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## Goodbye to Greenwashing in the Fashion Industry: Greater Enforcement and Guidelines

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## Goodbye to Greenwashing in the Fashion Industry: Greater Enforcement and Guidelines\*

*In recent years, the fashion industry has become replete with deceptive and misleading environmental marketing, also known as “greenwashing.” Greenwashing harms consumers who are paying higher prices to make environmentally conscious purchases. Additionally, the fashion industry is a leading polluter worldwide, and when brands engage in greenwashing, they perpetuate the fashion industry’s environmental harms instead of implementing change. Lately, consumers have been increasingly willing to take action against greenwashing in the fashion industry through class action lawsuits. So far, these class actions have had underwhelming results. This Comment proposes that the Federal Trade Commission revise its Green Guides—a guide that helps companies avoid making misleading environmental marketing claims—to provide guidance on sustainability claims and follow the lead of other nations by performing greater investigatory work of the fashion industry to uncover its worst offenders and seek enforcement against them.*

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## INTRODUCTION

Imagine you are on the lookout for a new winter jacket and head to the department store in search for one. After wandering through the merchandise, a fur-trimmed parka catches your eye. Intrigued, you pull the coat from the rack, read the product description on the tag, and discover the fur trim is made from real animal fur. Disappointment sinks in, as you have heard that animals used for their fur in clothing products often endure abuse.<sup>1</sup> However, upon further inquiry, you realize that the manufacturer is committed to sustainable fur sourcing and uses humane trapping methods. Your worries are eased, and you decide to purchase the jacket. However, just a week later you read a news article criticizing the company that manufactured your jacket for its abusive animal trapping methods. Had you known about the company's abusive practices at the time, you certainly would not have purchased the fur-trimmed parka.<sup>2</sup> Alas, you have fallen victim to greenwashing: a scheme fashion brands regularly employ to increase sales and revenue.<sup>3</sup>

"Greenwashing," a term that has been around since the 1980s, describes the phenomenon of companies exaggerating the environmental benefits of their products.<sup>4</sup> According to the Oxford English Dictionary, to greenwash is to "mislead (the public) . . . by falsely representing a person, company, product, etc., as being environmentally responsible."<sup>5</sup> Companies have been greenwashing for decades to increase profit and mislead consumers about their commitment to sustainability.<sup>6</sup>

1. See *Animals Used for Clothing*, PETA, <https://www.peta.org/issues/animals-used-for-clothing/#:~:text=Trapped%20animals%20used%20for%20their,items%20are%20often%20deliberately%20misleading.&text=So%20if%20you%20wear%20animals,whose%20skin%20you're%20in> [<https://perma.cc/5JLA-PRTX>] ("Trapped animals used for their fur can suffer for days from blood loss, shock, dehydration, frostbite, and gangrene or be attacked by predators before trappers return to kill them.").

2. See *infra* Section IV.A for the author's inspiration for this hypothetical scenario.

3. See CHANGING MKTS. FOUND., SYNTHETICS ANONYMOUS: FASHION BRAND'S ADDICTION TO FOSSIL FUELS 66–67 (2021), [http://changingmarkets.org/wp-content/uploads/2021/07/SyntheticsAnonymous\\_FinalWeb.pdf](http://changingmarkets.org/wp-content/uploads/2021/07/SyntheticsAnonymous_FinalWeb.pdf) [<https://perma.cc/BV4Q-M5C9>] (finding that fifty-nine percent of green claims made by a sample of fashion brands were highly susceptible to greenwashing).

4. Sophie Slater, *The 'Greenwashing' Hiding the Truth of Your Favourite Fashion Brands*, VICE (May 1, 2019, 5:04 AM), <https://www.vice.com/en/article/kzmw5a/the-greenwashing-hiding-the-truth-of-your-favourite-fashion-brands> [<https://perma.cc/KG34-HM8J>].

5. *Greenwash*, OXFORD ENG. DICTIONARY, <https://www.oed.com/view/Entry/251865?rskey=oAKNix&result=2&isAdvanced=false> [<https://perma.cc/ZGT8-F8G5> (staff-uploaded, dark archive)].

6. See Bruce Watson, *The Troubling Evolution of Corporate Greenwashing*, GUARDIAN (Aug. 20, 2016, 10:00 EDT), <https://www.theguardian.com/sustainable-business/2016/aug/20/greenwashing-environmentalism-lies-companies> [<https://perma.cc/3KJW-G3M3>].

For example, in 1969, Westinghouse Electric Corporation's nuclear power division faced scrutiny amidst the 1960s antinuclear movement.<sup>7</sup> Instead of taking action to actually improve the problems associated with nuclear energy,<sup>8</sup> Westinghouse "fought back" in an advertisement that portrayed a Westinghouse nuclear plant along a "pristine" lake with accompanying text that read, "We're building nuclear power plants to give you more electricity," and then went on to discuss the "clean" and "safe" nature of nuclear power plants.<sup>9</sup> While the plants were producing far less air pollution than competing coal plants, describing nuclear plants as clean and safe was nonetheless deceptive, especially considering the ads appeared shortly after two nuclear meltdowns.<sup>10</sup>

Similarly, in the 1980s, oil company Chevron executed a series of ads "to convince the public of its environmental bonafides."<sup>11</sup> The ad campaign "People Do" consisted of six commercials painting "rosy pictures" of Chevron's environmental good deeds.<sup>12</sup> The ads centered on video clips of butterflies, sea turtles, and a variety of "cute and cuddly" animals.<sup>13</sup> Ironically, while these ads were rolling, Chevron was "embroiled in lawsuits for *polluting* the environment."<sup>14</sup> One such suit related to an ad in which San Francisco-based Chevron created a fenced-in "sanctuary" to support the endangered El Segundo Blue Butterfly and help it thrive and multiply in the two-acre El Segundo Refinery complex.<sup>15</sup> However, the wastewater discharge from that same refinery

7. *Id.*

8. *Nuclear Explained: Nuclear Power and the Environment*, U.S. ENERGY INFO. ADMIN., <https://www.eia.gov/energyexplained/nuclear/nuclear-power-and-the-environment.php> [<https://perma.cc/AM2T-K4DJ>] ("An uncontrolled nuclear reaction in a nuclear reactor could result in widespread contamination of air and water.").

9. See Watson, *supra* note 6.

10. See *id.*; Cassandra Willyard, *Benchmarks: January 3, 1961: Three Men Die in Nuclear Reactor Meltdown*, EARTH MAG. (Jan. 5, 2012), <https://www.earthmagazine.org/article/benchmarks-january-3-1961-three-men-die-nuclear-reactor-meltdown> [<https://perma.cc/K62G-QL5R>]; Michael Hiltzik, *Column: 50 Years After 'We Almost Lost Detroit,' America's Nuclear Power Industry Faces Even Graver Doubts*, L.A. TIMES (Oct. 3, 2016, 12:50 PM), <https://www.latimes.com/business/hiltzik/la-fi-hiltzik-detroit-nuclear-20161003-snap-story.html#:~:text=On%20Oct.,radioactivity%20escaped%20to%20the%20environment> [<https://perma.cc/95LV-9NXX> (dark archive)].

11. See Watson, *supra* note 6.

12. Connie Benesch, *Chevron Does: Do's and Don'ts*, L.A. TIMES (Feb. 14, 1988, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1988-02-14-ca-42437-story.html> [<https://perma.cc/H6YN-F76T> (dark archive)].

13. See, e.g., Watson, *supra* note 6; Chevron, *1988 Chevron "People Do" TV Commercial*, YOUTUBE (Feb. 12, 1988), <https://www.youtube.com/watch?v=0njymB06JB8> [<https://perma.cc/5RGD-PGWM>] (originally aired as a KCOP television broadcast on Feb. 12, 1988); Chevron, *Chevron Commercial Ad 1985*, YOUTUBE (1985), <https://youtube.com/watch?v=cpm00Z9PXzk> [<https://perma.cc/6NTK-3TZD>] (originally aired on a television broadcast in 1985); Chevron, *1980s Chevron Commercial*, YOUTUBE, <https://www.youtube.com/watch?v=bReBO55XzZc> [<https://perma.cc/JHE8-PD7P>] (originally aired during a television broadcast as an advertisement for Chevron's sustainable programs and products).

14. See Benesch, *supra* note 12.

15. *Id.*

was the subject of an “18-month legal battle between Chevron and the Environmental Protection Agency.”<sup>16</sup> The suit ended with Chevron paying \$1.5 million for the thousands of pounds of pollutants Chevron illegally dumped into the Santa Monica Bay.<sup>17</sup>

Fast forward to modern day, greenwashing has spread like a weed in the world of marketing and consumer advertising and has found its home in the fashion industry. Consumer protection agencies have even described the fashion industry as one of greenwashing’s worst offenders.<sup>18</sup> Brands benefit from greenwashing by charging a premium for “sustainable” products.<sup>19</sup> Additionally, over 100 billion tons of clothing are produced each year, approximately twenty percent of which goes unsold.<sup>20</sup> Moreover, the global “fast fashion” industry—an industry focused on the rapid production of clothing available to consumers at low prices<sup>21</sup>—is estimated to grow from \$25.09 billion in 2020 to \$39.84 billion in 2025.<sup>22</sup> Not only has the production of clothing skyrocketed, but so has the prevalence of environmental and sustainability marketing.<sup>23</sup> Unfortunately, many of these advertisements are nothing more than greenwashing.<sup>24</sup>

Greenwashing has harmful consequences for both consumers and the environment. By engaging in greenwashing, fashion brands hurt socially conscious consumers who are puzzled and often manipulated by fashion brands’

16. *Id.*

17. *Id.*

18. Bella Webb, *The Big Global Greenwashing Crackdown*, VOGUE BUS. (May 27, 2021), <https://www.voguebusiness.com/sustainability/the-big-global-greenwashing-crackdown> [https://perma.cc/D4V9-XQEQ].

19. Marc McAree & Gieselle Davidian, *Greenbiz and Getting to Market: What It Takes To Go Green and Limit Liability*, AM. BAR ASS’N (Apr. 25, 2019), [https://www.americanbar.org/groups/tort\\_trial\\_insurance\\_practice/publications/the\\_brief/2016\\_17/winter/greenbiz\\_and\\_getting\\_to\\_market\\_what\\_it\\_takes\\_to\\_go\\_green\\_and\\_limit\\_liability/#1](https://www.americanbar.org/groups/tort_trial_insurance_practice/publications/the_brief/2016_17/winter/greenbiz_and_getting_to_market_what_it_takes_to_go_green_and_limit_liability/#1) [https://perma.cc/MZD8-TGVQ].

20. Dana Thomas, *The High Price of Fast Fashion*, WALL ST. J. (Aug. 29, 2019, 12:37 PM), <https://www.wsj.com/articles/the-high-price-of-fast-fashion-11567096637> [https://perma.cc/T5C6-HNY2 (staff-uploaded, dark archive)].

