HOLDING OREGON BENEFIT COMPANIES ACCOUNTABLE FOR GREENWASHING AND FAUX CSR

by
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The notion of corporate social responsibility (CSR) has gained popularity in recent years with both consumers and businesses, leading to Oregon and currently 35 other states adopting benefit company statutes that allow companies to elect status as a benefit corporation. CSR, however, can be marred by what is known as "greenwashing" and "faux CSR," which occur when a company falsely claims that it engages in environmentally friendly or socially responsible practices to boost sales or improve its brand. Oregon's benefit company statute contains features designed to protect against greenwashing and faux CSR, but the statute's accountability mechanisms are lackluster. Enforcement proceedings provide remedies for only a narrow class of stakeholders and are otherwise ineffective and perhaps unenforceable. A lack of accountability perpetuates greenwashing and faux CSR and threatens the legitimacy of the CSR movement.

While much has been written about greenwashing and benefit corporations, commentators have paid scant attention to viable causes of action against greenwashing benefit companies. Virtually no literature addresses the potential for Oregon benefit companies to engage in greenwashing or faux CSR, or what causes of action or remedies are available to aggrieved stakeholders. This Note seeks to fill this gap by assessing the potential for greenwashing and faux CSR under Oregon's benefit company legislation and considering avenues to hold an Oregon benefit company accountable. It analyzes how the enforcement proceeding under the Oregon benefit company statute allows these practices to occur, and proceeds to consider what avenues for accountability are available and to whom under the Oregon Uniform Trade Practices Act, the Federal Trade Commission Act, and the Lanham Act.

Close analysis reveals that these statutes together fail to ensure accountability. Until Oregon's benefit company statute includes more stringent protective mechanisms, benefit company status may offer companies merely seeking to capitalize on the CSR movement a safe haven from responsibility.

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INTRODUCTION

Consumers increasingly demand corporate social responsibility (CSR) and socially responsible business practices. A majority of global consumers across 60 countries are willing to pay more for products and services that companies committed to positive social and environmental impact provide.[1] Firms that adopt these practices may gain a competitive edge,[2] especially in Oregon where there is an ethos of sustainability and social responsibility.[3]

One significant problem that can accompany CSR is the practice of "greenwashing,"[4] which occurs "when a corporation increases its sales or boosts its brand image through environmental rhetoric or advertising, but in reality does not make good on these environmental claims."[5] Greenwashing can also happen when companies make false claims of social responsibility, also referred to as "faux CSR."[6] These practices are particularly relevant when there is mission drift and vagueness and in situations where there are limited transparency, oversight, or accountability mechanisms and decision-makers have "multiple masters."[7]

Policymakers have drafted Model Benefit Corporation Legislation which allows companies to pursue CSR via electing status as a benefit corporation.[8] Oregon

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1 *Global Consumers Are Willing to Put Their Money Where Their Heart Is When It Comes to Goods and Services from Companies Committed to Social Responsibility*, NIELSEN (June 17, 2014), https://www.nielsen.com/us/en/press-releases/2014/global-consumers-are-willing-to-put-their-money-where-their-heart-is/, *cited in* Michael B. Dorff, *Why Public Benefit Corporations?*, 42 DEL. J. CORP. L. 77, 103 (2017).

2 Miriam A. Cherry, *The Law and Economics of Corporate Social Responsibility and Greenwashing*, 14 U.C. DAVIS BUS. L.J. 281, 300 (2014).

3 *See* Madeline Raynor, *The Greenest States in America, Ranked*, MENTAL FLOSS (Apr. 27, 2018), https://www.mentalfloss.com/article/541747/map-americas-greenest-states (ranking Oregon as the second "greenest" state in America); *see also Infographic: Why Portland May Be America's Greenest City*, BUS. INSIDER (May 29, 2013, 1:23 PM), https://www.businessinsider.com/portland-green-city-infographic-2013-3 (considering Portland, Oregon one of America's "greenest" cities).

4 Alicia E. Plerhoples, *Social Enterprise as Commitment: A Roadmap*, 48 WASH. U. J.L. & POL'Y 89, 96 (2015).

5 Cherry, *supra* note 2, at 282.

6 *See* Miriam A. Cherry & Judd F. Sneirson, *Beyond Profit: Rethinking Corporate Social Responsibility and Greenwashing After the BP Oil Disaster*, 85 TULANE L. REV. 983, 985 (2011) (using the term "faux CSR"); *see also* Plerhoples, *supra* note 4, at 96 ("Although originally applied to environmental issues, greenwashing also applies to any firm's claim that its activities or actions improve the environment or society, or address an environmental or social problem.").

7 *See* Cherry, *supra* note 2, at 294 (arguing that "the incentives to greenwash decrease with oversight and accountability"); *see also* Plerhoples, *supra* note 4, at 93, 100 (arguing that hybrid corporate forms, such as benefit corporations, "have weak accountability mechanisms" which can lead to "mission drift" and engaging in greenwashing).

8 One of the drafters of the Model Legislation is attorney William ("Bill") Clark. *How to Pass Benefit Corporation Legislation*, B LAB, https://benefitcorp.net/policymakers/how-pass-benefit-corporation-legislation (last visited Mar. 6, 2020). Mr. Clark wrote a White Paper with another attorney, Larry Vranka, about Benefit Corporation legislation. *See* WILLIAM H. CLARK, JR. & LARRY VRANKA, THE NEED AND RATIONALE FOR THE BENEFIT CORPORATION: WHY IT IS THE LEGAL FORM THAT BEST ADDRESSES THE NEED OF SOCIAL ENTREPRENEURS, INVESTORS, AND ULTIMATELY, THE PUBLIC 16 (2013), http://benefitcorp.net/sites/default/files/Benefit_Corporation_White_Paper.pdf (suggesting that the benefit corporation form protects against

is one of 36 states that has some form of benefit corporation legislation.[9] Oregon's statute has several key elements: a benefit company commits to provide a general public benefit;[10] the company must evaluate how it provides a public benefit against a third-party standard and file an annual "benefit report" that reports its performance;[11] the company's governors have a duty to consider interests beyond shareholder wealth when making business decisions;[12] and the company and its actors enjoy limited liability from lawsuits.[13] These features are supposed to protect against greenwashing in three ways: the commitment to provide a public benefit is designed to prevent mission drift, the report with reference to a third-party standard is to increase transparency, and the duties are to provide accountability.[14]

Despite these protections, Oregon's statute falls short of its goals because it fails to solve the problems of vagueness, multiple masters, and mission drift. When deception occurs, the limited accountability under the statute incentivizes greenwashing and allows it to continue unchecked. The statute's "benefit enforcement proceeding" provision offers only a narrow class of stakeholder remedies which are ineffective and perhaps unenforceable. The Oregon Unlawful Trade Practices Act (UTPA),[15] the Federal Trade Commission Act (FTC Act),[16] and the Lanham Act[17] could fill the gap in accountability and hold benefit companies engaged in greenwashing and faux CSR accountable. However, these statutes only prohibit a limited range of conduct and restrict standing to a small group. Lackluster mechanisms to hold benefit companies accountable perpetuate greenwashing and other forms of faux CSR, threaten the legitimacy of the CSR movement, and undermine companies' genuine attempts to pursue public benefits.[18]

While a robust body of literature addresses greenwashing, benefit corporations,

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greenwashing).

9 OR. REV. STAT. §§ 60.750–70 (2017); *State by State Status of Legislation*, B LAB, http://benefitcorp.net/policymakers/state-by-state-status (last visited June 7, 2020).

10 OR. REV. STAT. § 60.758(1).

11 *Id.* § 60.768(1).

12 *Id.* § 60.760(1).

13 *See id.* § 60.760(5) (a governor does not have personal liability for the company's failure to provide a general public benefit); *id.* § 60.764(3)(a) (similar limited liability for managers, members, and officers of a benefit company); *id.* § 60.766(1) (governors, managers, members, and officers of a benefit company are protected from proceedings with exceptions); Mitch Nass, Note, *The Viability of Benefit Corporations: An Argument for Greater Transparency and Accountability*, 39 J. CORP. L. 875, 880 (2014) (referring to the benefit corporation statute and summarizing that the dual-purpose provision that a company pursue social goals limits risk of company management breaching fiduciary duties to shareholders).

14 *See infra* Section I.C.2 and Part II (discussing how the features of benefit corporations are supposed to protect against greenwashing).

15 Oregon Unlawful Trade Practices Act (UTPA), OR. REV. STAT. §§ 646.605–56 (2017).

16 Federal Trade Commission Act of 1914 §§ 1–15, 15 U.S.C. §§ 41–58 (2012).

17 Lanham Act of 1946 §§ 1–74, 15 U.S.C. §§ 1051–1141n (2012).

18 *See* Cherry, *supra* note 2, at 294 (arguing that accountability decreases the incentives to greenwash); J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes*, 2 AM. U. BUS. L. REV. 1, 33 (2012) [hereinafter Murray, *Choose Your Own Master*] ("But without at least some minimal level of board accountability, the benefit corporation statute could be an avenue to greenwashing and faux CSR rather than an antidote to them.").

and greenwashing in benefit corporations,[19] commentators have paid scant attention to viable causes of action against greenwashing benefit companies.[20] Virtually no literature addresses the potential for Oregon benefit companies to engage in greenwashing or faux CSR, or what causes of action or remedies are available to aggrieved stakeholders. This Note seeks to fill this gap by assessing the potential for greenwashing and faux CSR under Oregon's benefit company legislation and considering avenues to hold an Oregon benefit company accountable. It analyzes how the enforcement proceeding under the Oregon benefit company statute allows greenwashing and faux CSR to occur, and proceeds to consider what avenues for accountability are available and to whom under the UTPA, FTC Act, and Lanham Act.

The first Part provides an overview of CSR, greenwashing, faux CSR, and the drivers of greenwashing, and offers a primer on benefit corporation statutes generally and Oregon's benefit company statute in particular. The second Part analyzes three specific areas of Oregon's legislation and considers the potential for greenwashing and faux CSR to occur under the statute with reference to the drivers of greenwashing. The final Part imagines a fictional Oregon benefit company and considers avenues for accountability through the benefit company statute, where the statute suffers from gaps in accountability, and how the UTPA, the FTC Act, and the Lanham Act could provide accountability with respect to prohibited conduct, standing, and remedies.

I. OVERVIEW OF CSR, GREENWASHING AND FAUX CSR, AND BENEFIT COMPANIES

Before considering how Oregon's statute opens the door to greenwashing and

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19 *E.g.*, Hope M. Babcock, *Corporate Environmental Social Responsibility: Corporate "Greenwashing" or a Corporate Culture Game Changer?*, 21 FORDHAM ENVTL. L. REV. 1 (2010) (greenwashing and CSR); Dana Brakman Reiser, *Benefit Corporations—A Sustainable Form of Organization?*, 46 WAKE FOREST L. REV. 591 (2011) [hereinafter Brakman Reiser, *Benefit Corporations*] (benefit corporations); Cherry, *supra* note 2 (greenwashing); Cherry & Sneirson, *supra* note 6 (greenwashing and CSR); Briana Cummings, Note, *Benefit Corporations: How to Enforce a Mandate to Promote the Public Interest*, 112 COLUM. L. REV. 578 (2012) (benefit corporations); Magali A. Delmas & Vanessa C. Burbano, *The Drivers of Greenwashing*, 54 CAL. MGMT. REV. 64 (2011) (greenwashing); Joseph Karl Grant, *When Making Money and Making a Sustainable and Societal Difference Collide: Will Benefit Corporations Succeed or Fail?*, 46 IND. L. REV. 581 (2013) (benefit corporations); Kennan El Khatib, Comment, *The Harms of the Benefit Corporation*, 65 AM. U. L. REV. 151 (2015) (benefit corporations and greenwashing); Mark J. Loewenstein, *Benefit Corporations: A Challenge in Corporate Governance*, 68 BUS. LAW. 1007 (2013) (benefit corporations); Murray, *Choose Your Own Master*, *supra* note 18 (benefit corporations and greenwashing); Plerhoples, *supra* note 4 (greenwashing and CSR); Michelle J. Stecker, *Awash in a Sea of Confusion: Benefit Corporations, Social Enterprise, and the Fear of "Greenwashing,"* 50 J. ECON. ISSUES 373 (2016) (benefit corporations and greenwashing).

20 *E.g.*, Cherry & Sneirson, *supra* note 6, at 1025–37 (evaluating causes of action for greenwashing and faux CSR including false advertising and securities law); Joan MacLeod Heminway, *Corporate Purpose and Litigation Risk in Publicly Held U.S. Benefit Corporations*, 40 SEATTLE U. L. REV. 611, 628 (2017) (evaluating causes of action against benefit corporations generally); Jacob Vos, Note, *Actions Speak Louder than Words: Greenwashing in Corporate America*, 23 NOTRE DAME J.L. ETHICS & PUB. POL'Y 673, 687–89 (2009) (assessing greenwashing suits under citizen suit provisions in environmental law, common law torts, the Lanham Act, and securities law).

faux CSR, the following proceeds in three stages. The first Section provides an overview of what CSR is and its potential benefits. The second Section reviews the basics of greenwashing and faux CSR and considers what greenwashing and faux CSR look like in practice, how greenwashing and faux CSR happen, and their consequences. The final Section provides an outline of benefit company statutes including Oregon's.

A. CSR

Broadly, CSR is the concept of businesses considering and attending to interests beyond maximizing profits.[21] For example, some companies consider the "triple bottom line" of people, profit, and the planet as opposed to purely profit.[22] Companies that pursue—or at least claim to pursue—CSR are often referred to as "social enterprises."[23]

Traditional corporate forms can pursue CSR and hold themselves out as—or qualify as—"social enterprises."[24] However, directors and officers in traditional business organizations fear that pursuing social benefit over profit exposes them to shareholder derivative suits claiming breach of a fiduciary duty.[25] While commentators and corporate actors may overstate the risk of liability in traditional business organizations,[26] benefit corporation statutes explicitly allow companies to pursue general and specific public benefits with protection against stakeholder claims.[27] In

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21 Geoffrey B. Sprinkle & Laureen A. Maines, *The Benefits of Corporate Social Responsibility*, 53 BUS. HORIZONS 445, 445 (2010) (citing Keith Davis, *The Case for and Against Business Assumption of Social Responsibilities*, 16 ACAD. MGMT. J. 312, 312 (1973)).

22 *See* Brakman Reiser, *Benefit Corporations*, *supra* note 19, at 624 (referring to the "triple bottom line"); Ina Freeman & Amir Hasnaoui, *The Meaning of Corporate Social Responsibility: The Vision of Four Nations*, 100 J. BUS. ETHICS 419 (2011) (referring to the "triple bottom line" throughout an article on the definition of CSR); Daryl Koehn, *Why the New Benefit Corporations May Not Prove to Be Truly Socially Beneficial*, 35 BUS. & PROF. ETHICS J. 17, 29 (2016) (referring to the "triple bottom line" as well).

23 *See, e.g.*, Dana Brakman Reiser, *Theorizing Forms for Social Enterprise*, 62 EMORY L.J. 681, 681 (2013) [hereinafter, Brakman Reiser, *Theorizing Forms for Social Enterprise*] (referring to "social enterprise" as "an organization formed to achieve social goals using business methods"); Lyman Johnson, *Pluralism in Corporate Form: Corporate Law and Benefit Corporations*, 25 REGENT U. L. REV. 269, 269 (2013) ("[S]ocial enterprise is a general term used to describe an approach to business that, while aiming to produce profits, also seeks in a significant way to advance one or more social or environmental goals—i.e., a so-called 'dual mission.'" (citing Antony Page & Robert A. Katz, *Is Social Enterprise the New Corporate Social Responsibility?*, 34 SEATTLE U. L. REV. 1351, 1361 (2011))).

24 Brakman Reiser, *Theorizing Forms for Social Enterprise*, *supra* note 23, at 692.

25 Loewenstein, *supra* note 19, at 1007–08.

26 This concern is likely overstated given that courts afford decisions by directors and officers a high level of deference under the "business judgment rule." Simply put, corporate actors do not violate the fiduciary duty of care owed to shareholders if they make informed and disinterested decisions and "in good faith avoid wasting corporate assets and making irrational decisions." Dorff, *supra* note 1, at 97 (citing Brehm v. Eisner, 746 A.2d 244, 264 (Del. 2000)). Thus, directors and officers are not required to pursue maximizing profits; rather, they must make decisions with long-term interests of shareholders in mind. Koehn, *supra* note 22, at 19 (citing Murray, *Choose Your Own Master*, *supra* note 18, at 15).

27 Thomas J. White III, Note, *Benefit Corporations: Increased Oversight Through Creation of the Benefit Corporation Commission*, 41 J. LEGIS. 329, 344–45 (2015) (explaining that benefit corporation

fact, these statutes *require* that directors and officers pursue a general public benefit when making decisions.[28] Thus, benefit corporations and other "hybrid entities" have emerged as attractive options to risk-averse directors and officers who want to pursue CSR.[29]

Companies enjoy financial benefits from pursuing CSR. A socially responsible company can "do well by doing good," that is, reap financial benefits by "attending not only to its core business operations, but also to its responsibilities toward creating a better society."[30] Companies may derive financial benefit by engaging in environmentally sound practices that are more cost-effective.[31] Companies committed to CSR may also reap the benefits of competitive advantage, building reputation and legitimacy,[32] and increased goodwill. Consumers, employees, and investors alike have demonstrated support for companies that pursue social and environmental goals as opposed to purely profit maximization.[33]

While the literature establishes the "business case" for CSR, there is less attention to the societal benefits of CSR.[34] The imbalance in the literature may reflect the reality that it is difficult to measure how a practice benefits society.[35] However, the

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statutes afford benefit company directors discretion to consider general and specific public benefits).

28 Brett H. McDonnell, *Committing to Doing Good and Doing Well: Fiduciary Duty in Benefit Corporations*, 20 FORDHAM J. CORP. & FIN. L. 19, 34 (2014).

29 *See* Koehn, *supra* note 22, at 22–23 (referring to some directors as "risk-averse" and arguing that benefit corporation statutes may combat a perception that directors must increase shareholder wealth); Johnson, *supra* note 23, at 271 (referring to "hybrid forms"). *See generally* McDonnell, *supra* note 28 (analyzing the risks of liability that managers assess with regard to benefit corporations).

30 Elizabeth C. Kurucz et al., *The Business Case for Corporate Social Responsibility*, *in* THE OXFORD HANDBOOK OF CORPORATE SOCIAL RESPONSIBILITY 84 (Andrew Crane et al. eds., 2008); *accord* McDonnell, *supra* note 28, at 26 ("[Social enterprises] allow entrepreneurs . . . to do good while still doing well. That is, they can advance some objectives which they find morally attractive, while still earning a profit . . . .").

