

Corporate Codes of Conduct: Binding Contract or Ideal Publicity?

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Over the last twenty years, most multi-national corporations have adopted corporate codes of conduct, partially due to incentives from the U.S. government. These self-imposed ethical credos set out basic policy standards to guide employees and officers, but they also serve to assure consumers that the products they purchase come from a principled organization. But as of yet, there has been no successful suit against a multi-national corporation for violations of its code. Are these codes then nothing more than government-sanctioned golden publicity? Through the recent Doe v. Wal-Mart Stores, Inc. suit, this Note analyzes whether corporate codes of conduct are legally binding with regard to human rights violations at foreign supplier factories. After considering contract and tort theories of liability, as well as potential actions for violation of international treaties and false advertising, it remains unclear whether corporations can be legally held to their ethical claims. Ultimately, it may be most effective to look beyond the law—and the corporate code of conduct—in order to achieve justice for victims of human rights abuses abroad.

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INTRODUCTION

Corporations are not responsible for all the world's problems, nor do they have the resources to solve them all...[but], a well-run business... can have a greater impact on social good than any other institution or philanthropic organization.¹

Since the early 1990s, large U.S. corporations have adopted corporate codes of conduct. It is unclear, however, whether these self-imposed ethical protocols are anything more than publicity gold, with no legal efficacy. If these codes are not legally binding, there is no way to hold a corporation responsible for ethical violations—such as human rights abuses committed at foreign supply plants. This Note will utilize the recent *Doe v. Wal-Mart Stores, Inc.* suit as a lens to investigate whether corporate codes of conduct are legally binding under either a third-party beneficiary contract or a negligent undertaking tort framework. This Note will also examine other means of holding corporations accountable for their actions abroad, including the use of international treaties, false advertising claims, and proactive national legislation. Ultimately, while the binding nature of

1. Michael E. Porter & Mark R. Kramer, *Strategy and Society: The Link Between Competitive Advantage and Corporate Social Responsibility*, HARV. BUS. REV., Dec. 2006, at 78, 92.

corporate codes of conduct may be unsettled legally, holding corporations accountable for all levels of their supply chain is a worthwhile objective—whether we use a corporate code, a vote, or our dollar to achieve it.

I. *DOE V. WAL-MART STORES, INC.*

In 2005, workers in Wal-Mart suppliers' factories in China, Bangladesh, Indonesia, Swaziland, and Nicaragua, and employees of Wal-Mart's competitors in Southern California, filed a class action suit against the retail chain.² The plaintiffs alleged breach of contract as third-party beneficiaries (or Wal-Mart as joint employer in the alternative), negligence, unjust enrichment, violation of California's Unfair Competition Law ("UCL"), and violation of the Alien Tort Statute ("ATS").³ The plaintiffs contended that Wal-Mart failed to enforce its Standards for Suppliers code of conduct ("Standards"), which required foreign suppliers to adhere to local laws and industry standards regarding working conditions such as wages, hours worked, forced labor, child labor, and discrimination.⁴ As a result, the foreign plaintiffs suffered from poor working conditions that included excessive hours or days of work, withheld pay, overtime without pay, pay below minimum wage, denial of overtime pay, failure to provide required rest periods, lack of safety equipment, denial of maternity benefits, discrimination because of union activities, and physical abuse.⁵ The California plaintiffs lost pay and benefits because their employers were placed at an unfair disadvantage and were forced to reduce compensation in order to compete with Wal-Mart.⁶

On April 2, 2007, the district court granted with leave to amend Wal-Mart's motion to dismiss for failure to state a claim.⁷ Only the foreign plaintiffs appealed,⁸ and the Ninth Circuit subsequently upheld the district court's decision on July 10, 2009.⁹ The Ninth Circuit found

2. First Amended Class Action Complaint for Injunctive Relief and Damages, *Doe v. Wal-Mart Stores, Inc.*, No. CV 05-07307-NM(MANx), 2007 U.S. Dist. LEXIS 98102, (C.D. Cal. Dec. 28, 2005), ECF No. 19 [hereinafter *Complaint*].

3. *Id.* at 1–2. See 28 U.S.C. § 1350 (2010); CAL. BUS. & PROF. CODE § 17200 (West 2011).

4. *Complaint*, *supra* note 2, at 1–2.

5. *Id.*

6. *Id.*

7. *Doe v. Wal-Mart Stores, Inc.*, No. CV 05-7307 AG (MANx), 2007 U.S. Dist. LEXIS 98102, at *22 (C.D. Cal. Mar. 30, 2007).

8. Instead of amending, the plaintiffs appealed. See Appellee's Answering Brief at 2–3, *Doe v. Wal-Mart Stores, Inc.*, No. CV 05-7307 AG (C.D. Cal. 2008) (No. 08-55706). Because no final judgment had been issued, however, the parties stipulated to dismiss the plaintiffs' appeal. *Id.* The parties returned to district court and further stipulated that the April 2, 2007, order granting Wal-Mart's motion to dismiss was a final judgment, enabling the plaintiffs to appeal. See *id.*; see also *Doe v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 680 (9th Cir. 2009).

9. *Doe v. Wal-Mart Stores, Inc.*, 572 F.3d at 680.

that the employees' third-party beneficiary claim failed because Wal-Mart made no promise to monitor the suppliers, and thus no such promise or contractual duty flowed to their employees.¹⁰ The joint employer claim also failed because the supply contract terms did not entail a sufficient level of day-to-day control over the suppliers' employees to make Wal-Mart the plaintiffs' employer.¹¹ Additionally, the court rejected each of the negligence theories—third-party beneficiary negligence, negligent retention of control, negligent undertaking, and common law negligence—because Wal-Mart did not owe the employees a legal duty to monitor its suppliers or prevent the alleged intentional mistreatment of the suppliers' employees.¹² Finally, the court held that the unjust enrichment claim failed because the connection between the parties was too attenuated where there was no prior relationship between the foreign employees and Wal-Mart.¹³

II. WAL-MART'S FOREIGN SUPPLIERS AND THE STANDARDS FOR SUPPLIERS

A. STANDARDS FOR SUPPLIERS

Wal-Mart's Standards is a component of its Ethical Sourcing Program established in 1992 that aims to "strengthen the implementation of positive labor and environmental practices in factories [and] to bring opportunities for a better life in the countries where merchandise for sale by Wal-Mart is sourced."¹⁴ The company is "committed to working with [its] suppliers and other stakeholders to accomplish these objectives."¹⁵

The Standards outline Wal-Mart's "fundamental expectations from its suppliers regarding their activities in relation to the workers producing merchandise for sale by Walmart and the impact of their manufacturing practices on the environment."¹⁶ The Standards contain eleven sections. Part One requires that suppliers comply with all "national and/or local laws" related to "labor, immigration, health and safety, and the environment."¹⁷ Part Two, "Voluntary Labor," prohibits child, "forced, bonded, prison, or indentured labor."¹⁸ Part Three, "Hiring and

10. *Id.* at 682.

11. *Id.* at 683.

12. *Id.* at 684.

13. *Id.* at 685.

14. *Ethical Sourcing*, WAL-MART STORES, INC. (Dec. 18, 2010), <http://web.archive.org/web/20101218174108/http://walmartstores.com/AboutUs/279.aspx> (accessed using the Internet Archive index).

15. *Id.*

16. WAL-MART STORES, INC., STANDARDS FOR SUPPLIERS (2009) [hereinafter STANDARDS FOR SUPPLIERS]. Wal-Mart issued a new version of the Standards in 2012, but the references throughout this Note are to the 2009 version that was in place at the time of the *Doe* suit.

17. *Id.*

18. *Id.*

Employment Practices,” requires that all terms and conditions of employment, including “hiring, pay, promotion, termination, and retirement,” be based on a worker’s “ability and willingness to do the job.”¹⁹ Part Four specifies that suppliers must remunerate workers with “wages, overtime premiums, and benefits that meet or exceed local legal standards or collective agreements, whichever are higher.”²⁰ Part Five orders suppliers to permit workers to join or form labor unions, and Part Six mandates that suppliers must provide a “safe and healthy work environment” and take “proactive measures to prevent workplace hazards.”²¹ The remaining sections of the Standards discuss the suppliers’ obligation to comply with environmental regulations, avoid conflicts of interest, and ensure financial integrity and a lack of corruption.²² The final paragraph of the Standards includes contact information to report violations, which can be communicated confidentially in a local language.²³ Individuals are encouraged to report issues via the provided email address, website, or telephone hotline.²⁴

The ethics violation reporting website²⁵ links visitors to the “Statement of Ethics,” a global policy in force in each of Wal-Mart’s locations. The Statement of Ethics is available to download in several languages and applies to third parties such as suppliers, requiring them to “act ethically and in a manner consistent with this Statement of Ethics.”²⁶ Much of the language of the document, however, addresses Wal-Mart’s own employees, requiring Wal-Mart associates to comply “fully with all applicable federal, state, and local laws and regulations pertaining to wage-and-hour issues,” including “off-the-clock work, meal and rest breaks, overtime pay, termination pay, minimum-wage requirements, [and] wages and hours of minors.”²⁷

B. PROCESS TO BECOME A SUPPLIER

International suppliers must contact their local Wal-Mart Global Procurement office in order to supply goods for sale in Wal-Mart stores.²⁸

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. WALMART GLOBAL ETHICS OFFICE, <http://www.walmartethics.com/home.aspx> (last visited July 1, 2012).