21. See *infra* text accompanying notes 69–74.

22. Olivia Pinnock, *Sustainable Fashion Wants Brands To Redefine Business Growth*, FORBES (Sept. 24, 2021, 5:50 AM), <https://www.forbes.com/sites/oliviapinnock/2021/09/24/degrowth-is-trending-in-sustainable-fashion-what-does-that-mean-for-brands/?sh=685952734a6f> [https://perma.cc/GNH5-URJU (dark archive)]. While the global fashion industry saw substantial growth in 2021 and the first half of 2022, some have projected this growth to slow down in 2023 as a result of global economic decline. See IMRAN AMED, ACHIM BERG, ANITA BALCHANDANI, SARAH ANDRÉ, SANDRINE DEVILLARD, MICHAEL STRAUB, FELIX RÖLKENS, JOËLLE GRUNBERG, JANET KRESNAR & HANNAH CRUMP, *THE STATE OF FASHION 2023*, at 10–11 (2022).

23. See Remi Rosmarin, *Sustainability Sells: Why Consumers and Clothing Brands Alike Are Turning to Sustainability as a Guiding Light*, INSIDER (Apr. 22, 2020, 9:59 AM), <https://www.businessinsider.com/sustainability-as-a-value-is-changing-how-consumers-shop> [https://perma.cc/8K66-FL99].

24. See CHANGING MKTS. FOUND., *supra* note 3, at 17.

greenwashing schemes.<sup>25</sup> Greenwashing also harms the environment by inspiring inaction, allowing brands to *say* they are acting sustainably without taking actions to support those claims.<sup>26</sup> While the fashion industry and sustainability seem inherently at odds,<sup>27</sup> there are actions regulators can, and should, take to lessen the impact greenwashing has on consumers and the environment. Lately, consumer class actions have been taking the lead in providing enforcement against potential bad actors in the fashion industry. However, class actions have been met with mixed results. Thus, it is time for the Federal Trade Commission (“FTC”) to play a larger role in greenwashing enforcement in the fashion industry. In 2021, the FTC announced that it would be reviewing its “Guides for the Use of Environmental Marketing Claims” (the “Green Guides”),<sup>28</sup> a guide the FTC provides to help companies avoid making misleading environmental marketing claims.<sup>29</sup> This Comment proposes that the FTC revise its Green Guides to provide guidance on sustainability claims and follow the lead of other nations by better investigating the fashion industry to uncover its worst offenders and seek enforcement against them.

This Comment proceeds in five parts. Part I discusses why the fashion industry is vulnerable to greenwashing. Part II explains why we should be troubled by greenwashing in the fashion industry. Part III describes enforcement mechanisms in place to combat greenwashing in the United States. Part IV highlights four recent lawsuits involving greenwashing in the fashion industry. Finally, Part V proposes solutions to combat greenwashing in the United States.

## I. WHY THE FASHION INDUSTRY IS VULNERABLE TO GREENWASHING

Several factors contribute to the proliferation of greenwashing in the fashion industry. These factors include the rise in sustainability awareness among millennial and Gen Z consumers, the fashion industry’s use of complex supply chains, and a lack of regulatory guidance.

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25. *See infra* Section II.A and accompanying text.

26. *See infra* Section II.B and accompanying text.

27. “Inherently at odds” because the proliferation of fashion merchandize is detrimental to the environment. *See infra* Section II.B.

28. Regulatory Review Schedule, 86 Fed. Reg. 35239, 35239 (proposed July 2, 2021) (to be codified at 16 C.F.R. ch. 1).

29. Guides for the Use of Environmental Marketing Claims, 16 C.F.R. § 260 (2012).

A. *Rise in Sustainability Awareness*

Millennial and Gen Z generations are increasingly concerned with the environment and sustainability.<sup>30</sup> According to a 2020 report by First Insight, seventy-three percent of Gen Z consumers are willing to pay more for sustainable products.<sup>31</sup> Fifty-four percent even said they would pay over a ten percent premium for sustainable products.<sup>32</sup> Further, a study by the NYU Stern Center for Sustainable Business found that “50% of [consumer packaged goods] growth from 2013 to 2018 came from sustainability-marketed products.”<sup>33</sup>

The Increase in millennial and Gen Z consumer awareness makes this demographic especially vulnerable to false environmental and sustainability claims. With increased environmental awareness, these consumers are more likely to make purchasing decisions based on whether clothing is sustainable and ethically sourced.<sup>34</sup> According to Joseph Palumbo, sitting president of the International Consumer Protection and Enforcement Network (“ICPEN”),<sup>35</sup> the “greater customer emphasis on environmentalism has increased the use of misleading marketing.”<sup>36</sup> Thus, given that consumers are increasingly invested in making sustainable purchases, often for higher prices than they might otherwise pay, brands are more likely to falsely market their products as sustainable to increase sales.

30. See Marguerita Cheng, *8 Characteristics of Millennials That Support Sustainable Development Goals (SDGs)*, FORBES (June 19, 2019, 10:39 AM), <https://www.forbes.com/sites/margueritacheng/2019/06/19/8-characteristics-of-millennials-that-support-sustainable-development-goals-sdgs/?sh=3b21f62529b7> [https://perma.cc/6YK2-5WA9 (staff-uploaded, dark archive)]; Katie Jahns, *The Environment Is Gen Z's No. 1 Concern—And Some Companies Are Taking Advantage of That*, CNBC, <https://www.cnbc.com/2021/08/10/the-environment-is-gen-zs-no-1-concern-but-beware-of-greenwashing.html> [https://perma.cc/7JYE-PURA] (last updated Aug. 11, 2021, 8:23 AM). Millennials are described as those born within the years 1981–1996 and Gen Z are those born in 1997–2012. See *Age Range by Generation: Generations Defined by Name, Birth Year, and Ages in 2022*, BERESFORD RSCH., <https://www.beresfordresearch.com/age-range-by-generation/> [https://perma.cc/P2ZY-ATL9].

31. Jahns, *supra* note 30.

32. See *id.*

33. Tensie Whelan & Randi Kronthal-Sacco, *Research: Actually, Consumers Do Buy Sustainable Products*, HARV. BUS. REV. (June 19, 2019), <https://hbr.org/2019/06/research-actually-consumers-do-buy-sustainable-products> [https://perma.cc/W5HG-WDVS (staff-uploaded, dark archive)].

34. See Michelle Jones, *Sustainable and Ethical Fashion: Market Overview and Latest Trends*, VALUEWALK (May 20, 2021, 5:12 PM), <https://www.valuewalk.com/sustainable-ethical-fashion-latest-trends/> [https://perma.cc/GRR3-6SDF]; Webb, *supra* note 18.

35. The ICPEN is a network of consumer protection authorities from over sixty-five countries that coordinates cross-border greenwashing enforcement through a variety of measures, including warning letters and formal investigations with court processes. Webb, *supra* note 18.

36. *Id.*

### B. *Complex Supply Chains*

The fashion industry's complex supply chains also contribute to the industry's vulnerability to greenwashing. Globalization has led to a "fragmented scenario" where suppliers are scattered across the world, and thus follow different social and environmental regulations.<sup>37</sup> Sustainability issues often result from outsourced supply chains, where the entire business model is largely based on the use of "fragmented suppliers."<sup>38</sup> These suppliers are typically located in countries that provide labor for low wages and have looser environmental and social regulations.<sup>39</sup>

Moreover, supply chains are often lengthy and complicated, and involve numerous stages of production.<sup>40</sup> For instance, the shirt on your back likely traveled across the globe and was stitched together in a factory in Asia, Eastern Europe, Latin America, or some other region.<sup>41</sup> Aside from the poor environmental effects these global supply chains often create,<sup>42</sup> they also lead to difficulties in proper labeling.<sup>43</sup> Operating across different countries and regulatory systems can lead to a disconnect between suppliers and brands, with upstream suppliers misleading downstream brands about their production practices.<sup>44</sup> Additionally, most organizations' visibility into their supply chains is severely restricted, with one study reporting that only six percent of organizations have full visibility into their supply chains.<sup>45</sup> Without full visibility, companies cannot make "ironclad" statements that their products are sustainably and ethically made.<sup>46</sup> Moreover, brands may rely on third-party agents to check their supply chains and verify the environmental claims they

37. Antonella Moretto, Laura Macchion, Andrea Lion, Federico Caniato, Pamela Danese & Andrea Vinelli, *Designing a Roadmap Towards a Sustainable Supply Chain: A Focus on the Fashion Industry*, 193 J. CLEANER PROD. 169, 169 (2018).

38. *See id.* at 170.

39. *See id.*

40. *See* Zhi-Hua Hu, Qing Li, Xian-Juan Chen & Yan-Feng Wang, *Sustainable Rent-Based Closed-Loop Supply Chain for Fashion Products*, 6 SUSTAINABILITY 7063, 7066 (2014); Cindy Chen, *Behind the Scenes of the Fashion Supply Chain*, FASHINNOVATION (June 24, 2021), <https://fashioninnovation.nyc/fashion-supply-chain/> [<https://perma.cc/BMY4-GQCW>].

41. *See Follow the Thread: The Need for Supply Chain Transparency in the Garment and Footwear Industry*, HUM. RTS. WATCH (Apr. 20, 2017), <https://www.hrw.org/report/2017/04/20/follow-thread/need-supply-chain-transparency-garment-and-footwear-industry#> [<https://perma.cc/T4NW-SFQ5>].

42. *See* Hu et al., *supra* note 40, at 7065–66.

43. Webb, *supra* note 18.

44. *See id.*

45. Mark Burstein, *Why Supply Chain Transparency Means the End of Greenwashing*, SOURCING J. (Aug. 4, 2021, 3:30 PM), <https://sourcingjournal.com/topics/thought-leadership/logility-supply-chain-transparency-greenwashing-xinjiang-forced-labor-customs-293815/> [<https://perma.cc/YW52-7V92> (staff-uploaded, dark archive)].

46. *Id.*



are making.<sup>47</sup> This can lead to brands greenwashing their products, perhaps unintentionally, when agents of the brands misrepresent the brands' supply chains.<sup>48</sup>

Further, environmental legislation may target the environmental credentials of a fashion brand's own production and operations, but not the production and operations of its suppliers.<sup>49</sup> Thus, brands may hide the harmful effects their production has on the environment in their complex supply chain.<sup>50</sup> For instance, one fashion brand, & Other Stories, was accused of using its complex supply chain to mislead its customers about the provenance of its clothing.<sup>51</sup> & Other Stories was reported to have utilized poster advertisements of "white women's hands loftily holding tailoring scissors over cloth," layered with the words "Stockholm Atelier," implying its garments were produced in Sweden under Swedish labor protection laws.<sup>52</sup> While the report explains & Other Stories' products may be designed in Sweden, their garments are produced in China, Bulgaria, and Bangladesh.<sup>53</sup> & Other Stories had seemingly misled its consumers into believing that its products were manufactured under more stringent labor protection laws than they actually were.<sup>54</sup> Thus, complex supply chains can contribute to companies' greenwashing schemes.

### C. *Lack of Regulatory Guidance*

As will be discussed in much greater detail in Part V, lack of guidance on key terminology makes the fashion industry vulnerable to greenwashing. There are vague limits on what it means to be "sustainable."<sup>55</sup> For instance, while the FTC's Green Guides were "designed to help marketers avoid making environmental claims that mislead consumers,"<sup>56</sup> one attorney asserted that the FTC "somewhat sheepishly admitted that it could not define what sustainability really means in concrete terms for marketers" through its Green

47. Webb, *supra* note 18.

48. *See id.*

49. Jaymee Ng, *How To Spot and Avoid Greenwashing in Supply Chains*, CUHK BUS. SCH. (June 10, 2021), <https://cbk.bschool.cuhk.edu.hk/how-to-spot-and-avoid-greenwashing-in-supply-chains/> [https://perma.cc/YF6F-75VF].