31 *See* Cherry, *supra* note 2, at 288 (providing examples of why a company "may decide to engage in 'green behavior' not because it is good for the environment, but for cost-savings reasons").

32 Kurucz et al., *supra* note 30, at 85–91.

33 *See* CONE, 2010 CONE CAUSE EVOLUTION STUDY 5, 7, 18, 19, 24 (2010), http://ppqty.com/2010_Cone_Study.pdf (finding that consumers and employees want companies to support causes). The growth of socially responsible investing is one indicator of increased investor interest. White, *supra* note 27, at 330 (citing Amy Bell, *Redefining Returns: The Impact of an Emerging Investment Model*, THOUGHT, 2Q 2013 J.P. MORGAN THOUGHT 2 (2013), https://www.jpmorgan.com/jpmpdf/1320607786092.pdf).

34 It is possible that the literature primarily focuses on the benefits to businesses because the authors take for granted the benefits to society and their objective is to convince businesses to adopt CSR. *See* Philipp Schreck, *Reviewing the Business Case for Corporate Social Responsibility: New Evidence and Analysis*, 103 J. BUS. ETHICS 167, 167–68 (2011) (referencing the "voluminous body of literature [that] revolves around the question of whether there might be a business case for CSR" and noting that "the business case argument implies at least the possibility of a positive relation between social benefits and private profits" (emphasis omitted)). See generally *id.* at 167–73, for a review of the literature on the business case for CSR.

35 See generally Manuela Drews, *Measuring the Business and Societal Benefits of Corporate Responsibility*, 10 CORP. GOVERNANCE 421 (2010) and Michael Hopkins, *Measurement of Corporate*

imbalance may also reflect a potential issue with CSR: CSR focuses more on the advantages to businesses rather than to society.[36]

Today, companies are responding to the increased public interest in the environment and are adopting marketing and public relations campaigns with claims that its company or products are "green," "eco-friendly," or "sustainable."[37] There is nothing inherently wrong with companies adopting more environmentally responsible practices to increase profit because the result is the same.[38] The risk, however, is that companies will focus on the business advantages of CSR rather than societal benefits and engage in greenwashing in order to profit.[39]

B. *Greenwashing and Faux CSR*

The following provides a general background on the practices of greenwashing and faux CSR and examines how they occur in situations characterized by vagueness, lack of transparency and oversight, multiple masters and mission drift, and weak accountability. As examined below, these factors overlap with one another and ultimately lead to the issue of a lack of accountability.

1. *Fundamentals of Greenwashing and Faux CSR*

Greenwashing does not have a universally adopted or statutory definition.[40] One commentator describes the practice as "wrongdoing, distraction in the form of a 'wash,' and at its heart, an underlying structural problem [that] never receives proper redress."[41] When greenwashing is accompanied by efforts to convince the public that a company is otherwise socially responsible, commentators refer to the practice as "faux CSR."[42] At the core of greenwashing and faux CSR is deception.[43] While the following discussion focuses primarily on greenwashing, the same

Social Responsibility, 6 INT. J. MGMT. & DECISION MAKING 213 (2005), for research on measuring the benefits of CSR to society.

36 *See* Stephan Meier & Lea Cassar, *Stop Talking About How CSR Helps Your Bottom Line*, HARV. BUS. REV. (Jan. 31, 2018), https://hbr.org/2018/01/stop-talking-about-how-csr-helps-your-bottom-line (studying the impact of CSR initiatives and suggesting that "using CSR instrumentally to increase profits might destroy the very benefits it hopes to achieve"). For a brief review of criticism on CSR, see generally Paulina Księżak, *The Benefits from CSR for a Company and Society*, 3 J. CORP. RESP. & LEADERSHIP 53, 62–63 (2016).

37 *See* Cherry, *supra* note 2, at 285 ("Historically, then, greenwashing has been with us almost as long as it 'being green' has been seen as desirable. As long as consumers continue to look more favorably upon green products and services, then there is a marketing and public relations advantage to being perceived as engaged in a positive environmental approach.").

38 *See id.* at 288 ("There is nothing wrong with trimming waste and streamlining emissions, regardless of the reason behind it.").

39 *Id.*

40 *Id.* at 285.

41 *Id.* at 286.

42 *See id.* at 283 (referencing "faux CSR"); Cherry & Sneirson, *supra* note 6, at 985 (referring to "greenwashing" and "faux CSR"); *see also* Plerhoples, *supra* note 4, at 96 ("Although originally applied to environmental issues, greenwashing also applies to any firm's claim that its activities or actions improve the environment or society, or address an environmental or social problem.").

43 Plerhoples, *supra* note 4, at 96 ("Greenwashing involves diversion, deception, and hypocrisy." (citing Cherry, *supra* note 2, at 285)).

principles that define and drive greenwashing apply to faux CSR.

The organization TerraChoice studied false and misleading environmental claims in advertising and developed a summary of seven "sins" of greenwashing and ways to categorize the practice.[44] The first sin is using hidden trade-offs.[45] This involves claiming that a product is "green" because of a certain attribute while ignoring other important issues that contribute to whether a product is environmentally preferable.[46] The second sin is "no proof," or making claims that are difficult to substantiate.[47] For example, a company may claim that tissue products have certain percentages of post-consumer recycled content without any substantive evidence.[48] The third sin is vague language, which occurs when claims are poorly defined or so broad that a consumer is likely to misunderstand the real meaning of a term, such as "all-natural."[49] The fourth greenwashing sin is irrelevant claims that might be truthful but are not relevant to consumers seeking environmentally preferable products.[50] Fifth is the sin of the lesser of two evils, when a claim may be true within the product category but distracts from the larger environmental impacts of the product.[51] The sixth—and least subtle—sin is environmental claims that are outright lies.[52] The final sin is false labels that incorrectly give the impression of a third-party endorsement.[53] This list of sins, while not comprehensive, serves to frame what greenwashing looks like in practice.

Commentators usually examine greenwashing in the arena of false advertising and labeling. FIJI Water provides a prime example of greenwashing in advertising and related consumer litigation.[54] In 2008, FIJI Water launched a "carbon negative" campaign in a (failed) response to environmentalists' claims that the company

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44 *Sins of Greenwashing*, UL, http://sinsofgreenwashing.com/index35c6.pdf (last visited July 13, 2020).

45 *Id.*

46 *Id.*

47 *Id.*

48 *Id.*

49 *Id.* TerraChoice notes that technically, arsenic and formaldehyde occur naturally and are poisonous. "All natural" does not necessarily translate to "green." *Id.*

50 *Id.*

51 *Id.* TerraChoice provides the example of organic cigarettes and fuel-efficient sport utility vehicles. *Id.*

52 *Id.*

53 *Id.*; *see also* Delmas & Burbano, *supra* note 19, at 80 (citing several categories of greenwashing).

54 *See, e.g.*, David J. Gilles & Matthew T. Kemp, *Greenwash: Overselling a Product's 'Greenness,'* 85 WIS. LAW. 4, 4, 8 (2012) (referencing the *Hill v. Roll International Corp* class action greenwashing case against FIJI (citing Hill v. Roll Int'l Corp., 128 Cal. Rptr. 3d 109, 111 (Cal. Ct. App. 2011))); Catherine Jones et al., *FIJI Water, Water Everywhere: Global Brands and Democratic and Social Injustice*, 58 ASIA PAC. VIEWPOINT 112, 119 (2017) (reviewing FIJI's practices and referring to the *Hill v. Roll International Corp.* lawsuit); Marry Ann Mullin & Daniel J. Deeb, *Policing of Green Claims*, 26 NAT. RESOURCES & ENV'T 28, 29–30 (2012) (also using the case *Hill v. Roll International Corp.* as an example of a consumer class-action greenwashing claim); *see also* Jen Quraishi, *Fiji Water Sued for Greenwashing*, MOTHER JONES (Jan. 7, 2011), https://www.motherjones.com/politics/2011/01/fiji-water-sued-greenwashing/ (examining FIJI's practices and referring to the company as a "rather egregious example of greenwashing").

produced a significant carbon footprint.[55] FIJI's advertising and labels touted FIJI water as "The World's Only CARBON NEGATIVE bottled water."[56] In late 2010, a consumer filed a class action complaint in California federal court in the case *Worthington v. FIJI Water Co., LLC*.[57] The plaintiff alleged that she paid more for FIJI water because the company claimed that it was carbon negative, when, in reality, FIJI used a "discredited carbon accounting method" known as "forward crediting" which refers to "carbon removal that *may or may not take place* . . . in the future."[58] The plaintiff contended that FIJI's practices violated California's Legal Remedies Act and sections of the Business and Profession Codes that prohibit unfair competition and false advertising[59] because the company falsely represented that the water had "characteristics and benefits that it [did] not," features it did not have, and was a quality or standard which it was not.[60] The case did not proceed for reasons not apparent from the public record.[61]

FIJI faced another lawsuit in March 2011, *Hill v. Roll International Corp.*,[62] this time for its "Green Drop label." Here, the plaintiff filed a suit in California state court and alleged that FIJI's label gave the impression that FIJI water was "environmentally sound and superior to other sources of drinking water" and caused the plaintiff to purchase the product.[63] Identical to the 2010 case, the complaint alleged that FIJI and FIJI's parent company violated California's Legal Remedies Acts and sections of the state Business and Profession Codes that prohibit unfair competition and false advertising.[64] The plaintiff also brought fraud and unjust enrichment claims.[65] The trial court held that the plaintiff failed to state a cause of action, and the appellate court affirmed.[66]

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55 Swapnil Mishra, *Case Study: A Bottled Water Brand, an Ethical Obligation, and Everything in Between*, MEDIUM (Mar. 23, 2016), https://medium.com/@swapnilmishra/a-water-bottle-brand-an-ethical-obligation-and-everything-in-between-3bfcf8e568c2.

56 Ariel Schwartz, *Fiji Water Sued over Carbon Credit Greenwashing*, FAST COMPANY (Jan. 5, 2011), https://www.fastcompany.com/1714334/fiji-water-sued-over-carbon-credit-greenwashing.

57 Class Action Complaint, Worthington v. FIJI Water Co., No. 2:10-cv-09795-SJO (C.D. Cal. 2010) (ECF No. 1).

58 *Id.* at 2 (emphasis in original).

59 CAL. BUS. & PROF. CODE ANN. §§ 17200, 17500 (West 2017).

60 Class Action Complaint, *supra* note 57, at 9 (allegations as to the cause of action for violation of the California Consumer Remedies Act); *see id.* at 10 (alleging that FIJI falsely represented, in violation of the Business and Profession Code, that its water "ha[d] certain characteristics, benefits, uses and qualities which it d[id] not have and [was] of a particular quality or standard which it [was] not").

61 The last item on the docket is a transcript for a status conference held on February 9, 2011, addressing issues of class validity. Transcript of Status Conference, Worthington v. FIJI Water Co., No. 2:10-cv-09795-SJO (C.D. Cal. Mar. 21, 2011) (ECF No. 30).

62 Hill v. Roll Int'l Corp., 128 Cal. Rptr. 3d 109 (Cal. Ct. App. 2011).

63 Amended Class Action Complaint at 16, Hill v. Roll Int'l Corp., 128 Cal. Rptr. 3d 109 (Cal. Ct. App. 2011) (No. CGC 09487547).

64 *Id.*

65 *Id.* at 23–24.

66 *Hill*, 128 Cal. Rptr. at 115–16 (affirming the lower court's decision and holding that the consumer's beliefs did not meet the reasonable consumer standard under the FTC's "Green Guides" and state consumer law and there was not a claim for unjust enrichment because there

The FIJI case study provides a useful reference point for what the public considers greenwashing and how consumers use litigation—not always successfully—as an accountability mechanism. The litigation in *Worthington v. FIJI Water Co., LLC* and *Hill v. Roll International Corp.* received significant media attention and turned a critical eye towards FIJI's practices.[67] The results of the cases, however, also illustrate the harsh reality of greenwashing cases. Even if textbook greenwashing seems to occur, a plaintiff may have trouble establishing an actionable claim.

2. *How Greenwashing and Faux CSR Happen*

Corporate greenwashing and faux CSR can occur when there is vagueness, lack of transparency and oversight, multiple masters and mission drift, and when companies are subject to limited accountability. Underlying these issues are limited regulation of greenwashing and limited or ineffective enforcement.

There are strong economic incentives to provide environmentally friendly products and services.[68] However, when the costs of environmentally conscious and socially responsible practices are prohibitive, companies might attempt to deceive consumers and regulators to avoid the expense. Thus, limited accountability can increase incentives for companies to engage in greenwashing and faux CSR.

a. *Vagueness*

Vagueness is often a hallmark of greenwashing. For example, greenwashing advertisements use overly broad language or make claims are that poorly defined and create a false impression.[69] Vagueness also increases the difficulties of detection, and, even when detected, consumers and other stakeholders and regulators find it challenging to hold greenwashers accountable.

Vague claims in advertising can create an incorrect impression of products advertised.[70] When companies use vague language in advertising, research indicates that consumers are less likely to detect that greenwashing occurs than if a company uses overtly false claims which consumers can verify on an objective basis.[71] As a consequence, greenwashing may go undetected.

Moreover, consumers and regulators have limited ability to hold greenwashing

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was no actionable wrong).

[67] *See, e.g.*, sources referenced *supra* note 54; *see also* Devika Kewalramani & Richard J. Sobelsohn, *"Greenwashing:" Deceptive Business Claims of "Eco-Friendliness,"* FORBES (Mar. 20, 2012), https://www.forbes.com/sites/realspin/2012/03/20/greenwashing-deceptive-business-claims-of-eco-friendliness/#2b377d1b3d9a (using *Hill v. Roll International Corp.* as an example of green claims spurring lawsuits); Paul Nastu, *Fiji Water Targeted in 'Greenwashing' Class Action Suit*, ENVTL. LEADER (Dec. 29, 2010), https://www.environmentalleader.com/2010/12/fiji-water-targeted-in-greenwashing-class-action-suit/.

[68] Cherry, *supra* note 2, at 287.

[69] Desirée Schmuck et al., *Misleading Consumers with Green Advertising? An Affect-Reason-Involvement Account of Greenwashing Effects in Environmental Advertising*, 47 J. ADVERT. 127, 128 (2018) (citing Jerry C. Olson & Philip A. Dover, *Cognitive Effects of Deceptive Advertising*, 15 J. MARKETING RES. 29 (1978); Jacob Jacoby & Constance Small, *The FDA Approach to Defining Misleading Advertising*, 39 J. MARKETING 65 (1975)).

[70] Schmuck et al., *supra* note 69, at 130 (citing Guang-Xin Xie et al., *Disentangling the Effects of Perceived Deception and Anticipated Harm on Consumer Responses to Deceptive Advertising*, 129 J. BUS. ETHICS 281 (2015)).

[71] *Id.*

companies accountable.[72] Vague language allows companies to make sweeping policy statements or commitments without any discernible mechanisms to measure a commitment or avenue to hold a company accountable. For example, there is no standard to measure whether a company is "green" or "socially conscious" because these are elusive concepts. In the litigation context, companies can argue that these vague claims are "mere puffery" and thus not actionable.[73] "Puffery" (also referred to as "puffing") does not have a single definition, but includes statements that are vague, subjective, hyperbolic, or exaggerated to promote a good or service.[74] Generally speaking, a vague claim that is mere "puffery" is not actionable.[75] Thus, companies that make vague, subjective claims that reach the level of "mere puffery" are seemingly immune from accountability in the courtroom.[76]

b. Lack of Transparency and Inadequate Oversight

Lack of transparency and inadequate oversight are additional drivers of greenwashing. Lack of transparency can lead to greenwashing because, like with vagueness, it is less likely that the public will recognize greenwashing if it occurs. If greenwashing goes undetected, it is not possible to initiate accountability mechanisms. Effective reporting can promote transparency, but reporting has its limits.

Self-reporting alone is not effective unless the reports are truly transparent and verifiable.[77] For example, a company might use vague language—or even outright lies—in reports that purportedly demonstrate a commitment to environmental or social causes. Reports outlining performance on social issues that are not in fact transparent are simply rhetoric—a form of vagueness—and thus contribute to greenwashing.[78] Furthermore, misleading reporting is potentially more dangerous than no reporting at all; the public may mistake reporting for transparency and accuracy and unwittingly accept false statements.

The issues with transparency through self-reporting parallel challenges with weak oversight. Oversight may combat greenwashing by detecting the practice and

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[72] *See* Delmas & Burbano, *supra* note 19, at 65 (arguing that the "current regulatory environment is the key driver of greenwashing" and noting that there is limited regulation of greenwashing and uncertain enforcement of such regulation).

[73] For a more in-depth discussion of puffery, see *infra* Sections III.C.1.a and III.C.3.a.

[74] *See* David A. Hoffman, *The Best Puffery Article Ever*, 91 IOWA L. REV. 1395, 1397 (2006) ("Puffery is a 'vague statement' boosting the appeal of a service or product that, because of its vagueness and unreliability, is immunized from regulation."); J. THOMAS MCCARTHY, 5 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 27:38 (5th ed. 2019).

[75] *See* Hoffman, *supra* note 74, at 1397 (stating that puffery is "immunized from regulation" "because of its vagueness and unreliability"). For more on the consequences of puffery, see Cherry, *supra* note 2, at 291 (referencing a securities class action for CSR fraud where the Sixth Circuit Court of Appeals held that the company's statement that it was socially conscious was not actionable because it was "mere corporate puffery" (citing *In re* Ford Motor Co. Sec. Litig., 381 F.3d 563, 570–71 (6th Cir. 2005))).

[76] *See* Hoffman, *supra* note 74, at 1397.

[77] Plerhoples, *supra* note 4, at 134; Vos, *supra* note 20, at 689 (citing William S. Laufer, *Social Accountability and Corporate Greenwashing*, 43 J. BUS. ETHICS 253, 257 (2003); Catherine A. Ramus & Ivan Montiel, *When Are Corporate Environmental Policies a Form of Greenwashing?*, 44 BUS. & SOC'Y 377, 386 (2005)).

[78] Plerhoples, *supra* note 4, at 134.

decreasing the incentives to greenwash.[79] However, not all oversight is effective. Internal oversight may reveal greenwashing, but it might not trigger any accountability. For example, if the board of a closely held company detects greenwashing, it might have discretion not to act.[80] Thus, third-party oversight is likely more effective than internal oversight.[81]

Incentives to greenwash aside, transparency and oversight do not guarantee accountability. Without reliable mechanisms to verify a company's claims or a standard to test a company's claims and assertions, there cannot be meaningful accountability,[82] and greenwashing may still occur.

c. *Multiple Masters and Mission Drift*

Greenwashing may also occur when companies serve multiple interests, also referred to as serving "multiple masters."[83] Social enterprises, such as benefit companies, seek to serve the interests of multiple parties including the financial interests of shareholders as well as the interests of other constituents such as employees.[84] A company might have a commitment to serve interests that are challenging to define, for example, "the public" or the environment.[85] Management can find it difficult to balance a diverse set of expectations from multiple stakeholders.[86] Absent clear guidance of how to balance interests or a clear "master," a "social enterprise" might be inclined to serve "[its] own self-interest or [its] own objectives."[87] The result can be greenwashing: maintaining the image that the organization is pursuing a public benefit while actually attending to self-interest. This issue is especially relevant in the benefit company context, examined *infra* Part II, where it may be unclear how to balance financial and non-financial interests of various stakeholders.[88] If

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79 Cherry, *supra* note 2, at 294.

