

May 2017

Not Just Floundering Around: A Post-Regulatory Framework to Address Seafood Substitution

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Recommended Citation

Sage Friedman, *Not Just Floundering Around: A Post-Regulatory Framework to Address Seafood Substitution*, 22 Ocean & Coastal L.J. 195 (2017).

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NOT JUST FLOUNDERING AROUND: A POST-REGULATORY FRAMEWORK TO
ADDRESS SEAFOOD SUBSTITUTION

BY:

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ABSTRACT

Seafood substitution, the intentional or negligent mislabeling of fish and seafood, is estimated to cost American consumers over \$25 billion per year. According to some studies, more than a third of the five billion pounds of seafood consumed in the United States is mislabeled when sold. Despite being virtually omnipresent throughout every level the US food supply chain, seafood substitution is rarely prosecuted due to a woeful mismatch between the scale of the problem and the resources dedicated to enforcement. This comment explores the pervasiveness of the fish fraud problem and the inadequacies of the current response before developing a “crowd-sourced” enforcement model to realign the economics of the seafood industry in order to reduce or eliminate consumer-facing seafood substitution.

KEY TERMS

Seafood Substitution, Fish Fraud, Seafood Mislabeled, Food Inspection, Seafood Regulation, Consumer-Facing Fraud, Qui Tam Scheme, Economic Deterrence.

I. INTRODUCTION

Each year, nearly five billion pounds of seafood is consumed within the United States, equating to roughly fifteen pounds per capita, generating trillions in revenue across the supply chain and impacting the livelihood of fisherman, importers, wholesalers, retailers, processors and restaurants.¹ Lurking beneath the ocean's remarkable bounty is a potentially costly and dangerous truth – more than a third of seafood and seafood products sold may be mislabeled, either through innocent confusion or blatant fraud.² This mislabeling, commonly called seafood substitution, takes many forms – during importation when Asian catfish (swai) is labeled as grouper to avoid anti-dumping tariffs, at the wholesaler where frozen Pacific cod is sold as freshly caught local Atlantic cod to meet local demand, in the grocery store where farmed Atlantic salmon is labeled as higher-value wild-caught Coho, or on a sushi menu where the gastrointestinal distress inducing escolar is rechristened as “white tuna.”³ Seafood substitution is estimated to cost the American consumer over twenty-five billion dollars each year.⁴

Despite being virtually omnipresent throughout every level the US food supply chain, seafood substitution is rarely prosecuted due to a woeful mismatch between the scale of the problem and the resources dedicated to enforcement. The National Oceanic and Atmospheric Administration (“NOAA”), which has the primary responsibility of enforcing the seafood

¹ *Nearly Half of U.S. Seafood Wasted*, THE MARITIME EXECUTIVE (Jan. 1, 2017), <http://maritime-executive.com/article/nearly-half-of-us-seafood-wasted>; *Basic Questions about Aquaculture*, NOAA FISHERIES, http://www.nmfs.noaa.gov/aquaculture/faqs/faq_aq_101.html#4howmuch (last visited Jan. 1, 2017).

² Kimberly Warner, Walker Timme, Beth Lowell & Michael Hirshfield, *Oceana Study Reveals Seafood Fraud Nationwide*, OCEANA.ORG at 1, 10, 61, 63 (2013), http://oceana.org/sites/default/files/reports/National_Seafood_Fraud_Testing_Results_FINAL.pdf [hereinafter OCEANA Study 2013] (21 states had mislabeled seafood using 1,215 samples from a variety of retail establishments. There was a wide variation of seafood mislabeling among the cities tested: 21% in Portland, 35% in Kansas City, 39% in New York, 18% in Boston, 26% in Washington DC, 38% in South Florida, 36% in Denver, 25% in Atlanta, 56% in Pittsburgh, 32% in Chicago, 49% in Austin/Houston, 38% in Northern California, 18% in Seattle, 52% in Southern California and 33% nationwide.).