50. *Id.*

51. *See Slater, supra* note 4.

52. *Id.*

53. *Id.*

54. *See id.* In 2022, Bangladesh was ranked in the ten worst countries for working people, INT'L TRADE UNION CONFEDERATION, 2022 ITUC GLOBAL RIGHTS INDEX: THE WORLD'S WORST COUNTRIES FOR WORKERS 27 (2022), while Sweden was ranked as one of the best, *see id.* at 15.

55. Webb, *supra* note 18.

56. *Environmentally Friendly Products: FTC's Green Guides*, FED. TRADE COMM'N, <https://www.ftc.gov/news-events/media-resources/truth-advertising/green-guides> [https://perma.cc/TJ9K-KXMZ].

Guides.<sup>57</sup> Thus, brands will frequently use these terms in marketing without many guardrails on what it means to be “sustainable.”<sup>58</sup> Corey Spencer, cofounder of the sustainability-centric brand Amendi, contends that brands are “all using the same language to describe sustainability on a massive spectrum.”<sup>59</sup> Also, consumers in the United States are largely unsure what exactly makes clothing sustainable.<sup>60</sup> Moreover, on top of misleading consumers with the use of vaguely defined terms, the broad use of “sustainable” messaging also undermines the efforts of brands that meaningfully invest in their green and sustainability practices.<sup>61</sup>

Ultimately, the recent increase in consumers’ environmental and sustainability awareness, complex global supply chains, and vaguely defined terms put the fashion industry at significant risk of greenwashing.

## II. WHY WE SHOULD CARE ABOUT GREENWASHING IN THE FASHION INDUSTRY

To inspire action against greenwashing in the fashion industry, it is necessary to contemplate its social and environmental costs. Specifically, greenwashing is detrimental to socially conscious consumers and our environment.

### A. *Greenwashing Harms the Socially Conscious Consumer*

Greenwashing harms consumers who want to make socially conscious purchases but are instead left confused and exploited by the current greenwashing landscape. An increasing number of consumers want to make sustainable and environmentally friendly purchases and are willing to pay more to do so.<sup>62</sup> However, when a brand falsely markets its products as more sustainable and environmentally friendly than they really are, consumers’

57. *The Problem with Sustainability? It Doesn't Really Mean Anything*, FASHION L. (Aug. 12, 2019), <https://www.thefashionlaw.com/the-problem-with-sustainability-it-doesnt-really-mean-anything/> [https://perma.cc/LK7W-D3VL (dark archive)].

58. Webb, *supra* note 18.

59. *Id.*

60. According to a survey by Genomatica, eighty-six percent of consumers believe brands should strive for sustainability, yet forty-eight percent of consumers “don’t know how or where to find sustainable clothes” and forty-two percent of consumers are “confused about what makes clothing sustainable.” See *Survey: Consumers Want Sustainable Clothing*, GENOMATICA (May 26, 2021), <https://www.genomatica.com/news-content/survey-consumers-want-sustainable-clothing/> [https://perma.cc/ZW2P-MAYH]. Many fashion executives also report that the lack of sustainability performance standards is “the greatest hurdle to improving how consumers perceive their sustainability efforts.” AMED ET AL., *supra* note 22, at 19.

61. Webb, *supra* note 18.

62. See *supra* Section I.A and accompanying text.

“genuine environmental concerns” are exploited.<sup>63</sup> Additionally, the prevalence of greenwashing within the fashion industry may negatively affect consumers’ perceptions of fashion brands that are true to their green claims. For instance, one study found that greenwashing creates a “spillover effect,” such that “a single brand’s greenwashing behavior is strong enough to negatively affect purchase intention of other green brands” within the same industry.<sup>64</sup> Furthermore, brands are profiting from this deception as consumers “pay a premium for products and services that are good for the environment.”<sup>65</sup>

### B. *Greenwashing Harms the Environment*

Efforts should also be taken to counteract greenwashing to protect the environment. Because of the increasing prevalence of the fast fashion model and the large amount of waste generated by brands, the fashion industry is one of the most polluting industries in the world.<sup>66</sup> The fashion industry is responsible for an astounding ten percent of greenhouse gas emissions.<sup>67</sup> Moreover, three-fifths of all clothing ends up in a landfill within *one year* of its production.<sup>68</sup>

One reason the fashion industry is so harmful to the environment is due to the rise of the fast fashion business model. Fast fashion is “inexpensive clothing produced rapidly by mass-market retailers in response to the latest trends.”<sup>69</sup> For fast fashion brands, “it is economically advantageous to produce in mass quantities,” since quality is not the main focus of the production.<sup>70</sup> To keep up with fast fashion’s production, employees need to constantly clear retail

63. Anne Brouwer, *Revealing Greenwashing: A Consumers’ Perspective*, in INT’L CONFS. ON INTERNET TECHS. & SOC’Y (ITS 2016) EDUC. TECHS. (ICEDU TECH 2016) AND SUSTAINABILITY, TECH., AND EDUC. (STE 2016), at 245, 245 (Piet Kommers, Tomayess Issa, Theodore Issa, Elspeth McKay & Pedro Isaías eds., 2016), [https://www.researchgate.net/publication/322640690\\_Proceedings\\_of\\_the\\_International\\_Conference\\_s\\_on\\_Internet\\_Technologies\\_Society\\_ITS\\_2016\\_Educational\\_Technologies\\_ICEDuTech\\_2016\\_and\\_Sustainability\\_Technology\\_and\\_Education\\_STE\\_2016\\_which\\_have\\_been\\_orga](https://www.researchgate.net/publication/322640690_Proceedings_of_the_International_Conference_s_on_Internet_Technologies_Society_ITS_2016_Educational_Technologies_ICEDuTech_2016_and_Sustainability_Technology_and_Education_STE_2016_which_have_been_orga) [https://perma.cc/B7H7-72A2 (staff-uploaded archive)].

64. Hong Wang, Baolong Ma & Rubing Bai, *The Spillover Effect of Greenwashing Behaviours: An Experimental Approach*, 38 MKTG. INTEL. & PLAN. 283, 292 (2020).

65. McAree & Davidian, *supra* note 19.

66. SUSTAINABLE FASHION: CONSUMER AWARENESS AND EDUCATION 1, 4–6 (Subramanian Senthilkannan Muthu ed., 2019).

67. ANASTASIA DENISOVA, FASHION MEDIA AND SUSTAINABILITY: ENCOURAGING ETHICAL CONSUMPTION VIA JOURNALISM AND INFLUENCERS 6 (Steve Barnett, Christian Fuchs, Anastasia Kavada & Maria Michalis, eds., 2021).

68. *Id.*

69. *Fast Fashion*, OXFORD ENG. DICTIONARY, <https://www.oed.com/view/Entry/68420?rskey=IZ3Cng&result=1&isAdvanced=false> [https://perma.cc/VL4F-5DDJ (staff-uploaded, dark archive)].

70. See Ariele Elia, Note, *Fashion’s Destruction of Unsold Goods: Responsible Solutions for an Environmentally Conscious Future*, 30 FORDHAM INTEL. PROP. MEDIA & ENT. L.J. 539, 552 (2020).

products and make room for new shipments that arrive weekly.<sup>71</sup> To make room for new merchandise, old products are often discarded.<sup>72</sup> Additionally, the fast-fashion business model relies on synthetic fibers produced from fossil fuels.<sup>73</sup> Two-thirds of all materials from textiles consist of synthetic fibers, and the production of these fibers requires more oil than the total consumption of oil in Spain in a given year.<sup>74</sup>

While the fast fashion business model's rising emphasis on overproduction and overconsumption of cheaply made items is problematic for the environment,<sup>75</sup> luxury brands are also at fault for the effects of the fashion industry on the environment.<sup>76</sup> In 2018, Burberry, an upscale brand, reported in its annual 10K report that its "cost of finished goods physically destroyed in the year was £28.6m" (or \$37,809,915).<sup>77</sup> This figure equates to 20,000 Burberry trench coats.<sup>78</sup>

As described in this section, the fashion industry's harm to the environment is immense. Instead of inspiring solutions to these environmental and social hazards, greenwashing ultimately inspires inaction. Brands can take the easy route and *say* they are substantially improving the environment without doing so,<sup>79</sup> which is why regulatory changes and enforcement measures must be made.

71. *See id.*

72. *See id.* at 546–47.

73. *See* CHANGING MKTS. FOUND., *supra* note 3, at 7.

74. *See id.*

75. *See* Alex Crumbie, *What Is Fast Fashion and Why Is It a Problem?*, ETHICAL CONSUMER (Oct. 5, 2021), <https://www.ethicalconsumer.org/fashion-clothing/what-fast-fashion-why-it-problem> [<https://perma.cc/FVA4-UC99>].

76. Elia, *supra* note 70, at 547.

77. BURBERRY, ANNUAL REPORT 2017/18, at 165 (2018), [https://www.burberryplc.com/content/dam/burberry/corporate/Investors/Results\\_Reports/2018/Burberry\\_AnnualReport\\_FY17-18.pdf](https://www.burberryplc.com/content/dam/burberry/corporate/Investors/Results_Reports/2018/Burberry_AnnualReport_FY17-18.pdf) [<https://perma.cc/XWR2-HZ8B>].

78. Elia, *supra* note 70, at 547.

79. One such way that fashion brands can give the appearance of taking action without actually doing so is by making forward-looking statements. For example, in an apparent publicity stunt, Boohoo announced that it was going to ban all wool products due to systemic abuse of sheep used for their wool. Connor Sephton, *Boohoo Changes Its Mind—Hours After Announcing Ban on Wool*, SKY NEWS (Feb. 16, 2019, 8:25 PM), <https://news.sky.com/story/ewe-turn-boohoo-says-it-will-keep-using-wool-in-its-products-11639459> [<https://perma.cc/754H-KQFZ>]. Nonetheless, just several hours after making the announcement, Boohoo reversed its decision and decided to keep using wool products. *Id.*

### III. GREENWASHING ENFORCEMENT IN THE UNITED STATES

This Comment focuses on two primary mechanisms for greenwashing enforcement<sup>80</sup>: Section 5 of the Federal Trade Commission Act<sup>81</sup> (“FTC Act”) and consumer class action lawsuits.<sup>82</sup> While both avenues present an opportunity for greenwashing enforcement, the FTC’s lack of guidance on “sustainability” claims hinders this enforcement. Additionally, the complex requirements of class actions and frequency of settlements make consumer class actions a mediocre approach.