80 *See infra* Section III.B.

81 *See* Nass, *supra* note 13, at 888 (recommending stronger third-party oversight in benefit corporation legislation to combat greenwashing).

82 Grant, *supra* note 19, at 596–97.

83 *E.g.*, Murray, *Choose Your Own Master*, *supra* note 18, at 33 (referring to "multiple masters"); *see, e.g.*, Barnali Choudhury, *Serving Two Masters: Incorporating Social Responsibility into the Corporate Paradigm*, 11 U. PA. J. BUS. L. 631 (2009); Plerhoples, *supra* note 4, at 95 (referring to "serving two masters"); *see also id.* at 96 (arguing that serving more than one master can lead to greenwashing). Commentators also describe the issue as "serving two masters." *See* Plerhoples, *supra* note 4, at 95.

84 *See* Brakman Reiser, *Theorizing Forms for Social Enterprise*, *supra* note 23, at 694 (noting that "statutory formulations for social enterprises" consider pursuing a variety of interests a social good); Plerhoples, *supra* note 4, at 96 (acknowledging the various and competing interests that social enterprise founders and managers must manage); *accord* OR. REV. STAT. § 60.760(1) (2017) (Oregon's benefit company statute requiring consideration of these interests).

85 *See* OR. REV. STAT. § 60.760(1)(f) (requiring that governors consider "[t]he local and global environment").

86 Murray, *Choose Your Own Master*, *supra* note 18, at 28–29 (contemplating that conflicting interests may arise); *see also* Plerhoples, *supra* note 4, at 95 (citing Laura A. Costanzo et al., *Dual-Mission Management in Social Entrepreneurship: Qualitative Evidence from Social Firms in the United Kingdom*, 52 J. SMALL BUS. MGMT. 655, 659–60 (2014)).

87 Murray, *Choose Your Own Master*, *supra* note 18, at 28.

88 *See* Brakman Reiser, *Benefit Corporations*, *supra* note 19, at 612 (noting that benefit corporation statutes generally offer shareholders and fiduciaries little guidance as to how to

stakeholders are unable to hold a company's actors accountable for straying from stakeholder interests, managers have less incentive to consider those interests. As the discussions of fiduciary duties in the following sections reveal, in reality, managers have limited accountability to non-financial interests.[89]

Serving multiple masters can overlap with "mission drift," which occurs when a company prioritizes pursuing profit at the expense of the public benefit.[90] For example, a business may undertake environmental commitments to save money. When saving money and maintaining the commitment to the environment become at odds, the environment often loses.[91]

While companies with a clear mission are less susceptible to mission drift, it can prove challenging to stick to a social or environmental mission. Because it is easier to evaluate and measure financial results than social or environmental value, management may, consciously or unconsciously, focus on meeting benchmarks that are easier to quantify than more amorphous concepts. Pursuing financial interests, of course, is not inherently wrong, and it is possible that financial and social interests will converge. However, when a company prioritizes financial interests to the detriment of social or environmental interests and drifts away from its mission, it engages in greenwashing. [92]

Whether having too many "masters" leads to mission drift or mission drift occurs on its own, social enterprises such as benefit corporations are prone to greenwashing.[93] A company that has a clear "master" and adheres to its mission is seemingly less likely to greenwash; however, without strong accountability mechanisms, the practice is more likely to occur.[94]

d. *Weak Accountability*

Weak or nonexistent accountability is at the heart of greenwashing. Vagueness, lack of transparency and oversight, and multiple masters and mission drift all make it challenging to recognize if greenwashing occurs. For a visual representation of the relationship, see *infra* Appendix A. Identifying bad acts is one of the first steps in the accountability process.

Under corporate law statutes, managers of companies have fiduciary duties to shareholders including the duties of loyalty and care. Statutes can strengthen,

balance various interests); Murray, *Choose Your Own Master*, *supra* note 18, at 33–34 (discussing the issues with multiple masters and stakeholders that arise from benefit corporation statutes not providing any clear guidance as to how to balance interests). As this Note will discuss, *infra* Part II, under Oregon's statute, management must consider the interests of shareholders and other interests, yet there is no requirement to balance the interests in any particular way and shareholders likely have pecuniary interests whereas the other stakeholders might not.

89 *See infra* Sections II.C, III.B.2.

90 Plerhoples, *supra* note 4, at 97 (citing Joseph W. Yockey, *The Compliance Case for Social Enterprise*, 4 MICH. BUS. & ENTREPRENEURIAL L. REV. 1, 6 (2014)).

91 Cherry, *supra* note 2, at 288.

92 Plerhoples, *supra* note 4, at 97.

93 *Id.* at 96 (arguing that multiple masters and mission drift together can lead to greenwashing).

94 Cherry, *supra* note 2, at 287–88. See generally *id.*, for an in-depth review of economic incentives to greenwash.

weaken, or expand fiduciary duties that management owes to shareholders.[95] Expanded fiduciary duties are present in Oregon's benefit company statute and are described in more detail *infra* Section II.C.1.

The strength of fiduciary duties that managers owe shareholders—or other people to whom managers owe duties—relates to the risk of greenwashing.[96] The weaker the fiduciary duty provisions in a statute, the greater likelihood that greenwashing will occur.[97] Managers may assess that the risk of shareholders or other stakeholders holding the managers liable is so low that they "can safely ignore the risk" of liability.[98] If managers perceive a low risk of liability, then they may be more inclined to engage in greenwashing.

On the other hand, enforcement mechanisms—or at least the potential for enforcement—can mitigate greenwashing in part by "corralling the natural selfishness urges of directors."[99] Accountability through regulatory schemes likewise removes some of the incentives to greenwash.[100] Unfortunately, greenwashing is largely unregulated, and statutory enforcement tools are sometimes ineffective and uncertain,[101] as is the case with Oregon's benefit company statute as described *infra* Part II.

3. *Harmful Effects of Greenwashing and Faux CSR*

Greenwashing and other faux CSR efforts can harm consumers, the CSR movement, and ultimately the environment and social progress. Indeed, commentators consider greenwashing "[o]ne of the most significant challenges to achieving" CSR because it undermines legitimate and well-meaning CSR efforts.[102]

Greenwashing makes consumers skeptical of companies' sustainability claims.[103] As a result, companies with genuine commitment to sustainability or social responsibility may not receive the recognition they deserve in the marketplace or the financial investment community.[104]

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95 *See generally* Paul M. Altman & Srinivas M. Raju, *Delaware Alternative Entities and the Implied Contractual Covenant of Good Faith and Fair Dealing Under Delaware Law*, 60 BUS. LAW. 1469, 1469 (2005).

96 McDonnell, *supra* note 28, at 58.

97 *Id.*

98 *Id.* at 62.

99 Murray, *Choose Your Own Master*, *supra* note 18, at 34; *see* Cherry, *supra* note 2, at 294 (arguing that incentives to greenwash decrease with oversight and accountability).

100 *See* Delmas & Burbano, *supra* note 19, at 65 (arguing that regulatory schemes—or lack thereof—play a role in driving greenwashing); *see also* Cherry, *supra* note 2, at 294.

101 Delmas & Burbano, *supra* note 19, at 69.

102 Cherry, *supra* note 2, at 282; *see* Peter Neergaard & Esben Rahbek Pedersen, *Corporate Social Behaviour: Between the Rules of the Game and the Law of the Jungle*, 12 J. CORP. CITIZENSHIP 43, 55 (2003) (arguing that greenwashing might negatively "affect the overall legitimacy of CSR initiatives").

103 *See* Menno D. T. De Jong et al., *Making Stuff Green? Effects of Corporate Greenwashing on Consumers*, 32 J. BUS. & TECHNICAL COMMS. 77, 99 (2017) (finding in an empirical study that greenwashing has a negative effect on the perceived integrity of communications, and confirming the assumed relationship between greenwashing practices and consumer skepticism towards CSR communication).

104 Izi Pinho, Note, *The Advent of Benefit Corporations in Florida*, 47 STETSON L. REV. 333, 359

Even if consumers are not skeptical, companies that actually invest in CSR may be at a financial disadvantage to those that merely pretend to do so. When investing in CSR is more expensive than not doing so, faux CSR companies can undercut competitors and gain market share. Faux CSR companies might also take advantage of the fact that some employees favor working for companies committed to social causes.[105] As a result, companies that genuinely commit to CSR may not be able to compete. Once a greenwashing company eliminates its competitors, it may drop the greenwashing façade because it no longer needs the marketing edge. The ultimate result is that society loses the potential benefits of genuine CSR.

Greenwashing could also have negative environmental impacts. Consider a large, hypothetical greenwashing company, Clean Well, that claims its cleaning detergents are "green" and "safe for the environment," but in reality contain cheap, hazardous chemicals. Some businesses sell detergents that are actually environmentally friendly and far less hazardous to the environment than Clean Well's products, but their ingredients are more expensive. Clean Well's prices prove hard to beat, and competitors find themselves unable to compete. Meanwhile, the hazardous chemicals in the "green" product pollute waterways and have other negative impacts. Clean Well might even be able to fly under the radar of regulators because of its (undeserved) reputation for environmentally friendly products.[106] Because benefit corporations regularly commit to CSR, these companies are especially prone to engage in greenwashing and faux CSR.[107]

C. *Benefit Companies*

Against the background on CSR and greenwashing and faux CSR, this Section outlines the basics of benefit corporations, clarifies terminology, examines the primary features of Oregon's benefit company statute, and considers the steps to becoming a benefit company and the advantages of such status.

Policymakers designed benefit corporation statutes to allow companies to engage in CSR and also to prevent greenwashing. The non-profit organization B Lab and other champions of corporate responsibility drafted the Model Benefit Corporation Legislation ("Model Legislation"), which provides a template for state benefit

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(2018) (citing Cherry, *supra* note 2, at 301–02).

105 *See* John J. Heldrich et al., *Talent Report: What Workers Want in 2012*, NET IMPACT 53 (2012), https://netimpact.org/sites/default/files/documents/what-workers-want-2012.pdf (finding that 53% of survey respondents indicated that gaining satisfaction in a work environment that practices social responsibility is a top reason why they are motivated to work for a socially responsible company); Jeanne Meister, *The Future of Work: Corporate Social Responsibility Attracts Top Talent*, FORBES (June 7, 2012, 11:03 AM), https://www.forbes.com/sites/jeannemeister/2012/06/07/the-future-of-work-corporate-social-responsiblity-attracts-top-talent/#6ba09a623f95 (reporting on the study by Net Impact).

106 *See* Vos, *supra* note 20, at 685 (contemplating that if a greenwashing company is a polluter, then the company may receive less attention from regulators because of its reputation).

107 Plerhoples, *supra* note 4, at 96 ("A firm cannot engage in greenwashing if it never committed to an underlying environmental or social action. Greenwashing is therefore a particularly acute problem for social enterprises, because they claim to create social and environmental value.").

corporation legislation.[108]

Oregon is one of now 36 states that has adopted some form of benefit corporation legislation based on the Model Legislation.[109] In drafting the Oregon legislation, which went into effect on January 1, 2014,[110] the state legislature noted in the statute's preamble that the law was designed to "provide the legal means to create and operate benefit companies, a form of business entity the purpose of which is to create benefits for the public in addition to generating profit for the entity's owners . . . ."[111] Given the lack of additional material explaining the Oregon legislature's intent, one must examine the purpose behind the Model Legislation. Comments in the annotated version of the Model Legislation and literature written by one of the drafters of the Model Legislation, Bill Clark, Jr.,[112] are a useful starting place to understand the legislation.

1. Benefit Company Basics

Before examining the basic features of benefit corporation legislation and Oregon's legislation, it is instructive to understand the terminology. "Benefit corporation statute" broadly refers to state statutes that allow companies to incorporate or organize as a benefit corporation, benefit company, or public benefit company.[113] Most of the literature analyzes the Model Benefit Corporation Legislation; thus, commentators predominately use the phrase "benefit corporation."[114] However, Oregon's statute differs from the Model Legislation in that it is "entity agnostic."[115] That is, Oregon allows corporations and limited liability companies (LLCs) to

108 *The Model Legislation*, B LAB, https://benefitcorp.net/attorneys/model-legislation (last visited July 13, 2020).

109 *See State by State Status of Legislation*, *supra* note 9.

110 H.R. 2296 77th Leg. Assem., Reg. Sess. (Or. 2014). On the first day Oregon businesses could register as a benefit company, 29 businesses registered, setting a new record for states that had adopted benefit corporation legislation. Press Release, Oregon Secretary of State, Record Number of Oregon Businesses Register as Benefit Companies on Day 1 of New Law (Jan. 2, 2014), https://www.oregon.gov/newsroom/Pages/NewsDetail.aspx?newsid=1687.

111 H.R. 2296, 77th Leg. Assem., Reg. Sess. (Or. 2014).

112 *See How to Pass Benefit Corporation Legislation*, B LAB, https://benefitcorp.net/policymakers/how-pass-benefit-corporation-legislation (last visited Mar. 6, 2020) (crediting Mr. Clark as one of the drafters of the Model Legislation). *See generally* William H. Clark, Jr. & Elizabeth K. Babson, *How Benefit Corporations Are Redefining the Purpose of Business Corporations*, 38 WM. MITCHELL L. REV. 817, 818 (2012); CLARK & VRANKA, *supra* note 8.

113 Delaware's law uses the term "Public Benefit Corporation," DEL. CODE tit. 8, § 361 (2019), and Washington's law uses the phrase "social purpose corporation," WASH. REV. CODE § 23B.25.005 (2019). As an aside, B Lab does not list Washington as a state which has benefit corporation legislation. *See State by State Status of Legislation*, *supra* note 9.

114 *E.g.*, Loewenstein, *supra* note 19, at 1009–10 (analyzing the Model Legislation and referring to benefit corporation legislation generally); Kyle Westaway & Dirk Sampselle, *The Benefit Corporation: An Economic Analysis with Recommendations to Courts, Boards, and Legislatures*, 62 EMORY L.J. 999 (2013) (referring to benefit corporation statutes generally and the Model Legislation throughout).

115 Jerry Carleton, founder of Oregon's first benefit company law firm, described Oregon's statute as "entity agnostic" during an interview for a separate research project. Telephone Interview with Jerry Carleton, Founder and Principal, Immix Law Group (Oct. 29, 2018).

organize as a benefit *company* as opposed to only a benefit *corporation*.[116] Oregon's statute uses parallel wording that applies to both corporations and LLCs, such as when it outlines the duties of a manager, member, or officer of a benefit company.[117]

Also important is the difference between "benefit corporation" or "benefit company" and "B Corporation" or "B Corp." Neither "B Corporation" nor "B Corp" refers to a "benefit corporation." Instead, "B Corp" is the designation that the non-profit B Lab gives to a business to certify that the business meets B Lab's criteria.[118] One criterion is that certified B Corps must have a legal obligation to "consider the impact of their decisions on all their stakeholders."[119] An organization can meet this requirement by incorporating as a benefit company.[120] Thus, a certified B Corp might also be a benefit company. Another layer of overlap between benefit companies and B Corps occurs because Oregon's benefit company statute—like other state statutes[121]—requires that benefit companies measure performance against an acceptable third-party standard,[122] which includes B Lab's standard.[123] While Oregon's statute does not require formal certification from a third party, a B Corp certification provides one way to demonstrate compliance with the statutory requirement.[124]

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116 *See* OR. REV. STAT. § 60.750(1) (2017) ("'Benefit company' means a corporation or a limited liability company that is incorporated, organized, formed or created under ORS 60.754."). Because Oregon's statute allows more types of business organizations to organize as benefit companies, Oregon's statute has an edge over other state statutes that only allow corporations to incorporate as a benefit corporation. While incorporating as a corporation has advantages, organizing as an LLC offers a business greater flexibility and different tax consequences. LLCs that are not willing to convert to a corporation can still become benefit companies without sacrificing benefits of limited liability status. As a result, Oregon's statute enables more businesses to have status as a benefit company than in states where only corporations have the option of benefit corporation status.

117 *Id.* § 60.764. As another example, the statute refers to a benefit company's "articles of incorporation or articles of organization." *Id.* § 60.758(2)(a).

118 *About B Corps*, B LAB, https://bcorporation.net/about-b-corps (last visited July 13, 2020). There are three pillars to certification as a B Corp: "verified performance," "legal accountability," and "public transparency." *Id.*; *Certification*, B LAB, https://bcorporation.net/certification (last visited July 13, 2020). B Lab verifies company performance with its "B Impact Assessment" which evaluates a "company's impact on its workers, customers, community, and environment." *About B Corps*, *supra*. Note that B Lab was involved in drafting the Model Legislation. See *infra* note 164 for a discussion of the relationship between B Lab and benefit companies.

119 *Certification*, *supra* note 118.

120 *See id.* (providing that "B Corps make this legal change by updating their articles of incorporation, reincorporating as benefit companies, or making other structural changes").

121 *See* MODEL BENEFIT CORPORATION LEGISLATION § 102 (2017), https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf (including the third-party standard in the Model Legislation).

122 OR. REV. STAT. § 60.768(2)(b)(A).

123 *File to Become a Benefit Company*, OR. SEC'Y STATE, https://sos.oregon.gov/business/pages/benefit-company.aspx (last visited July 13, 2020).

124 See *infra* Section II.B for additional discussion of the third-party standard requirement.

2. Primary Features

Drafters of the Model Legislation and commentators identify three features of benefit corporation legislation that differ from traditional corporate legislation: corporate purpose, transparency, and accountability.[125] First, benefit corporation legislation includes a corporate purpose provision, which requires that a company "create a material positive impact on society and the environment."[126] Second, to address transparency, benefit corporation legislation includes an obligation to report the company's social and environmental performance against a third-party standard.[127] Third, to address accountability, benefit corporation legislation expands the fiduciary duties of directors to consider "non-financial interests" in decision-making.[128] Benefit corporation legislation also provides for a "benefit enforcement proceeding," which is the sole mechanism in the statute to enforce the obligation to provide public benefit.[129]

The aims of benefit corporation legislation—corporate purpose, transparency, and accountability—overlap with factors that are designed to protect against greenwashing and faux CSR. In reality, the statutory provisions in the Model Legislation and Oregon's legislation that are supposed to increase transparency and accountability may in practice even perpetuate greenwashing and faux CSR.

