

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

JUL 20 2018

FOR THE NINTH CIRCUIT

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U.S. COURT OF APPEALS

MONICA SUD, individually, and on behalf
of all others similarly situated and CECILIA
JACOBO, individually, and on behalf of all
others similarly situated,

Plaintiffs-Appellants,

v.

COSTCO WHOLESALE CORPORATION,
a Washington Corporation,

Defendant-Appellee,

and

CHAROEN POKPHAND FOODS, PCL, a
Bangkok, Thailand Corporation and C.P.
FOOD PRODUCTS, INC., a Maryland
Corporation,

Defendants.

No. 17-15307

D.C. No. 4:15-cv-03783-JSW

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Jeffrey S. White, District Judge, Presiding

Argued and Submitted June 12, 2018
San Francisco, California

* This disposition is not appropriate for publication and is not precedent
except as provided by Ninth Circuit Rule 36-3.

Before: SCHROEDER, GOULD, and DIAZ,** Circuit Judges.

Tragically, forced labor still infects the supply chains of many of the goods that American consumers buy. Here, the plaintiffs contend that California consumer protection laws impose a duty on Costco to disclose forced labor in the supply chain of prawns sold at Costco stores.¹ The district court granted Costco's motion to dismiss. Reviewing the dismissal *de novo*, we affirm.

Insofar as the plaintiffs' claims are premised on omissions, our decision in *Hodsdon v. Mars, Inc.*, 891 F.3d 857 (9th Cir. 2018), controls the outcome. In *Hodsdon* we held that a seller of goods has a duty to disclose only product defects that relate to the "central functionality" of the product. *Id.* at 863. Slave labor in a product's supply chain does not relate to the central functionality of a food product such as the shrimp at issue here. *See id.* at 864. The plaintiffs' claims under the CLRA, the unlawful and fraudulent prongs of the UCL,² and the FAL all require

** The Honorable Albert Diaz, United States Circuit Judge for the U.S. Court of Appeals for the Fourth Circuit, sitting by designation.

¹ Plaintiffs assert that Costco violated the Unfair Competition Law (UCL), Cal. Bus. and Prof. Code § 17200 *et seq.*, the Consumer Legal Remedies Act (CLRA), Cal. Civ. Code § 1750 *et seq.*, and the False Advertising Law (FAL), Cal. Bus. & Prof. Code § 17500 *et seq.*

² The UCL prohibits "any unlawful, unfair or fraudulent business act or practice." Cal. Bus. & Prof. Code § 17200. As in *Mars* plaintiffs here assert that Costco's failure to disclose was unlawful under the UCL because that failure to disclose violated the CLRA. Because we hold that Costco did not violate the CLRA, we also hold that it did not violate the unlawful prong of the UCL.

showing that Costco had a duty to disclose forced labor in the product supply chain. *Id.* at 865, 867–68.

To bring a claim under the unfair prong of the UCL, a plaintiff must show either that the supposed unfairness is “tethered” to a legislative policy, or that it is immoral, unethical, oppressive, unscrupulous, or injurious to consumers. *Scripps Clinic v. Superior Court*, 134 Cal. Rptr. 2d 101, 116 (Cal. Ct. App. 2003). Here, the plaintiffs identify the anti-slavery policy of the United Nations Declaration of Human Rights (UNDHR) as the relevant legislative policy. But in *Hodsdon* we held that “there is not a close enough nexus” between the UNDHR and the failure to include disclosures on product labeling. 891 F.3d at 867. We also held that “failure to disclose information [the defendant] had no duty to disclose in the first place is not substantially injurious, immoral, or unethical.” *Id.* The plaintiffs have not stated a claim under the unfair prong of the UCL.

The plaintiffs try to differentiate this case from *Hodsdon* on grounds that they have pled affirmative misrepresentations, whereas *Hodsdon* involved only omissions. Specifically, the plaintiffs point to Costco’s website statements about its supplier code of conduct, and the steps that Costco would take to curtail human trafficking in its supply chain. Under the relevant California consumer protection statutes, however, the plaintiffs can recover on an affirmative misrepresentation theory only if they relied on the defendant’s representations. *In re Tobacco II*

Cases, 207 P.3d 20, 39 (Cal. 2009) (UCL); *Tucker v. Pac. Bell Mobile Servs.*, 145 Cal. Rptr. 3d 340, 357 (Cal. Ct. App. 2012) (CLRA); *Kwikset Corp. v. Superior Court*, 246 P.3d 877, 884, 888 (Cal. 2011) (FAL). Here, the plaintiffs have not pled reliance on Costco's alleged misrepresentations. Even if construed as an affirmative misrepresentation claim, the plaintiffs' complaint was correctly dismissed. Our recent decision in *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956 (9th Cir. 2018), does not change this result with regard to injunctive relief. In that case we held that "a previously deceived consumer may have standing to seek an injunction against false advertising or labeling." *Id.* at 969. But the plaintiffs here did not rely on Costco's statements and were not previously deceived by them.

AFFIRMED.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:

<http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf>.

Note: If you wish to file a bill of costs, it **MUST** be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

v. 9th Cir. No.

The Clerk is requested to tax the following costs against:

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	REQUESTED <i>(Each Column Must Be Completed)</i>				ALLOWED <i>(To Be Completed by the Clerk)</i>			
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST
Excerpt of Record	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>
Opening Brief	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>
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TOTAL:				\$ <input type="text"/>	TOTAL: \$ <input type="text"/>			

* *Costs per page:* May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** *Other:* Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

Continue to next page

Form 10. Bill of Costs - Continued

I, , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature

("s/" plus attorney's name if submitted electronically)

Date

Name of Counsel:

Attorney for:

(To Be Completed by the Clerk)

Date

Costs are taxed in the amount of \$

Clerk of Court

By: , Deputy Clerk