#### A. Section 5 of the FTC Act

The FTC is one of the primary actors tasked with greenwashing enforcement in the United States.<sup>83</sup> The mission of the FTC is to “[p]rotect[] consumers and competition by preventing anticompetitive, deceptive, and unfair business practices through law enforcement, advocacy, and education.”<sup>84</sup> The FTC is governed by the FTC Act,<sup>85</sup> Section 5 of which pertains to greenwashing enforcement.<sup>86</sup> This section provides that “unfair or deceptive acts or practices in or affecting commerce . . . are . . . declared unlawful.”<sup>87</sup> According to the FTC, “deceptive” practices include those that involve a “material representation, omission or practice that is likely to mislead a

80. While beyond the scope of this Comment, the Securities and Exchange Commission (“SEC”) proposed rules in 2022 to protect investors from companies that greenwash their environmental, social, and governance (“ESG”) practices. See *Enhanced Disclosures by Certain Investment Advisers and Investment Companies About Environmental, Social, and Governance Investment Practices*, 87 Fed. Reg. 36654, 36554 (proposed June 17, 2022) (to be codified at 17 C.F.R. pts. 200, 230, 232, 239, 249, 274, 279). Investors are increasingly interested in investing in companies that value ESG practices, and the proposed SEC rules would help investors make better informed decisions by providing a regulatory framework for companies’ ESG disclosures. See *id.* at 36655.

81. Federal Trade Commission Act, ch. 311, 38 Stat. 717 (codified as amended in scattered sections of 15 U.S.C.).

82. See *id.* § 5; Robin M. Rotman, Chloe J. Gossett & Hope D. Goldman, *Greenwashing No More: The Case for Stronger Regulation of Environmental Marketing*, 72 ADMIN. L. REV. 417, 417 (2020) (“Fraudulent and deceptive environmental claims in marketing . . . are a persistent problem in the United States, despite nearly thirty years of efforts by the [FTC] to prevent it.”); *Greenwashing Claims on the Rise: Avoiding Dirty Laundry*, QUINN EMANUEL URQUHART & SULLIVAN, LLP (Mar. 22, 2021), <https://www.quinnemanuel.com/the-firm/publications/greenwashing-claims-on-the-rise-avoiding-dirty-laundry/> [<https://perma.cc/6WE7-ESR3>] (“Greenwashing suits are often brought by consumer organizations or as consumer class actions.”). Section 5 of the original FTC Act is codified in 15 U.S.C. § 45, which includes subsequent legislative amendments that are collectively called “Section 5” in this work.

83. See Rotman et al., *supra* note 82, at 424–25.

84. *About the FTC*, FED. TRADE COMM’N, <https://www.ftc.gov/about-ftc> [<https://perma.cc/2KEH-6SKB>].

85. 15 U.S.C. §§ 41–58.

86. McAree & Davidian, *supra* note 19.

87. 15 U.S.C. § 45(a)(1).

consumer acting reasonably in the circumstances.”<sup>88</sup> Additionally, an act may be considered “unfair” when “the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.”<sup>89</sup> Moreover, in an enforcement action, the FTC can find that an act is either deceptive *or* unfair (it does not need to find the act is both deceptive and unfair).<sup>90</sup> Overall, Section 5 is broad and allows the FTC significant discretion to define and regulate greenwashing.

The FTC’s investigative authority is also broad,<sup>91</sup> and it is authorized to “prosecute any inquiry necessary to its duties in any part of the United States,”<sup>92</sup> as well as compile information about and investigate an entity whose business affects commerce.<sup>93</sup> The FTC may initiate an investigation voluntarily, at the request of government officials or agencies, through the referral of courts, or in response to a complaint by the general public.<sup>94</sup> If, following an investigation, the FTC finds “reason to believe” that the entity is engaging in an unfair act or practice or unfair method of competition in violation of the FTC Act, the FTC may issue a warning letter to that entity<sup>95</sup> or initiate formal enforcement against it through administrative or judicial proceedings.<sup>96</sup> Warning letters inform companies that they are likely in violation of the FTC Act, and that they should immediately comply with the law or risk legal consequences.<sup>97</sup> Additionally, through an administrative proceeding, an administrative law judge (“ALJ”) may order the entity violating Section 5 to “cease and desist” from the act or practice.<sup>98</sup> Finally, through a judicial proceeding, the FTC can obtain civil penalties, consumer redress, and injunctive relief.<sup>99</sup>

88. *A Brief Overview of the Federal Trade Commission’s Investigative, Law Enforcement, and Rulemaking Authority*, FED. TRADE COMM’N (May 2021), <https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority> [<https://perma.cc/J6BS-9VZA>].

89. 15 U.S.C. § 45(n).

90. 1 STEPHANIE W. KANWIT, FEDERAL TRADE COMMISSION § 4:3 (2021–2022 ed.).

91. The investigatory powers of the FTC have been described as “probably the broadest investigatory powers of any federal regulatory agency.” *Id.* § 13:1.

92. 15 U.S.C. § 43.

93. § 46(a).

94. 1 KANWIT, *supra* note 90, § 13:2.

95. *About FTC Warning Letters*, FED. TRADE COMM’N, <https://www.ftc.gov/news-events/topics/truth-advertising/about-ftc-warning-letters> [<https://perma.cc/VT2B-YV6A>].

96. *A Brief Overview of the Federal Trade Commission’s Investigative, Law Enforcement, and Rulemaking Authority*, *supra* note 88.

97. *About FTC Warning Letters*, *supra* note 95.

98. 15 U.S.C. § 45(b); *see* 1 KANWIT, *supra* note 90, § 8:1 (“An order is entered after an adjudicative hearing has been held before an administrative law judge.”). The FTC could also pursue civil penalties through greater use of its Penalty Offense Authority under Section 5(m)(1)(B) of the FTC Act. *See generally* Rohit Chopra & Samuel A.A. Levine, *The Case for Resurrecting the FTC Act’s Penalty Offense Authority*, 170 U. PA. L. REV. 71 (2021) (arguing the FTC should lean into its Penalty Offense Authority to deter unfair or deceptive practices and correct harmful behavior).

99. 1 KANWIT, *supra* note 90, § 10:1.

Looking at Section 5 on its face, it is not obvious when a misleading sustainability-centric claim in an advertisement constitutes a violation of the Act.<sup>100</sup> For this reason, the FTC implemented its Green Guides, which advise marketers how to make environmental claims without violating Section 5.<sup>101</sup> The FTC first introduced the Green Guides in 1992 and last revised them in 2012.<sup>102</sup> Additionally, the Green Guides serve as the FTC's administrative interpretation of Section 5 of the FTC Act, and the FTC "can take action under the FTC Act if a marketer makes an environmental claim inconsistent with the guides."<sup>103</sup> However, the Green Guides themselves are not binding law.<sup>104</sup> The general principles set forth in the Green Guides direct marketers to do the following:

- (a) Use "clear, prominent, and understandable" disclosures, by using "plain language and sufficiently large type" and "avoid making inconsistent statements or using distracting elements that could undercut or contradict the disclosures."<sup>105</sup>
- (b) Specify whether a claim "refers to the product, the product's packaging, a service, or just to a portion of the product, package, or service."<sup>106</sup>
- (c) Avoid "overstat[ing], directly or by implication, an environmental attribute or benefit."<sup>107</sup>
- (d) Use clear "[c]omparative environmental marketing claims . . . [with] substantiation for the comparison."<sup>108</sup>

The 2012 revision of the Green Guides added new guidance for environmental marketing claims, including guidance about carbon offsets, seal approvals, and compostable and nontoxic claims.<sup>109</sup> However, the 2012 revised Guides failed to address several critical pieces of information useful in properly guiding businesses in making responsible claims: organic, sustainable, and natural claims.<sup>110</sup> The failure of the 2012 Green Guides to include guidance on

100. Rotman et al., *supra* note 82, at 422. ("The FTC implemented these initial enforcement efforts [against fraudulent environmental marketing claims] piecemeal, under general policy, which led to a climate of frustration for both industry and consumers.")

101. Guides for the Use of Environmental Marketing Claims, 16 C.F.R. § 260.1(a) (2012).

102. See Rotman et al., *supra* note 82, at 424–25.

103. 16 C.F.R. § 260.1(a).

104. See *id.*

105. *Id.* § 260.3(a).

106. *Id.* § 260.3(b).

107. *Id.* § 260.3(c).

108. *Id.* § 260.3(d).

109. *Id.* § 260.

110. See *id.*

“sustainability” was especially damaging to marketing in the fashion industry and has enabled brands to deal in “fluffy” and “forward-looking statements” without having to prove these statements or even face legal ramifications.<sup>111</sup> According to the FTC, the Green Guides revision did not include information on “sustainable” claims because there was no accepted definition for “sustainable” at the time.<sup>112</sup> Without a proper definition of “sustainable” and guidance on sustainable claims, fashion brands are given broad discretion to interpret this term. Overall, the failure of the FTC to address these issues in the 2012 version of the Green Guides has perpetuated greenwashing in the fashion industry and allowed brands to get away with baseless claims.

Nevertheless, the FTC announced that it will review the Green Guides<sup>113</sup> and sought public comment until February 21, 2023.<sup>114</sup> This decision was in response to an effort by PoliticallyInFashion and Amendi, who “led a coalition letter” to the FTC in May 2021 urging the FTC to undertake a thorough review of the current Green Guides.<sup>115</sup> The letter was signed by forty brands, experts, and activists who “stand ready to work with [the FTC]” in improving the Guides.<sup>116</sup>

#### B. Consumer Class Actions

Consumer class actions serve as another enforcement mechanism for greenwashing claims, as illustrated by four cases filed in the last three years: *Lee v. Canada Goose US, Inc.*,<sup>117</sup> *Dwyer v. Allbirds, Inc.*,<sup>118</sup> *Commodore v. H&M*<sup>119</sup> and *Lizama v. H&M*.<sup>120</sup> Through consumer class actions, plaintiffs with “valid but relatively small claims,” like consumers in the clothing industry, can group

111. *The Federal Trade Commission Says It Will Review Its “Green Guides” in 2022*, FASHION L. (July 7, 2021), <https://www.thefashionlaw.com/the-federal-trade-commission-says-it-will-review-its-green-guides-in-2022/> [<https://perma.cc/44TR-ARZR> (dark archive)].

112. See Edward Wyatt, *F.T.C. Issues Guidelines for Eco-Friendly Labels*, N.Y. TIMES (Oct. 1, 2012), <https://www.nytimes.com/2012/10/02/business/energy-environment/ftc-issues-guidelines-for-eco-friendly-labels.html> [<https://perma.cc/27AJ-ADSU> (staff-uploaded, dark archive)]; Albert Cohen, *Marketing “Sustainability”: Don’t Forget the Green Guides*, SUSTAINABLE BRANDS, <https://sustainablebrands.com/read/marketing-and-comms/marketing-sustainability-don-t-forget-the-green-guides> [<https://perma.cc/DRN5-6NXF>].

113. See FTC Regulatory Review Schedule, 86 Fed. Reg. 35239, 35239 (proposed July 2, 2021) (to be codified at 16 C.F.R. pt. 260).

114. See Guides for the Use of Environmental Marketing Claims, 87 Fed. Reg. 77766, 77766 (proposed December 20, 2022) (to be codified at 16 C.F.R. pt. 260).

115. *After Letter from PoliticallyInFashion and 40 Fashion Leaders, the FTC Announces Plan To Review the Green Guides*, POLITICALLYINFASHION (July 16, 2021), <https://politicallyinfashion.com/the-green-guides> [<https://perma.cc/K3DH-ZWEZ> (staff-uploaded archive)] [hereinafter *Letter from PoliticallyInFashion*].