³ Nicole Lou, *Bait and Switch: The Fraud Crisis In the Seafood Industry*, THE ATLANTIC (Mar. 19, 2015), <http://www.theatlantic.com/business/archive/2015/03/bait-and-switch/388126/> [hereinafter Lou, *Bait and Switch*]; Nicole Danna, *That “Grouper” is Really Mackerel: Seafood Fraud Rampant in Florida*, NEW TIMES BROWARD PALM BEACH, July 24, 2012, <http://www.browardpalmbeach.com/restaurants/that-grouper-is-really-mackerel-seafood-fraud-rampant-in-florida-6389152>; Jenn Abelson & Beth Daley, *On the Menu, but not on your Plate*, THE BOSTON GLOBE, Oct. 23, 2011, <http://www.bostonglobe.com/2011/10/22/dnatest/NDbXGXdPR6O37mXRSVPGIL/story.html> [hereinafter Abelson & Daley, *On the Menu*]; Beth Daley & Jenn Abelson, *Fish Supply Chain Open to Abuses*, THE BOSTON GLOBE, Oct. 24, 2011, <https://www.bostonglobe.com/2011/10/23/suppliers-art/ASVzh9iDn1rTNuMbS2beFO/story.html> [hereinafter Daley & Abelson, *Fish Supply Chain Open to Abuse*].

⁴ Lou, *Bait and Switch*, *supra* note 3.

mislabeling provisions of the Lacey Act⁵ has less than one hundred fisheries investigators on staff.⁶ Meanwhile, the Food & Drug Administration (“FDA”), which holds enforcement authority under the Food & Drug Act, inspects less than two-percent of imported seafood and fails to address economic fraud in any meaningful way.⁷ With such limited resources available, Federal enforcement tends to focus on only the largest scale of fish fraud, targeting multi-million dollar import and origin labeling frauds, particularly those where foreign caught seafood is relabeled as US caught or promoted as being from a distinctive US fishery.⁸

While possibly justifiable given the lack of resources, these enforcement priorities fail to address the vast majority of seafood substitutions, especially at the retail and food service levels, leaving consumers across the country exposed to fraudulent fish.⁹ However, in response to growing awareness among consumers and industry watchdog groups, the Presidential Task Force on Combating Illegal, Unreported, and Unregulated Fishing and Seafood Fraud released a number of broad recommendations aimed at combating seafood substitution through enhanced cooperation and information sharing between enforcement agencies, expanded regulation of seafood marketing by providing clear guidance on acceptable names and labels for marketing,¹⁰

⁵ 16 U.S.C. § 3372(d) (2016) (“It is unlawful for any person to make or submit any false record, account, or label for, or any false identification of any fish, wildlife, or plant which has been, or is intended to be (1) imported, exported, transported, sold, purchased, or received from any foreign country; or (2) transported in interstate or foreign commerce.”); *see also*, *Fraud*, FISHWATCH U.S. SEAFOOD FACTS, <http://www.fishwatch.gov/eating-seafood/fraud> (last visited Jan. 1, 2017) [hereinafter *Fraud*, FISHWATCH U.S. SEAFOOD FACTS].

⁶ Catherine Rentz, *Seafood Fraud Cases Plummet as NOAA Cuts Investigators*, THE PORTLAND PRESS HERALD, Dec. 11, 2014, <http://www.pressherald.com/2014/12/11/seafood-fraud-cases-plummet-as-noaa-cuts-investigators/>.

⁷ Lou, *Bait and Switch*, *supra* note 3; U.S. GOVERNMENT ACCOUNTABILITY OFFICE, REPORT TO THE RANKING MEMBER, SUBCOMMITTEE ON OCEANS, ATMOSPHERE, FISHERIES, AND COAST GUARD, COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION, U.S. SENATE: SEAFOOD FRAUD, 5-6 (2009), <http://www.gao.gov/assets/290/287425.pdf> [hereinafter GAO SEAFOOD FRAUD].