3. Becoming a Benefit Company

Before analyzing in depth Oregon's benefit company statute and how its provisions drive greenwashing, it is useful to understand how and why a business becomes a benefit company and how benefit company status sets the stage for greenwashing.

To qualify as a benefit company, a corporation or LLC must state in its articles of incorporation or organization, as the case may be, that the business is subject to the benefit company statute.[130] There are several reasons why a company may elect benefit company status, but two are of particular importance when considering the drivers of greenwashing.

First, status as a benefit company enables a business to build a distinctive brand.[131] The status draws in employees who want to work for organizations that align with their values,[132] in this case, promoting social and environmental causes.

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125 CLARK & VRANKA, *supra* note 8, at 15; *see* McDonnell, *supra* note 28, at 31; White, *supra* note 27, at 340 (summarizing purpose, accountability, and transparency as three mechanisms where benefit corporation legislation diverts from traditional corporation standards).

126 CLARK & VRANKA, *supra* note 8, at 15.

127 *See* McDonnell, *supra* note 28, at 31.

128 CLARK & VRANKA, *supra* note 8, at 15.

129 *Id.* at 22 (clarifying that the intent of the Model Legislation is for the benefit enforcement proceeding "to be the sole cause of action available to shareholders with respect to general and specific public benefit purpose").

130 OR. REV. STAT. § 60.754(1)(a) (2017) (corporations organized under ORS chapter 60); *id.* § 60.754(1)(b) (LLCs organized under ORS chapter 63). For additional requirements with reference to entities organized in other ways, see *id.* § 60.754.

131 Koehn, *supra* note 22, at 20; Nancy B. Kurland, *Accountability and the Public Benefit Corporation*, 60 BUS. HORIZONS 519, 520 (2017) (citing Koehn, *supra* note 22).

132 Koehn, *supra* note 22, at 21.

Benefit company status also attracts consumers who believe that benefit companies have higher quality products or services than non-benefit companies.[133] Thus, status as a benefit company can build consumer loyalty, allowing companies to charge more for goods and services.[134] While a company could demonstrate commitment to CSR with simply a certification as a "B Corp" or through a marketing campaign, registration with the Secretary of State as a benefit company can signal legitimacy of the firm's commitment and lessen skepticism.

A second reason to elect benefit company status is the legal advantage with respect to liability. As examined in greater detail below, company actors may pursue public benefit goals with less concern about attacks from shareholders based on financial performance.[135]

Greenwashing and faux CSR threaten genuine CSR efforts. Benefit corporation legislation is supposed to protect against greenwashing, but, as the next Part reveals, Oregon's benefit company legislation allows the practice to occur.

II. OREGON'S BENEFIT COMPANY STATUTE AND THE POTENTIAL FOR GREENWASHING

Against this background on CSR, greenwashing and faux CSR, and benefit corporation statutes, it is appropriate to evaluate the specifics of Oregon's statute. The following examines the Oregon benefit company statute's company purpose provision, its requirement that companies publish an annual benefit report, the duties company actors have to a wide variety of stakeholders, and the liability of company actors.[136] The following analysis generally describes each of these features, considers how the feature might protect against greenwashing with reference to some or all of the drivers of greenwashing, and analyzes how each feature fails to protect against—and may even encourage—greenwashing and faux CSR.

Before scrutinizing how the statute may enable greenwashing and faux CSR, it is worth reviewing the incentives for benefit companies to engage in these practices. First, status as a benefit company might make it easier for a company to raise prices for goods and services. If the business chooses not to make the financial investments that genuine CSR companies make, it may be able to increase its profit margins. Second, it is especially attractive to engage in greenwashing or faux CSR because benefit company actors enjoy limited liability. Without adequate protection against greenwashing and faux CSR, Oregon's benefit company statute opens the door to abusing benefit company status and harming consumers, the community, and the CSR movement at large.

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133 *Id.* (suggesting that status as a benefit corporation may signal to consumers that the firm's products are higher quality than products from non-benefit companies).

134 *Id.*

135 White, *supra* note 27, at 345. However, serving as a director of a benefit corporation might increase legal liability. *See* Koehn, *supra* note 22, at 26–27.

136 Discussion of the benefit enforcement proceeding is reserved for the Note's later analysis of accountability mechanisms *infra* Section III.B.

A. Company Purpose: Public Benefit

A hallmark of a benefit corporation statute is the somewhat radical notion that a benefit company's purpose goes beyond maximizing shareholder profits and instead is to provide a "general public benefit."[137] Oregon's statute defines general public benefit as "a material positive impact on society and the environment, taken as a whole, from the business and operations of a benefit company."[138] While the statute requires and defines a general public benefit, it does not adequately address vagueness or potential mission drift.

First, defining "general public benefit" addresses the issue of vagueness, both a type of greenwashing and one of its drivers. Vagueness can occur if a term is poorly defined,[139] or if a concept is so amorphous that there is no true definition. "General public benefit" has no singular definition, and thus defining the concept in the statute is an important step towards eliminating vagueness and thus greenwashing. The statute also provides that a company must measure a public benefit with regard to a third-party standard, explored *infra* Section B, which should also serve to limit vagueness.

Second, the statute addresses vagueness by allowing benefit companies to adopt, in addition to the mandatory general public benefit purpose, a *specific* public benefit purpose.[140] In this instance, the company identifies the specific public benefit in its articles of incorporation or articles of organization, depending on the type of entity.[141] As an example, a company might identify its specific public benefit as "providing low-income or underserved individuals or communities with beneficial products or services."[142] A specific public benefit limits the dangers of vague terms because it narrows what constitutes a public benefit.

Third, the requirement that a company provide a public benefit should protect against mission drift because there is a clear mission guiding the relevant decision-makers.

Despite its intent, the statute allows vagueness to occur. Once again, vagueness can occur if a term is not defined.[143] Commentators have criticized the general public benefit requirement for being "vague and undefined."[144] "General public benefit" is subjective: depending on a person's point of view, nearly anything could qualify as a public benefit. While Oregon's statute defines "general public benefit" as "a material positive impact on society and the environment, taken as a whole, from the

137 OR. REV. STAT. § 60.758(1) (2017).

138 *Id.* § 60.750(3).

139 *Sins of Greenwashing*, *supra* note 44.

140 OR. REV. STAT. § 60.758(2)(a).

141 *Id.*

142 MODEL BENEFIT CORPORATION LEGISLATION, *supra* note 121, § 102.

143 *Sins of Greenwashing*, *supra* note 44.

144 Brakman Reiser, *Benefit Corporations*, *supra* note 19, at 611; *accord* Loewenstein, *supra* note 19, at 1025 (arguing that the general public purpose provision "sets forth a vague and general aspiration" as opposed to specific actions); Murray, *Choose Your Own Master*, *supra* note 18, at 30–31 (arguing that the general public benefit purpose is too vague); Nass, *supra* note 13, at 887 n.97 (referencing the "vagueness implicit in the general public benefit standard").

business and operations of a benefit company,"[145] the definition itself includes vague terms. For example, the phrase "material positive impact on society"[146] is vague because it is open to widely varying interpretations and is nearly impossible to measure. Even experts on CSR do not have an agreed-upon metric for how something impacts society.[147]

The statute attempts to address the problem of vagueness by requiring that a company measure how it provides a general public benefit with reference to a third-party standard, discussed in more detail *infra* Section B.1. However, as the following Section demonstrates, this standard fails to provide management clear guidance in making decisions about providing a public benefit.[148]

The vagueness of the term "general public benefit" also exacerbates the risk of mission drift. When the mission itself is not clear, decision-makers might shift towards pursuing objectives that are easier to grasp, for example, financial growth. While benefit company status promotes the image that the company provides a public benefit, the company may engage in greenwashing or faux CSR. This issue receives more attention *infra* Section C.

B. *Reporting Against a Third-Party Standard*

A benefit company must publish an annual "benefit report" that discloses how the company provided a general public benefit with reference to a third-party standard.[149] The reporting requirement is intended to provide transparency.[150]

Benefit companies must use the third-party standard in two ways: to assess how the company provides a public benefit,[151] and to describe how it meets or exceeds the third-party standard for social and environmental performance in an annual report.[152] Requiring that benefit companies use third-party standards and publish a report could be a "strong antidote to greenwashing" because "incentives to greenwash decrease with oversight and accountability."[153] However, these requirements often fail to solve the problems of vagueness, transparency, and accountability.

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145 OR. REV. STAT. § 60.750(3).

146 *Id.*

147 *See* ADRIAN HENRIQUES, CORPORATE IMPACT: MEASURING AND MANAGING YOUR SOCIAL FOOTPRINT 5 (2010) (suggesting that measuring social impact is elusive because of "the range and complexity" and "inherently subjective nature" of social issues); *see also* Hopkins, *supra* note 35 (noting the gap in literature on measuring the outcomes of social responsibility).

148 *See* Murray, *Choose Your Own Master*, *supra* note 18, at 30, 32 (arguing that, even with a third-party standard, management in a benefit corporation still does not have a straightforward or practical guide regarding how to provide a public benefit).

149 OR. REV. STAT. § 60.768(2)(b)(A).

150 *See* CLARK & VRANKA, *supra* note 8, at 17–20 (addressing the third-party standard under the heading "transparency"); MODEL BENEFIT CORPORATION LEGISLATION, *supra* note 121, §§ 401–02 (including the section on benefit reports under the subchapter titled "transparency").

151 OR. REV. STAT. § 60.770.

152 *Id.* § 60.768(2)(b)(A); *see also id.* § 60.750(6) (providing that a benefit company uses a third-party standard to "defin[e], report[,] and assess[]" the company's social and environmental performance).

153 Cherry, *supra* note 2, at 294.

1. Measure Performance Against a Third-Party Standard

Oregon's benefit company statute requires that a company measure the extent it provided a general public benefit or specific public benefit against an acceptable third party's standard.[154] Drafters of the Model Legislation acknowledged concerns that the concept of "general public benefit" is too broad to have meaning and that the requirement to provide "a material positive impact on society and the environment" is also too vague.[155] Requiring a standard to measure "general public benefit" was designed to address the problem of vagueness which is particularly likely to occur if there is no metric to evaluate a company's claim.[156]

Oregon's statute contains three main requirements regarding the third-party standard. First, the standard must establish criteria that apply to the interests that a company's management must consider.[157] Second, neither the benefit company nor its affiliates may control the organization that develops the standard.[158] Third, the third-party organization must have several types of information publicly available, including "[t]he criteria the standard uses to measure [the company's] overall social and environmental performance" and how much weight the standard gives each criterion;[159] how the organization revises and develops the standard;[160] and information about "any relationships that might compromise the organization's independence."[161] Oregon's Secretary of State website provides four examples of organizations that meet the statutory requirements, including B Lab and the Oregon-based "Benefit Corporations for Good."[162]

The statute's requirement that the third-party organization have certain information available to the public targets the issue of transparency. The public can scrutinize the standard itself and determine whether the third-party is neutral with respect to the benefit company.

While the statute has robust requirements regarding the standard, the standard may prove to be inadequate. In certain situations, the requirement that the third-party organization publish information regarding criteria used to measure overall social and economic performance does not preclude the use of vague criteria, nor does it guarantee that the criteria to determine social or environmental impact are accurate. There is also no assurance that a third-party standard is even useful

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154 *See* White, *supra* note 27, at 342–44 (describing the Model Legislation).

155 This was the intent of the drafters of the Model Legislation, as one of the drafters of the legislation, Mr. Clark, explains in CLARK & VRANKA, *supra* note 8, at 23. Because Oregon's statute is based on the Model Legislation, it is fair to assume that the intent of the legislation applies to Oregon's statute.

156 *Sins of Greenwashing*, *supra* note 44 (arguing that greenwashing through vagueness can occur if there is no metric to evaluate a company's claims).

157 OR. REV. STAT. § 60.750(6)(a) (cross-referencing *id.* § 60.760(1)(b)–(f)); *see infra* Section II.C (analyzing duties).

158 *Id.* § 60.750(6)(b).

159 *Id.* § 60.750(6)(c)(A).

160 *Id.* § 60.750(6)(c)(B).

161 *Id.* § 60.750(6)(c)(C).

162 *File to Become a Benefit Company*, *supra* note 123; *see How to Become a Certified Benefit Corporation*, BENEFIT CORPS. FOR GOOD, https://benefitcorporationsforgood.com/certification (last visited July 13, 2020) (noting that Benefit Corporations for Good is based in Oregon).

because there is no clear enforcement mechanism.[163] Finally, the third-party organization may not be truly neutral. For example, commentators have raised questions as to whether B Lab can, in fact, be independent when benefit companies have financial incentives to select the popular organization.[164]

2. Benefit Reports

Oregon's statute requires that a benefit company annually prepare a "benefit report," which the company must deliver to each holder of an equity interest within 120 days after the end of the company's fiscal year or at the same time the company delivers other annual reports to equity interest holders.[165] The company must also post its benefit reports "on the publicly accessible pages of the benefit company's website" and provide a copy to a person who requests one.[166]

Delivery of the annual benefit report is another statutory requirement designed to create transparency. Specifically, the report would "giv[e] consumers and the general public a means of judging whether a business is living up to its claimed status as a benefit corporation."[167]

The benefit report must include a narrative description of how the company provided a general public benefit and how it performed against a third-party standard. Two subsections of the statute address the content of the report.

The first subsection requires that a company include narrative descriptions of how it provided a public benefit in three areas: first, "[t]he extent to which the benefit company provided a general public benefit and the actions and methods the benefit company used to provide the general public benefit;"[168] second, if applicable, the same narrative description with regard to the extent to which the company provided a specific public benefit;[169] and third, "[a]ny circumstances that hindered or prevented the benefit company from providing a general public benefit or a specific public benefit."[170]

The second subsection of the statute requires that a benefit company select a third-party standard and identify the standard in the report.[171] The report must

163 *See* J. Haskell Murray, *An Early Report on Benefit Reports*, 118 W. VA. L. REV. 25, 46 (2015) [hereinafter Murray, *An Early Report on Benefit Reports*] ("[Benefit corporation] statutes do not appear to provide a clear enforcement mechanism to ensure that the third-party standards are actually useful.").

164 B Lab provides monetary incentives to companies that become benefit corporations and use its paid monitoring services. Rae André, *Assessing the Accountability of the Benefit Corporation: Will This New Gray Sector Organization Enhance Corporate Social Responsibility?*, 110 J. BUS. ETHICS 133, 143 (2012). B Lab introduces companies to service partners that give benefit corporations a "heavy discount." *Id.* at 144. "Independent" thus becomes a misnomer because "[b]enefit corporations are, in practice, highly interdependent with their third-party evaluator." *Id.*

165 OR. REV. STAT. § 60.768(3).

166 *Id.* § 60.768(4).

167 MODEL BENEFIT CORPORATION LEGISLATION, *supra* note 121, § 102 cmt.

168 OR. REV. STAT. § 60.768(2)(a)(A).

169 *Id.* § 60.768(2)(a)(B).

170 *Id.* § 60.768(2)(a)(C).

171 The statute requires that the benefit report assess how the company's performance meets or exceeds a third-party standard that the company "selected and *identified* in the benefit report." *Id.* § 60.768(2)(b)(A) (emphasis added). There are not, however, additional provisions which

include an assessment of how the company "met or exceeded" the standard.[172] The benefit company itself—as opposed to the third party—must conduct the assessment and evaluate the company's performance,[173] either in a manner that is consistent with previous reports or explains any inconsistencies.[174] The report must also describe how and why the company selected the third-party standard.[175]

Because the company must publish an assessment of its social and environmental performance against a third-party standard, the public has criteria to evaluate performance that "is otherwise almost impossible to determine."[176] Thus, the statute attacks two causes of greenwashing. First, the reporting requirement addresses vagueness by requiring objective criteria to measure a claim or concept. Second, the requirement enhances transparency by requiring that the company disclose how it selected the third-party standard and how the company assessed and evaluated its performance. Most importantly, the statute requires that the company disclose in the report whether or not it actually provides the public benefit that it claims it does.

Public reporting is designed to encourage directors to pursue the public benefit in earnest.[177] If a report reveals that a company has not met its commitment, investors, customers, and employees may refrain from doing business with the company.[178] The public might also launch a public campaign to pressure the company to change and, perhaps even worse, lobby other people to boycott the organization.

There are, however, issues with benefit reports. The value of reporting depends on whether a company is transparent and the information it publishes is accurate and "readily available and easily accessed and searched."[179]

First, it is unlikely that a greenwashing company would create a truly transparent report that exposes the weakness of its claims. A company might issue a report that is vague because the third-party standard it selected has broad criteria that are easy to meet.

Second, there is no guarantee that information in a benefit report is accurate. Benefit reports are self-generated, which can diminish the credibility of the report.[180] In addition, there are no clear consequences if a company does not publish truthful information.[181] While benefit companies that do not provide accurate

explicitly require that the benefit company identify the requirement in the benefit report. A separate section of the statute requires that the company "assess the extent to which the benefit company provides a general public benefit and any specific public benefit . . . against a third-party standard." *Id.* § 60.770. Oddly, this section is at the end of the statute and separate from the reporting requirement section. *See id.*

172 *Id.* § 60.768(2)(b)(A).

173 *Id.*

174 *Id.*

175 *Id.* § 60.768(2)(b)(B).

176 CLARK & VRANKA, *supra* note 8, at 19.

177 Dorff, *supra* note 1, at 105.

178 McDonnell, *supra* note 28, at 33 (citing Brakman Reiser, *Theorizing Forms for Social Enterprise*, *supra* note 23, at 707–08).

179 Koehn, *supra* note 22, at 33.

180 Kurland, *supra* note 131, at 521.

181 Koehn, *supra* note 22, at 34.

information might under some circumstances be vulnerable to anti-fraud suits,[182] stakeholders have limited ability to hold these companies accountable.[183]

Third, regarding availability, at least one study demonstrated that a significant number of benefit companies across the country, including in Oregon, do not post current and compliant reports.[184] Status as a benefit company signals to the market that it provides a public benefit and, at least implicitly, follows procedures and meets obligations that accompany the status. Companies that fail to post reports may be avoiding providing a public benefit and any accountability. As an unfortunate additional consequence, widespread failure to report can lead to the market questioning the legitimacy of the business form.[185] Finally, the availability of a transparent and accurate report does not necessarily mean that it is useful to the public.[186] Perhaps the largest issue with the benefit report scheme is that the statute does not provide a mechanism to hold companies accountable for inadequate or missing benefit reports, addressed *infra* Section III.B.3.