116. See *id.*

117. No. 20-CV-09809, 2021 U.S. Dist. LEXIS 121084 (S.D.N.Y. June 29, 2021).

118. No. 21-CV-05238, 2022 U.S. Dist. LEXIS 71055 (S.D.N.Y. Apr. 18, 2022).

119. No. 7:22-CV-06247 (S.D.N.Y. filed July 22, 2022).

120. No. 4:22-CV-01170 (E.D. Mo. filed Nov. 3, 2022).



together and aggregate their claims, “attract[ing] counsel to cases that would otherwise be ignored,” and allowing “greater monetary award[s].”<sup>121</sup> Since many regulatory agencies are “resource-strapped,” class actions allow plaintiffs to seek enforcement and redress themselves.<sup>122</sup> Also, class actions often generate negative publicity about defendants, incentivizing businesses to avoid them in the first place.<sup>123</sup> These class action suits can be brought under state consumer protection laws,<sup>124</sup> which vary widely from state to state.<sup>125</sup> While state consumer protection laws are generally broad and protect consumers from a multitude of harms,<sup>126</sup> statutes that specifically prohibit deceptive acts and practices are a mechanism for greenwashing enforcement.<sup>127</sup> Each state “has a consumer protection law that prohibits deceptive practices,”<sup>128</sup> and in general, these statutes have broad prohibitions on deception and unfairness.<sup>129</sup> These practices can include “literal misrepresentation, misleading innuendo or half-truth, [and] deception by omission or by action.”<sup>130</sup> However, these statutes lack uniformity, with some states offering greater protection than others.<sup>131</sup>

Moreover, while consumer class actions often present a logical avenue for consumers seeking legal redress in deceptive advertising schemes,<sup>132</sup> relying on class actions as a sole mechanism for greenwashing enforcement can be problematic. For instance, “[c]ertain procedural issues must be faced in every consumer class action filed under state unfair and deceptive practices acts.”<sup>133</sup> These procedural requirements include: (1) common questions of law or fact, (2) a manageable class size, and (3) the ability of the named plaintiffs to adequately represent the class.<sup>134</sup> Further, aside from the procedural

121. DEE PRIDGEN & RICHARD M. ALDERMAN, CONSUMER PROTECTION AND THE LAW § 6:28, Westlaw (database updated Nov. 2021).

122. See David Marcus, *The History of the Modern Class Action, Part I: Sturm Und Drang, 1953–1980*, 90 WASH. U. L. REV. 587, 593 (2013).

123. See Stephen J. Choi, *The Evidence on Securities Class Actions*, 57 VAND. L. REV. 1465, 1468 (2004) (“[D]efendants will incur . . . negative publicity affecting relations with both customers and suppliers.”).

124. See Elizabeth O’Connor Tomlinson, *Cause of Action Under State Consumer Protection Law for “Greenwashing” or Misleading Environmental Claims in Advertising and Marketing*, in 79 CAUSES OF ACTION 2D 323 § 20, Westlaw (database updated Nov. 2022).

125. *Id.* § 4.

126. *Id.*

127. *Id.*

128. CAROLINE L. CARTER, NAT’L CONSUMER L. CTR., CONSUMER PROTECTION IN THE STATES: A 50-STATE REPORT ON UNFAIR AND DECEPTIVE ACTS AND PRACTICES STATUTES 5 (2009), [https://www.nclc.org/images/pdf/car\\_sales/UDAP\\_Report\\_Feb09.pdf](https://www.nclc.org/images/pdf/car_sales/UDAP_Report_Feb09.pdf) [<https://perma.cc/6465-8NUD>].

129. *Id.* at 11.

130. PRIDGEN & ALDERMAN, *supra* note 121, § 3:1.

131. See CARTER, *supra* note 128, at 5.

132. See PRIDGEN & ALDERMAN, *supra* note 121, § 6:28.

133. *Id.*

134. *Id.*

complexities involved in class actions, “large consolidated cases necessarily proceed slowly and sharply restrict settlement.”<sup>135</sup> Thus, many of the class action requirements place a heavy burden on the very people who are being harmed by greenwashing schemes: the consumers.

Additionally, there is always a chance that class action suits will settle before the court determines the outcome. For one, class action attorneys may act out of self-interest and seek a settlement even though it is not what is best for the entire class.<sup>136</sup> Further, companies may rather pay to make the problem disappear than litigate in court.<sup>137</sup> Thus, while of some utility, consumer class actions are an imperfect enforcement mechanism for greenwashing enforcement.

#### IV. GREENWASHING LAWSUITS IN THE FASHION INDUSTRY

In the past few years, there have been class action lawsuits over greenwashing in advertising against fashion brands Canada Goose, Inc. (“Canada Goose”), Allbirds, Inc. (“Allbirds”), and H&M Henes & Maurtiz LP (“H&M”).<sup>138</sup> This rise in greenwashing lawsuits reveals an increased consumer commitment to purchase environmentally friendly and sustainable products, as well as a greater willingness by fashion brands to inflate the environmental bona fides of their brands and products. While these lawsuits indicate heightened scrutiny of greenwashing in the fashion industry, they are met with mixed results and reveal issues surrounding a lack of guidance on sustainability claims.

135. TIMOTHY D. COHELAN, COHELAN ON CALIFORNIA CLASS ACTIONS § 1:7 (2022–2023 ed.), Westlaw (database updated Nov. 2022).

136. See, e.g., Alexandra D. Lahav, *Two Views of the Class Action*, 79 FORDHAM L. REV. 1939, 1947–48 (2011) (“[T]he [class action] lawyer is a type of entrepreneur (more negatively referred to as a ‘bounty hunter’) who conceives of the lawsuit, finds the client, and pursues the litigation for private gain.”); John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 226 (1983) (arguing that the potential for private council “to create a credible penalty structure is undercut if the private watchdog can be bought off by tossing him the juicy bone of a higher-than-ordinary fee award in return for his acceptance of an inadequate settlement”); *Graybeal v. Am. Sav. & Loan Ass’n*, 59 F.R.D. 7, 13 (D.D.C. 1973) (“In any class action there is always the temptation for the attorney for the class to recommend settlement on terms less favorable to his clients because a large fee is part of the bargain.”).

137. See Danielle Keats Citron & Daniel J. Solove, *Privacy Harms*, 102 B.U. L. REV. 793, 817 (2022) (“Many class actions become the equivalent of a shake down, with companies paying the lawyers to go away.”).

138. See *Lee v. Can. Goose US, Inc.*, No. 20-CV-09809, 2021 U.S. Dist. LEXIS 121084 (S.D.N.Y. June 29, 2021); *Dwyer v. Allbirds, Inc.*, No. 21-CV-05238, 2022 U.S. Dist. LEXIS 71055 (S.D.N.Y. Apr. 18, 2022); *Commodore v. H&M*, 7:22-CV-06247 (S.D.N.Y. filed July 22, 2022).

A. *Lee v. Canada Goose US, Inc.*

Although the consumer class action lawsuit against Canada Goose was voluntarily dismissed in 2022,<sup>139</sup> this case is notable because the court allowed several of the plaintiff's claims to survive a motion to dismiss, revealing the court's willingness to recognize and enforce greenwashing claims.<sup>140</sup>

The suit arose as a result of the plaintiff purchasing a Canada Goose parka with coyote fur trim in 2017.<sup>141</sup> The plaintiff alleged that when he purchased this jacket, he relied on Canada Goose's characterization of the fur trim on the jacket being "sourced using ethical and humane trapping methods," and that, given the increased consumer demand for "ethically sourced products," Canada Goose "attempt[ed] to cultivate an image that its fur products [we]re sourced using humane, sustainable, and ethical practices, when in fact they [we]re not."<sup>142</sup> Specifically, a tag attached to the parka stated:

"The Canada Goose Fur Transparency Standard™ is our commitment to support the ethical, responsible, and sustainable sourcing and use of real fur";

"The first traceability program to cover the wild habitat, it ensures that all fur sourced by Canada Goose is in accordance with the Agreement of International Humane Trapping Standards . . . in Canada and the Best Managed Practices . . . in the United States, and is fully traceable throughout the supply chain"; and

"The standard certifies that we never purchase fur from fur farms, never use fur from endangered animals, and only purchase fur from licensed North American trappers strictly regulated by state, provincial and federal standards."<sup>143</sup>

The plaintiff found these statements misleading because they suggested the fur trapping methods used by Canada Goose did not inflict extreme pain and distress on the animals being trapped.<sup>144</sup> Specifically, the plaintiff alleged that the use of the terms "ethical" and "sustainable" were misleading because of their ability to lead consumers to believe the goods were produced with high regard for animal welfare.<sup>145</sup> Yet, according to the plaintiff, Canada Goose suppliers used "cruel [trapping] methods" that caused "strangulation and broken bones"

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139. Joint Stipulation Requesting Dismissal at 1, *Lee*, 2021 U.S. Dist. LEXIS 121084 (No. 1:20-CV-09809).

140. *Lee*, 2021 U.S. Dist. LEXIS 121084, at \*12.

141. *Id.* at \*1–2.

142. *Id.* at \*2–3.

143. *Id.* at \*3 (citation omitted).

144. *Id.*

145. *Id.* at \*4.

to animals trapped for Canada Goose apparel,<sup>146</sup> including leg traps and snares, which often cause severe physical and psychological distress to animals.<sup>147</sup>

Despite the defendant's argument that the plaintiff's "subjective views" on animal treatment "d[id] not render the Company's statements misleading or deceptive,"<sup>148</sup> the court found that the plaintiff "plausibly alleged that this statement has a tendency to mislead a reasonable consumer[]"<sup>149</sup> and Canada Goose's statements (and omissions) regarding its fur sourcing were material.<sup>150</sup> Thus, the court denied the dismissal of the plaintiffs' claim under the D.C. Consumer Protection and Procedures Act<sup>151</sup> ("CPPA").<sup>152</sup> The court found that the allegations reasonably supported the inference that Canada Goose's statements regarding "ethical" fur sourcing were misleading to consumers because Canada Goose "obtain[ed] fur from trappers who use allegedly inhumane leghold traps and snares."<sup>153</sup> Also, given that the plaintiff contended that animal welfare was an important consideration for a consumer determining whether a product is "ethically sourced," and given that research on consumer perception indicated terms like "sustainably produced" signal "higher animal welfare standards," the court found that Canada Goose's statements regarding its sourcing could unduly influence an unsophisticated consumer.<sup>154</sup>

On April 27, 2022, the case was "voluntarily dismissed."<sup>155</sup> Despite the voluntary dismissal, the court found for the plaintiff on multiple grounds, demonstrating its willingness to recognize a greenwashing claim despite Canada Goose's contentions that its animal welfare claims were "nonactionable" and

146. *Id.*

147. *Id.* at \*5.

148. *Id.* at \*9 (citation omitted).

149. *Id.* at \*12.

150. *Id.* at \*19.

151. Act of July 22, 1976, D.C. Law 1-76 (codified as amended in scattered sections of 28 D.C. CODE).

152. See D.C. CODE § 28-3904 (LEXIS through Mar. 9, 2023). The parts of the CPPA the court found the plaintiff adequately pled were (e) the defendant "misrepresent[s] as to a material fact which has a tendency to mislead," (f) "fail[s] to state a material fact if such a failure tends to mislead," and (f-1) "[u]se[s] innuendo or ambiguity as to a material fact, which has a tendency to mislead." *Id.*; *Lee*, 2021 U.S. Dist. LEXIS 121084, at \*14, \*19–20 (finding the plaintiff adequately pled subsections (e), (f), and (f-1) of the CPPA).