⁸ *E.g.*, Peter Dujardin & Tamara Dietrich, *Feds Investigating Casey’s Seafood on Mixing Atlantic Blue Crab with Imports*, DAILY PRESS (June 25, 2015), <http://www.dailypress.com/news/crime/dp-nws-federal-charges-peninsula-20150627-story.html>; Office of Public Affairs, *North Carolina Seafood Processor and Distributor Sentenced for Mislabeling Shrimp*, U.S. DEPARTMENT OF JUSTICE (Aug. 11, 2015), <http://www.justice.gov/opa/pr/north-carolina-seafood-processor-and-distributor-sentenced-mislabeling-shrimp>; *Texas Company Sentenced for Passing Off Mexican Shrimp As U.S. Caught*, NOAA FISHERIES (Sep. 24, 2015), http://www.nmfs.noaa.gov/ole/newsroom/stories/15/24_texas_company_sentenced_for_passing_off_mexican_shrimp_as_u.s.-caught.html.

⁹ OCEANA Study 2013, *supra* note 2, at 1-2.

¹⁰ *See generally* *The Seafood List - FDA’s Guide to Acceptable Market Names for Seafood Sold in Interstate Commerce*, U.S. FOOD AND DRUG ADMINISTRATION, <http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/Seafood/ucm113260.htm> (last visited Jan. 3, 2017) [hereinafter FDA Seafood List] (“This guidance is intended to provide guidance to industry about what FDA considers to be acceptable market

and plans to establish a comprehensive international origin and processing traceability program.¹¹ Unfortunately, in the current US political climate, proposals that require legislative approval for additional resources or regulatory controls are, at best, unlikely to proceed.

Faced with a permanent and terminal disconnect between the resources allocated to enforcement and the scale of the seafood substitution problem there is an opportunity to augment traditional command and control regulation with creative solutions that leverage potential liability to induce change. This comment will propose the construction of a post-regulatory enforcement regime targeting consumer-facing seafood fraud, primarily built from tested legal innovations used in other areas of the law, such as civil rights litigation, strict liability statutes, and tax enforcement. The goal is to create a statutory mechanism that: (1) crowd sources inspection to the local consumer or consumer group; (2) organizes cases into an efficient scale for discovery and adjudication; (3) differentiates bad actors from the merely sloppy or easily bamboozled; and (4) imposes a severe enough penalty such that it aligns the economics of the industry in order to minimize mislabeling throughout the supply chain.

This comment will begin in Section II by analyzing the scope of the problem, the current state of the laws and the inadequacy of resources dedicated to addressing seafood substitution. The comment will then review the motivators of seafood substitution as well as recent enforcement actions by NOAA and the US Department of Justice. Section III will clearly define the goals for any proposed statutory or regulatory changes and review the metrics for success before analyzing the applicability of legal innovations from other areas of law (strict liability, private enforcement, fee shifting, *qui tam* lawsuits, and insurance as quasi-regulator). Section IV will restate the chosen elements of the proposed scheme, and section V will speculate as to regime's impact on typical enforcement scenarios.

II. THE SCOPE OF THE PROBLEM AND THE STATE OF THE LAW

A. *The Problem*

Seafood substitution is not a new phenomenon. For example, the use of surimi, a fish paste that can imitate crab, lobster and other shellfish, dates back centuries in Japan and is used to this day,¹² sometimes transparently,¹³ at other times not.¹⁴ Over the past decade, however,

names for seafood sold in interstate commerce and to assist manufacturers in labeling seafood products. . . FDA's guidance documents, including this guidance, do not establish legally enforceable responsibilities. Instead, guidances describe the Agency's current thinking on a topic and should be viewed only as recommendations. . .").

¹¹ PRESIDENTIAL TASK FORCE ON COMBATING IUU FISHING AND SEAFOOD FRAUD, at 3-4 (March 2015), http://www.nmfs.noaa.gov/ia/iuu/noaa_taskforce_report_final.pdf.