C. *Fiduciary Duties and Liability*

The third feature of Oregon's statute is that it expands fiduciary duties for and limits liability of benefit company governors, managers, members, and officers ("corporate actors" or "management"). While fiduciary duties should encourage accountability,[187] the expanded duties and limited liability open the door for greenwashing and faux CSR.

Before considering the duties and liabilities of management of a benefit company, a note on the structure of benefit companies is useful. A board of governors manages a benefit company.[188] In the statute, "governor" means a director in the context of a corporation or, in the context of an LLC, either a member in a member-managed LLC or a manager in a manager-managed LLC.[189] The board of governors "may designate" a member of the board as a "benefit governor," who has additional powers, duties, rights, privileges, and immunities.[190]

1. *Duties*

Oregon's benefit company statute creates fiduciary duties that extend beyond

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182 Stecker, *supra* note 19, at 378.

183 *See* Koehn, *supra* note 22, at 34.

184 Maxime Verheyden, *Public Reporting by Benefit Corporations: Importance, Compliance, and Recommendations*, 14 HASTINGS BUS. L.J. 37, 94 (2018). For a review of Oregon's compliance with the statute, see *id.* at 63–68. Professor J. Haskell Murray collected similar data on benefit reports across four states, not including Oregon, and found that compliance with reporting requirements was "abysmal." Murray, *An Early Report on Benefit Reports*, *supra* note 163, at 26.

185 Kurland, *supra* note 131, at 521.

186 J. Haskell Murray, *Understanding and Improving Benefit Corporation Reporting*, ABA BUS. L. TODAY (2016), https://www.americanbar.org/groups/business_law/publications/blt/2016/07/04_murray/.

187 CLARK & VRANKA, *supra* note 8, at 15.

188 OR. REV. STAT. § 60.762(1)(a) (2017).

189 *Id.* § 60.750(4).

190 *Id.* § 60.762(1)(a).

what corporate statutes usually include.[191] These duties require that company decision-makers—governors, managers, members, and officers—consider how a decision to act or not act will impact multiple stakeholders.[192] This provision was designed to address accountability,[193] but the limited liability that decision-makers enjoy and the limited mechanisms to hold company actors responsible may limit the provision's effectiveness.

A governor of a benefit company must act in the best interest of the company and consider how a decision will affect various interests including shareholders, employees, customers, the environment, and the ability to fulfill the company's general public benefit or specific public benefit identified in the articles of incorporation or organization.[194] Other people in management—managers, members, and officers—have similar duties.[195] In the interest of brevity, this analysis will refer to the duties of governors unless otherwise indicated.[196]

A governor of a benefit company does not need to give a particular interest priority over another interest outlined in the statute.[197] However, the benefit company's articles of incorporation or organization may identify an interest to which a governor must give priority.[198]

A board of governors may designate one of its members as a benefit

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191 *See* CLARK & VRANKA, *supra* note 8, at 15 (referring to "expanded fiduciary duties" in the Model Legislation which are in accord with Oregon's legislation).

192 *See* OR. REV. STAT. § 60.760(4) (providing the duties of and standard of conduct for governors of a benefit company); *id.* § 60.764(1) (providing the duties of and standard of conduct for managers, members, and officers of a benefit company); *accord* CLARK & VRANKA, *supra* note 8, at 17 (regarding the Model Legislation).

193 CLARK & VRANKA, *supra* note 8, at 17 (using the subheading "Accountability: Consideration of Stakeholders" in the white paper).

194 OR. REV. STAT. § 60.760(1)(a)–(h). Specifically, the governor must consider how a decision will affect: the company's shareholders or members, *id.* § 60.760(1)(a); the company's subsidiaries and suppliers, *id.* § 60.760(1)(c); the employees and work force of the company, *id.* § 60.760(1)(b); the employees and work force of the company's subsidiaries and suppliers, *id.* § 60.760(1)(b); the interest the benefit company's customers have in receiving a portion of the general or specific public benefit the company provides, *id.* § 60.760(1)(d); communities the company's activities affect—including where the "company is located, operates or has offices or other facilities" and where "subsidiaries and suppliers are located, operate or have offices or other facilities[,]" *id.* § 60.760(1)(e); "the local and global environment[,]" *id.* § 60.760(1)(f); the short- and long-term interests of the company, which include "an interest in benefits that might accrue from the benefit company's long-term plans and the possibility that the interests of the benefit company are best served by keeping the benefit company independent[,]" *id.* § 60.760(1)(g); and the ability to fulfill the company's general or specific public benefit identified in the articles of incorporation or organization, *id.* § 60.760(1)(h).

195 *See id.* § 60.764(1) (mirroring the obligations of governors to consider how the effects of an action or decision not to act under ORS 60.760(1)–(3) for managers, members, and officers). The statute distinguishes members with management duties in the first sub-section of the section but does not make this distinction in the rest of the statutory section.

196 When applicable, citations will include parallel citations regarding the duties of managers, members, and officers.

197 OR. REV. STAT. § 60.760(3) (duties of governors); *see id.* § 60.764(1)(c) (duties of managers, members, and officers).

198 *Id.* § 60.760(3).

governor,[199] who would have additional duties including providing information or statements to other governors concerning the obligations of other governors under ORS 60.760.[200] While a benefit governor reminds other board members of their obligations, it is not clear whether the benefit governor has any power to enforce these duties.

The statute limits the scope of the parties to whom governors owe duties. A person's status as a beneficiary of either the general or specific public benefit that a company provides does not create a governor's duty to that person.[201] This provision provides a layer of protection for risk-averse governors. If a governor had a duty to any person who fell within the broad umbrella of the company's general or specific public benefit beneficiaries, the governor would be exposed to claims of a virtually unlimited number of persons.[202]

The idea behind expanded duties is that governors are accountable to stakeholders if they do not consider interests.[203] However, expanded fiduciary duties exacerbate the problems of multiple masters and mission drift. The list of stakeholder interests that governors must consider underscores the challenges they face. By serving many interests, governors may end up serving none.[204] Governors must consider a long list of interests which the statute does not prioritize.[205] This is a classic example of the multiple masters issue.[206] The danger is that, absent clear guidance or an identifiable "master," a governor might serve "their own self-interest or their own objectives."[207] This issue is especially relevant when it is unclear how to balance pecuniary and non-pecuniary interests. The result can be greenwashing—maintaining the image that the organization is pursuing public benefit while actually attending to self-interest.

When management must balance multiple masters, it might choose to prioritize financial goals because they are easier to measure than how a decision affects "[t]he local and global environment,"[208] for example. It is important to note that

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199 *Id.* § 60.762(1)(a).

200 *Id.* § 60.764(3).

201 *Id.* § 60.750(5)(c) (duties of governors); *see id.* § 60.764(3)(c) (duties of managers, members, and officers).

202 *See* Clark & Babson, *supra* note 112, at 850 (referring to benefit corporation legislation broadly, arguing that "the exclusion of any right of action by third parties protects the benefit corporation from unknown, expanded liability that would otherwise operate as a disincentive to becoming a benefit corporation").

203 *See* CLARK & VRANKA, *supra* note 8, at 28 (referencing accountability in the Model Legislation).

204 *See* Johnson, *supra* note 23, at 290 (citing Murray, *Choose Your Own Master*, *supra* note 18, at 27–29; Cummings, *supra* note 19).

205 OR. REV. STAT. § 60.760(3) (duties of governors); *see id.* § 60.764(1)(c) (duties of managers, members, and officers).

206 *See* Murray, *Choose Your Own Master*, *supra* note 18, at 28–29 (arguing that benefit corporations are especially prone to the "multiple masters" issue because benefit corporation statutes do not provide the board of directors guidance to consider the effects of actions on diverse groups of stakeholders).

207 *Id.* at 28.

208 OR. REV. STAT. § 60.760(1)(f).

shareholders and members of a benefit company are the only people with interests that management must consider who have standing to bring an action claiming that the governors failed to act in accordance with their duties to consider interests.[209]

While considering a variety of stakeholders is consistent with a holistic notion of a general public benefit, it is impracticable. The legislation requires that a governor consider how an action will affect the organization's ability to fulfill a general public benefit.[210] As one commentator noted, the concept of a "general public benefit" is too vague for governors to make decisions.[211]

Furthermore, even though governors must consider these interests, they do not seem to owe any enforceable duty to the respective stakeholders, except for perhaps shareholders or members.[212] Absent a strong mechanism to hold a governor accountable for not considering all interests, the risk of greenwashing is stronger. As the Part below on causes of action suggests, the statute provides a weak mechanism to hold greenwashing governors accountable.[213]

The second driver of greenwashing related to the fiduciary duties provision is vagueness. Governors have a duty to consider how an action or decision not to act will affect the company's ability to fulfill its general or specific public benefit.[214] As explained above, "general public benefit" is a vague term. Accordingly, governors have limited assurance that their decisions are in pursuit of a public benefit.[215] Moreover, vagueness may allow a governor to engage in abuse and self-dealing.[216]

Even the obligation to "consider" or "create" a public benefit is vague. First, the notion of "creating" a public benefit itself is elusive because there is no obvious metric of what actions "create" a public benefit.[217] Third-party standards can provide guidance, but they are far from a concrete metric and have limited

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209 *See id.* § 60.760(1)(a) (providing the duty that governors of a benefit company shall consider how a decision to act or not act will affect the interests of shareholders or members of the benefit company); *id.* § 60.764(1)(c) (applying the same duties that governors have under section 60.760(1)–(3) of the statute to managers, members, and officers of a benefit company); *id.* § 60.766(2)(c) (a shareholder or member may commence a proceeding against a benefit company or its governors, managers, members, or officers). This issue receives additional attention *infra* Section III.B.2.

210 OR. REV. STAT. § 60.760(1)(h); *see id.* § 60.764(1)(c) (applying the same duties to managers, members, and officers).

211 *See* Murray, *Choose Your Own Master*, *supra* note 18, at 30 (critiquing the Model Legislation). For more discussion on why this is a vague concept, see *supra* Section II.A.

212 *See* Johnson, *supra* note 23, at 292 (referring to benefit corporation legislation). See *infra* Section III.B, for more in-depth analysis of this issue.

213 *See infra* Section III.B.

214 OR. REV. STAT. § 60.760(1)(h); *see id.* § 60.764(1)(c) (applying the same duties to managers, members, and officers).

215 Murray, *Choose Your Own Master*, *supra* note 18, at 30; Roxanne Thorelli, Note, *Proving Clarity for Standard of Conduct for Directors within Benefit Corporations: Requiring Priority of a Specific Public Benefit*, 101 MINN. L. REV. 1749, 1767 (2017) (citing Murray, *Choose Your Own Master*, *supra* note 18, at 30).

216 *See* Thorelli, *supra* note 215, at 1784 (regarding benefit corporation legislation, generally).

217 *See* Loewenstein, *supra* note 19, at 1014 (regarding the Model Legislation).

usefulness.[218] Second, "consider" is also a vague term,[219] in part because governors do not have any statutory guidance as to how to prioritize interests. This issue also relates to limited accountability when shareholders and other stakeholders cannot measure whether a company adheres to its commitments.[220]

2. Liability

The benefit company statute expands the duties of management while at the same time limiting liability. If a benefit company does not provide a specific or general public benefit, neither governors, managers, members, nor officers are personally liable for money damages.[221] The management of a benefit company is also not personally liable for money damages so long as it acts in accordance with the duties imposed by the statute and applicable Oregon law.[222] The statute, however, does not foreclose the possibility of money damages if the actor does not act in accordance with its duties under the statute and applicable law. This potential receives attention *infra* Section III.B.

Because members of management of benefit companies have limited liability, they also have little at stake when it comes to greenwashing and faux CSR.

Oregon's benefit company statute opens the door to the drivers of greenwashing for several reasons. The company purpose provision is vague and allows mission drift. The requirement that benefit companies publish an annual benefit report does not guarantee transparency, accuracy, or compliance with the requirement. Also, the fiduciary duties and liabilities of benefit company actors are susceptible to vagueness, the multiple masters issue, and mission drift.

Moreover, the statute's sole accountability mechanism, an enforcement proceeding, as Part III, *infra*, explains, has three major issues. First, there are limited circumstances when a person can initiate a proceeding against a benefit company or its management. Second, few people can initiate a proceeding against a benefit company or its management and those people are unlikely to do so. Third, the remedies available are inadequate and likely unenforceable.

The next Part uses the example of a hypothetical Oregon benefit company to illustrate how the state's benefit company statute fails to provide an effective deterrent to greenwashing and faux CSR and how other avenues for accountability might be more powerful.

III. AVENUES FOR ACCOUNTABILITY

The Oregon benefit company statute fails to prevent benefit companies from

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218 *See supra* Section II.B.

219 Koehn, *supra* note 22, at 32 (referring to the features of benefit corporations generally); Thorelli, *supra* note 215, at 1770 (critiquing the Model Legislation); *see* Tiffany M. Burba, *To "B" or Not to "B": Duties of Directors and Rights of Stakeholders in Benefit Corporations*, 70 VAND. L. REV. EN BANC 147, 154 (2017) (noting the vagueness issue when directors must "consider" interests).

220 *See infra* Section II.C.2.

221 OR. REV. STAT. § 60.760(5)(b) (2017) (governor of a benefit company); *id.* § 60.764(3)(b) (manager, member, or officer of a benefit company).

222 *Id.* § 60.760(5)(a) (governor of a benefit company); *id.* § 60.764(3)(a) (manager, member, or officer of a benefit company).

engaging in greenwashing and faux CSR. This Part addresses what avenues for accountability are available when a benefit company engages in greenwashing or faux CSR and evaluates three areas of law outside of the benefit company statute that might provide redress for a plaintiff.

The first Section introduces a hypothetical benefit company, Green Grocer. The following Section considers the benefit company statute's enforcement proceeding and how the statute fails to prevent greenwashing and faux CSR and even allows it to continue. The next Sections focus on three other areas of law that might provide for accountability: Oregon's UTPA, the FTC Act, and the Lanham Act. Each Section will evaluate what conduct the law prohibits, who can bring an action, and what remedies are available.

A. Hypothetical Benefit Company: Green Grocer

Consider a hypothetical Oregon benefit company grocery store named "Green Grocer." Green Grocer is proud to be Oregon's first benefit company grocer registered with the Oregon Secretary of State, and the company's savvy marketing team takes every opportunity to remind the public that it is a benefit company. The store features products with the label, "Green Goodness," and the tagline "Green Grocer: Oregon's first registered benefit company grocer." The store offers reusable shopping totes with its name and tagline. The founder even framed and hung registration papers from the Oregon Secretary of State on a wall in the store.

Even though it is a small, closely held family business, the store has been a huge success. Shoppers love the family business and are willing to pay top dollar to support a company that is "doing good" and providing a public benefit. But what if Green Grocer does not live up to its claims? Imagine that this company files a benefit report, but the report does not meet the statutory requirements. Or that the company outright lies in the report about how it meets a third-party standard and provides a public benefit. Or that it fails to file a report at all. What are the potential causes of action and remedies for this greenwashing and faux CSR and who has standing to take action against the benefit company?

B. Enforcement Proceeding Under the Oregon Benefit Company Statute

Oregon's benefit company statute offers plaintiffs the potential to commence a proceeding—typically known as a "benefit enforcement proceeding"[223]—against a benefit company based on its failure to provide a public benefit or a company actor's failure to meet its duties or act in accordance with a prescribed standard of conduct.[224] The benefit enforcement proceeding is the only mechanism in Oregon's benefit company legislation to hold a benefit company accountable in court.[225]

The following Section considers the circumstances under which an enforcement proceeding can begin and, under each circumstance, who has standing to

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223 It is more accurate to refer to the proceeding as an "enforcement" proceeding rather than a "benefit enforcement" proceeding because a plaintiff can enforce both the general public benefit and duties.

224 OR. REV. STAT. § 60.766(2).

225 *Id.* § 60.766(1).

commence a proceeding, what remedies are available, and how these features of the statute allow greenwashing and faux CSR. This Section concludes by considering how an obligation to file a benefit report fits into the statute's enforcement proceeding framework. The analysis considers an enforcement proceeding against a benefit company in the context of the hypothetical benefit company, Green Grocer.

Only members of a narrowly defined class may commence a direct or derivative proceeding either to compel a benefit company to provide a general or specific public benefit,[226] or to require a governor, manager, member, or officer to act in accordance with the duty or standard of conduct set forth in the benefit company statute or the company's articles.[227]

Four groups of people have standing to commence a proceeding: the benefit company itself,[228] a governor of the company,[229] a shareholder or member of the company,[230] and a person whom the company declares in its bylaws, articles of incorporation, or articles of organization has a right to commence a proceeding.[231]

1. *Compel to Provide a Public Benefit*

A person with standing may initiate a proceeding to compel a benefit company to provide a specific or general public benefit. However, at least three things make such a proceeding a lackluster accountability mechanism. First, "public benefit" remains a vague term. Second, a person with standing might not be inclined to bring this enforcement action. Finally, there are practical issues with the remedy. As a result, some benefit companies are likely to greenwash and engage in faux CSR and continue to do so with impunity.

The first issue is that the term "public benefit" is vague and nearly impossible to define.[232] Because the term is challenging to define, a plaintiff may have difficulty pleading that the company has not provided a public benefit. A plaintiff could refer to the third-party standard that the company chose, but there is no guarantee that a benefit company will publish a report with the name of the third-party standard. Even if a plaintiff could point to a third-party standard, the standard could use overly vague criteria to determine whether a company provides a public benefit.[233]

A plaintiff might define public benefit by referring to what is *not* a public benefit. This is similar to how scholars and judges define the likewise elusive concept of "good faith" in corporate law as the "absence of bad faith."[234] However, defining

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226 *Id.* § 60.766(2)(a)–(d).

227 *Id.*

228 *Id.* § 60.766(2)(a).

229 *Id.* § 60.766(2)(b).

230 *Id.* § 60.766(2)(c).

231 *Id.* § 60.766(2)(d).

232 A benefit company could limit this issue if it commits itself to a narrower specific public benefit. *Id.* § 60.758(2)(a). However, a specific public benefit might still be vague. *See supra* Section II.B.

233 *See supra* Section II.B.

234 *See In re* Walt Disney Co. Derivative Litig., 907 A.2d 693, 753 (Del. Ch. 2005) (arguing that, when considering how to define good faith, "at least in the corporate fiduciary context, it is probably easier to define bad faith rather than good faith"), *aff'd*, 906 A.2d 27 (Del. 2006); *accord* Elizabeth A. Nowicki, *Not in Good Faith*, 60 SMU L. REV. 441, 459–68 (2007) (referencing "not in

a concept with reference to its inverse has limits. Whereas bad faith is certainly not good faith, the same might not hold for what is and is not a public benefit. One group may think something is not a public benefit while another may think that it is. If a would-be plaintiff cannot articulate with specificity whether or not a company provides a public benefit, it would find it difficult to hold accountable a benefit company that falsely claims it provides a public benefit. This allows greenwashing and faux CSR to either go undetected or continue without consequence.

