because a consumer is unhappy about omissions regarding poor treatment of employees would expose companies to "limitless" liability under the UCL or the California CLRA—a result that would be unacceptable as a matter of policy.[150] A company, the *Hall* court held, simply does not have a duty to disclose "*anything and everything*" that might cause consumers not to purchase its products, even if some consumers allege that the information is material to them.[151] The court did say, however, that plaintiffs may have standing to sue where a company is *affirmatively untruthful*, stating that SeaWorld could theoretically be liable for "measurably false, affirmative representations concerning the health and conditions of [its] whales[.]"[152]

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144. *Id.* at *7.

145. *Id.* at *1, *6–7 (explaining that the complaint "[did] not specifically allege that Plaintiffs saw or heard, let alone relied on, any advertisements, offers, or other representations of SeaWorld in advance of their ticket purchases. As a result, the FAC fail[ed] to plead how, if the allegedly omitted material had been disclosed, the Plaintiffs would have been aware of it and behaved differently").

146. *Id.* at *7.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at *8.

152. *Id.* at *7.

Had the plaintiffs in *Hall* pleaded their claims with more specificity under Rule 9(b), it is possible the court still would likely have limited the definition of "material" to issues of consumer safety and disallowed a broader reading of "materiality." But a question remains as to whether the result would have been the same if plaintiffs adequately pleaded that SeaWorld engaged in a focused, multi-year CSR campaign showcasing SeaWorld's dedication to animal welfare, all the while possessing information about the detriments of captivity on killer whales. The court's own reasoning suggests that a statement of that nature could have been "affirmatively untruthful" enough to be actionable.[153]

*3. Sustainability Disclosure on Product Packaging*

Similar cases involve questions of duties to disclose, and what information need be disclosed, on product packaging. In *Hodsdon v. Mars, Inc.*, for example, plaintiffs brought a lawsuit under the California CLRA, UCL, and FAL alleging that the defendant company breached its duty to disclose on its product packaging that Mars's cacao suppliers in Côte d'Ivoire used child labor practices.[154] The narrow question in this case was whether the defendant had any duty to disclose this information at the point of sale.[155] In dismissing all claims, the court again placed a limit on the definition of a "material omission" that gives rise to liability, finding that California CLRA and UCL liability could only stem from misleading information and/or omissions of product safety or product defect information.[156] The court therefore imposed a bright-line rule and gave companies clear guidance about their disclosure responsibilities under these consumer laws.[157] Interestingly, here the court actually stated that it was laying down a bright line with respect to materiality.[158] Additionally, with respect to the broad UCL claim, the court took the time to point out that information about the source of Mars's cacao beans was in fact readily available on the company's website in the form of a public sustainability disclosure.[159] As such, the absence of the same information on the product packaging was not "substantially injurious to consumers."[160]

This begs an interesting question—in *Hodsdon*, could the absence of any such information about cacao beans *anywhere* have been "substantially

153. *Id.*

154. 162 F. Supp. 3d 1016, 1019 (N.D. Cal. 2016).

155. *Id.*

156. *Id.* at 1023, 1026 (discussing the UCL and the California CLRA claim and dispensing with the FAL claim easily because the FAL requires a statement to have been made, and plaintiff had not alleged reliance on a misleading statement, but instead rested his claim on the *omission* of material information from the product wrapper).

157. *Id.* at 1026 (rejecting the application of a broader materiality test, holding "[t]he definition of a material omission has stunning breadth, and could leave manufacturers (chocolate or otherwise) little guidance about what information, if any, it must disclose to avoid CLRA or UCL liability").

158. *Id.*

159. *Id.* at 1027.