¹² *Seafood Q&A: What is Surimi?*, SEAFOODHEALTHFACTS.ORG, <http://www.seafoodhealthfacts.org/faq/what-surimi> (last visited Jan. 9, 2017).

¹³ See e.g., *Simply Surimi, Flake Style*, TRANSOCEAN PRODUCTS, <http://trans-ocean.com/our-products/simply-surimi/flake-style/> (last visited Jan. 9, 2017) ("This great-tasting seafood is certified gluten-free and certified sustainable by MSC and heart healthy by the American Heart Association.").

concerted efforts by government agencies, the traditional press, and non-governmental organizations (“NGOs”) have revealed that mislabeling is endemic across the U.S. seafood supply chain, exceeding thirty-percent in all seafood nationally, with higher rates of fraud in several major metropolitan areas.¹⁵ The National Marine Fisheries Service (“NMFS”) voluntary seafood inspection program also documents a forty-percent rate of mislabeling among submitted products.¹⁶ While direct extrapolation from these studies is slightly fraught,¹⁷ they yield an estimate that more than one and a half billion pounds of mislabeled seafood moves through the U.S. market annually.¹⁸

Although this comment focuses on the economic impact of seafood substitution, and the estimated twenty-five billion dollars in economic cost to U.S. consumers and businesses,¹⁹ rampant levels of seafood substitution impact other areas of policy. Seafood mislabeling negatively affects environmental concerns by undercutting fisheries management through misreported statistics on fish consumption, which can lead to inaccurate estimates being used in setting catch limits.²⁰ Similarly, mislabeling can confuse consumers into thinking endangered fisheries are healthy and abundant, discouraging them from adjusting their purchasing habits towards more sustainable sources.²¹

Widespread seafood mislabeling also implicates food safety. For example, tilefish is often substituted for grouper, but has a much higher level of mercury accumulation.²² Inaccurate labeling could easily result in overconsumption of mercury among pregnant woman or other populations subject to enhanced risk. Moreover, marketing escolar as “white tuna” or “butterfish” exposes diners to explosive gastrointestinal distress from indigestible *gempylotoxin*

¹⁴ See e.g., Felicity Lawrence, *Diner is left shellshocked over crab dish*, THE GUARDIAN, May 2, 2014, <http://www.theguardian.com/world/2014/may/02/diner-shellshocked-crab-dish-frankie-bennys-surimi>.

¹⁵ OCEANA Study 2013, *supra* note 2 (39% in New York, 38% in South Florida, 36% in Denver, 56% in Pittsburgh, 32% in Chicago, 49% in Austin/Houston, 38% in Northern California, 52% in Southern California and 33% nationwide); Stephen Wagner, Note, *When Tuna Still Isn't Always Tuna: Federal Food Safety Regulatory Regime Continues to Inadequately Address Seafood Fraud*, 20 OCEAN & COASTAL L.J. 111, 113-15 (2015).

¹⁶ Gill Paterson, et al, *Seafood Fraud in the United States: Current Science and Policy Options*, UNIV. OF MINNESOTA FOOD POLICY RESEARCH CENTER (Feb. 2015), <https://www.foodpolicy.umn.edu/policy-summaries-and-analyses/seafood-fraud-united-states-current-science-and-policy-options>; see generally GAO SEAFOOD FRAUD, *supra* note 7.

¹⁷ The conglomeration of fraud data and its extension to the overall supply of seafood is not strictly a haddock to haddock comparison—most of the NGO and press reports focus on retail or restaurant level sales while government enforcement efforts are generally focused on importers, distributors and wholesalers. Extrapolation across categories may underestimate the actual incidence of seafood mislabeling in any given species or product type.

¹⁸ See also Lou, *Bait and Switch*, *supra* note 3; OCEANA Study 2013, *supra* note 2; Paterson, *supra* note 16.