The second issue with the enforcement proceeding as an accountability mechanism is limited standing. The statute limits standing to the benefit company, a governor, a shareholder or member, or a person whom the company identifies in its articles has standing.[235]

Shareholders or members might have incentives to allow the company to continue greenwashing if they stand to gain financially from the practice.[236] Where the only stakeholders who can commence an enforcement proceeding are the people who might stand to gain financially from greenwashing, the threat of an enforcement proceeding can be too low to deter the practice.

Shareholders or members who are committed to the company staying true to its public benefit mandate may have incentives to bring an action. However, when a business is closely held and the shareholders or members are likely the governors of the organization, it seems unlikely that they would file suit against the company.[237] Greenwashing or faux CSR may not come as a surprise if the shareholders or members are involved in decision-making or otherwise apprised of the company's actions.[238] It is similarly unlikely that a governor or the benefit company itself would initiate a proceeding.

In the case of Green Grocer, it is doubtful that someone within the company will "blow the whistle." After all, the shareholders are reaping the benefits of goodwill associated with having a benefit company without needing to expend the time and resources to comply with the requirements. As a practical matter, it may not be worth the time or expense of litigation where there are no monetary damages available.[239] Thus, there may be no effective check against governors who may engage in the greenwashing or faux CSR.

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good faith"). This approach can have limits, though. *See* Clark W. Furlow, *Good Faith, Fiduciary Duties, and the Business Judgment Rule in Delaware*, 2009 UTAH L. REV. 1061, 1071 (2009) ("[D]efin[ing] 'good faith' as the absence of 'bad faith' tends to narrow the scope of good faith to the absence of particular categories of extremely bad conduct deemed to be in bad faith.").

235 OR. REV. STAT. § 60.766(2).

236 *See* Brakman Reiser, *Benefit Corporations*, *supra* note 19, at 613 (regarding benefit corporations, generally).

237 *See* Dorff, *supra* note 1, at 104–05 (making this argument with regard to Delaware's benefit corporation legislation).

238 *See id.* at 108 (arguing that Delaware's benefit corporation legislation, which differs from the Model Legislation and Oregon's legislation in some respects, leads to greenwashing where the benefit corporation only needs to send a benefit report to its shareholders and noting that, in the case of a closely held company, the shareholders are likely in control of the board and thus "unsurprised and undisturbed by whatever the report contains").

239 *See* Murray, *Choose Your Own Master*, *supra* note 18, at 39 (citing John C. Coffee, Jr., *Understanding the Plaintiffs Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 670 (1986)).

An Oregon benefit company may expand standing for enforcement proceedings by providing in its bylaws or articles of organization or incorporation that a particular person has the right to commence an action;[240] however, this is highly unlikely to happen in practice. A draw of benefit company status is limited liability.[241] If a company like Green Grocer sets out to engage in greenwashing or faux CSR, it is even less likely to expand the class of people who may hold the company accountable in court.

The third issue is the weakness of remedy. Assuming that a shareholder, member, or another person with standing wants to compel the company to provide a public benefit, the remedy is not likely enforceable. The statutory remedy compels a company to provide a general or specific public benefit, a form of specific performance.[242] Specific performance is an equitable remedy available when a remedy at law, for example, damages or monetary compensation, is not adequate or available.[243] Courts have discretion to grant specific performance.[244]

Courts rarely grant specific performance,[245] especially if it requires ongoing monitoring of duties or obligations.[246] While the statute excludes monetary damages as a remedy,[247] and thus there is arguably no remedy available at law, a judge still might not enforce this remedy for at least three reasons. First, it is difficult to discern what a public benefit looks like.[248] Second, it is even more challenging to decide what actions will provide a public benefit. Finally, it is a nearly insurmountable task to enforce a company's ongoing obligation to provide a public benefit. There is no

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240 OR. REV. STAT. § 60.766(2)(d).

241 *See* CLARK & VRANKA, *supra* note 8, at 20 (explaining why the Model Legislation restricts liability).

242 Technically, specific performance is only available to protect contract rights. 71 AM. JUR. 2D *Specific Performance* § 1, Westlaw (database updated Feb. 2020). However, this remedy has the same flavor of specific performance, and commentators refer to this remedy under an enforcement proceeding as specific performance. *See, e.g.*, Loewenstein, *supra* note 19, at 1021 n.61 (drawing parallels between the enforcement part of benefit enforcement proceedings and specific performance); Nass, *supra* note 13, at 887 (referring to the remedy as specific performance).

243 71 AM. JUR. 2D, *supra* note 242, § 1; *id.* § 10; *id.* § 12.

244 *Id.* § 1; 81A C.J.S. *Specific Performance* § 7, Westlaw (database updated Feb. 2020).

245 Alan Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271, 272 (1979) ("Under current law, courts grant specific performance when they perceive that damages will be inadequate compensation. Specific performance is deemed an extraordinary remedy, awarded at the court's discretion . . . .").

246 *See* 71 AM. JUR. 2D, *supra* note 242, § 110 (providing that courts generally refuse to decree specific performance especially if performance will require "constant and long-continued supervision by the court," and if the performance "will extend over a considerable period of time and include a series of acts"); *see also* HOWARD O. HUNTER, MODERN LAW OF CONTRACTS § 13:13, Westlaw (database updated Apr. 2019) (referring to the "usual reluctance of courts to enforce agreements that may require ongoing monitoring").

247 OR. REV. STAT. § 60.760(5)(b) (2017) (liability of governors); *id.* § 60.764(3)(b) (liability of managers, members, and officers); *id.* § 60.766(3) (liability of the benefit company).

248 *See* Nass, *supra* note 13, at 887–88 ("In the same way that it would be difficult to measure compliance with an order for specific performance, it will likely be just as difficult for a court to determine whether a benefit corporation breached its duty to create a material public benefit to the extent necessary to trigger court intervention.").

precedent of benefit enforcement proceedings,[249] let alone precedent of how to continually enforce an obligation to provide a public benefit.

In sum, a proceeding to compel a benefit company to provide a public benefit is an inadequate accountability mechanism for three reasons. First, the vague nature of the term "public benefit" makes it difficult to initiate a proceeding. Second, it is unlikely that a person with standing would initiate a proceeding. Third, even in the improbable event that a proceeding is instituted, a court is unlikely to enforce the remedy. The result is that the statute allows a company to use its status as a benefit company to claim that it provides a public benefit without serious legal repercussions.

2. Compel to Act in Accordance with Duties and Standards of Conduct

A person with standing may require a governor, manager, member, or officer of a benefit company to act in accordance with a duty or standard of conduct specified in the company's articles of incorporation or organization or in the benefit company statute. There are at least three issues with this type of proceeding, each of which is similar to an action to compel a benefit company to provide a general public benefit. First, the duties and standards of conduct provided in the statute are difficult to measure. Second, it is not likely that a person with standing will bring this type of enforcement action. Finally, the remedy is riddled with issues. The result, again, is that the statute creates only a façade of accountability that incentivizes greenwashing conduct and allows it to occur unfettered.

Management of a benefit company must act in the best interest of the company and must consider how an action or decision not to act will affect a long list of stakeholders including shareholders or members of the benefit company.[250] The benefit company may provide in its articles an obligation to prioritize certain interests over others.[251]

The first challenge for a plaintiff is proving that a governor failed to consider the interests of a stakeholder. Unless there is a record of how a governor considers and does not consider each stakeholder, it is difficult to prove that the governor failed to consider an interest. There is also no statutory definition of "consider," and the statute does not require a governor to weigh interests in a certain manner.

Even if a stakeholder feels that a governor of the benefit company acted contrary to the stakeholder's interests, the governor may still have acted appropriately. "Consider" does not mean the same thing as prioritize. A governor could consider a stakeholder's interest but decide to serve another interest and still satisfy the duty to consider interests.[252]

The next issue with using a proceeding to ensure accountability is the benefit company statute's requirement for standing. There are few incentives for the benefit company's actors to consider interests of stakeholders without standing, and the stakeholders with standing are not likely to advocate the interests of other

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249 Peter Smith, *Benefit Enforcement Proceedings for the Benefit Corporation—What are they and How Will they Work?*, APEX LAW GROUP (Apr. 2, 2012), http://apexlg.com/benefit-enforcement-proceedings-for-the-benefit-corporation-what-are-they-and-how-will-they-work/.

250 OR. REV. STAT. § 60.760(1); *id.* § 60.764 (duties of managers, members, and officers).

251 *Id.* § 60.760(3).

252 The same analysis applies to managers, members, and officers.

stakeholders.[253] As a result, there is little incentive for a company's actors to focus on non-financial interests.

Shareholders and members are the only stakeholders who can commence a proceeding against the company's management when the company's actors do not consider their interests. So, even though benefit company actors have an obligation to consider interests of a variety of stakeholders, there is no accountability to the majority of these stakeholders. As a result, a company can maintain the illusion that it does consider these interests while engaging in faux CSR.

Limited standing also results in a situation where it is unlikely that a shareholder or member will commence an action against management if management considers their interests. Shareholder or member interests may clash with other stakeholder interests. For instance, considering the interests of employees may come at the cost of shareholder or member wealth. In a situation where interests conflict, a shareholder or member is unlikely to demand that the company's actors fulfill their obligation to consider the interests of the other stakeholders.[254]

In our hypothetical example, consider Monty, a shareholder of Green Grocer. If Monty feels that the governors are not adequately considering his interests, and, thus not acting in the company's best interest, he might bring an action against the governors. However, if the governors are not acting in the best interest of the company by not considering the interests of its workforce and Monty is not a member of the workforce, he has less incentive to compel Green Grocer to act. After all, the governors are making Monty a top priority. If Monty is a workers' rights advocate who cares more about how company decisions impact these stakeholders than himself, he might seek to compel the governors to consider these interests. However, in the context of a benefit company like Green Grocer, where shareholders like Monty are likely apprised of the company's misdeeds, Monty will probably not blow the whistle. As a result, the benefit company might use its status to signal to the public that it considers interests beyond purely profit while in fact it only considers financial interests.

The final issue is the remedy. A governor (or other corporate actor) is not personally liable for money damages if they discharge their duties in accordance with the statute and other applicable law.[255] There is nothing in the statute that suggests that governors or other actors are *not* personally liable for money damages if they do not discharge their statutory duties, but the statute only refers to compelling a company actor to act in accordance with the actor's duties and does not mention money damages.[256]

Again, compelling a person to act in accordance with their duties is a form of specific performance. Courts are reluctant to grant this type of equitable remedy,

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253 *See* Nass, *supra* note 13, at 887 (arguing that the "limit[ed] pool of stakeholders that can bring an enforcement proceeding . . . presents something of a moral hazard that creates an opportunity for greenwashing").

254 *See* Brakman Reiser, *Benefit Corporations*, *supra* note 19, at 614 ("[S]hareholders are uniquely hamstrung as enforcers in the benefit corporation context.").

255 OR. REV. STAT. § 60.760(5)(a) (liability of governors); *id.* § 60.764(3)(a) (liability of managers, members, and officers).

256 *Id.* § 60.766(2).

especially where it requires overseeing an ongoing duty or obligation and especially where a remedy at law is available.[257] It seems impracticable to compel a governor to act in the best interest of the company where there is a panoply of stakeholders. First, the statute does not indicate how governors should weigh interests. Second, it is likely outside the scope of a court's expertise to determine the best interests of the company. Indeed, courts give company actors a fair amount of leeway to make decisions under the "business judgment rule"[258] in part because courts recognize it is not their place to decide how to govern a business.[259] Third, a court would find it difficult to establish a practical mechanism to compel a governor to act a certain way.

A proceeding to compel a governor, manager, member, or officer to meet their statutory duties is unlikely to occur because of the limited standing and remedy issues. Thus, while the actors of benefit companies have a duty to consider the interests of a variety of stakeholders beyond the pecuniary interests of stakeholders or members, the lack of true accountability allows them to act in their own self-interest and engage in greenwashing and faux CSR with impunity.

3. Additional Consideration: Benefit Reports

Proceedings to compel a benefit company to provide a public benefit or to require a company actor to act in accordance with the actor's duties do not provide for adequate accountability. While a benefit company has an obligation to provide a benefit report, the statute does not provide any mechanisms to hold it (or its actors) accountable for failing to meet its obligations.[260]

The statute does not provide for consequences if Green Grocer makes an outright lie in its report or fails to provide a report at all. One may argue that a party may bring an action for claims *other* than that the company failed to pursue, create, or provide a general or specific benefit or that management did not act in

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257 *See* 71 AM. JUR. 2D, *supra* note 242, § 110 (providing that courts generally refuse to decree specific performance especially if performance will require "constant and long-continued supervision by the court," especially if the performance "will extend over a considerable period of time and include a series of acts"); *see also* HUNTER, *supra* note 246, § 13:13 (referring to the "usual reluctance of courts to enforce agreements that may require ongoing monitoring"); Loewenstein, *supra* note 19, at 1021 ("It seems somewhat unlikely that a court would order a benefit corporation to take certain actions that the plaintiff believes would enhance the achievement of the general or specific public benefit, because that would require the court to monitor the board's conduct, which a court is unlikely to do." (citing JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 557 (6th ed. 2009))).

258 The business judgment rule "requires . . . that informed and disinterested directors acting in good faith avoid wasting corporate assets and making irrational decisions." Dorff, *supra* note 1, at 97 (citing Brehm v. Eisner, 746 A.2d 244, 264 (Del. 2000)).

259 The court in *Brehm v. Eisner* recognized the limited role that the court has when it judges business decisions. *Brehm*, 746 A.2d at 266. "To rule otherwise would invite courts to become super-directors, measuring matters of degree in business decisionmaking and executive compensation. Such a rule would run counter to the foundation of our jurisprudence." *Id.*

260 This differs from the Model Legislation. *Compare* OR. REV. STAT. §§ 60.750–.770, *with* MODEL BENEFIT CORPORATION LEGISLATION, *supra* note 121, § 102 cmt. (providing that a benefit enforcement proceeding can enforce the obligation to post a benefit report online and supply copies if the company does not have a website).

accordance with its duties.[261] In theory, then, a person could bring a claim against Green Grocer for filing a false benefit report, but it is not clear what the cause of action would be or who would be in the best position to bring a claim. There may be unlawful trade practice or false advertising claims available to a plaintiff, explored *infra* Sections C.1 and C.3.

The lack of accountability with respect to benefit reports under the statute provides companies with limited incentive to tell the truth or to publish a report at all. As a result, a company may take its obligation to file a truthful report lightly.

4. *Conclusion*

What appears as the sole legal mechanism to hold benefit companies and its management accountable under the benefit company statute is inadequate to address greenwashing and faux CSR. The standing requirement for a proceeding only allows a narrow group of self-interested stakeholders to commence an action against the company, and the remedy is almost impossible to enforce. Benefit companies and their managers have little incentive to provide a public benefit or adhere to their statutory duties where there are limited remedies to hold them accountable. Also, while benefit reports are designed to encourage transparency, the statute does not provide a mechanism to ensure their accuracy or completeness.

C. *Accountability Outside of the Benefit Company Statute*

Given the limits of the benefit company statute, a plaintiff may have to look elsewhere for an avenue to discourage greenwashing or faux CSR.

There is no tort for greenwashing or specific statute that outright prohibits greenwashing.[262] As noted previously, false advertising is a common cause of action for greenwashing.[263] Generally, a consumer may plead a greenwashing claim under a state unfair competition, false advertising, or other consumer protection statute.[264] Competitors may also bring a greenwashing cause of action under the Lanham Act.[265] To date, there are no reported Oregon greenwashing cases, and there is little or no scholarship on Oregon greenwashing causes of action.

When an Oregon benefit company engages in greenwashing or faux CSR, plaintiffs might have a cause of action under the UTPA, the FTC Act, or the Lanham Act. For each law, the following analysis addresses: what conduct the statute prohibits and how it relates to greenwashing and faux CSR, when plaintiffs have

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261 *See* OR. REV. STAT. § 60.766(1)(a)–(b).

262 Cherry, *supra* note 2, at 285.

263 *Supra* Section I.B.1.

264 *See, e.g.*, Hill v. Roll Int'l Corp., 128 Cal. Rptr. 3d 109 (Cal. Ct. App. 2011) (a "greenwashing" case where the plaintiffs brought claims against FIJI Water under California's Unfair Competition Law, False Advertising Law, Consumer Legal Remedies Act, and common law fraud and unjust enrichment); *see* Cherry, *supra* note 2, at 298 (citing Cherry & Sneirson, *supra* note 6, at 1036) (including false advertising as a suggested cause of action for greenwashing).

265 *See, e.g.*, Euro-Pro Operating LLC v. Euroflex Americas, No. 08CV6231 (HB), 2008 WL 5137060, at *1–2, 5 (S.D.N.Y. Dec. 8, 2008) (a competitor sued the manufacturer of handheld steam cleaners under Section 43(a) of the Lanham Act on the basis that the defendant claimed its product was "EPA tested and approved so you know it's safe" when the EPA did not have an approval mechanism).

standing, and what remedies are available.

The following focuses on greenwashing and faux CSR conduct in the context of Oregon benefit companies, although any company could engage in the practice. Specifically, the analysis considers when a company that does not meet statutory requirements uses its status as a benefit company to engage in greenwashing, and when a benefit company files a false benefit report or fails to file a report at all.

1. UTPA[266]

A state consumer protection statute can provide an avenue to hold a company engaged in greenwashing or faux CSR accountable when it engages in false advertising or deceptive business practices.[267] Oregon's consumer protection statute, enacted in 1971, is the UTPA and is designed to "discourage deceptive trade practices and to provide a viable remedy for consumers who are damaged by such conduct."[268] Despite the aspiration of the statute, the National Consumer Law Center has deemed Oregon's statute one of the "weakest substantive prohibitions [of deception and unfairness] in the nation" in part because its prohibition against deception is limited to specific acts that the attorney general rules prohibit.[269]

This Section reviews three things: what conduct the statute prohibits and whether using status as a benefit company to greenwash or filing a false benefit report falls within the prohibited conduct, who has standing to plead a cause of action, and what remedies are available.

a. Prohibited Conduct

Oregon's UTPA prohibits a person (including natural and unnatural persons[270]) from engaging in a "laundry list" of nearly 80 unlawful business practices.[271] In some cases, the statute codifies common law "unfair competition" torts.[272] The

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266 OR. REV. STAT. §§ 646.605–.656 (2017).

267 *See* Elizabeth O'Connor Tomlinson, *Cause of Action Under State Consumer Protection Law for "Greenwashing" or Misleading Environmental Claims in Advertising or Marketing*, *in* 79 CAUSES OF ACTION 2D 323 § 1 Westlaw (database updated Nov. 2019).