160. *Id.*

injurious" to consumers? Decisions such as *Hall* seem to suggest not, since courts seem eager to limit the definition of "materiality" to product defect and safety issues under these consumer laws regardless of how misleading a statement about the origin of cacao beans may be.[161]

In *Sud v. Costco Wholesale Corp.*, plaintiffs again brought claims under the California CLRA, UCL, and FAL against Costco and Costco suppliers, alleging the defendants failed to disclose on product packaging that they procured prawns from Thailand, a country in which Costco's supply chain was tainted by slavery, human trafficking, and other illegal labor practices.[162] Again the narrow question for the court to decide when ruling on Costco's motion to dismiss was whether companies have a duty to disclose information about slavery/unfair labor practices in their supply chain *on their product packaging* at the point of sale.[163] The court first found that Costco did not have a duty to disclose such information at the point of sale under either the California CLRA or UCL.[164] The court concurred with previous decisions in similar cases, finding that "some bright-line limitation on a manufacturer's duty to disclose is sound policy, given the difficulty of anticipating exactly what information some customers might find material to their purchasing decisions and wish to see on product labels."[165] Therefore, the court held that required disclosures under the California CLRA were limited—again—to issues of product safety and product defects vis-à-vis the consumer, thus the plaintiffs had failed to state a claim under the California CLRA and under the fraudulent prong of the UCL.[166] The court dismissed all other claims against defendant Costco and its suppliers.[167]

Again in *Dana v. Hershey Co.*, plaintiffs brought claims under the same set of laws, the California CLRA, UCL, and FAL, alleging that defendant Hershey failed to disclose material information about child labor practices in Côte d'Ivoire on its product packaging.[168] The court looked to the decision in *Hodsdon* and similarly rejected a broad duty to disclose sustainability information to consumers at the point of sale beyond product safety and product defect issues.[169] In limiting the scope of required disclosure under the California CLRA, the court decided the case in much the same way as the *Hodsdon* court, stating that "[t]here are countless issues that may be legitimately important to

161. *Hall v. Sea World Entm't, Inc.*, 3:15-cv-660-CAB-RBB, 2015 WL 9659911, at *6–7 (S.D. Cal. Dec. 23, 2015).

162. 229 F. Supp. 3d 1075, 1079 (N.D. Cal. 2017).

163. *Id.* at 1080.

164. *Id.* at 1084–87.

165. *Id.* at 1086 (citing McCoy v. Nestle USA, Inc., 173 F. Supp. 3d 954, 996 (N.D. Cal. 2016)) (emphasis added).

166. *Id.* at 1087.

167. *Id.* at 1082.

168. 180 F. Supp. 3d 652, 655 (N.D. Cal. 2016).

169. *Id.* at 659, 664–65.

many customers, and the courts are not suited to determine which should occupy the limited surface area of a chocolate wrapper."[170]

It is possible that cases involving omissions and disclosure duties simply demonstrate that California's consumer protection laws are not the best vehicles through which to enforce consumer rights to sustainability information. However, that would be somewhat troubling given that California possesses arguably the most strong, progressive consumer protection laws in the country.[171] But with respect to the misrepresentation (rather than omission) cases in particular, it remains an open question whether the claims in *Hall*, *Barber*, and *Ruiz* could have survived motions to dismiss if the statements at issue ran afoul of more specific, detailed, and "affirmative" sustainability commitments. Another question remains as to what a sustainability disclosure or statement outside of a formal securities filing needs to look like in order to be an actionable "affirmative misrepresentation" as opposed to a nonactionable "aspirational statement." If all sustainability reports, CSR reports, and ethics statements have "aspirational" aspects, our research suggests that plaintiffs may have no recourse even if such statements are misleading.