¹⁹ Lou, *Bait and Switch*, *supra* note 3.

²⁰ Wagner, *supra* note 15, at 117.

²¹ *Id.*

²² *Id.*

(wax esters) in the meat of the fish.²³ Extensive use of antibiotics and chemical additives in aquaculture becomes a more dangerous proposition when consumers cannot distinguish wild caught seafood (such as salmon or shrimp) from similar farmed varieties at the restaurant or grocery store.²⁴ This situation is even more concerning because many exporting countries provide minimal or no oversight of their aquaculture industry.²⁵

B. Enforcement Resources and the Current State of the Law

Unfortunately the many studies of seafood substitution provide only minimal evidence regarding intention and responsibility.²⁶ While researchers tend to blame foreign producers and importers for the bulk of seafood fraud, substitution has been documented at every level of the U.S. supply chain.²⁷ Substitution, from negligent mislabeling to blatant fraud, is further enabled by an underfunded patchwork of regulatory and enforcement regimes at the federal and state levels. Federally, seafood is regulated by NOAA, the Food & Drug Administration (“FDA”), U.S. Customs & Border Protection (“CBP”), U.S. Department of Agriculture (“USDA”), and the Federal Trade Commission (“FTC”), but a lack of cross agency coordination is frequently cited as one of the barriers to effective prevention and enforcement.²⁸

1. Primary Federal Agencies Tasked with Enforcement

Primary management of U.S. fisheries and ocean resources resides with the NOAA National Marine Fisheries Service (“NMFS”) under the U.S. Department of Commerce.²⁹ In addition to managing the coastal fisheries, NMFS and the NOAA Office of Law Enforcement (“OLE”) investigate noncompliance from seafood mislabeling to stolen lobster traps, and refer

²³ *Use Caution When Eating Escolar*, THE KITCHN, <http://www.thekitchn.com/use-caution-when-eating-escola-66602> (last visited Oct. 24, 2015) (Escolar is banned in Japan and Italy, and requires a warning label in Canada, Sweden and Demark). The author would like to note that escolar is delicious in taste and exceptional in texture, it is the consumption of more than a small portion that produces the gastrointestinal concerns. The choice of whether or not to eat escolar, also called “ex-lax” fish, and risk an embarrassing and uncomfortable reaction, should be the right of a fully informed consumer.

²⁴ Lou, *Bait and Switch*, *supra* note 3.

²⁵ *Id.*

²⁶ Abelson & Daley, *On the Menu*, *supra* note 3; Daley & Abelson, *Fish Supply Chain Open to Abuse*, *supra* note 3; Lou, *Bait and Switch*, *supra* note 3; Danna, *supra* note 3; *see generally* OCEANA Study 2013, *supra* note 2.

²⁷ Abelson & Daley, *On the Menu*, *supra* note 3; Daley & Abelson, *Fish Supply Chain Open to Abuse*, *supra* note 3; Danna, *supra* note 3; GAO SEAFOOD FRAUD, *supra* note 7; Lou, *Bait and Switch*, *supra* note 3; OCEANA Study 2013, *supra* note 2.

²⁸ GAO SEAFOOD FRAUD, *supra* note 7, at 2-3; Lou, *Bait and Switch*, *supra* note 3; PRESIDENTIAL TASK FORCE ON COMBATING IUU FISHING AND SEAFOOD FRAUD *supra* note 11, at 24.