153. *Lee*, 2021 U.S. Dist. LEXIS 121084, at \*18.

154. See *id.* at \*19.

155. Joint Stipulation Requesting Dismissal, *Lee*, 2021 U.S. Dist. LEXIS 121084 (No. 20-CV-09809). This is likely because it was later discovered that the "plaintiff misleadingly alleged that the Canada Goose store he entered to examine the item was the store he purchased the item from." See Order, *Lee*, 2021 U.S. Dist. LEXIS 121084 (No. 20-CV-09809).

“subjective.”<sup>156</sup> Overall, the court’s decision may be indicative of the direction that courts’ treatment of greenwashing claims is going.<sup>157</sup>

B. *Dwyer v. Allbirds, Inc.*

*Dwyer v. Allbirds, Inc.* is another recent example of greenwashing in the fashion industry and reveals how a lack of standards in sustainable and environmental marketing can be detrimental to a plaintiff’s case.<sup>158</sup> Allbirds is a shoe and apparel company that claims to implement a business model that prioritizes the environment and sustainability.<sup>159</sup> Nevertheless, a class action lawsuit was filed against Allbirds in 2021.<sup>160</sup> According to the complaint, Allbirds’ sustainability marketing contributed to Allbirds’ worth of over one billion dollars.<sup>161</sup> However, the class action suit alleged that Allbirds’ marketing misled consumers about its carbon footprint and treatment of animals.<sup>162</sup>

The complaint alleged that Allbirds misled consumers through many of its “eco-friendly” advertisements, including the phrases “Sustainability Meets Style,” “Low Carbon Footprint,” “Environmentally Friendly,” and “Made With Sustainable Wool.”<sup>163</sup> Additionally, the complaint highlighted one of Allbirds’ “most prominent” environmental initiatives: Allbirds’ focus on a product’s carbon footprint.<sup>164</sup> This initiative measured the emissions and carbon footprint of Allbirds’ products through various stages of production, including materials, manufacturing, transportation, product use, and end of life.<sup>165</sup> Allegedly, Allbirds’ Life Cycle Assessment tool used at the time of the complaint only measured the carbon footprint of each product and did not take into consideration the environmental impact of wool production, which includes the impact on water, eutrophication, and land production.<sup>166</sup> Furthermore, the complaint explained that according to the Higgs Materials Sustainability Index, a trusted tool for the measurement of the environmental

156. *See Lee*, 2021 U.S. Dist. LEXIS 121084, at \*9, \*18.

157. Greenwashing cases outside of the fashion industry have also been successful. *See, e.g.*, *Uslar v. Vital Farms, Inc.*, No. A-21-CV-447, 2022 WL 149109, at \*1, \*8 (W.D. Tex. Jan. 31, 2022) (finding plaintiffs sufficiently pleaded that they were misled by Vital Farms, an egg seller, marketing itself as an ethical company that values the humane treatment of animals).

158. *Dwyer v. Allbirds, Inc.*, No. 7:21-CV-05238, 2022 U.S. Dist. LEXIS 71055, at \*26 (S.D.N.Y. Apr. 18, 2022).

159. *See Giving Mother Nature a Seat at the Table*, ALLBIRDS, <https://www.allbirds.com/pages/giving-mother-nature-a-seat-ipo> [<https://perma.cc/3K3N-7Z33>].

160. *See* Class Action Complaint at 1, *Dwyer*, U.S. Dist. LEXIS 71055 [hereinafter *Dwyer* Complaint].

161. *See id.* at 1.

162. *Id.* at 1, 3.

163. *Id.* at 1.

164. *Id.* at 2.

165. *Sustainable Practices: What’s in a Footprint?*, ALLBIRDS, <https://www.allbirds.com/pages/footprint> [<https://perma.cc/B8WR-E3AA>].

166. *See Dwyer* Complaint, *supra* note 160, at 3.

impact of products,<sup>167</sup> the carbon footprint of wool only accounts for a little over half of wool's complete environmental impact.<sup>168</sup> Thus, the complaint claimed that Allbirds' Life Cycle Assessment tool ignored almost half of the environmental impact of wool.<sup>169</sup> Moreover, the plaintiffs alleged the Life Cycle Assessment tool used the most conservative estimates in its assessments and skewed the numbers in Allbirds' favor.<sup>170</sup>

The plaintiffs also accused Allbirds of greenwashing regarding its animal welfare claims. Specifically, many advertisements promoted the high quality of life of the sheep used for Allbirds' wool, including one advertisement claiming these sheep "Live The Good Life."<sup>171</sup> The complaint highlighted these advertisements as examples of the plaintiffs' misleading animal welfare claims.<sup>172</sup> Despite Allbirds advertising its products as environmentally and sustainably sound, the complaint alleged that Allbirds' sheep did not live "happy lives," but rather horrible lives in which the sheep were abused and neglected.<sup>173</sup> The plaintiffs pointed to the fact that investigations into large scale wool operations revealed that "workers beat, stomped on, cut open the skin of, and slit the throats of conscious, struggling sheep."<sup>174</sup> Further, the complaint claimed that ZQ Merino, Allbirds' wool supplier, could not feasibly ensure that their sheep "live the good life" given the vast production numbers and impossibility of ensuring proper care to individual sheep.<sup>175</sup> Moreover, the complaint cited ZQ Merino's lack of transparency and its failure to disclose vital information to ensure that its sheep "live the good life."<sup>176</sup>

The plaintiffs alleged violations of various laws,<sup>177</sup> arguing that they, as consumers, reasonably relied on Allbirds' misleading representations regarding the sustainability and environmental quality of its products, and that had they known the truth behind Allbirds' products, they would not have bought them or they would have paid substantially less for them.<sup>178</sup> Nevertheless, on April 18, 2022, the district court found in favor of Allbirds and dismissed the

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167. *Higg Product Tools*, SUSTAINABLE APPAREL COAL., <https://apparelcoalition.org/higg-product-tools/> [<https://perma.cc/7LJL-Q4JC>].

168. *See Dwyer Complaint*, *supra* note 160, at 3.

169. *Id.*

170. *Id.*

171. *See id.* at 4; *Wool*, ALLBIRDS, <https://www.allbirds.com/pages/our-materials-wool> [<https://perma.cc/96LK-MXDK>].

172. *See Dwyer Complaint*, *supra* note 160, at 4–5.

173. *See id.* at 6.

174. *Id.*

175. *See id.*

176. *See id.* at 6–7.

177. These allegations included violation of a New York consumer protection statute, breach of warranty, negligent misrepresentation, fraud, and unjust enrichment. *See id.* at 10–13.

178. *See id.* at 8–12.

complaint.<sup>179</sup> With regard to the Life Cycle Assessment tool, the court found that the fact that it did not assess the complete environmental impact and life cycle of wool production “is a criticism of the tool’s methodology, not a description of a false, deceptive, or misleading statement about the Product.”<sup>180</sup> Additionally, the court held that the plaintiffs’ animal welfare claims were nonactionable and “classic puffery.”<sup>181</sup> The fact that these statements were found to be mere “puffery” reveals that the realm of sustainability claims is a gray area of law in need of clearer guidance and standards.

### C. *Commodore v. H&M and Lizama v. H&M*

Finally, two class action complaints were filed in 2022 against H&M: the *Commodore* class action and the *Lizama* class action.<sup>182</sup> Both complaints alleged that H&M engaged in a marketing scheme intended to mislead consumers about the environmental and sustainable nature of its products.<sup>183</sup> For example, the *Commodore* complaint alleged that, following an investigation by Quartz,<sup>184</sup> H&M had been publishing environmental scorecards on its website, called “Higgs Sustainability Profiles,” that contained “falsified information that does not comport with underlying data.”<sup>185</sup> For instance, the Quartz investigation reported that a dress H&M advertised as utilizing twenty percent *less* water to manufacture on its Sustainability Profile was actually using twenty percent *more* water to manufacture.<sup>186</sup> Various other products were also reported to be advertised as sustainable on the Sustainability Profile scorecard, while their actual scores indicated that they were less sustainable than conventional materials.<sup>187</sup> Additionally, both the *Commodore* and *Lizama* complaints alleged that H&M’s “Conscious” products (which were advertised as more “sustainable”)<sup>188</sup> were comprised of unsustainable materials and a higher percentage of synthetics than the main collection.<sup>189</sup>

179. *Dwyer v. Allbirds, Inc.*, No. 21-CV-05238, 2022 U.S. Dist. LEXIS 71055, at \*32 (S.D.N.Y. Apr. 18, 2022).

180. *Id.* at \*5.

181. *Id.* at \*8.

182. See Class Action Complaint at 1, *Commodore v. H&M Hennes & Mauritz LP*, No. 7:22-CV-06247 (S.D.N.Y. July 22, 2022) [hereinafter *Commodore* Complaint]; *Lizama v. H&M Hennes & Mauritz LP*, No. 4:22-CV-01170 (E.D. Mo. Nov. 3, 2022) [hereinafter *Lizama* Complaint].

183. *Commodore* Complaint, *supra* note 182, at 1–2; *Lizama* Complaint, *supra* note 182, at 2–3.

184. See Amanda Schendruk, *Quartz Investigation: H&M Showed Bogus Environmental Scores for Its Clothing*, QUARTZ (June 29, 2022), <https://qz.com/2180075/hm-showed-bogus-environmental-higg-index-scores-for-its-clothing/> [https://perma.cc/N6QZ-XBEU].

185. *Commodore* Complaint, *supra* note 182, at 3.

186. See *id.*

187. See *id.* at 3–5; Schendruk, *supra* note 184.

188. *Lizama* Complaint, *supra* note 182, at 2.

189. *Commodore* Complaint, *supra* note 182, at 5; *Lizama* Complaint, *supra* note 182, at 2.

Both complaints alleged that the plaintiffs relied on H&M's misleading representations and would not have purchased the products had they known the representations were misleading.<sup>190</sup> The litigation for both cases is ongoing as of January 11, 2023.

Overall, these class actions represent a greater willingness among consumers in the fashion industry to purchase products that are environmentally friendly and sustainably made, as well as a greater willingness to seek redress in court when they think a brand has misled them. While *Lee* demonstrates a court's willingness to recognize greenwashing, *Dwyer* reveals issues surrounding a lack of clear guidance and standards on sustainability claims. Overall, more guidance surrounding what is "sustainable" is needed. Each plaintiff claimed to be misled by the "sustainable" marketing of the brand, yet there was no single standard on which the plaintiffs relied as to what sustainability means.<sup>191</sup> As evidenced by the *Dwyer* case, the lack of standards surrounding "sustainability" makes it more difficult to find misleading sustainability claims actionable, and ultimately hold defendants accountable. Furthermore, requiring plaintiffs to carry the burden and maneuver through the complexities of a class action lawsuit makes consumer class actions an unfair and unreliable method of greenwashing enforcement.<sup>192</sup> While the *Commodore* and *Lizama* cases are ongoing, both the lack of guidance surrounding sustainability and the issues associated with class actions generally make each case an uphill battle.