26. WAL-MART STORES, INC., STATEMENT OF ETHICS 6 (2008).

27. *Id.* at 13.

28. See *Become a Supplier: Proposal Packet*, WAL-MART STORES, INC., <http://walmartstores.com/Suppliers/250.aspx> (last visited July 1, 2012) [hereinafter *Proposal Packet*]; Press Release, Wal-Mart Stores, Inc., Wal-Mart Opens Office to Encourage U.S. Exports of American-Made Goods (Feb. 14, 2003), available at <http://walmartstores.com/pressroom/news/4497.aspx>.

For this purpose, the Global Procurement Program has regional offices in seventeen countries.²⁹

Once registered with the Global Procurement Program, a vendor can provide a product submission to be reviewed by Wal-Mart buyers.³⁰ If the product is accepted, the foreign supplier is required to sign a “legally binding agreement,” which includes contract terms that detail “allowances, new store discounts, merchandise warranties, defective/return merchandise allowances, warehouse allowances, soft goods allowances, late shipment penalties and markdown dollars or discounts.”³¹ Wal-Mart suppliers must also sign the Standards, acknowledging they have read and accept the terms and further acknowledging that any failure to comply with the code of conduct *may* result in Wal-Mart’s immediate cancellation of all orders and refusal to continue to do business with the supplier.³² The code of conduct is intended to apply to suppliers both nationally and internationally.³³ However, it is unclear whether assent to the Standards is a component of a “legally binding” framework for future Wal-Mart orders.

III. WAL-MART: NOT JUST ANY DEFENDANT

A. WAL-MART AND ITS LEGAL BATTLES

Headquartered in Bentonville, Arkansas, Wal-Mart Stores, Inc. is a publicly traded company and the world’s largest retailer.³⁴ With over ten thousand stores in twenty-seven countries and over 2.2 million employees,³⁵ Wal-Mart’s 2011 revenue exceeded \$420 billion with over \$16 billion in profits.³⁶ Wal-Mart ranks number two on *Forbes*’ Fortune 500 (making it America’s second largest company),³⁷ and welcomes more than one-hundred million customers into its U.S. stores each week—nearly a third of the U.S. population.³⁸

Since its founding in 1962, Wal-Mart has faced significant criticism for its treatment of employees, its anti-union stance, discrimination

29. Press Release, *supra* note 28.

30. *Proposal Packet*, *supra* note 28.

31. *Become a Supplier: Requirements*, WAL-MART STORES, INC., <http://walmartstores.com/Suppliers/248.aspx> (last visited July 1, 2010).

32. WAL-MART STORES, INC., *ETHICAL SOURCING: STANDARDS FOR SUPPLIERS MANUAL 18–19* (2009) [hereinafter *MANUAL*]. Wal-Mart issued a new version of the Manual in 2012, but the references throughout this Note are to the 2009 version that was in place at the time of the *Doe* suit.

33. *Id.* at 5.

34. Complaint, *supra* note 2, at 13.

35. See *About Us*, WAL-MART STORES, INC., <http://www.walmartstores.com/aboutus/> (last visited July 1, 2012).

36. See *Key Walmart Stores, Inc.: Financials*, HOOVER’S, http://www.hoovers.com/company/Wal-Mart_Stores_Inc/trjiff-1-1nj3j-1njhft.html (last visited July 1, 2012).

37. DELOITTE, *SWITCHING CHANNELS: GLOBAL POWERS OF RETAILING 2012*, at G11 (Jan. 2012).

38. See Ann Zimmerman & Kris Hudson, *Managing Wal-Mart: How U.S.-Store Chief Hopes to Fix Wal-Mart*, WALL ST. J., Apr. 17, 2006.

against women and minorities, predatory pricing, environmental policies, and foreign product sourcing, among other practices.³⁹ As a result, in 2005 labor unions established several watchdog organizations to influence public opinion against Wal-Mart, including Wake Up Wal-Mart (United Food and Commercial Workers) and Wal-Mart Watch (Service Employees International Union).⁴⁰

Wal-Mart was also recently embroiled in a sexual discrimination lawsuit, the largest class action suit of its kind in U.S. history.⁴¹ Filed in 2000, the suit alleged that Wal-Mart discriminated against women in promotion, pay, and job assignment decisions in violation of Title VII of the Civil Rights Act of 1964.⁴² In June 2004, the district court certified the class which included 1.5 million women who work or have worked at a Wal-Mart store since December 28, 1998.⁴³ The Ninth Circuit affirmed the certification in 2007 and again in 2010 by an en banc panel.⁴⁴ Wal-Mart petitioned the Supreme Court, which in June 2011 decertified the class on the grounds that it lacked commonality because it was impossible for the plaintiffs to prove that every single woman was the victim of sex discrimination.⁴⁵ The class was also rejected for attempting to certify a Federal Rule of Civil Procedure Rule 23(b)(2) injunctive relief class while at the same time seeking Federal Rules of Civil Procedure Rule 23(b)(3) money damages for back pay.⁴⁶

As both a deep-pocketed target for lawsuits and an aggressive defender of its rights, Wal-Mart is constantly involved in litigation. Legal analysts believe Wal-Mart is sued more often than any American entity except the U.S. government, and juries decide a case in which Wal-Mart is a defendant about six times every business day.⁴⁷ According to its most recent quarterly filing with the Securities and Exchange Commission, Wal-Mart is a party in “a number” of suits that include a wage-and-hour

39. See, e.g., Marcus Kabel, *Gloves Come off as Wal-Mart, Critics Slam Each Other on Web*, USA TODAY (Jul. 18, 2006, 6:18 PM), http://www.usatoday.com/tech/news/2006-07-18-wal-mart-web_x.htm.

40. See WAKE UP WAL-MART (Dec. 1, 2010), <http://web.archive.org/web/20101201012047/http://wakeupwalmart.com/about> (accessed using the Internet Archive index); WAL-MART WATCH (Jan. 18, 2006), <http://web.archive.org/web/20060118030123/http://walmartwatch.com/home/pages/about> (accessed using the Internet Archive index).

41. See James Vicini, *Wal-Mart Class-Action Appeal Goes to Supreme Court*, REUTERS (Dec. 6, 2010), <http://www.reuters.com/article/2010/12/07/us-walmart-lawsuit-discrimination-idUSTRE6B531W20101207>.

42. *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 144 (N.D. Cal. 2004).

43. *Id.* at 141, 164.

44. *Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214, 1222 (9th Cir. 2007), *aff'd en banc*, 603 F.3d 571, 577 (9th Cir. 2010).

45. See Daniel Fisher, *Supreme Court Dumps Wal-Mart Sex-Discrimination Class Action*, FORBES (June 20, 2011), <http://www.forbes.com/sites/danielfisher/2011/06/20/supreme-court-dumps-wal-mart-sex-discrimination-class-action>.

46. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2557–59 (2011).

47. See Richard Willing, *Lawsuits a Volume Business at Wal-Mart*, USA TODAY (Aug. 13, 2001, 11:51 PM), <http://www.usatoday.com/news/nation/2001/08/14/walmart-usat.htm>.

class action, gender discrimination cases, and hazardous materials investigations.⁴⁸ Wal-Mart is also notorious for its refusal to settle cases.⁴⁹

With regard to Wal-Mart's foreign labor practices, perhaps the most (in)famous event was the public scandal involving television host Kathie Lee Gifford. In 1996, the human rights group National Labor Committee reported that factories were using sweatshop labor to make the clothes for the Kathie Lee line sold at Wal-Mart stores.⁵⁰ A worker in Honduras smuggled a garment out of a factory, which included a Kathie Lee label on it, and another worker came to the United States to testify about the factory's working conditions.⁵¹ During an episode of *Live! With Regis and Kathie Lee*, Gifford publicly disclaimed any involvement with the day-to-day management of the factories and vowed to establish an independent monitoring program for all of the factories producing her clothing.⁵² President Clinton subsequently appointed her to the White House Apparel Industry Partnership Task Force, part of the Clinton Administration's effort to require some of the best-known brands to begin putting disclaimers on clothing to assure buyers that children were not exploited in the manufacture of those clothes.⁵³

B. WAL-MART'S RESPONSE TO CRITICISM

In response to the accusations that it is an "unrepentant and recidivist violator of human rights,"⁵⁴ Wal-Mart implemented several measures to prevent workers' rights violations in its supplier factories.⁵⁵ One such measure is the Standards code of conduct, developed in 1992 and intended to apply to all suppliers.⁵⁶ The code of conduct is incorporated into its supply contracts, and as a part of its public representations, Wal-Mart promises to do business exclusively with suppliers who are in compliance with the Standards.⁵⁷ Compliance with the Standards is imposed and

48. WAL-MART STORES, INC., FORM 10-Q: QUARTERLY REPORT FOR THE QUARTERLY PERIOD ENDED APRIL 30, 2012, at 13-14 (2012).

49. See *What You Should Know About Suing Wal-Mart*, WAL-MART LITIGATION PROJECT (Mar. 25, 2010), <http://web.archive.org/web/20100325215625/http://www.wal-martlitigation.com/know.htm> (accessed using the Internet Archive index); Willing, *supra* note 47.