²⁹ *Our Mission*, NOAA FISHERIES, http://www.nmfs.noaa.gov/aboutus/our_mission.html (last visited Jan 10, 2017).

seafood substitution cases to the Department of Justice for prosecution under the Lacey Act³⁰ or the Magnuson-Stevens Fisheries Conservation and Management Act.³¹ NOAA NMFS regulates all U.S. Coastal Fisheries from three miles out to two hundred miles offshore (or nine miles to two hundred miles off various parts of Texas), but has fewer than 100 agents for the entire country.³² Despite being responsible for the inspection and safety of billions of pounds of seafood, NMFS has cut the number of field investigators from 147 in 2008 to a mere ninety-three in 2014.³³ Over the same time period, NOAA records reflect a precipitous seventy-five percent drop in prosecutions for seafood fraud, from 793 to 215.³⁴

Additionally, while the FDA is responsible for the overall safety of the U.S. food supply, it does not regulate most meat products, which are under the purview of the USDA (supplemented by equivalent state inspection programs), and takes a very limited role in combating seafood fraud.³⁵ The FDA has 1,100 inspectors on staff and is responsible for 167,000 processing facilities, which are inspected “routinely” in relation to the risks presented.³⁶ “Routinely” may mean once every ten years.³⁷ Moreover, the FDA is estimated to inspect less than two-percent of imported seafood and has generally failed to bring a concerted effort to address economic fraud.³⁸ However, that agency does maintain the Seafood List, which cross-references official species names against vernacular and marketing names for seafood. While the Seafood List does not carry any legal authority, it does provide guidance about what the FDA considers acceptable naming and marketing conventions.³⁹ For example, a search for “snapper” yields 56 species of fish that the FDA considers marketable under the name “snapper,” including such fish as Grey Snapper, Crimson Jobfish, and Twinspot Snapper.⁴⁰

2. The Lacey Act & Other Federal Proposals (SAFE Seafood Act)

³⁰ The Lacey Act, 16 U.S.C. §§ 3371-3378 (2016) (Conservation law passed in 1900 that creates civil and criminal penalties for interstate trading in prohibited plants and animals, as well as trading in any wildlife that has been illegally harvested in its origin jurisdiction. Also provides criminal penalties for intentional mislabeling of wildlife and any derived products.).

³¹ Magnuson-Stevens Fisheries Conservation and Management Act, 16 U.S.C. §§ 1801-1884 (2016) (Passed in 1976 the Magnuson-Stevens Act regulates US fisheries for long-term biological and economic sustainability.).

³² Rentz, *supra* note 6.

³³ *Id.*

³⁴ *Id.*

³⁵ GAO SEAFOOD FRAUD, *supra* note 7, at 2-3.

³⁶ *FDA Basics: How often does FDA inspect food manufacturing facilities?* U.S. FOOD AND DRUG ADMINISTRATION, <http://www.fda.gov/AboutFDA/Transparency/Basics/ucm194242.htm> (last visited Oct 16, 2015).

³⁷ Nathan M. Trexler, Note, “Market” Regulation: Confronting Industrial Agriculture’s Food Safety Failures, 17 WIDENER L. REV. 311, 323 (2011).

³⁸ GAO SEAFOOD FRAUD, *supra* note 7, at 2, 5, 13.

³⁹ FDA Seafood List, *supra* note 10.

⁴⁰ *Id.* (note that only one singular fish, *Lutjanus campechanus*, is marketable as “red snapper” according to the Seafood List).

The Lacey Act, originally passed in 1900, creates civil and criminal penalties for those trading in prohibited plants and wildlife and makes it a crime to sell or transport any animals or plants that have been illegally harvested under state, federal or foreign law.⁴¹ The original intention of the Act was to address poaching and the preservation of game animals by making it a federal crime to poach in one state and sell the catch across state lines.⁴² This enhancement of existing state laws attempted to remove any viable interstate profit from the activity. In addition to prohibiting the transport and sale of illegally harvested wildlife and plants, the Lacey Act also provides criminal penalties for mislabeling:

It is unlawful for any person to make or submit any false record, account, or label for, or any false identification of, any fish, wildlife, or plant which has been, or is intended to be (1) imported, exported, transported, sold, purchased, or received from any foreign country; or (2) transported in interstate or foreign commerce.⁴³

Further, depending on the value of the mislabeled fish at issue, the Act provides civil fines of up to \$10,000, and criminal penalties include up to five years of imprisonment as well as fines of \$350,000 for individuals and \$500,000 for organizations.⁴⁴ While a robust and flexible tool, the Lacey Act is used almost exclusively in enforcement against importers, wholesaler/distributors, and fishermen. The Lacey Act does not, and cannot, address retail or restaurant labeling, and thus leaves enforcement of these primarily intra-state commerce issues to local authorities under applicable state fraud, mislabeling, and consumer protection statutes.