#### V. IDEAS TO BETTER COMBAT GREENWASHING IN THE UNITED STATES

While consumer class actions are useful in many respects, they are imperfect vehicles for greenwashing enforcement. Also, recent class actions pertaining to greenwashing have been met with "mixed results."<sup>193</sup> Thus, it is time for the FTC—the very agency tasked with protecting the public from unfair and deceptive acts and practices—to play a greater role in stopping greenwashing in the fashion industry. The FTC can do this by revising the

190. *Commodore* Complaint, *supra* note 182, at 12–13; *Lizama* Complaint, *supra* note 182, at 3.

191. The plaintiff in *Lee v. Canada Goose* grounded its definition of "ethically produced" in animal welfare surveys and its definition of "sustainable" in an acknowledgement by the FTC. See Complaint at 13, *Lee v. Can. Goose US, Inc.*, 2021 U.S. Dist. LEXIS 121084, at \*13 (S.D.N.Y. Nov. 20, 2020) (No. 1:20-CV-09809). In *Dwyer v. Allbirds*, the plaintiff relied on a "Google search" for their definition of "sustainable." See *Dwyer* Complaint, *supra* note 160, at 6 n.6. The plaintiffs in *Commodore* and *Lizama* did not define "sustainable." See *Commodore* Complaint, *supra* note 182; *Lizama* Complaint, *supra* note 182.

192. See *supra* notes 132–35 and accompanying text.

193. *H&M Facing New Lawsuit Over "Misleading" Marketing of "Conscious" Collection*, FASHION L. (Nov. 11, 2022), [https://www.thefashionlaw.com/hm-facing-new-lawsuit-over-misleading-marketing-of-conscious-collection/?utm\\_source=Evolok+PROD&utm\\_campaign=d347a87724-registered-nov-11&utm\\_medium=email&utm\\_term=0\\_9b49635b30-d347a87724-493994218&ct=t\(registered-nov-11\)](https://www.thefashionlaw.com/hm-facing-new-lawsuit-over-misleading-marketing-of-conscious-collection/?utm_source=Evolok+PROD&utm_campaign=d347a87724-registered-nov-11&utm_medium=email&utm_term=0_9b49635b30-d347a87724-493994218&ct=t(registered-nov-11)) [https://perma.cc/S6AL-ZZGU (dark archive)].



Green Guides to provide more guidance on sustainability claims and pursuing greater investigatory work and enforcement against greenwashing.

While the Green Guides are imperfectly drafted, they are a starting point in curbing greenwashing in the United States.<sup>194</sup> To better combat greenwashing, the FTC should revise the Green Guides and implement more guidance on sustainability claims. Providing guidance on “sustainable” claims is especially crucial to the fashion industry, as “sustainable” is a term frequently used by clothing brands.<sup>195</sup> While the FTC cited a lack of consensus over what “sustainability” means as a reason for not including this topic in its 2012 revision,<sup>196</sup> the term has evolved since 2012 and is more frequently used in marketing claims.<sup>197</sup> Also, by failing to provide clear guidance on sustainability claims, the FTC is further perpetuating greenwashing by allowing businesses to decide what they want sustainability to mean.

One way the FTC can provide guidance on sustainability is by looking abroad to how other countries are defining sustainability. In the United Kingdom, the Competition and Market Authority (“CMA”)<sup>198</sup> published in 2021 an in-depth guide for businesses on how to responsibly make green claims.<sup>199</sup> This guide defines “sustainability claims” as

claims which suggest that a product is made, a service delivered or a business run in accordance with principles of sustainability, sustainable consumption or sustainable development. This could include claims relating to the environment and climate change, biodiversity, animal welfare, workers’ welfare or corporate social responsibility.<sup>200</sup>

Along with defining what sustainability claims are, the CMA guidance provides examples and instruction on when sustainability claims are misleading.<sup>201</sup> For instance, when a product’s claim “draws attention to a particular sustainability benefit,” the claim could still be considered misleading

194. See Rotman et al., *supra* note 82, at 429 (“[T]he Green Guides were intended to curb the growing problem of deceptive and fraudulent ‘green’ marketing in the United States, and they have succeeded in doing so in many respects.”).

195. See Rosmarin, *supra* note 23.

196. See *The Federal Trade Commission Says It Will Review Its “Green Guides” in 2022*, *supra* note 111.

197. Letter from *PoliticallyInFashion*, *supra* note 115 (“In the past nine years, there has been an exponential growth in sustainability claims by businesses.”).

198. The CMA is a U.K. competition watchdog tasked with promoting competition, ensuring that businesses comply with the law, and ensuring consumers get a good deal when purchasing goods. COMPETITION & MKTS. AUTH., *See About Us: Competition & Markets Authority*, GOV.UK, <https://www.gov.uk/government/organisations/competition-and-markets-authority/about> [<https://perma.cc/QS8N-ZMHG>].

199. See COMPETITION & MKTS. AUTH., *Making Environmental Claims on Goods and Services*, GOV.UK (Sept. 20, 2021), <https://www.gov.uk/government/publications/green-claims-code-making-environmental-claims/environmental-claims-on-goods-and-services> [<https://perma.cc/9FZE-2NL5>].

200. *Id.*

201. *See id.*

to consumers if “there are also significant negative impacts from that product.”<sup>202</sup> By providing guidance on sustainability claims, the FTC could prevent businesses from making baseless claims regarding sustainability. Additionally, using guidelines adopted abroad might prove useful given that the fashion industry is a global market, with a brand based in one country often marketing its clothes to countries across the globe. Further, while the Green Guides serve as the FTC’s administrative interpretation of Section 5 of the FTC Act,<sup>203</sup> the Green Guides are also commonly cited and consulted for guidance in consumer class actions.<sup>204</sup> Thus, in lawsuits like *Lee* and *Dwyer*, parties can ground their claims in the Green Guides and have a more uniform understanding of what sustainability means. For instance, unlike the CMA definition of sustainability claims, the current Green Guides do not take animal welfare into consideration.<sup>205</sup> Thus, if the FTC updates its Green Guides to include guidance on sustainability claims and takes into consideration animal welfare, then plaintiffs in cases like *Dwyer* could point to this guidance to argue that Allbirds’ advertising its products as “Made With Sustainable Wool” when sheep are allegedly being harmed is deceptive and misleading.

Additionally, the FTC should follow the lead of other nations and perform greater investigative work to combat greenwashing in the fashion industry. For instance, from November 9 to November 27, 2020, the CMA conducted for the first time an international and industry-wide internet “sweep” to target “misleading environmental claims.”<sup>206</sup> As part of the sweep, the CMA reviewed almost five hundred “randomly selected websites” for misleading environmental claims.<sup>207</sup> The CMA analyzed websites that promoted products and services in a variety of sectors, including food, cosmetics, and clothes.<sup>208</sup> Astonishingly, forty percent of the websites investigated “appeared to be using tactics that could be considered misleading and therefore potentially break consumer law.”<sup>209</sup> The CMA warned businesses that they had until January 1,

202. *Id.*

203. See Guides for the Use of Environmental Marketing Claims, 16 C.F.R. § 260.1(a) (2012).

204. See, e.g., *Smith v. Keurig Green Mountain, Inc.*, 393 F. Supp. 3d 837, 846 (N.D. Cal. 2019) (using guidance from the Green Guides with regard to “recyclability” claims); *Duchimaza v. Niagara Bottling, LLC*, No. 21 Civ. 6434, 2022 WL 3139898, at \*8 (S.D.N.Y. Aug. 5, 2022) (“The parties agree that the term ‘recyclable’ is a term of art and that the FTC’s Green Guides inform its meaning.”); *In re S.C. Johnson & Son, Inc. Windex Non-Toxic Litig.*, No. 20-CV-03184, 2021 WL 3191733, at \*6 (N.D. Cal. July 28, 2021) (using guidance from the Green Guides with regard to “non-toxic” claims).

205. See 16 C.F.R. § 260.

206. See COMPETITION & MKTS. AUTH., *Global Sweep Finds 40% of Firms’ Green Claims Could be Misleading*, GOV.UK (Jan. 28, 2021), <https://www.gov.uk/government/news/global-sweep-finds-40-of-firms-green-claims-could-be-misleading> [<https://perma.cc/VK5M-WEJU>].

207. See *id.*

208. *Id.*

209. *Id.*

2022, to ensure their environmental claims were in compliance with the law.<sup>210</sup> In 2022, the CMA began to “carry out a full review of misleading green claims,”<sup>211</sup> with particular focus on the fashion industry.<sup>212</sup> So far, the CMA has launched investigations into three fashion brands it suspects may be engaged in greenwashing: ASOS, Boohoo, and George.<sup>213</sup> Along with the CMA, the Netherlands Authority for Consumers and Markets (“ACM”) in March 2021 investigated 170 businesses in the Netherlands in search of misleading sustainability claims.<sup>214</sup> The ACM looked into the energy, dairy, and clothing sectors<sup>215</sup> because it found many potentially misleading claims within these sectors in its preliminary investigation.<sup>216</sup> In the fashion industry, “over 70 clothing companies [were] contacted and asked to take a critical look at their claims.”<sup>217</sup> The ACM conducted an in-depth investigation into H&M, finding that H&M advertised its products using the term “Conscious,” without indicating the sustainability benefits of products labeled “Conscious.”<sup>218</sup> Overall, if governmental authorities investigate greenwashing, greenwashing offenders are more likely to face sanctions and clean up their act.

Like the United Kingdom and the Netherlands, the FTC should implement an “internet sweep” and use its “broad power to investigate”<sup>219</sup> to review the environmental and sustainable internet marketing claims of the fashion industry.<sup>220</sup> Performing an investigation would incentivize businesses to

210. COMPETITION & MKTS. AUTH., *Greenwashing: CMA Puts Businesses on Notice*, GOV.UK (Sept. 20, 2021), <https://www.gov.uk/government/news/greenwashing-cma-puts-businesses-on-notice> [<https://perma.cc/G4B8-ESCR>].

211. *Id.*

212. See Press Release, Competition & Mkts. Auth., ASOS, Boohoo and Asda Investigated Over Fashion ‘Green’ Claims (July 29, 2022), <https://www.gov.uk/government/news/asos-boohoo-and-asda-investigated-over-fashion-green-claims> [<https://perma.cc/6W9E-7HUM>].

213. *Id.*

214. Webb, *supra* note 18; *ACM Launches Investigation into Misleading Sustainability Claims in Three Sectors*, AUTH. FOR CONSUMERS & MKTS. (Mar. 5, 2021), <https://www.acm.nl/en/publications/acm-launches-investigations-misleading-sustainability-claims-three-sectors> [<https://perma.cc/X98D-ZX4W>].