268 Wolverton v. Stanwood, 563 P.2d 1203, 1204–05 (Or. 1977). The UTPA is modeled after the Uniform Deceptive Trade Practices Act (UDTPA). UNIF. DECEPTIVE TRADE PRAC. ACT (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 1966); OR. LEG. LEGIS. COMM. SERVS., BACKGROUND BRIEF ON THE UNLAWFUL TRADE PRAC. ACT 1, 1 (2014), https://www.oregonlegislature.gov/lpro/Publications/BB2014UnlawfulTradePracticesAct.pdf (citing OR. REV. STAT. §§ 646.605–656 (2013)).

269 CAROLYN L. CARTER, CONSUMER PROTECTION IN THE STATES: A 50-STATE EVALUATION ON UNFAIR AND DECEPTIVE PRACTICES LAWS 13 (2018), https://www.nclc.org/images/pdf/udap/udap-report.pdf. Carolyn Carter of the National Consumer Law Center also critiques Oregon's statute because, although it prohibits "unconscionable tactics," it does not provide consumers a right to enforce the prohibition. *Id.*

270 *See* OR. REV. STAT. § 646.605(4) ("'Person' means natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations and any other legal entity except bodies or officers acting under statutory authority of this state or the United States.").

271 *See id.* § 646.608; *see also* Tim Alan Quenelle, *Unlawful Trade Practices*, *in* CONSUMER LAW IN OREGON § 4.2-2 (Oregon State BarBooks rev. 2013) (referring to the "608 laundry list").

272 Quenelle, *supra* note 271, § 4.2-2(d) (referencing OR. REV. STAT. §§ 646.608(1)(a)–(d), (h)(2) (2013)). There are additional unlawful practices under the statute that the Attorney General can enforce. *See* OR. REV. STAT. § 646.607 (2017) (prohibited conduct); *id.* § 646.632 (authority of

statute prohibits representing that goods or services "have sponsorship, approval, characteristics, ingredients, uses, benefits, quantities or qualities" they do not have.[273] Under this section of the statute, a plaintiff must plead and prove that the representation at issue asserts that the product or service has "characteristics, ingredients, uses, benefits," or "qualities" that it does not have.[274] This includes "misdescriptions of specific or absolute characteristics of a product."[275] A plaintiff must also "affirmatively plead and prove that the statements . . . are either objectively false or at least likely to mislead a reasonable consumer."[276] The statute adds a catch-all that declares unlawful "any other unfair or deceptive conduct in trade of commerce."[277] However, to state a cause of action under this sub-section of the statute, the Attorney General must first establish a rule that declares a specific conduct as unfair or deceptive in trade or commerce.[278] Within the "laundry list" of deceptive trade practices, a false benefit report and other false claims regarding the status of a benefit company may qualify as a false representation of an attribute of a good or service.

To state a claim under the UTPA, a private plaintiff must allege that: (1) the defendant (a) represents (b) that goods or services (c) have characteristics, ingredients, uses, benefits, quantities or qualities (d) that the goods or services do not have,[279] (2) the plaintiff (a) suffers a loss (b) as a result of the unlawful trade practice,[280] and (3) the defendant's conduct was willful.[281] This Note will focus on the most important elements for an action against a benefit company, including whether there is a representation, the representation is about goods or services, and the defendant causes injury.

The first issue is what constitutes a "representation" and whether statements about a benefit company's status or statements in a benefit report qualify as representations under the UTPA. Under the statute, a representation "may be any manifestation of any assertion by words or conduct, including, but not limited to, a failure to disclose a fact."[282]

Green Grocer markets itself as a benefit company. The company represents that it is registered as a benefit company on product labels and shopping totes. The

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the prosecuting attorney). However, this analysis focuses on conduct that a private plaintiff can enforce.

273 OR. REV. STAT. § 646.608(1)(e) (2017).

274 Andriesian v. Cosmetic Dermatology, Inc., No. 3:14-cv-01600-ST, 2015 WL 1638729, at *3 (D. Or. Mar. 3, 2015) (quoting OR. REV. STAT. ANN. § 646.608(1)(e) (2015)).

275 *Id.* at *5 (quoting Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911 F.2d 242, 246 (9th Cir. 1990)).

276 *Id.* at *3.

277 OR. REV. STAT. § 646.608(1)(u) (2017).

278 *Id.* § 646.608(4); *see* Quenelle, *supra* note 271, § 4.2-2(a); *see also Andriesian*, 2015 WL 1638729, at *9 (dismissing the plaintiff's allegation that the defendant violated ORS Section 646.608(1)(u) when the Attorney General had not established a rule prohibiting the conduct at issue).

279 *Andriesian*, 2015 WL 1638729, at *3 (quoting OR. REV. STAT. § 646.608(1)(e) (2015)).

280 OR. REV. STAT. § 646.638(1) (2017).

281 *Id.*

282 *Id.* § 646.608(2).

grocery store even hangs its registration papers on a wall. This conduct constitutes a representation because there is the assertion that the company is a registered benefit company and a manifestation by words on the company's products and even its walls. Additionally, when a non-compliant benefit company makes a claim that it is a benefit company, this is likely a false representation under the UTPA. In our example, Green Grocer is a benefit company, albeit a potentially noncompliant one if it lies in a benefit report or fails to publish a report. However, when Green Grocer holds itself out as a benefit company, it suggests that it meets the applicable statutory requirements, which may constitute a representation under the statute.

The content of a benefit report constitutes a representation because it includes assertions that the company meets certain standards or provides a public benefit. If Green Grocer were to post a benefit report that falsely claims it exceeded a third-party standard, consumers may have a hook to claim that the company violated the UTPA. It becomes more difficult for a consumer to prevail if Green Grocer merely claims that its stores and products are "green," or "good for the environment," or uses another vague descriptor without a way to measure the concept.

It is important to note that it is unreasonable as a matter of law for a plaintiff to rely on "[g]eneralized, vague and unspecific assertions" because they constitute "mere 'puffery.'"[283] In the typical greenwashing context, a company's representation that it is "green" may be vague and "mere puffery." On the other hand, a plaintiff might successfully argue that it is reasonable to rely on vague assertions that are otherwise "mere puffery" when a benefit company makes the assertions.

If Green Grocer were to claim that it is "good for the environment" or "good for society," a consumer might reasonably rely on the representation because the company committed in its governing documents to provide a public benefit. The company also implicitly committed to provide a public benefit when it registered with the Oregon Secretary of State as a benefit company.

Even if statements about a company's status or other statements in the company's benefit reports constitute false representations, there is another hurdle to overcome under the UTPA. The statute provides that it is an unlawful practice to represent that *goods or services* have characteristics, benefits, or qualities that they do not have.[284] Here, Green Grocer does not necessarily make claims about its goods or services when it holds itself out as a benefit company. For example, if the label on a jar of its jam only refers to the Green Goddess brand and notes that Green Grocer is a benefit company, arguably the company is not making a representation about the jam itself. A benefit report does not need to address the company's goods or services and goes more to attributes of the company as a whole, but when a benefit company makes assertions about its status, a plaintiff can argue that the company implicitly claims that its goods or services reflect the attributes of a benefit company.

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[283] *Andriesian*, 2015 WL 1638729, at *4 (quoting Glen Holly Entm't, Inc. v. Tektronix Inc., 343 F.3d 1000, 1015 (9th Cir. 2003)) (describing puffery); *see* Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911 F.2d 242, 243–44 (9th Cir. 1990) (holding that it was unreasonable as a matter of law to rely on mere puffery). The issue of puffery receives additional attention *infra* Section C.3.a.

[284] OR. REV. STAT. § 646.608(1)(e) (emphasis added).

Assuming that a plaintiff can establish a violation of the statute, it must also show that the defendant's unlawful trade practice caused an ascertainable loss to the plaintiff.[285] The plaintiff must plead an ascertainable loss that is monetary or property.[286] Noneconomic losses do not satisfy the plaintiff's burden.[287]

Although the text of the UTPA does not expressly require reliance, because a person must suffer a loss *as a result of* an unlawful trade practice, there are circumstances when a plaintiff needs to establish reliance depending on the conduct involved and the loss that the conduct allegedly causes.[288] When a plaintiff alleges economic loss when they purchased a good because they believed that it had attributes that the defendant falsely claimed, the statute implicitly requires reliance.[289]

Assume that Sheila regularly shops at Green Grocer because she wants to support a company that is committed to providing a public benefit to the community and that issues benefit reports to publicly measure its performance. Even though her bill at Green Grocer is nearly 50% greater than if she shopped elsewhere, she believes it is worth it. She learns that Green Grocer has not published a report in nearly two years. If she can demonstrate that her bill was greater than if she purchased comparable products elsewhere, Sheila could prove an ascertainable monetary loss.

Establishing an ascertainable loss for someone who is not the store's customer, like an employee, is more challenging. Because the statute requires financial loss as a result of a representation, it effectively narrows the class of individuals able to obtain relief.

b. Standing

Consumers who suffer an ascertainable loss as a result of a company's willful conduct have standing under the UTPA. While consumers can have an interest in the company meeting its obligations, operating as a legitimate benefit company, and publishing truthful benefit reports, they might not have enough information to know that a benefit company greenwashes or engages in faux CSR.

One group of stakeholders that may have adequate information about a company's greenwashing conduct—and incentive to file a claim[290]—is its workforce. Imagine that Green Grocer did post a benefit report and an employee, Elise, chose to work there because it was a benefit company and its social values appeared to align with hers. However, she learned that the company's benefit report included

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285 Pearson v. Philip Morris, Inc., 361 P.3d 3, 23 (Or. 2015).

286 *Id.* at 22 (citing OR. REV. STAT. § 646.638(1) (2013)). A plaintiff does not need to allege or prove the amount of ascertainable loss to obtain relief under the statute. Scott v. W. Int'l Surplus Sales, Inc., 517 P.2d 661, 662 (Or. 1973).

287 *Pearson*, 361 P.3d at 23.

288 *Id.* at 27 (citing State *ex rel.* Redden v. Discount Fabrics, Inc., 615 P.2d 1034, 1039 (Or. 1980); Sanders v. Francis, 561 P.2d 1003, 1006 (Or. 1977)).

289 *See id.* at 26–27 ("Specifically, plaintiffs alleged that they suffered ascertainable loss 'as a direct result' of defendant's misrepresentation because they paid for cigarettes that 'they believed were inherently lower in tar and nicotine than defendant's regular cigarettes but received cigarettes that would deliver lowered tar and nicotine only if smoked in particular ways.' They sought a refund of their purchase price as a remedy.").

290 Shareholders of a closely held company likely also have information to bring a claim but likely lack incentives to do so. See *supra* Section III.B, regarding shareholder (dis)incentives.

false statements and falsely claimed that the company donates food to the local food bank when, in fact, it sells its surplus food to discount retailers. If Elise had known that the company was nothing more than a greenwashing, over-priced grocery store, she would have chosen to work at another store with better benefits and pay. While Elise might be able to establish reliance, she did not experience loss related to purchasing goods or services.

c. *Remedies and Statute of Limitations*

While the UTPA offers remedies that are more attractive than what is available under the benefit company statute, the statute of limitations severely limits the availability of relief. [291] A plaintiff with a UTPA claim can recover compensatory damages, punitive damages, and attorney fees.[292] However, the UTPA has a one-year statute of limitations for private actions which commences on the discovery of the unlawful trade practice.[293] In the greenwashing example, consumers may not be able to detect a practice as greenwashing within the short statute of limitations, especially if the greenwashing company uses vague language.[294]

d. *Conclusion*

The UTPA has the potential to fill the gap in accountability that the benefit company statute left open with regard to a benefit company failing to file or filing a false benefit report or using its status to greenwash or engage in faux CSR. However, consumers may experience difficulties using the UTPA as a ground for relief. First, the UTPA does not broadly prohibit deceptive trade practices and requires that the Attorney General define what is a deceptive trade practice. Second, the injury requirement limits the pool of plaintiffs to people who suffer financial loss. Third, the short statute of limitations requires that plaintiffs act quickly when they detect a violation of the UTPA.

2. *FTC Act*[295]

The FTC Act, with its broad prohibition against unfair or deceptive acts or practices, may provide an avenue to hold a benefit company accountable if it files a false benefit report or uses its status to greenwash its conduct. However, the Act does not provide a private right of action which limits its usefulness as an accountability mechanism.[296]

The FTC Act provides a basis for a greenwashing cause of action.[297] Section 5

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291 *See* Quenelle, *supra* note 271, § 4.7-1 (referring to the short statute of limitations as a major shortcoming of the statute).

292 *Id.* § 4.8-5 (citing Beckett v. Comput. Career Inst., 852 P.2d 840 (Or. Ct. App. 1993)).

293 *Id.* § 4.5 (citing OR. REV. STAT. § 646.638(6) (2013)). The statute of limitations tolls if a state prosecutor files a complaint to prevent, restrain, or punish a violation of the statute. OR. REV. STAT. § 646.638(6) (2017).

294 *See* Schmuck et al., *supra* note 69, at 136 (reporting consumer inability to detect vague greenwashing).

295 Federal Trade Commission Act of 1914 §§ 1–15, 15 U.S.C. §§ 41–58 (2012).

296 *Id.*

297 *See* Elizabeth K. Coppolecchia, Note, *The Greenwashing Deluge: Who Will Rise Above the Waters of Deceptive Advertising?*, 64 U. MIAMI L. REV. 1353, 1363–71 (2010) (reviewing the FTC's involvement in enforcing environmental green marketing claims); *see also id.* at 1371–86 (analyzing

of the Act declares unlawful "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce . . . ."[298] The FTC has authority to "prosecute any inquiry necessary to its duties,"[299] investigate violations of law by individuals and businesses,[300] and initiate enforcement actions if the agency has reason to believe the law is being or has been violated.[301] The FTC or the attorney general of a particular state typically litigates public enforcement actions under the statute.[302]

Greenwashing claims and the FTC Act are a natural fit. First, there is precedent for the FTC using the Act to hold greenwashers accountable.[303] Second, the FTC has adopted guidelines regarding "green advertising" with its "Green Guides," which reflect the Agency's view on environmental claims and provide broad principles and particular environmental claims and examples.[304] Although Green Guides do not have the force of law, courts generally consider them persuasive authority to evaluate environmental marketing claims.[305] Third, the Act has a consumer-friendly standard of proof that is lower than deception.[306] Fourth, the Act prohibits deceptive conduct broadly and, in contrast to the Lanham Act, does not require that the conduct is part of an advertisement.[307] Thus, false benefit reports likely fall within the broad range of unfair and deceptive acts or practices that the Act regulates.

The Act does not provide a private right of action,[308] and the FTC has broad discretion as to whether to carry out an enforcement action on behalf of a consumer. Thus, even if the FTC detects greenwashing, the action may go

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the role of the FTC in responding to environmental marketing claims).

298 15 U.S.C. § 45(a)(1).

299 *Id.* § 43.

300 *Id.* § 46(a).

301 *What We Do: Enforcement Authority*, FED. TRADE COMM'N (Oct. 2019), https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority (providing an overview of the FTC's investigative, law enforcement, and rulemaking authority).

302 Tomlinson, *supra* note 267, § 2.

303 *See generally* Coppolecchia, *supra* note 297 (reviewing the FTC's enforcement authority, history of actions, and Green Guides); Eric L. Lane, *Greenwashing 2.0*, 38 COLUM. J. ENVTL. L. 279, 288–90 (2013) (discussing greenwashing, government and FTC responses to "paradigm cases" of greenwashing, and the FTC's Green Guides).

304 16 C.F.R. § 260.1 (2010); Coppolecchia, *supra* note 297 at 1365; Mullin & Deeb, *supra* note 54, at 28. For more on the Green Guides, see generally sources cited *supra* note 303.

305 Tina H. Ho, Note, *Social Purpose Corporations: The Next Targets for Greenwashing Practices and Crowdfunding Scams*, 13 SEATTLE J. SOC. JUST. 935, 942 (2015) (citing Gilles & Kemp, *supra* note 54, at 5); *see also* Tomlinson, *supra* note 267, § 19.

306 Under Section 5 of the Act, the FTC must show that an act or practice is "'likely to mislead consumers acting reasonably under the circumstances.'" FTC v. AMG Capital Mgmt., LLC, 910 F.3d 417, 422 (9th Cir. 2018) (quoting FTC v. Stefanchik, 559 F.3d 924, 928 (9th Cir. 2009)). This is similar to the Oregon UTPA where a plaintiff must show that an advertisement is either objectively false or likely to mislead a reasonable consumer. *See* Andriesian v. Cosmetic Dermatology, Inc., No. 3:14-cv-01600-ST, 2015 WL 1638729, at *3 (D. Or. Mar. 3, 2015) (explaining the standard under the UTPA).

307 15 U.S.C. § 45(a)(1) (2012).

308 MCCARTHY, *supra* note 74, § 27:119.

unchallenged.[309] To its credit, the FTC urged states to pass legislation known as "little FTC acts" with language that parallels the federal statute but provides for state and private enforcement.[310] However, unlike the FTC Act, Oregon's UTPA does not broadly prohibit unfair or deceptive practices.[311]

The limited standing under the FTC Act adversely impacts Oregonians because Oregon's benefit company statute already severely limits the standing of stakeholders and third-party beneficiaries. The Lanham Act, in contrast, does not require agency enforcement and has greater potential to attack greenwashing.

3. Lanham Act

The Lanham Act provides for a cause of action when greenwashing occurs in the context of false advertising and marketing.[312] However, the Act narrowly prohibits false advertising, and standing is limited to competitors.

a. Prohibited Conduct

Section 43(a) of the Lanham Act prohibits a person from, on or in connection with any goods or services, using commercial advertising with false or misleading descriptions or representations of fact regarding the nature, characteristics, or geographic origin of the advertiser's or another person's goods, services, or commercial activities.[313] An advertiser that engages in prohibited conduct is liable to a person who believes that the advertiser's prohibited conduct has damaged or will damage them.[314]

There are five elements[315] in a false advertising cause of action under the Lanham Act:

> (1) a false statement of fact by the defendant in a commercial advertisement about its own or another's product;
>
> (2) the statement actually deceived or has the tendency to deceive a substantial segment of its audience;
>
> (3) the deception is material, in that it is likely to influence the purchasing decision;

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309 Coppolecchia, *supra* note 297, at 1372 (citing 16 C.F.R. § 260.2 (2009)).

310 DEE PRIDGEN & GENE A. MARSH, CONSUMER PROTECTION LAW IN A NUTSHELL 23 (4th ed. 2016).

311 The UTPA is based on the UDTPA. UNIF. DECEPTIVE TRADE PRAC. ACT, *supra* note 268; BACKGROUND BRIEF ON THE UNLAWFUL TRADE PRAC. ACT, *supra* note 268, at 1, (providing that the UTPA was based on the UDTPA).