50. See Lynne Duke, *The Man Who Made Kathie Lee Cry*, WASH. POST, July 31, 2005, at D1.

51. See Videotape: Zoned for Slavery: The Child Behind the Label, (Nat'l Labor Com. 1995); see also Charles Bowden, *Keeper of the Fire*, MOTHERJONES, July/Aug. 2003.

52. *Id.*

53. *Id.*

54. Complaint, *supra* note 2, at 13.

55. This was also likely a reaction to the 1991 enactment of the U.S. Sentencing Guidelines, which provided monetary incentives and mitigated future liability for companies that instituted ethics programs, including codes of conduct. See *Corporate Codes of Conduct*, INTERNATIONAL LABOUR ORGANIZATION BUREAU FOR WORKERS' ACTIVITIES, <http://actrav.itcilo.org/actrav-english/telearn/global/ilo/code/main.htm> (last visited July 1, 2010); U.S. SENTENCING GUIDELINES MANUAL § 8 (2010).

56. Complaint, *supra* note 2, at 14.

57. See MANUAL, *supra* note 32, at 2-3 ("If a factory fails to meet its required or permitted levels, then the factory will be asked to provide a remediation plan to improve compliance performance so

monitored by the Global Procurement Division from the company's headquarters, with regional offices tasked with implementing the policies and practices to ensure uniformity for all Wal-Mart suppliers in Asia, Africa, and Latin America.⁵⁸ Moreover, Wal-Mart's Standards for Suppliers Manual ("Manual") requires that the Standards be posted at "each factory producing Walmart's merchandise in the local language or languages as a mechanism to communicate with the workers Walmart's expectations from its suppliers and their factories producing Walmart's merchandise."⁵⁹

In concert with the Standards, Wal-Mart reserves the right to inspect foreign suppliers to ensure they are in compliance with the code of conduct. The introduction to the 2009 Manual asserts that Wal-Mart will "audit . . . factories regularly."⁶⁰ The Manual goes on to clarify that the relevant Global Procurement Overseas Field Office is responsible for executing the Ethical Standards Program ("ESP") for all Direct Import Suppliers, and that audits covering "100% of all [m]erchandise" will be conducted by "WalMart approved 3rd party audit firms."⁶¹ Further, all audits after the initial audit will be unannounced.⁶²

The audit consists of a factory tour, a minimum of twenty-five employee interviews, and review of factory documents.⁶³ The auditor then assigns one of four ESP assessment ratings to the factory: (1) Green: no or low-risk violations—follow-up audit within two years; (2) Yellow: medium-risk violations—follow-up audit within one year; (3) Orange: high-risk violations—follow-up audit within six months or disapproved from last audit date if third Orange rating in two years; or (4) Red: serious violations—one strike against the factory.⁶⁴

Wal-Mart enforces its Standards through a "Three Strikes Policy." The first strike from a Red rating results in the cancellation of all current and future orders with the supplier's factory.⁶⁵ If there is a second strike within two years of the first, all current and future orders are cancelled, and the supplier must conduct an independent third-party audit at its own expense and receive a higher audit assessment.⁶⁶ After a third strike, Wal-Mart may terminate its business relationship with the supplier.⁶⁷

that it meets or exceeds allowable limits. Failure to improve environmental performance will result in a factory being banned from producing merchandise for sale by Walmart.").

58. See Complaint, *supra* note 2, at 15.

59. MANUAL, *supra* note 32, at 5.

60. *Id.* at 2.

61. *Id.* at 28.

62. *Id.* at 47.

63. *Id.* at 35–36.

64. *Id.* at 38–39.

65. *Id.* at 40.

66. *Id.* at 40–41.

67. *Id.* at 41.

From September 2010 to August 2011, Wal-Mart also instituted a new web-based training program for Chinese suppliers.⁶⁸ The monthly webinars were intended to supplement existing training and were directed at “manufacturers trying to improve their Walmart audit ratings and factory productivity.”⁶⁹ At its inception, the training program was only directed at specific Chinese factories that manufacture products for Wal-Mart stores, although in the future the training webinars will be offered to additional countries.⁷⁰

Wal-Mart has publicized its goal of sourcing 95% of its merchandise from factories receiving the highest ESP rating by 2012.⁷¹ In order to achieve this objective, Wal-Mart increased the use of third-party auditors to focus its attention on a Supplier Development Program (“SDP”) aimed at helping suppliers understand and apply responsible sourcing in their factories.⁷² While the plaintiffs in *Doe* asserted that at most only 8% of Wal-Mart audits in 2004 were unannounced, this figure may have significantly increased in recent years because Wal-Mart shifted a majority of its field auditing responsibility to third parties in 2009.⁷³ Moreover, the SDP has helped 564 supplier factories (12% of Wal-Mart’s direct import product volume) improve from an Orange to a Green or Yellow rating.⁷⁴ However, this improvement does not discount the possibility that workers are coached on the answers to give audit inspectors, who in turn are pressured to produce positive reports of factories not actually in compliance with the Standards.⁷⁵

IV. CONTRACTUAL OBLIGATION OF THE STANDARDS FOR SUPPLIERS

A. CONTRACT FORMATION

Traditional contract formation requires mutual assent: an offer and an acceptance. While mutual assent is typically achieved by each party making a promise, it can be conveyed by the parties beginning or rendering performance.⁷⁶ According to the Restatement (Second) of

68. *Supplier Training Program*, WAL-MART STORES, INC. (May 20, 2011), <http://web.archive.org/web/20110520084754/http://walmartstores.com/Suppliers/10337.aspx> (accessed using the Internet Archive index).

69. *Id.*

70. *Id.*

71. MANUAL, *supra* note 32, at 48.

72. *Id.*

73. Complaint, *supra* note 2, at 16; WALMART, GLOBAL SUSTAINABILITY REPORT 2010 PROGRESS UPDATE 20 (2010) [hereinafter GLOBAL SUSTAINABILITY REPORT]. This was likely a reaction to the negative publicity from the *Doe v. Wal-Mart Stores, Inc.* suit.

74. GLOBAL SUSTAINABILITY REPORT, *supra* note 73, at 20.

75. Complaint, *supra* note 2, at 26 (“[I]n 2003, the PT Busanaremajaja Agracipta Factory Manager ordered Plaintiff John Doe III, and other workers, to inform Wal-Mart inspectors, if asked, that they do not work much overtime, and that their leave is properly paid.”).

76. See RESTATEMENT (SECOND) OF CONTRACTS § 18 (1981) (“Manifestation of mutual assent to an exchange requires that each party either make a promise or begin or render a performance.”); *see also*

Contracts section 18, determining whether Wal-Mart's Standards is contractually binding between Wal-Mart and its suppliers' employees will hinge upon whether the Standards (1) made "a promise clear enough for an offer;" (2) was communicated in a way that foreign supplier employees knew of its contents and reasonably relied on it; and (3) whether these "employees accepted the offer either by commencing or continuing to work."⁷⁷

Beginning with the second prong, Wal-Mart required the dissemination of the Standards to a degree that foreign employees should have known its contents. Suppliers were obligated to post a copy of the Standards in factories, and the poster version was translated into twenty-five languages for this purpose.⁷⁸ In this respect, the complaint in *Doe* alleged that all of the plaintiffs either "saw posted in the supplier factory or were otherwise made aware" of the Standards, and one of the Indonesian plaintiffs was required to distribute copies of the Standards in his role as a foreman.⁷⁹ Swaziland plaintiff Jane Doe VII saw the Standards posted in the factory where she worked and "understood that the worker rights provisions contained therein were for her direct benefit."⁸⁰ In this manner, the plaintiffs in *Doe* successfully alleged the second prong of contract formation. Similarly, plaintiffs likely met their burden on the third prong because all of the plaintiffs continue to work in Wal-Mart supplier factories, and their performance constitutes "acceptance" of the offer.⁸¹

The most ambiguous component of contract formation between Wal-Mart and its vendors' employees is the first prong: whether Wal-Mart made a promise sufficient to constitute an offer.⁸² Courts often analyze codes of conduct for general or specific terms, and the prevalence of general statements of company policy weighs against formation. Because of this, the Standards are probably not a promise clear enough to constitute an offer. For one, failure to comply with the Standards is not an automatic bar from being a Wal-Mart supplier, and poorly rated factories have several opportunities to take remedial measures in order to continue doing business with Wal-Mart. Instead, the

Morton v. Hewitt, 202 F. Supp. 2d 394, 396 (D. V.I. 2002) (3d Cir. 2003) (although contractor did not immediately accept homeowners' offer, he effectively accepted when he began construction work on the homes and an enforceable agreement was created when he completed the work).