One sustainability case seems to cut the other way, highlighting a more liberal approach to "materiality" and "reliance" under the same consumer protection laws. In *Stanwood v. Mary Kay, Inc.*, the district court denied in part defendant Mary Kay's motion to dismiss.[172] The plaintiff in *Stanwood* brought fraud and fraudulent concealment claims along with claims under the California CLRA, FAL, and UCL against Mary Kay cosmetics, alleging that Mary Kay engaged in a long-term, focused marketing campaign designed to show consumers that it did not test products on animals, when in fact it did in order to comply with Chinese market laws.[173] The plaintiff alleged, among other things, that not only did Mary Kay *affirmatively* represent to organizations like People for the Ethical Treatment of Animals (PETA) that it did not conduct product testing on animals, but it *explicitly* stated on its website that it did not test on animals.[174] The company even touted itself as a "PETA pledge member" after being placed on the PETA "Do Not Test" list.[175]

While the district court did dismiss plaintiff's fraudulent misrepresentation claim for failure to meet the heightened pleading standard under Federal Rule of

170. *Id.* at 664–65.

171. *See* Anderson et al., *supra* note 43, at 28.

172. 941 F. Supp. 2d 1212, 1216 (C.D. Cal. 2012).

173. *Id.* at 1215–16.

174. *Id.*

175. *Id.*; *see also* PETA, *Companies that Don't Test on Animals: Frequently Asked Questions* (Jan. 12, 2019), http://www.mediapeta.com/peta/PDF/companiesdonttest.pdf ("Company representatives interested in having their company's name added to our cruelty-free list(s) must complete a short questionnaire and sign a statement of assurance verifying that they do not conduct, commission, or pay for any tests on animals for ingredients, formulations, or finished products and that they pledge not to do so in the future. PETA will then add qualifying companies to our pocket-sized Cruelty-Free Shopping Guide, our Shopping Guide brochure, and our online searchable database of cruelty-free companies.").

Civil Procedure 9(b), the court did allow other claims to survive—namely claims under the California CLRA and for fraudulent concealment.[176] Most notably, the court held that the plaintiff had sufficiently alleged that Mary Kay in fact had a duty to disclose information about animal testing because that information *was material*, meaning that "had [plaintiff] known about the animal testing practices, she would have acted differently by not purchasing Mary Kay products."[177] Thus, this court analyzing a claim brought under the same consumer protection laws was willing to find a sustainability-related issue—animal welfare[178]—"material" such that it could give rise to a duty to disclose and could not be disposed of on a motion to dismiss.[179] The court held that plaintiff sufficiently alleged that "a reasonable consumer would behave differently had she been aware of Mary Kay's animal testing practices."[180]

Moreover, the plaintiff's "reliance" on Mary Kay's representations, required for California CLRA liability, was not dismissed out of hand as unreasonable as a matter of law.[181] It is important to note, however, that subsequent California courts specifically declined to follow *Stanwood*'s broader take on "materiality" and potential liability in cases involving sustainability statements and disclosures.[182] Therefore, *Stanwood* is distinct from the cases discussed above given that the court viewed the company's statements as affirmatively untruthful based on what the company actually knew, rather than merely aspirational and misleading.

These consumer cases raise interesting questions about the ability of consumers to leverage sustainability disclosures (or the absence of them) in legal actions, given that consumers (and investors) often rely on sustainability statements, such as CSR reports, that could be viewed as "aspirational" when making purchasing decisions. The consumer protection cases discussed above stand for the proposition that there is generally no duty to disclose sustainability information to begin with, severely limiting the scope of "material" information, or lack thereof, under existing California consumer protection laws and curtailing legal remedies for consumers alleging fraud. Additionally, sustainability information that *is* disclosed is often expressed in a format separate from, and less formal than, an Exchange Act securities filing. If that information, contained instead in sustainability reports, ethics statements, etc., is too "prospective" and "aspirational," court decisions seem to suggest that reliance

176. *Stanwood*, 941 F. Supp. 2d at 1219–23.
177. *Id.* at 1221.
178. *See* sources cited *supra* note 18.
179. *Stanwood*, 941 F. Supp. 2d at 1219–23.
180. *Id.* at 1223.
181. *Id.*
182. *See* Dana v. Hershey Co., 180 F. Supp. 3d 652, 664 (N.D. Cal. 2016) (declining to extend *Stanwood*, affirming that some "bright-line limitation on a manufacturer's duty to disclose is sound policy"); Hodsdon v. Mars, Inc., 162 F. Supp. 3d 1016, 1025 (N.D. Cal. 2016) (declining to follow *Stanwood* in light of "overwhelming authority to the contrary").