312 *See* Coppolecchia, *supra* note 297, at 1386–99 (considering greenwashing actions under Section 43(a) of the Lanham Act).

313 15 U.S.C. § 1125(a) (2012).

314 *Id.* Under the statute: "[a]ny person who, on or in connection with any goods or services, or any containers for goods, uses in commerce . . . any . . . false or misleading description of fact, or false or misleading representation of fact, which . . . (B) in commercial advertising or promotion, mispresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is likely to be damaged by such act." *Id.*

315 Because there are multiple layers of sub-elements, *infra* Appendix B outlines the elements and sub-elements of a false advertising cause of action under the Lanham Act for reference.

> (4) the defendant caused its false statement to enter interstate commerce; and
>
> (5) the plaintiff has been or is likely to be injured as a result of the false statement, either by direct diversion of sales from itself to defendant or by a lessening of the goodwill associated with its products.[316]

The first issue to address is whether a benefit report constitutes a commercial advertisement. If a benefit report does not meet this test, there would be no greenwashing cause of action under the Lanham Act when a report contains false information.

Oregon's federal district court has ruled that a statement is a commercial advertisement if it is:

> (1) commercial speech;
>
> (2) by a defendant who is in commercial competition with plaintiff;
>
> (3) for the purpose of influencing consumers to buy defendant's goods or services; and
>
> (4) the advertisement or promotion [is] disseminated sufficiently to the relevant purchasing public to constitute "advertising" or "promotion" within that industry.[317]

Courts have defined commercial speech as "expression related solely to the economic interests of the speaker and its audience."[318] In the context of the Lanham Act, commercial speech includes subject matter that promotes commercial transactions.[319] Courts consider three factors to determine whether speech is commercial: whether the speech is an advertisement, whether the speech refers to a specific product or service, and whether the speaker has economic motivation for the speech.[320] Speech is not purely commercial if "it does no more than propose a commercial transaction."[321]

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316 Skydive Ariz., Inc v. Quattrocchi, 673 F.3d 1105, 1110 (9th Cir. 2012).

317 Leatherman Tool Grp., Inc. v. Coast Cutlery Co., 823 F. Supp. 2d 1150, 1154–55 (D. Or. 2011) (quoting Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co., 173 F.3d 725, 735 (9th Cir. 1999)).

318 Healthport Corp. v. Tanita Corp. of Am., 563 F. Supp. 2d 1169, 1178 (D. Or. 2008) (quoting Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 561 (1980)). The relationship of the First Amendment, commercial speech, and false advertisement is a thorny issue and outside the scope of this Note. As a general principle, the U.S. Constitution accords less protection to commercial speech than other expression guaranteed under the Constitution. *Cent. Hudson Gas*, 447 U.S. at 563. The government can regulate commercial speech that is false or misleading. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 69 (1983); *see* MCCARTHY, *supra* note 74, § 27:68 (summarizing Supreme Court jurisprudence regarding constitutional protection of false advertising). See generally Martin H. Redish & Kyle Voils, *False Commercial Speech and the First Amendment: Understanding the Implications of the Equivalency Principle*, 25 WM. & MARY BILL RTS. J. 765 (2017), for more on the topic.

319 *See* Proctor & Gamble Co. v. Haugen, 222 F.3d 1262, 1267–68 (10th Cir. 2000) (rejecting the appellant's argument that the subject of the message on the company's communication system—that a Proctor & Gamble manufacturer was an agent of Satan—did not promote commercial transactions and was therefore not commercial speech).

320 U.S. Healthcare, Inc. v. Blue Cross of Greater Phila., 898 F.2d 914, 933 (3d Cir. 1990) (citing *Bolger*, 463 U.S. at 66–67).

321 Mattel, Inc. v. MCA Records, Inc., 296 F.3d 894, 906 (9th Cir. 2002) (quoting Hoffman

Benefit reports likely qualify as commercial speech under the Lanham Act. The first factor is whether the speech is an advertisement. This creates a circular issue when using the commercial speech test to determine whether something is an advertisement. While benefit reports are designed to comply with a statutory obligation, companies have great freedom to write the report as long as it includes certain information. Companies can, then, fashion benefit reports in ways that are similar to advertisements. The second factor is whether the speech refers to a specific product or service. A benefit report may refer to specific products or services with reference to the company's performance. Third, companies that publish benefit reports may have an economic motivation for the speech. The benefit report is a way to advance a company's image and benefit financially. On balance, there is a strong argument that benefit reports can qualify as commercial speech under the Lanham Act.

The second requirement, commercial competition, is highly fact-specific and does not warrant additional attention.

Under the third requirement, a statement must be for the purpose of influencing consumers to buy the defendant's goods or services. A benefit company could argue that the alleged advertisement in a benefit report is intended to comply with its statutory obligation rather than influence consumers to buy goods or services. However, status as a benefit company is voluntary, and the content of the report and the manner in which the company disseminates it could clearly evidence an intent to persuade consumers to buy the company's goods or services.

Imagine that the landing page of Green Grocer's website prominently provides a link to its benefit report with the caption: "Check out Green Grocer's latest benefit report. As a benefit company we take our commitment to provide a general public benefit seriously. When you shop at Green Grocer, you are supporting a company that practices what it preaches and gives back to the community." Framing the report in this way is unmistakably a way to influence customers to shop at Green Grocer.

The last requirement of a commercial advertisement is dissemination. An Oregon benefit company must post a benefit report on its website.[322] A benefit company could also issue the benefit report as a press release. Both the website posting and the press release could qualify as commercial advertisements.[323] In the Green Grocer example, promotional materials on a website or in press releases are likely standard in the food industry.[324] On the whole, a benefit report could qualify as a commercial advertisement under the Lanham Act and thus meet part of first element of a false advertising cause of action.

Returning to the main elements of a false advertising cause of action, the first element requires that the advertisement be false, so a benefit report containing false information could satisfy the rest of the elements required for a false advertising

v. Capital Cities/ABC, Inc., 255 F.3d 1180, 1184 (9th Cir. 2001)).

322 OR. REV. STAT. § 60.768 (2017).

323 *See* Leatherman Tool Grp., Inc. v. Coast Cutlery Co., 823 F. Supp. 2d 1150, 1155 (D. Or. 2011) (holding that the website and press releases about the defendant's products were commercial advertisements under the Lanham Act).

324 This requires additional market research.

cause of action under the Lanham Act.

Turning to the next elements, courts often address materiality and deception together.[325] A false benefit report could also materially deceive a substantial segment of the advertiser's audience. Even if the statement in an advertisement does not directly address the quality of the advertiser's goods, there is precedent that this statement might constitute material deception. For example, in *Healthport Corp. v. Tanita Corp. of America*, the United States District Court for the District of Oregon held that false statements regarding the credentials of a company's officers "may deceive consumers and influence consumer decisions on whether to purchase" the company's product.[326] Similarly, a statement regarding a company's compliance with a third-party standard may influence a consumer's decision to purchase its goods or services.

Establishing that the defendant caused the false statement to enter commerce and that the plaintiff is likely to suffer injury as a result of the false statement will depend on the particulars of a benefit report. One overarching issue, however, is whether a false statement is actionable or instead is "mere puffery."

Any alleged false or misleading statement must be a statement of fact as opposed to a statement of opinion.[327] Thus, "mere puffery," which is an expression of opinion rather than a statement of fact,[328] is not actionable. There are generally two types of puffery: grossly exaggerated claims that no reasonable person would believe were true, and general claims of superiority that are "so vague and indeterminate that [they] will be understood as mere expression[s] of opinion."[329] It is possible, however, that a claim that might otherwise be classified as puffery is factual.[330] This might occur when, in context, "mere puffery" might be transformed into a message with a definite, factual meaning.[331]

A benefit company—like other companies—might make grossly exaggerated claims that no one would believe was true. A benefit company might also make general claims of superiority, for example, that its products are "good for the environment" or "green," or that the company provides a "public benefit." These are vague and indeterminate concepts that may constitute puffery. However, in the benefit company context, there are third-party standards that—although sometimes

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325 *See, e.g.*, Healthport Corp. v. Tanita Corp. of Am., 563 F. Supp. 2d 1169, 1179 (D. Or. 2008) (analyzing the second and third elements of a false advertising cause of action under the Lanham Act under one subheading), *aff'd*, 324 Fed. Appx. 921 (Fed. Cir. 2009).

326 *Id.* at 1180.

327 15 U.S.C. § 1225(a) (2012) (using the words "description . . . or . . . representation of fact"); MCCARTHY, *supra* note 74, § 27:67.

328 MCCARTHY, *supra* note 74, § 27:67.

329 *Id.* § 27:38.

330 *Id.*

331 *Id.* Professor McCarthy cites an example in the Fifth Circuit, *Pizza Hut, Inc. v. Papa John's International, Inc. Id.* (citing Pizza Hut, Inc. v. Papa John's Int'l, Inc., 227 F.3d 489 (5th Cir. 2000)). Here, when pizza purveyor Papa John's used the slogan "Better Ingredients. Better Pizza" without comparison to other pizzas, it was mere puffery. *Pizza Hut*, 227 F.3d at 491. However, when Papa John's used the slogan in a comparative advertising context, there was now an objective, quantifiable, and fact-specific meaning to the slogan, and the slogan became a claim based on fact rather than opinion. *Id.* at 499–501.

vague[332]—provide a yardstick to measure environmental impact or public benefit. Thus, a claim that a benefit company provides a public benefit has definite, factual meaning with regard to meeting a third-party standard. As a result, a court may decide that a false statement that might otherwise qualify as "mere puffery" is actionable.

In summary, it is possible that a benefit report would constitute an advertisement under the Lanham Act, in which case a plaintiff may be able to establish that the report meets the rest of the elements for a false advertising cause of action. The next issue is who has standing to bring a false advertising claim.

b. Standing

The Lanham Act provides that "*any* person who believes that he or she is likely to be damaged by [an unlawful act]" has standing.[333] Despite the broad phrasing in the statute, courts, including the Ninth Circuit Court of Appeals, have narrowly interpreted the statute to mean that only competitors have standing.[334] While the parties do not need to be in direct competition with one another,[335] this narrow reading of the statute means that not everyone damaged by a false statement has standing to sue.

c. Remedy

False advertising remedies include preliminary and permanent injunctions,[336] corrective advertising, and monetary recovery.[337] However, these remedies require that an audience viewed the message and that consumers experienced and continue to experience deception regarding the nature of the company's goods.[338] A prevailing party may also receive attorney fees in exceptional circumstances including if an act is fraudulent, deliberate, or willful.[339] In the benefit report context, an injunction

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332 *Supra* Section II.B.

333 15 U.S.C. § 1125(a) (emphasis added).

334 The Ninth Circuit Court of Appeals decision even made its decision in a consumer "greenwashing" claim. Barrus v. Sylvania, 55 F.3d 468, 469 (9th Cir. 1995) (holding that the consumer plaintiffs lacked standing when they brought a false advertising claim under the Lanham Act against a light bulb manufacturer which claimed that its "Energy Saver" bulbs would "reduce pollution, conserve energy, and lower consumers' utility bills"); *see also* Made in the USA Found. v. Phillips Foods, Inc., 365 F.3d 278, 278 (4th Cir. 2004) (affirming the lower court's decision that consumers lacked standing to sue under the Lanham Act).

335 Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 131–32 (2014).

336 15 U.S.C. § 1116(a) provides that courts have authority to grant injunctions to prevent violation of § 1125(a), which includes a civil action for false advertising. *See, e.g.*, Healthport Corp. v. Tanita Corp. of Am., 563 F. Supp. 2d 1169, 1181 (D. Or. 2008) (granting defendant cross-claimant's request to permanently enjoin plaintiff from disseminating false statements), *aff'd,* 324 Fed. Appx. 921 (Fed. Cir. 2009).

337 MCCARTHY, *supra* note 74, § 27:24 (citing *id.* § 27:37 (preliminary injunctions); *id.* § 27:42 (corrective advertising); *id.* § 27:42 (monetary recovery)).

338 *See Healthport Corp.*, 563 F. Supp. 2d at 1182 (denying the motion for corrective advertising where the movant did not present evidence that an audience actually viewed the website with the false advertisement or that consumers were and continued to actually experience deception regarding the nature of the company's goods).

339 15 U.S.C. § 1117(a); *see Healthport Corp.*, 563 F. Supp. 2d at 1183 (citing Gracie v. Gracie, 217 F.3d 1060, 1068 (9th Cir. 2000)). Intentional acts are not necessarily malicious, deliberate, or

or correction advertisement may prove an adequate remedy to halt and correct greenwashing and faux CSR statements.

d. Challenges

A competitor may have a false advertising claim under the Lanham Act if a benefit company publishes a false benefit report. However, a plaintiff needs to clear several hurdles which may prove difficult and uncertain in this context. One of the biggest challenges is defining whether benefit reports are advertisements and whether they are commercial speech. If benefit reports are advertisements, then a plaintiff must plead injury such as lost sales.

Facing liability for false reports, companies may be reluctant to publish specific information on social and environmental impact.[340] Benefit companies might frame more of their disclosures as "mere puffery" to avoid a false advertising claim. This issue presents another reason that Oregon's benefit company statute needs specific mechanisms to enforce a company's obligations to publish benefit reports that accurately reflect its practices and commitments.

CONCLUSION

Despite the intentions of Oregon's benefit company statute and its supposed protections against greenwashing and faux CSR, the statute falls short of its goals. The vagueness of the company purpose provision allows mission drift, and thus greenwashing, to occur. The benefit report and third-party standard requirements likewise fail to address the vagueness problem, providing only a façade of transparency that allows companies to greenwash and engage in faux CSR undetected. Also, the fiduciary duty provisions of the statute require that management consider multiple masters without meaningful accountability to its stakeholders. Finally, the statute's lackluster enforcement proceeding limits standing to people who are unlikely to initiate a proceeding against the company or its management, and the available remedies are likely unenforceable.

If an Oregon benefit company files a false benefit report or uses its status as a benefit company to engage in greenwashing or faux CSR, a private plaintiff may have a cause of action under Oregon's UTPA, the FTC Act, or the Lanham Act. However, these statutes do not adequately fill the gaps in the accountability that the Oregon benefit company statute leaves open.

As the foregoing analysis reveals, Oregon's benefit company statute fails to prevent—and in fact may encourage—greenwashing and faux CSR. Until there are

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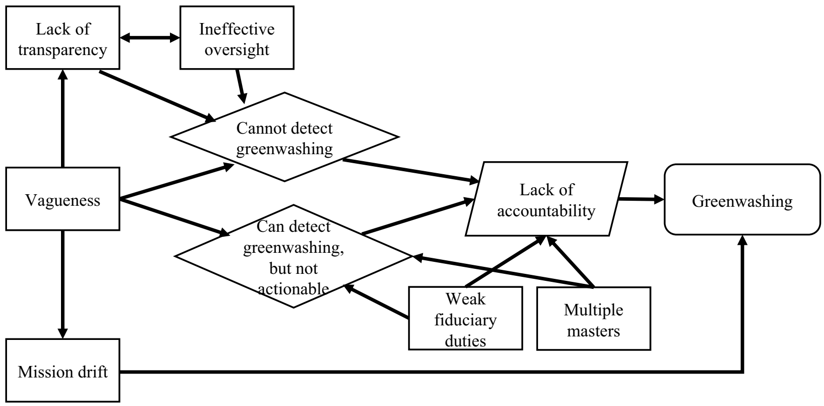
willful conduct. *Healthport Corp.*, 563 F. Supp. 2d at 1183 (citing Watec Co. v. Liu, 403 F.3d 645, 656 (9th Cir. 2005)). The Ninth Circuit Court of Appeals instructs district courts to examine the "totality of the circumstances" to determine if a case is exceptional. *See* SunEarth, Inc. v. Sun Earth Solar Power Co., 839 F.3d 1179, 1181 (9th Cir. 2016) (quoting Octane Fitness, LLC v. ICON Health & Fitness, Inc., 572 U.S. 545, 553–54 (2014)) (aligning with the Third, Fourth, Fifth, and Sixth Circuits and holding that *Octane Fitness* governs the fee-shifting standard under the Lanham Act).

[340] *See* Michele Sutton, Note, *Between a Rock and a Judicial Hard Place: Corporate Social Responsibility Reporting and Potential Legal Liability Under* Kasky v. Nike, 72 UMKC L. REV. 1159, 1180 (2004) (suggesting that corporations may be reluctant to publish information if there is concern that they will face liability).

more stringent mechanisms for accountability built into the statute, benefit company status may provide a safe haven for companies that simply want to capitalize on the ethos of public benefit and social responsibility.

APPENDIX A

A VISUAL REPRESENTATION OF HOW GREENWASHING HAPPENS



APPENDIX B

ELEMENTS OF A LANHAM ACT FALSE ADVERTISING CAUSE OF ACTION

(1) a false statement of fact by the defendant in a commercial advertisement about its own or another's product;[341]

(a) commercial speech;[342]

(i) whether the speech is an advertisement;[343]

(ii) whether the speech refers to a specific product or service;[344] and

(iii) whether the speaker has economic motivation for the speech.[345]

(b) "by a defendant who is in commercial competition with plaintiff;"[346]

(c) "for the purpose of influencing consumers to buy defendant's goods or services;"[347] and

(d) the advertisement or promotion is "disseminated sufficiently to the relevant purchasing public to constitute 'advertising' or 'promotion' within that industry."[348]

(2) the statement actually deceived or has the tendency to deceive a substantial segment of its audience;[349]

(3) the deception is material, in that it is likely to influence the purchasing decision;[350]

(4) the defendant caused its false statement to enter interstate commerce;[351] and

(5) the plaintiff has been or is likely to be injured as a result of the false statement, either by direct diversion of sales from itself to defendant or by a lessening of the goodwill associated with its products.[352]

341 Skydive Ariz., Inc. v. Quattrocchi, 673 F.3d 1105, 1110 (9th Cir. 2012).

342 Leatherman Tool Grp., Inc. v. Coast Cutlery Co., 823 F. Supp. 2d 1150, 1154–55 (D. Or. 2011).

343 U.S. Healthcare, Inc. v. Blue Cross of Greater Phila., 898 F.2d 914, 933 (3d Cir. 1990).

344 *Id.*

345 *Id.*

346 *Leatherman Tool Grp., Inc.*, 823 F. Supp. 2d at 1154–55 (quoting Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co., 173 F.3d 725, 735 (9th Cir. 1999)).

347 *Id.*

348 *Id.*

349 Skydive Ariz., Inc. v. Quattrocchi, 673 F.3d 1105, 1110 (9th Cir. 2012).

350 *Id.*

351 *Id.*

352 *Id.*