77. Katherine E. Kenny, *Code or Contract: Whether Wal-Mart's Code of Conduct Creates a Contractual Obligation Between Wal-Mart and the Employees of its Foreign Suppliers*, 27 Nw. J. INT'L L. & BUS. 453, 463 (2007).

78. *See id.*

79. Complaint, *supra* note 2, at 26, 35.

80. *Id.* at 26.

81. *See* RESTATEMENT (SECOND) OF CONTRACTS § 18.

82. *See Atlantic Pebble Co. v. Lehigh Valley R. Co.*, 98 A. 410, 412 (N.J. 1916) (finding that, where a promise is in effect an offer contemplating acceptance by performance of a condition, performance of the condition before withdrawal of the offer gives rise to a valid contract).

Standards is merely a list of the types of conduct that *may* result in disciplinary action. Moreover, several of the sections fail to define terms or enumerate consequences. For example, the “Voluntary Labor” section says that “[c]hild, forced, bonded, prison, or indentured labor will not be tolerated,” but it does not describe those violations or what remedial actions Wal-Mart may take in response.⁸³ Thus, a court will likely find the Standards does not contain an offer, and its content is better classified as “general statements of company policy and guidelines for employer-employee conduct.”⁸⁴

Wal-Mart could also successfully argue that it did not intend the Standards to confer rights on workers but rather to serve as notice to its suppliers of the types of conduct that could result in Wal-Mart’s unilateral termination of a contract. Accordingly, the code of conduct should not be read as contractually binding in the context of “Voluntary Labor,” “but should merely be seen as non-contractual guidelines for suppliers to follow.”⁸⁵ In its answer, Wal-Mart asserted a version of this argument, claiming that it obtained a “*right to* monitor the suppliers for its own benefit, not for the benefit of the suppliers or plaintiffs.”⁸⁶ For these reasons, courts have historically been reluctant to find corporate codes of conduct to be enforceable contracts, as was the case in *Doe v. Wal-Mart Stores, Inc.*⁸⁷

B. GERMAN CODE OF CONDUCT DISPUTE

Courts thus far have generally been disinclined to find a code of conduct to be an implied contract—much less an express contract—between a corporation and its employees.⁸⁸ However, a 2005 court ruling in Germany sheds light on Wal-Mart’s own view of the binding nature of a similar code of conduct on its employees.

83. STANDARDS FOR SUPPLIERS, *supra* note 16.

84. Kenny, *supra* note 77, at 464. *See, e.g.*, *Campbell v. City of Champaign*, 940 F.2d 1111, 1112 (7th Cir. 1991) (finding that, when the purpose of an employee handbook is not to confer rights, but to warn employees about conduct that will result in termination, the handbook does not constitute a contract); *Weber Shandwick Worldwide v. Reid*, No. 05 C 709, 2005 U.S. Dist. LEXIS 14482, at *12–13 (N.D. Ill. 2005) (finding that a code of conduct containing no clear promissory language is merely a guide for the standards of conduct expected of an employee); *Czarnecki v. Claypool*, No. 98 C 2908, 2000 U.S. Dist. LEXIS 5647, at *10–13 (N.D. Ill. 2000) (finding that a handbook containing language that merely gives examples of the types of conduct that can lead to discharge does not amount to a contractual promise); *Vickers v. Abbott Lab.*, 719 N.E.2d 1101, 1113–14 (Ill. App. 1999) (finding that general statements of company policy or practice are too indefinite to create a binding promise).

85. Kenny, *supra* note 77, at 466.

86. Appellee’s Answering Brief, *supra* note 8, at 9.

87. *See, e.g.*, *Day v. Staples, Inc.*, 555 F.3d 42, 58 (1st Cir. 2009); *Hinchey v. NYNEX Corp.*, 144 F.3d 134, 141–42 (1st Cir. 1998); *King v. Marriot Int’l, Inc.*, 520 F. Supp. 2d 748, 754 (D. S.C. 2007); *see also* *Lord v. Kimberly-Clark Corp.*, 2011 WL 5118534, at *5–6 (D. S.C. 2011).

88. *See supra* notes 84, 87.

In 2005, Wal-Mart attached a Code of Conduct to its German employees' paychecks and displayed posters with the same Code in local Human Resources departments.⁸⁹ This Code required employees to refrain from intimate relationships with other employees and provided a hotline where suspected violations could be reported.⁹⁰ The Local Labour Court of Wuppertal found the Code violated the German Constitution and German Labor laws, which require that rules regarding employees' personal lives be agreed upon between employees and employers.⁹¹ More importantly, this case demonstrates Wal-Mart's belief that its Code of Conduct is binding on its employees, subjecting them to possible termination for failure to abide by it.⁹² This belief in a binding obligation suggests a similar intent behind Wal-Mart's creation of the Standards, and it also shows the courts' view that codes of conduct, especially those distributed and displayed to employees, have some binding force to them.⁹³ It is important to note, however, that the German code of conduct at issue (unlike the Standards) was specifically directed at Wal-Mart's own employees (as opposed to foreign supplier employees who are one step removed), contained detailed provisions, and warranted termination for non-compliance, allowing it to overcome the contract formation hurdles the *Doe* plaintiffs faced. More significantly, while the German courts viewed such a contract as binding on employees, it remains unclear whether the obligation to enforce the contract is also binding on Wal-Mart.

V. THIRD-PARTY BENEFICIARY CONTRACT CLAIM

The Ninth Circuit rejected plaintiffs' third-party beneficiary breach of contract claim because Wal-Mart did not adopt a contractual duty to inspect supplier factories.⁹⁴ The language of the Standards did not provide for adverse consequences if Wal-Mart failed to monitor suppliers, even though the suppliers could be penalized for failing to comply with the code of conduct.⁹⁵ Instead, Wal-Mart merely reserved the right to monitor its suppliers. Because Wal-Mart made no promise to monitor suppliers, "no such promise flows to Plaintiffs as third-party beneficiaries."⁹⁶

89. See RONALD C. BROWN, *EAST ASIAN LABOR AND EMPLOYMENT LAW: INTERNATIONAL AND COMPARATIVE CONTEXT* 169 (2012); see also Ingebjörg Darsow, *Implementation of Ethics Codes in Germany: The Wal-Mart Case*, IUSLABOR (Mar. 2005), <http://upf.edu/iuslabor/032005/art111.htm>.

90. *Id.*

91. *Id.* Later that year, the Labour Court of Appeal Düsseldorf affirmed the lower court's decision. See Sabine Schmeinck, *Germany-Labour Court of Appeal Düsseldorf Confirms Wal-Mart Decision*, LINKLATERS (Dec. 14, 2005), <http://www.linklaters.com/Publications/Publication1403Newsletter/PublicationIssue20051214/Pages/PublicationIssueItem825.aspx>.

92. Kenny, *supra* note 75, at 463.

93. *Id.*

94. *Doe v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 682 (9th Cir. 2009).

95. *Id.*

96. *Id.*

A third-party beneficiary may assert a claim where a “promise in a contract creates a duty in the promisor to any intended beneficiary to perform the promise.”⁹⁷ Moreover, an intended beneficiary may only make a third-party claim “if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties.”⁹⁸ *Zigas v. Superior Court* qualifies this third-party right to sue in the government contract context: Where a government agency is the promisee and there are an unlimited number of third-party beneficiaries, there must be a clear showing that the contract intended third-party beneficiaries or they have no claim.⁹⁹ This rationale can be extended by analogy to apply to buyer-supplier contracts with multi-national corporations like Wal-Mart, where potential third-party supplier employees could number in the millions. Otherwise, such companies could face almost limitless liability from even the most minor contributors to the supply chain.

The *Doe* court dismissed plaintiffs’ third-party claim due to a lack of evidence of the parties’ clear intent to make a legally binding promise to monitor supplier factories. Wal-Mart also argued that the plain language of the Standards “casts these issues as a right” to monitor, as opposed to a promise to do so made by Wal-Mart.¹⁰⁰ However, as Wal-Mart’s Ethical Sourcing Program develops and the company places a greater emphasis on addressing the human rights violations of its suppliers, this may not be the case.