on such documents is unreasonable as a matter of law due to the *form* in which it appears.[183]

Arguably, the average investor or consumer may be more likely to look at a company's website as opposed to a Form 10-K or other Exchange Act report when forming an opinion that might influence investment and/or purchasing decisions. Looking to a sustainability or CSR report on a company's website might be preferable anyway, given that formal securities filings do not often include the sustainability information or the data that consumers and investors are looking for.[184] At present, investors and consumers face almost insurmountable obstacles when it comes to holding companies legally accountable to their sustainability commitments. Most companies disclose sustainability information in an informal manner that is arguably at least somewhat aspirational. Picture, for example, a company's glossy annual CSR report with sustainability goals. These reports certainly contain information "material" to at least some investors and consumers.[185] And while these reports certainly have "optimistic" and "aspirational" qualities, they also often include quantitative "affirmative" statements about corporate sustainability impacts.

So where does this leave investors and consumers who rely on sustainability or CSR reports in order to assess companies' sustainability practices? What must a corporate sustainability disclosure actually look like for it to form a valid basis for a fraud action? Can a company ever be both "aspirational" and "affirmative" when expressing its sustainability goals without exposing itself to liability, or is it in a corporation's best interest to keep its sustainability disclosures "vague"

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183. Of course, *Stanwood* is distinguishable given that Mary Kay's marketing campaign was so explicit in its attempts to convince consumers that it did not conduct animal testing. 941 F. Supp. 2d at 1219–20. However, given courts' reticence to follow *Stanwood*, it would be interesting to see if another case with a similar fact pattern turned out the same way.

184. *See, e.g.*, WORLD BUS. COUNCIL FOR SUSTAINABLE DEV., MATERIALITY IN CORPORATE REPORTING—A WHITE PAPER FOCUSING ON THE FOOD AND AGRICULTURE SECTOR 9 (2018), http://docs.wbcsd.org/2017/form/WBCSD_Materiality_Report.PDF.

185. For example, Colgate-Palmolive's Policy on Responsible and Sustainable Sourcing of Palm Oils states:

> As we strive for zero deforestation in our operations and activities, we will partner with stakeholders and our suppliers to build a transparent global supply chain that meets the following criteria:
>
> No deforestation of High Carbon Stock (HCS) forest
>
> No deforestation of High Conservation Value (HCV) areas
>
> No use of fire for land clearance
>
> No new development on peat lands, regardless of depth
>
> Reduction of Greenhouse Gas Emissions
>
> No exploitation of people or local communities.

*Our Policy on Responsible and Sustainable Sourcing of Palm Oils*, COLGATE-PALMOLIVE CO., https://www.colgatepalmolive.com/en-us/core-values/our-policies/palm-oils-policy (last visited Jan. 13, 2019). In 2016, Greenpeace identified Colgate-Palmolive as one of the companies failing its commitment on sustainable sourcing. *See* GREENPEACE, CUTTING DEFORESTATION OUT OF THE PALM OIL SUPPLY CHAIN: COMPANY SCORECARD 7 (2016), https://www.greenpeace.org/archive-international/Global/international/publications/forests/2016/gp_IND_PalmScorecard_FINAL.pdf.

and "puffy" to avoid liability? And where does this leave various stakeholders interested in holding companies accountable for their public sustainability representations? Court decisions to date suggest that reliance on many informal sustainability statements would be misplaced and unreasonable, despite the fact that these disclosures are often the sole public indicators of a company's sustainability goals and performance. It follows that there is no clear way to hold companies legally accountable for sustainability statements because many such statements are aspirational in nature. This is an undesirable scenario in today's world where numerous facets of sustainability—from labor to environmental impact—are of "material" importance to many investors and consumers.[186]

There are two options for remedying this problem. First, if sustainability disclosures were mandated by law, misleading information or omissions would be actionable outside of securities and consumer protection frameworks because a separate, specialized legal framework would apply. Second, courts could begin to recognize the growing importance of such disclosures and clarify their interpretations of "materiality" and "reliance" based on a predetermined process and set of criteria that allow companies to identify material issues related to sustainability. By doing this, courts would be better able to hold companies accountable for responsibly and accurately depicting material sustainability practices to the public.