215. *Id.*

216. *Id.*

217. *Id.*

218. *Going Forward, Decathlon and H&M Will Provide Better Information About Sustainability to Consumers*, AUTH. FOR CONSUMERS & MKTS. (Sept. 13, 2022), <https://www.acm.nl/en/publications/going-forward-decathlon-and-handm-will-provide-better-information-about-sustainability-consumers> [<https://perma.cc/9MG7-SDA3>]. As a result of this investigation, H&M has promised “to adjust or no longer use sustainability claims on their clothes and/or websites” and make donations of 500,000 euros to “sustainable causes.” *Id.*

219. See 35 Thomas B. Merritt, MASSACHUSETTS PRACTICE, CONSUMER LAW § 2:24 (4th ed. 2022).

220. 1 KANWIT, *supra* note 90, § 22:4 (noting the FTC has performed “industry-wide” investigations in other contexts).

clean up their sustainability claims or risk FTC sanctions.<sup>221</sup> Like the CMA, the FTC could implement a ten-day internet sweep to better grasp the extent of the problem and uncover bad actors. If, following an investigation, the FTC finds “reason to believe” the FTC Act is or has been violated, then the FTC could pursue enforcement through various mechanisms, including through the issuance of warning letters, an administrative process, or a judicial process.<sup>222</sup> In 2022, the FTC sought an injunction and civil penalties against the department stores Kohl’s and Walmart for greenwashing various home products by falsely marketing and selling rayon products as made from “bamboo.”<sup>223</sup> The FTC sought penalties pursuant to Section 5(m)(1)(B) of the FTC Act, which requires (1) that the company knew the conduct was unlawful and (2) that a prior FTC order had found the conduct unlawful.<sup>224</sup> Because Kohl’s and Walmart were previously put on notice through warning letters that their conduct may violate the rules,<sup>225</sup> and prior decisions indicated the conduct did violate the rules,<sup>226</sup> each company was ordered to pay \$2.5 million and \$3 million, respectively.<sup>227</sup> In light of these decisions, warning letters may be increasingly effective against greenwashing, as companies may be more likely to take FTC warnings seriously and not risk the severe penalties that Kohl’s and Walmart faced. Overall, the FTC has various tools for enforcement, and by undertaking an investigation, the FTC could hold companies accountable for their greenwashing claims and deter other companies from making misleading claims.

Nevertheless, a few obstacles hinder the FTC’s ability to effectively seek enforcement and deter greenwashing. For one, the FTC lacks resources.<sup>228</sup> For

221. See 1 *id.* § 13:2 (noting while most investigations are nonpublic, “industry-wide investigations are announced publicly”).

222. See *supra* text accompanying notes 95–99.

223. See Order at 2, 4–9, *United States of America v. Kohl’s Inc.*, 22-cv-964 (D.D.C. May 4, 2022) [hereinafter *Kohl’s Order*]; Stipulated Order and Judgment for Civil Penalties Permanent Injunction, and Other Relief at 1–2, 4–9, *United States of America v. Walmart Inc.*, 1:22-cv-00965 (D.D.C. Apr. 8, 2022) [hereinafter *Walmart Order*]. The complaints also allege violations of the Textile Act. *Kohl’s Order*, *supra*, at 1; *Walmart Order* *supra*, at 1.

224. See 15 U.S.C. § 45(m)(1)(B); Complaint for Civil Penalties, Permanent Injunction, and Other Relief at 26, *Kohl’s Inc.*, 22-cv-964 (JDB) [hereinafter *Kohl’s Complaint*]; Complaint for Civil Penalties, Permanent Injunction, and Other Relief at 20, *Walmart Inc.*, 1:22-cv-00965 [hereinafter *Walmart Complaint*].

225. See *Kohl’s Order*, *supra* note 223, at 2; *Kohl’s Complaint*, *supra* note 224, at 26; *Walmart Order*, *supra* note 223, at 2; *Walmart Complaint*, *supra* note 224, at 20.

226. See *Kohl’s Complaint*, *supra* note 224, at 19; *Walmart Complaint*, *supra* note 224, at 13.

227. See *Kohl’s Order*, *supra* note 223, at 9; *Kohl’s Complaint*, *supra* note 224, at 26; *Walmart Order*, *supra* note 223, at 8; *Walmart Complaint*, *supra* note 224, at 20.

228. See FED. TRADE COMM’N, FISCAL YEAR 2023 CONGRESSIONAL BUDGET JUSTIFICATION 9 (2022), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/P859900FY23CBJ.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/P859900FY23CBJ.pdf) [<https://perma.cc/Q7BD-NUH9> (staff-uploaded archive)] (highlighting the FTC’s need for an increased budget); Austin H. Krist, *Large-Scale Enforcement of the Fair Credit Reporting Act and the Role of State Attorneys General*, 115 COLUM. L. REV. 2311, 2324 (2015) (“[T]he FTC lacks the resources necessary to litigate the full panoply of small-scale FCRA violations that occur on a daily basis.”).

instance, in the past five years, the consumer fraud reports received by the FTC have increased from 1.3 to 2.8 million, and even the FTC admits that it lacks the resources necessary for effective enforcement.<sup>229</sup> Consequentially, the FTC is calling for more funding in its budget request for the 2023 fiscal year,<sup>230</sup> which will be necessary to seek greater enforcement against greenwashing offenders. Nevertheless, implementing an internet sweep over the course of a few days and then focusing enforcement on the worst offenders might allow the FTC to best utilize its limited resources and deter other companies from greenwashing their products. Additionally, considering the *Kohl's* and *Walmart* orders and that companies may be even more inclined to take warning letters seriously, the FTC could also focus on issuing warning letters to fashion brands it suspects of greenwashing, which would incentivize companies to comply with the FTC Act and be more cost-effective than pursuing formal enforcement through an administrative or judicial process against all offenders.

Another obstacle hindering the FTC's enforcement is the 2021 Supreme Court ruling in *AMG Capital Management, LLC v. Federal Trade Commission*,<sup>231</sup> which removed an enforcement tool the FTC previously possessed.<sup>232</sup> In *AMG*, the Court ruled that Section 13(b) of the FTC Act does not grant the FTC authority to pursue equitable monetary relief.<sup>233</sup> Section 13(b) allows the FTC to go directly to court and obtain a "temporary restraining order or a preliminary injunction," and in "proper cases . . . a permanent injunction."<sup>234</sup> After its enactment, the FTC began using Section 13(b) and the words "permanent injunction" to forego the administrative process and use the courts to obtain consumer redress for FTC Act violations through monetary awards in court.<sup>235</sup> Prior to the Court's holding in *AMG*, the FTC brought dozens of cases a year under Section 13(b)<sup>236</sup> and recovered "billions of dollars from corporate and individual defendants."<sup>237</sup> Thus, the elimination of equitable monetary relief under Section 13(b) undermined the FTC's ability to deter FTC Act

229. FED. TRADE COMM'N, *supra* note 228, at 9 (noting that the FTC is requesting a budget increase of \$139 million from the 2022 fiscal year).

230. *See id.*

231. 141 S. Ct. 1341 (2021).

232. *Id.* at 1349, 1352.

233. *Id.* at 1352. The FTC brought this action against payday lenders under Section 5 of the FTC Act, alleging unfair and deceptive trade practices. *Id.* at 1345. The district court ordered the defendants to pay \$1.27 billion in restitution and disgorgement. *Id.* Ultimately, the Supreme Court reversed the Ninth Circuit, holding this equitable monetary relief impermissible under Section 13(b). *Id.* at 1352.

234. 15 U.S.C. § 53; *see also AMG Cap. Mgmt., LLC*, 141 S. Ct. at 1352.

235. *AMG Cap. Mgmt., LLC*, 141 S. Ct. at 1346–47.

236. *Id.* at 1347.

237. M. Sean Royall, Richard Cunningham & Olivia Adendorff, *A Watershed Moment? What Comes Next for the FTC in the Wake of AMG*, 35 ANTITRUST 103, 103 (2021).

violations and seek consumer redress.<sup>238</sup> Nevertheless, the FTC is permitted to pursue restitution for consumers under Section 5 and Section 19. For example, if a person or entity violates a rule, or if the FTC has issued a cease and desist order following an administrative proceeding, then the FTC can pursue an action in court “to redress injury to consumers or other persons, partnerships, and corporations resulting from the rule violations or the unfair or deceptive act or practice” under Section 19.<sup>239</sup> This relief includes, but is not limited to, “rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation or the unfair or deceptive act or practice.”<sup>240</sup> Since 13(b) is no longer an avenue for equitable monetary relief, the importance of Section 19 in providing this relief may be increasing.<sup>241</sup> For example, in 2022, a district court granted summary judgment for the FTC, which allowed for over \$3 million in monetary relief for consumers through Section 19.<sup>242</sup> Furthermore, the FTC still has its other tools for enforcement at its disposal, including warning letters, administrative proceedings, and judicial proceedings.<sup>243</sup> Overall, to effectively reduce greenwashing in the fashion industry, the FTC should revise the Green Guides to provide standards for “sustainability” claims and pursue greater enforcement of greenwashing offenders.

#### CONCLUSION

In conclusion, the rise in sustainability awareness, complex supply chains, and a lack of regulatory guidance have allowed greenwashing in the fashion industry to increase exponentially.<sup>244</sup> The proliferation of greenwashing in the

238. See Amy Widman, *Inclusive Agency Design*, 74 ADMIN. L. REV. 23, 41 (2022) (“The recent decision in *AMG* . . . weakened regulatory oversight of fraudulent actors in the consumer marketplace. . . . The combined effect of a weekend regulatory landscape and a formalist Supreme Court ruling makes it harder for the Federal Trade Commission to get money back in people’s pockets after they suffer fraud.”); Aiste Zalepuga, Note, *Updating the Federal Agency Enforcement Playbook*, 96 NOTRE DAME L. REV. 2083, 2084 (2021) (“[T]he FTC’s use of equitable remedies grew into a powerful tool to secure some of the agency’s most significant settlements, until federal courts stepped in to limit the FTC’s arsenal of equitable remedies.”). To ultimately restore the FTC’s full enforcement and deterrent capabilities, Congress may need to amend the FTC Act to explicitly provide for equitable monetary relief under Section 13(b).

239. 15 U.S.C. § 57b(a)–(b).

240. *Id.* § 57b(b).

241. Daniel Kaufman, *Taking Another Look at Courts Interpreting Section 19 of the FTC Act*, JD SUPRA (July 5, 2022), [https://www.jdsupra.com/legalnews/taking-another-look-at-courts-7576665/#:~:text=Section%2019%20provides%20that%20in,as%20the%20case%20may%20be\\_\[https://perma.cc/M8YE-UNEA\]](https://www.jdsupra.com/legalnews/taking-another-look-at-courts-7576665/#:~:text=Section%2019%20provides%20that%20in,as%20the%20case%20may%20be_[https://perma.cc/M8YE-UNEA]). In April 2022, a district court granted summary judgment for the FTC, which allows for over \$3 million in monetary relief for consumers. See *FTC v. QYK Brands LLC*, No. SACV 20-1431 PSG (KESx), 2022 WL 1090257, at \*8–9 (C.D. Cal. Apr. 6, 2022).

242. See *QYK Brands LLC*, 2022 WL 1090257, at \*8–9.

243. See *supra* text accompanying notes 95–99.

244. See *supra* Section I.

fashion industry harms consumers and is severely detrimental to the environment. Furthermore, greenwashing enforcement in the United States has been largely inadequate. Recently, there has been an increase in consumer class actions alleging greenwashing in the fashion industry,<sup>245</sup> signaling a greater willingness among consumers in the fashion industry to purchase products that are environmentally friendly and sustainably made, as well as a greater willingness to seek redress in court when they think a brand has misled them. While some of the litigation is still pending, these cases have found little success. Thus, the FTC should take a more active role by pursuing an industry-wide investigation of current marketing claims in the fashion industry and providing clear guidance on sustainability claims in the upcoming revision of the Green Guides. In the meantime, consumers may have to continue taking matters into their own hands through consumer class actions to curb greenwashing in the fashion industry and seek redress for their harms.

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245. See *supra* Section III.B.

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