For one, the circumstances surrounding the creation of the Standards suggest an intent to benefit foreign workers. Wal-Mart was reacting to bad press and needed to assuage the public that it was addressing human rights violations in its factories. While the creation of a code of conduct may have originally been intended just for Wal-Mart’s benefit—that is, to improve public relations—it is unlikely that the world’s largest retailer would admit to this. Fear of a public relations backlash may also be the reason why corporate codes of conduct do not contain disclaimers that would prevent employees from bringing suit on the basis of the code’s statements.

Even if the code of conduct was originally established to benefit the company itself, or it sought to serve foreign workers out of selfish motives, that should not undercut a third-party beneficiary claim. The fact that Wal-Mart required its suppliers to post the Standards in the local language in each factory implies Wal-Mart’s desire that foreign workers recognize that their factory employers are held to ethical

97. RESTATEMENT (SECOND) OF CONTRACTS § 304 (1981).

98. *Id.* § 302(1).

99. 174 Cal. Rptr. 806, 811 (1981).

100. Reporter’s Transcript of Proceedings at 26:1–2, *Doe v. Wal-Mart Stores, Inc.*, No. CV 05-7307 AG (MANx), 2007 U.S. Dist. LEXIS 98102 (C.D. Cal. Dec. 11, 2006).

obligations designed for employee benefit and that violations may be directly reported to Wal-Mart. As Wal-Mart advances its goal of sourcing 95% of its merchandise from compliant factories and works directly with factories to improve their policies through the SDP, it becomes more difficult to make the claim that factory workers are not the intended beneficiaries of these measures based on the various indicia of intent.

Beyond failing to show Wal-Mart's intent to benefit foreign workers, proving that Wal-Mart breached the Standards was an insurmountable obstacle for the *Doe* plaintiffs.¹⁰¹ It is possible, however, to interpret Wal-Mart's recent efforts as equivalent to Wal-Mart pledging to support code compliance by agreeing to monitor and counsel foreign suppliers.¹⁰² Plaintiffs' counsel asserted that it would be "certainly plausible and a reasonable inference" that suppliers went to Wal-Mart claiming that it:

can't expect us overnight to suddenly clean up all of our hundreds or thousands of factories. If you, Wal-Mart, want us to do this, we want you to help us implement and we want you to put some resources in this to help us ensure that we're not losing our contract the day that your code of conduct begins.¹⁰³

Indeed, the Supplier Development Program is described as a collaborative program to work with supplier partners in order to achieve certain social and environmental goals.¹⁰⁴

However, there is no mention of the SDP in the Standards agreement that requires the suppliers' assent, and there is little evidence of

101. The trial court summarily dismissed these "reality-bending allegations," noting that it "strains logic to think that the suppliers would have been motivated to bargain for a counter-promise from Defendant to enforce the suppliers' contractual promise to comply." *Doe v. Wal-Mart Stores, Inc.*, No. CV 05-7307 AG (MANx), 2007 U.S. Dist. LEXIS 98102, at *11 (C.D. Cal. Mar. 30, 2007). However, the court did not address the possibility that competition between suppliers for Wal-Mart's lucrative contracts would lead them to seek a reciprocal commitment from Wal-Mart; that way, suppliers able to secure contracts with Wal-Mart would not have them immediately revoked because sufficient ethical standards were not already in place.

102. See Joe Phillips & Suk-Jun Lim, *Their Brothers' Keeper: Global Buyers and the Legal Duty to Protect Suppliers' Employees*, 61 RUTGERS L. REV. 333, 371 (2009).

103. Reporter's Transcript, *supra* note 100, at 7:14-21. Plaintiffs counsel also cites a Wal-Mart exhibit that takes credit for having implemented the code of conduct: "Since Wal-Mart started [the code of conduct program] . . . in 1992, we have contributed to the improvement of working conditions for many thousands of workers in the factories around the world." *Id.* at 8:3-6. This suggests that Wal-Mart made a promise that was bargained for because "if you're a supplier in China and you are cut to the margins—because that's what Wal-Mart does. They say, you'll make this at the lowest possible price. And if you then come in as Wal-Mart and say in addition to everything else you're doing for us and working 24 hours a day to meet our contracts, we want you to come in and clean up your factories, give everyone a raise, and implement our code of conduct, it is reasonable to assume that a supplier would say, well, then you need to help us do that. You need to show us how to do that. You need to help us monitor. And as Wal-Mart promises, you have to help us implement the code." *Id.* at 8:15-9:1.

104. MANUAL, *supra* note 32, at 48. The hearing transcript also notes that Wal-Mart helped monitor and implement the Standards in some factories (although not ones where Plaintiffs worked), and this shows "what Wal-Mart understood its own obligation to be." Reporter's Transcript, *supra* note 100, at 9:23-10:1.

consideration on the suppliers' part in exchange for Wal-Mart's additional promise to support compliance. Agreeing to comply with the code, being subject to audits, taking remedial actions, and accepting sanctions would likely be viewed as consideration for Wal-Mart's contract to do business with the suppliers and not as additional consideration for Wal-Mart's promise to assist with compliance. Therefore, it is difficult to determine whether this aspect of the Ethical Sourcing Program would be legally binding for lack of consideration. The central tenet of contract construction, that contracts are to be strictly construed against the drafter—especially when factors such as unequal sophistication and bargaining power of the parties are taken into consideration—may, however, make such a claim more feasible.¹⁰⁵

Even more importantly, plaintiffs' third-party beneficiary claim against Wal-Mart as the promisor places plaintiffs in the shoes of the suppliers, making them the promisees. Wal-Mart raised a solid point when it asserted that a "supplier would never sue Wal-Mart to enforce their obligations vis-à-vis Wal-Mart. It just makes no sense."¹⁰⁶ Likewise, because a third-party beneficiary cannot assert greater rights than those of the promisee under a contract, and because it is unlikely suppliers would sue Wal-Mart for its failure to monitor their compliance with the Standards, plaintiffs would likely not succeed on a claim that the foreign suppliers themselves would not bring.¹⁰⁷ The determination of whether or not a defendant should be liable to a third person not in privity, however, is

a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury, and the policy of preventing future harm.¹⁰⁸

Thus, the *Doe* plaintiffs should have had privity to sue Wal-Mart because the Standards agreement was intended—if only indirectly—to benefit them, they suffered harm, and if they are not permitted to recover then no one will be able to do so on their behalf. Without privity, foreign factory workers will be left injured with no means of redress, while Wal-Mart benefits from human exploitation and simultaneously garners

105. See, e.g., *Miller v. Monumental Life Ins. Co.*, 502 F.3d 1245, 1253 (10th Cir. 2007) ("*Contra proferentem* construes all ambiguities against the drafter."); *United States v. Kelly*, 646 F. Supp. 2d 1249, 1253 (D. Kan. 2009) ("An ambiguity will be construed against the party who drafted the agreement.").

106. Reporter's Transcript, *supra* note 100, at 27:1–2.

107. See Appellee's Answering Brief, *supra* note 8, at 19 (citing *Marina Tenants Ass'n v. Deauville Marina Dev. Co.*, 226 Cal. Rptr. 321, 327 (1986)).

108. *Lucas v. Hamm*, 364 P.2d 685 (Cal. 1961) (holding that where a will did not reach its intended beneficiaries due to draftsman error, privity for a tort or third-party beneficiary claim was appropriate to provide reprieve for heirs who would otherwise have no interest).

positive public attention from a code of conduct that is merely window dressing for human rights abuse.

Conversely, the court in *Noel v. Pizza Hut* relied on principles of equity to hold that where “the promisee of the third-party agreement is responsible for the breach, jointly or alone, there is no legal theory that protects the promisee from liability for the breach.”¹⁰⁹ In this way, Wal-Mart need not have made a promise to assist with Standards compliance. Instead, liability results from Wal-Mart causing the suppliers’ breach by making compliance impossible through unreasonable production schedules or prices or failures to assist with compliance. Plaintiffs alleged that Wal-Mart’s “unreasonable time requirements and refusal to pay fair and reasonable prices for manufactured goods” contributed to the suppliers’ inability to pay plaintiffs fair wages and benefits, provide adequate working conditions, and comply with labor laws.¹¹⁰ Indeed, certain plaintiffs were informed by their supervisors that since Wal-Mart was paying such low prices for merchandise, the supplier was forced to pay workers less.¹¹¹

This theory, however, has been criticized. The Washington Legal Foundation and Allied Education Foundation penned an amicus brief dismissing any relationship between Wal-Mart’s contract demands and the suppliers’ factory conditions:

[I]f Wal-Mart’s offered terms are “too low” to make the contract profitable, then the supplier is free to decline the offer. . . . [and] any harm to [plaintiffs] stems directly and exclusively from the supplier’s voluntary decision on how best to operate its business, not from anything attributable to Wal-Mart’s conduct.¹¹²

This argument, however, fails to take into account Wal-Mart’s behemoth stature in the global marketplace. As the largest retailer in the world, Wal-Mart can force deflated contract prices on its vendors that affect the broader market and impact contract prices for manufacturers with which it does not even do business. Moreover, Wal-Mart may be the best or only game in town, leaving foreign suppliers with little to no leverage when negotiating their contracts. When resources are consolidated so heavily in one entity, a “race to the bottom” is often inevitable.