## CONCLUSION

This is a litigation overview as of August 2018. This project will require continuous monitoring for new filings, new case developments under securities laws, consumer protection laws, and in other legal contexts, as well as new legislative or regulatory developments on sustainability disclosure. The case law that is available, however, highlights the current state of sustainability disclosure litigation and the seeming discrepancies in judicial treatment based on the form in which sustainability disclosures are presented to the public.

This overview underscores the following main points. First, the seriousness with which courts treat sustainability disclosures seems to depend on the *form* in which the sustainability disclosure occurs: a factual, quantitative statement will be treated more seriously than one that seems more "aspirational." Courts then seem to take a highly conservative approach to sustainability disclosure in cases where sustainability or CSR reports, as opposed to securities filings reflecting sustainability issues as risks to business, are at issue. This discrepancy disadvantages both consumers *and* investors who rely on sustainability information available in the very sources that are specifically created to provide

186. *See* FORUM FOR SUSTAINABLE AND RESPONSIBLE INVESTMENT, REPORT ON US SUSTAINABLE, RESPONSIBLE AND IMPACT INVESTING TRENDS 2016, at 5 (2016), https://www.ussif.org/files/SIF_Trends_16_Executive_Summary(1).pdf ("The market size of sustainable, responsible and impact investing in the United States in 2016 is $8.72 trillion [USD], or one-fifth of all investment under professional management."); Terris, *supra* note 1.

that information. Arguably, the average person should not be expected to differentiate between an "affirmatively false" sustainability statement and one that is merely "aspirational"—materials containing both types of statements provide stakeholders with critical information about corporate sustainability efforts.

These discrepancies may be the result of existing statutory schemes struggling to accommodate the scope of potential liabilities created by new demand for a broad range of sustainability information. Informative ancillary research to this project might include analyzing how other countries have dealt with sustainability disclosure liability. For example, some countries have developed codified sustainability disclosure requirements.[187] Looking to other countries could provide a basis for American consumers and investors to argue for mandatory sustainability disclosure laws in the United States at both the state and federal levels. Informative questions for future research could include the following: Do sustainability disclosures in foreign countries need to be included in government filings, as well as less formal disclosure formats, such as CSR reports? If so, do domestic courts enforce those obligations effectively, and do they allow private causes of action for fraud? Does enforcement differ, and if so, how?

How U.S. courts in securities and consumer cases deal with the questions of legal "materiality" and permissible "reliance" in future sustainability cases is undetermined—the case law on sustainability disclosure is still in its early stages. But one thing is certain: pressure to expand the parameters of those concepts in order to keep pace with a world in which investors, shareholders, consumers, and other stakeholders demand sustainability information from corporations ranging across some or all of the GRI categories listed above will only increase. Corporations will either continue to benefit from both a lack of agreed-upon standards governing sustainability disclosures and judicial skepticism about making aspirational statements in sustainability reports and similar documents actionable, *or* existing U.S. law will evolve—either by judge-made law or statute—to meet the needs and demands of younger generations demanding transparency about corporate sustainability practices.

187. *See generally* Council Directive 2014/95, 2014 O.J. (L 330) 1, 1–4 (EU) (amending EU Directive 2013/34 regarding disclosure of nonfinancial and diversity information); *see also* Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre [Law 2017-399 of March 27, 2017 on the Duty of Care of Parent Companies and Ordering Companies], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL JOURNAL OF FRANCE], Mar. 28, 2017.

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