109. 805 P.2d 1244, 1251 (Kan. Ct. App. 1991). A corporation made an agreement with third-party beneficiaries allowing them to sell their stock in the open market, but it made a subsequent agreement with a franchisor that abrogated their right to sell the stock. *Id.* at 1250–51. The court reversed the dismissal for failure to state a claim because there were sufficient facts to show the corporation owed a duty to the beneficiaries and there was no absolute prohibition against a third-party beneficiary suing the promisee of a third-party agreement. *Id.*

110. Complaint, *supra* note 2, at 43.

111. *Id.*

112. Brief of Washington Legal Foundation and Allied Educational Foundation as Amici Curiae in Support of Appellee, Urging Affirmance at 9, *Doe v. Wal-Mart Stores, Inc.*, 572 F.3d 677 (9th Cir. 2009) (No. 08-55706) [hereinafter WLF & AEF Brief].

VI. NEGLIGENT UNDERTAKING TORT CLAIM

The Ninth Circuit dismissed plaintiffs' negligent undertaking claim because Wal-Mart did not undertake any obligation to protect its foreign suppliers' workers.¹¹³ Because Wal-Mart merely reserved the right to audit supplier factories, any inspections performed were gratuitous and did not impose a duty on Wal-Mart to use reasonable care in protecting plaintiffs.¹¹⁴

Under the negligent undertaking duty of care, once an individual undertakes to assist another, he assumes a duty to use reasonable care in doing so.¹¹⁵ Significantly, this Good Samaritan doctrine does not require the existence of a contract or a request for a duty to be imposed. Section 324A of the Second Restatement of Torts notes that an actor who

undertakes, gratuitously or for consideration, to render services to another which *he should recognize as necessary for the protection of a third person* or his things, is subject to *liability to the third person* for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if (a) his failure to exercise reasonable care *increases the risk of such harm*, or (b) he has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of *reliance of the other or the third person upon the undertaking*.¹¹⁶

As noted above, Wal-Mart's statements to the public regarding its goals to improve factory conditions, mandatory supplier assent to the Standards, and placement of this code of conduct in factories for foreign workers to see, seemingly demonstrated Wal-Mart's intent to benefit its foreign suppliers' workers—even if this aim was also beneficial to Wal-Mart. A negligent undertaking tort claim does not require a contractual relationship between the parties; instead, there need only be an assumption of the duty to aid that is demonstrated through a party's intent. Wal-Mart's increased efforts to aid foreign workers and its highly publicized initiatives, such as the Supplier Development Program, only strengthen the argument that Wal-Mart intended to benefit foreign workers following the *Doe* suit.

Because Wal-Mart assumed the duty to be "reasonably careful when contracting with suppliers to prevent international labor violations by those suppliers," Wal-Mart was obligated to exercise due care in monitoring the factories—which plaintiffs asserted it failed to do.¹¹⁷ On

113. *Doe v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 684 (9th Cir. 2009).

114. *Id.*

115. RESTATEMENT (SECOND) OF TORTS §§ 323, 324, 324A (1965).

116. *Id.* § 324A (emphasis added).

117. *Doe v. Wal-Mart Stores, Inc.*, No. CV 05-7307 AG (MANx), 2007 U.S. Dist. LEXIS 98102, at *14 (C.D. Cal. Mar. 30, 2007). Moreover, Plaintiffs assert that Wal-Mart knows its auditing process can often be the main enforcement mechanism of ethical labor standards because labor laws are not routinely enforced in many of the countries in which Wal-Mart's suppliers have factories. See Complaint, *supra* note 2, at 19.

the contrary, Wal-Mart demanded low prices and quick turnarounds that necessarily resulted in sweatshop conditions.¹¹⁸ Further, in holding itself out as requiring ethical sourcing in its factories, Wal-Mart disincentivized other aid programs (labor activists, human rights groups, consumer groups, and non-governmental organizations) from assisting plaintiffs and similarly situated workers because such groups assumed Wal-Mart had already addressed human rights issues in its suppliers' factories.¹¹⁹ Consequently, because Wal-Mart effectively "waived off the ambulance," foreign workers were worse off than they would have been had Wal-Mart not undertaken to benefit them.¹²⁰

Wal-Mart responded to this allegation with the argument that it merely reserved the right to inspect and monitor foreign supplier facilities and did not specifically undertake to benefit plaintiffs.¹²¹ This "absence of a clear, express, active undertaking" by Wal-Mart precludes any such claim by Plaintiffs.¹²² Indeed, courts have been reluctant to consider Good Samaritan liability unless the defendant specifically undertook "to perform the task that [it] is charged with having performed negligently."¹²³ The Pacific Legal Foundation reiterated this point in an amicus brief, highlighting the fact that Wal-Mart's conduct did not exacerbate plaintiffs' injuries:

[Plaintiffs] do not allege that (1) they would not have worked for Wal-Mart suppliers had they known that Wal-Mart would not reasonably enforce the Standards; (2) Wal-Mart's purported halfhearted enforcement of the Standards made its suppliers *more likely* to harm [plaintiffs] than if the Standards has never been promulgated; (3) Wal-Mart has assumed any duty owed by its suppliers to [plaintiffs]; or (4) other entities were discouraged from policing Wal-Mart's suppliers *and* would have been successful in such policing had Wal-Mart not announced its intent to enforce the Standards.¹²⁴

118. The *Doe* plaintiffs allegedly suffered forced overtime without pay, were not paid minimum wage, had pay withheld by their employers, were not allowed to take holidays off or given legally required rest periods or bathroom breaks, were refused benefits, were exposed to unsanitary conditions and environmental hazards, and were subjected to physical violence. See Complaint, *supra* note 2, at 20–31.

119. Reporter's Transcript, *supra* note 100, at 18:12–20.

120. *Id.* at 19:5. In response, Wal-Mart asserted that Plaintiffs failed to demonstrate that "by virtue of [Wal-Mart's] acts . . . the situation got worse." *Id.* at 29:5–6.

121. Appellee's Answering Brief, *supra* note 8, at 33.

122. *Id.* at 34.

123. *Patentas v. United States*, 687 F.2d 707, 716 (3d Cir. 1982); see *Sheridan v. NGK Metals Corp.*, 609 F.3d 239, 263 (3d Cir. 2010); *Evans v. Liberty Mut. Ins. Co.*, 398 F.2d 665, 667 (3d Cir. 1968).

124. Brief Amicus Curiae of Pacific Legal Foundation in Support of Appellee Wal-Mart Stores, Inc. and Affirmance at 14, *Doe v. Wal-Mart*, No. CV 05-7307 AG (MANx), 2007 U.S. Dist LEXIS 98102 (C.D. Cal. Mar. 30, 2007) (No. 08-55706) (footnote omitted). The brief goes on to conclude:

Wal-Mart's purportedly mediocre enforcement of the Standards would have done nothing *but* improve, however marginally, the Appellants' treatment. For Wal-Mart had no duty outside of the Standards to inspect its suppliers' factories, and the suppliers' knowledge that they might be inspected perhaps just once a year (i.e., ineffective enforcement of the

The *Doe* trial court feared the floodgates would open if it did not dismiss plaintiffs' third-party claim for negligent undertaking: All businesses would "be responsible for the employment conditions for their own workers and all the workers employed by their suppliers."¹²⁵ The court, however, may have overstated the claim's "broad implications."¹²⁶ Instead of applying to all businesses, only those that "assumed a duty of care would be potentially liable" for their suppliers' workers—such as those that put forth codes of conduct and publicize their measures to improve foreign working conditions.¹²⁷ Moreover, liability would be limited to the "specific duties assumed and triggered only when the defendant negligently carried out its assumed responsibilities."¹²⁸ In this respect, Wal-Mart would be solely liable for failing to monitor its suppliers' factories and condoning the human rights violations at factories from which it sourced merchandise.

Furthermore, it is unsettled whether a Good Samaritan must have actually increased the risk in order to be held liable:

Clear authority is lacking, but it is possible that a court may hold that one who has thrown rope to a drowning man, pulled him half way to shore, and then unreasonably abandoned the effort and left him to drown, is liable even though there were no other possible sources of aid, and the situation is made no worse than it was.¹²⁹

Utilizing this approach, Wal-Mart could be held liable for even a nod in the direction of improving supplier factory conditions, where human rights violations have long been commonplace and would continue absent further intervention by Wal-Mart. Because Good Samaritan liability—especially in this extreme form—discourages corporations from making voluntary attempts to improve conditions, this may not be the most desirable cause of action to sustain in order to affect necessary change.

Standards) surely would encourage better conduct on their part than if no inspection were ever to occur.

Id. at 15.

125. *Doe v. Wal-Mart*, No. CV 05-7307 AG (MANx), 2007 U.S. Dist LEXIS 98102, at *15 (C.D. Cal. Mar. 30, 2007). Defendant Wal-Mart also remarked that finding liability in relationships that are "several steps removed" (for example, like that between Wal-Mart and its foreign suppliers' workers) would result in "terrible, terrible liability where it's really not appropriate." Reporter's Transcript, *supra* note 100, at 28:23–29:2. The Washington Legal Foundation and Allied Educational Foundation's amici brief further detailed the harrowing results of ascribing liability to Wal-Mart: The costs of international trade would increase, consequently increasing the price of goods for American consumers with "little or no corresponding benefit to foreign workers, many of whom would lose their jobs because of decreased trade." WLF & AEF Brief, *supra* note 112, at 5. Such a dire forecast is of course relative to the substandard conditions that foreign workers currently endure.

126. *Doe*, 2007 U.S. Dist LEXIS 98102, at *15.

127. Phillips & Lim, *supra* note 102, at 353.

128. *Id.*

129. RESTATEMENT (SECOND) OF TORTS § 323 cmt.e (1965).

VII. THE LAST RESORT: AN INTERNATIONAL TREATY

While the *Doe* plaintiffs had a genuine injury, it is unclear whether a third-party beneficiary contract claim or a negligent undertaking tort claim can provide redress in the future for similarly situated plaintiffs. Future plaintiffs' only alternative may be to rely on international treaties mandating ethical labor practices.

The *Doe* plaintiffs pursued this avenue by invoking international agreements in their complaint. To bring their suit, the foreign plaintiffs relied on the Alien Tort Statute ("ATS"), which allows foreign litigants to seek damages in U.S. courts for crimes against the law of nations.¹³⁰ Plaintiffs alleged the working conditions imposed by Wal-Mart to be in violation of several anti-slavery and forced labor treaties.¹³¹

Virginia A. Leary's declaration in support of plaintiffs' claims noted that the United States has long condemned forced labor both at home and abroad.¹³² Indeed, the United States is active in the International Labor Office ("ILO"), a specialized agency of the United Nations, and serves on its governing body.¹³³ The ILO has adopted "the two most widely ratified treaties on forced labor: Conventions Nos. 29 and 105."¹³⁴ ILO Convention Number 29 has been ratified by more than 145 nations, and Number 105 by more than 130 nations.¹³⁵ This widespread prohibition of forced labor in treaties can "be taken as evidence of a customary international norm for states which have not ratified the relevant conventions."¹³⁶ Even though the United States has not specifically ratified Convention Number 29 on the abolition of forced labor,¹³⁷ it has "demonstrated its acceptance of the norm prohibiting forced labor" through its ratification of Convention Number 105 and

130. "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (2006). Law of nations (*jus gentium*) is the natural reason of all men also observed among all nations. See *jus gentium*, ENCYCLOPÆDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/308654/jus-gentium> (last visited July 1, 2012). Today, it is used to describe the system of rules governing interactions by different nations in public international law. See *id.*

131. These include the Protocol Amending the Slavery Convention, the Supplementary Convention on the Abolition of Slavery, International Labour Organisation Convention No. 29 Concerning Forced or Compulsory Labour, International Labour Organisation Convention No. 105 Concerning the Abolition of Forced Labour Convention, and the Slavery Convention. Complaint, *supra* note 2, at 53.

132. Declaration of Virginia A. Leary and Exhibits in Support of Plaintiffs' Opposition to Defendant's Motion to Dismiss First Amended Complaint, *Doe v. Wal-Mart*, No. CV 05-7307 AG (MANX), 2007 U.S. Dist LEXIS 98102 (C.D. Cal. Mar. 30, 2007).

133. *Id.* at 2.

134. *Id.*

135. *Id.* at 3.

136. *Id.*

137. The United States has not ratified ILO Convention Number 29 because it would require extensive revisions of existing state and federal laws that directly conflict with the Convention. U.S. COUNCIL FOR INT'L BUS., ISSUE ANALYSIS: U.S. RATIFICATION OF ILO CORE LABOR STANDARDS 2 (2007).

other anti-slavery treaties as well as participation with bodies (such as the ILO) that condemn such practices.¹³⁸ Moreover, forced labor is “unequivocally considered a violation of a peremptory norm . . . of international law, meaning again one from which no state can deviate, regardless of whether the state has or has not ratified a particular international instrument against its prohibition.”¹³⁹ Finally, the United States has also implemented national legislation prohibiting forced labor¹⁴⁰ and participates in the non-binding Organization for Economic Cooperation and Development’s “Guidelines for Multinational Corporations” that encourages participants to observe a set of principles for responsible business conduct—including adequate compensation and the elimination of forced labor—wherever they operate.¹⁴¹

The trial court in *Doe* similarly rejected application of the ATS because plaintiffs failed to provide authoritative support for the claim that the suppliers’ treatment of workers was equivalent to the “limited and heinous conduct found actionable under the ATS.”¹⁴² The broad implications of plaintiffs’ ATS claim would permit a federal suit whenever an employee was denied pay while living in “difficult economic circumstances,” and although the court was “sympathetic to the plight of Plaintiffs, the ATS is not the appropriate avenue for relief.”¹⁴³ For this reason, on appeal plaintiffs ultimately abandoned the ATS federal claim, which was the only means of raising international law violations in U.S. courts.¹⁴⁴

Plaintiffs faced an uphill battle from the start, considering that no U.S. court has recognized international labor standards as binding international law.¹⁴⁵ However, there is a trend to interpret the ATS more

138. Declaration of Virginia A. Leary, *supra* note 132, at 4.

139. *Id.* at 6; *see also* Vienna Convention on the Law of Treaties art. 53, Jan. 27, 1980, 1155 U.N.T.S. 332, (“[A] peremptory norm . . . is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”). It remains unsettled whether preemptory norms are binding on U.S. courts with respect to domestic law, or only with regard to international law. *See* United States v. Matta-Ballesteros, 71 F.3d 754, 764 n.5 (9th Cir.1995) (“Kidnapping . . . does not qualify as a *jus cogens* norm, such that its commission would be justiciable in our courts even absent a domestic law. *Jus cogens* norms, which are non-derogable and peremptory, enjoy the highest status within customary international law, are binding on all nations, and can not be preempted by treaty.”).

140. The Generalized System of Preferences Act of 1984, 19 U.S.C. §§ 2461–67 (2006), requires the inclusion of the prohibition of any form of compulsory labor in governmental reporting on the status of “internationally recognized” worker rights. *See* Declaration of Virginia A. Leary, *supra* note 132, at 5.

141. OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (2008).

142. *Doe v. Wal-Mart*, No. CV 05-7307 AG (MANx), 2007 U.S. Dist LEXIS 98102, at *21 (C.D. Cal. Mar. 30, 2007).

143. *Id.*

144. Appellee’s Answering Brief, *supra* note 8, at 7.

145. Kenny, *supra* note 77, at 468.

expansively, and scholars theorize that future courts may be willing to view the core set of labor rights publicized in corporate codes of conduct as a binding international norm based on their general recognition and acceptance throughout the world.¹⁴⁶

CONCLUSION

Ultimately, due to the confines and interpretations of present law, both the trial and appellate courts properly dismissed the claims against Wal-Mart. Corporate codes of conduct are self-imposed, self-regulated, and voluntary, and therefore lack a definitive enforcement mechanism. There is no separate standard for deep-pocketed mega-corporations, even if a sense of morality tells us there ought to be. Based on current law, Wal-Mart is neither legally obligated to use its vast market share to improve the conditions of every community in which it operates or sources products, nor can it be held liable for not leveraging its economic power over other countries to improve conditions to a U.S. standard. The Ninth Circuit ultimately agreed with Wal-Mart's assertion that a verdict in Plaintiffs' favor would

discourage American companies from undertaking voluntary efforts to improve employment conditions at the overseas factories of their foreign suppliers. Voluntary efforts at improving conditions in foreign countries should not make American companies the guarantors of the overseas working conditions they seek to improve nor should it subject them to class action litigation and liability in the courts of the United States.¹⁴⁷

The case, however, raises significant ethical issues that must be addressed as corporate paternalism takes hold and corporations function more and more like governments. A 2007 study at two Taiwanese and two Korean suppliers for Nike found that more than two-thirds of workers (67.1%) either "agreed" or "strongly agreed" that code of conduct compliance resulted from Nike's efforts and not from the efforts of either the management (53.2%) or unions (38.2%).¹⁴⁸ Considering this significant power, should the principles of capitalism take a back seat where basic human rights are concerned?

A. FALSE ADVERTISING VERSUS FIRST AMENDMENT PROTECTED SPEECH

That corporate behemoths can establish codes of conduct that have no efficacy is discomfoting: They are a boon for public relations and corporate image but create no real obligation on the corporation to

¹⁴⁶ See, e.g., Jane C. Hong, *Enforcement of Corporate Codes of Conduct: Finding a Private Right of Action for International Laborers Against MNCs for Labor Rights Violations*, 19 WIS. INT'L L.J. 41, 68 (2000).

¹⁴⁷ Appellee's Answering Brief, *supra* note 8, at 2.

¹⁴⁸ Phillips & Lim, *supra* note 102, at 348.

abide by or enforce them. These empty claims, however, could amount to false advertising on the part of the corporation. Plaintiffs raised this issue in their complaint, stating that Wal-Mart had aggressively advertised in California that it had a code of conduct, complied with labor regulations, and treated workers well.¹⁴⁹ Plaintiffs alleged that these statements were knowingly made even though they were false and induced consumers to believe that Wal-Mart's products were made under lawful conditions.¹⁵⁰ Moreover, such false advertising has "counteracted any consumer pressure on Wal-Mart to actually improve the conditions of its supplier factories and actually require its suppliers to comply with the Code of Conduct."¹⁵¹ Plaintiffs asserted that Wal-Mart's claims amount to unfair business practices under UCL 17200,¹⁵² defined as "unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising."¹⁵³

The Washington Legal Foundation's amicus brief disregarded the UCL claims. It argued that Wal-Mart's speech regarding its practices abroad is protected by the First Amendment.¹⁵⁴ Regardless of whether the speech is classified as "commercial"—and thus subject to lesser protection due to government regulation designed to protect consumers engaging in commercial transactions—the "overseas labor practices of large American corporations is an issue of *major public importance*" and thus entitled to full First Amendment protection.¹⁵⁵ Consequently, the Washington Legal Foundation argued that plaintiffs failed to state a claim for relief under the UCL because the UCL does not authorize compensatory damages,¹⁵⁶ and the First Amendment prohibits prior restraints on fully protected speech.¹⁵⁷ Indeed, the Washington Legal Foundation perhaps best summarized the issue: "The appropriate response by those who believe that Wal-Mart's speech has been false is to engage in counter-speech of their own, not to attempt to silence Wal-Mart."¹⁵⁸

149. Complaint, *supra* note 2, at 49.

150. *Id.*

151. *Id.*

152. *Id.* at 2.

153. CAL. BUS. & PROF. CODE § 17200 (West 2011).

154. Brief of Washington Legal Foundation as *Amicus Curiae* in Support of Wal-Mart's Motion to Dismiss First Amended Complaint at 5, *Doe v. Wal-Mart Stores, Inc.*, No. CV 05-7303 GPS (MANx), 2007 U.S. Dist. LEXIS 98102 (C.D. Cal. May 4, 2006) [hereinafter WLF Brief].

155. *Id.*

156. The UCL only provides for restitution and injunctive relief. BUS. & PROF. CODE § 17203.

157. WLF Brief, *supra* note 154, at 6.

158. *Id.* at 17; *see also* *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) ("If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.")

On this point the trial court agreed, noting first that such a claim based on conduct occurring in foreign factories is beyond the reach of the statute.¹⁵⁹ Even when viewed with regard to the California plaintiffs originally included in the suit, in order to have standing, the UCL requires a plaintiff to have “suffered injury in fact and . . . lost money or property as a result of the unfair competition.”¹⁶⁰ The court held that the California plaintiffs—who did not even claim to be consumers of Wal-Mart’s products—did not meet this burden with their claim to have “lost money as a result of the independent actions of their employers, who were influenced by [Wal-Mart’s] actions.”¹⁶¹ This is not the type of injury that occurs ‘as a result of’ false or deceptive advertising.”¹⁶² The plaintiffs dropped their UCL claim on appeal,¹⁶³ underscoring the fact that this cause of action is better left to consumers.

B. LEGISLATION

While Wal-Mart’s publicity campaign is morally repugnant, false advertising claims are unlikely to hold water in suits going forward. Instead, we must look to other means of flushing out “free riders who advertise a code without incurring enforcement costs.”¹⁶⁴ Lawsuits—even if unsuccessful—hit a corporation where it hurts most, in the court of public opinion, because they inform the public of a business’s actual practices beyond the corporate propaganda.¹⁶⁵ Legislation, however, may ultimately be the most direct way to encourage changes in corporate behavior, in a similar manner to the way in which the U.S. Sentencing Guidelines incentivized corporate ethics programs and codes of conduct in the first place.¹⁶⁶ Moreover, there is ample precedent for the successful application of such legislation. The Foreign Corrupt Practices Act makes U.S. companies liable for bribes in foreign countries.¹⁶⁷ States, including California, have taken the matter into their own hands and approved

159. *Doe v. Wal-Mart Stores, Inc.*, No. CV 05-7303 GPS (MANx), 2007 U.S. Dist. LEXIS 98102, at *18 (C.D. Cal. 2007).

160. BUS. & PROF. CODE § 17204.

161. *Doe*, 2007 U.S. Dist. LEXIS 98102, at *18

162. *Id.*

163. Appellee’s Answering Brief, *supra* note 8, at 7.

164. Phillips & Lim, *supra* note 102, at 378.

165. Yet this comes at a high price for plaintiffs who typically do not have the means to take on the formidable legal teams of multi-national corporations.

166. See U.S. SENTENCING GUIDELINES, *supra* note 55. The Federal Sentencing Guidelines were enacted partly to establish a clear corporate crime sentencing and enforcement policy. By defining a model for good corporate citizenship, the guidelines created financial incentives for companies to take crime controlling actions. See Dove Izraeli & Mark S. Schwartz, *What Can We Learn from the U.S. Federal Sentencing Guidelines for Organizational Ethics?*, 17 J. BUS. ETHICS 1045, 1045–46 (1998).

167. 15 U.S.C. § 78dd-2 (2010).

ordinances to prevent labor violations abroad.¹⁶⁸ The Clinton Administration's Apparel Industry Partnership—the same one Kathie Lee Gifford joined in the wake of her Wal-Mart clothing scandal—pushed clothing manufacturers to higher social standards in their overseas factories.¹⁶⁹

Legislation could be the most effective approach because it is “proactive rather than reactionary and gives corporations, local businesses, and politicians an opportunity to win public favor.”¹⁷⁰ Wal-Mart itself even implied the effectiveness of legislation when it cited the Trade Promotion Act of 2002 as a “conscious congressional balance between promoting improved foreign labor practices and respecting the sovereignty of foreign nations in relation to their domestic matters.”¹⁷¹ This is convenient rhetoric, however, considering Wal-Mart cited the Trade Promotion Act to counter plaintiffs' reliance on the ATS to invoke several treaties that condemned forced labor practices.

While holding companies liable for their claims may initially stymie voluntary corporate efforts to improve conditions abroad, pressure from consumers that affects the bottom line should compensate for this shift.¹⁷² The need to appease shareholders and increase sales will force companies to overcome the conflict “between striving to set a higher standard for human and labor rights, and the criticism [they] will face for falling short of that higher standard.”¹⁷³ Ultimately, a rising tide lifts all boats, and holding U.S. corporations accountable for all aspects of their supply chain—including the ethical treatment of foreign suppliers' workers—can only have a positive impact around the world. Where the law may lag behind, consumers and governments will need to take up the cause by proposing aggressive legislation founded on a sense of equity to ensure that foreign injustices do not go unnoticed.

168. The California Transparency in Supply Chains Act of 2010 (SB 657) went into effect in January 2012 and requires large retailers and manufacturers doing business in California to disclose efforts to eradicate slavery and human trafficking from its supply chain. CAL. CIV. CODE § 1714.43 (2011); see also CORPORATE DISCLOSURE IN COMPLIANCE WITH SB657 CALIFORNIA TRANSPARENCY IN SUPPLY CHAINS ACT (HUMAN TRAFFICKING AND ANTI-SLAVERY) (2011).

169. See U.S. Dep't of Labor, Apparel Industry Partnership's Agreement (Apr. 14, 1997), available at <http://actrav.itcilo.org/actrav-english/telearn/global/ilo/guide/apparell.htm>.

170. Kenny, *supra* note 77, at 471.

171. Appellee's Answering Brief, *supra* note 8, at 48.

172. Consumers care about corporate social responsibility because “they want to pass on a better world to their children, and many want their purchasing to reflect their values.” Archie B. Carroll & Kareem M. Shabana, *The Business Case for Corporate Social Responsibility: A Review of Concepts, Research and Practice*, 12 INT'L J. MGMT. REV. 85, 92 (2010). There is also evidence that a positive link of corporate social responsibility to consumer patronage is spurring companies to devote greater resources to such initiatives. See *id.* at 98.

173. Ryan P. Tofloy, *Now Playing: Corporate Codes of Conduct in the Global Theater*, 15 ARIZ. J. INT'L & COMP. L. 905, 917 (1998).