In response to media and NGO investigations of seafood substitution,⁴⁵ Rep. Edward Markey introduced the Safety and Fraud Enforcement for Seafood Act (“SAFE Seafood Act”) in 2012 and 2013.⁴⁶ The SAFE Seafood Act would have imposed stricter labeling requirements (species, acceptable name, origin, harvest method, date of catch, weight, processing location, farmed status, fresh/frozen status), moved responsibility for maintaining the Seafood List from FDA to HHS, encouraged inter agency cooperation, affirmed FDA’s primacy on inspections and required the FDA to begin addressing economic fraud as part of its existing inspection scheme.⁴⁷ The SAFE Act would also have provided enforcement powers and penalties in line with the Magnuson-Stevens Fishery Conservation and Management Act §§ 308 through 311.⁴⁸ The 2013

⁴¹ 16 U.S.C. §§ 3371-3378 (2016).

⁴² Rebecca F. Wisch *Overview of the Lacey Act (16 U.S.C. §§ 3371-3378)*, MICHIGAN STATE UNIVERSITY COLLEGE OF LAW ANIMAL LEGAL & HISTORICAL CENTER, <https://www.animallaw.info/article/overview-lacey-act-16-usc-ss-3371-3378> (last visited Jan 7, 2017).

⁴³ 16 U.S.C. § 3372(d) (2012).

⁴⁴ 16 U.S.C. §§ 3373(a)(1), (d)(3) (2012); 18 U.S.C. §§ 3771(b)(3), (c)(3) (2012).

⁴⁵ See *Rep. Markey Introduces SAFE Seafood Act to Combat Fish Fraud*, FOOD SAFETY NEWS (Mar 8, 2013), http://www.foodsafetynews.com/2013/03/rep-market-introduces-safe-seafood-act-to-combat-fish-fraud/#.Vxf_QjArKM9.

⁴⁶ Safety and Fraud Enforcement for Seafood Act, H.R. 6200, 112th Cong. (2012) (reintroduced on Mar. 6, 2013 as H.R. 1012); Safety and Fraud Enforcement for Seafood Act, S. 520, 113th Cong. (2013).

⁴⁷ *Id.*

⁴⁸ *Id.*

version of the SAFE Seafood Act was referred to multiple committees within the House of Representatives, nevertheless, no further action was taken.⁴⁹

3. Presidential Task Force on IUU Fishing

Created in 2014, the Presidential Task Force on Combating Illegal, Unreported, and Unregulated (“IUU”) Fishing and Seafood Fraud brought together thirteen federal agencies⁵⁰ to provide recommendations for the establishment of a “comprehensive framework of integrated programs to combat IUU fishing and seafood fraud that emphasizes the greatest need.”⁵¹ The task force produced fifteen broad recommendations to combat IUU fishing and seafood fraud at the international level by strengthening enforcement tools, enhancing inter-agency and Federal-State coordination and information sharing, and increasing traceability requirements.⁵² While all of the recommendations would have at least a collateral impact on reducing seafood substitution, six are particularly relevant to combating the consumer-facing economic fraud this comment is most concerned with: #8 expanding enforcement information sharing across key agencies/departments tasked with enforcement; #10 providing clearer industry guidance on acceptable marketing names and coordinating the FDA Seafood List with Harmonized Tariff Schedule (HTS) codes for imported seafood products to reduce confusion; #11 enhanced cooperation between federal agencies and State/Local enforcement using tools like NOAA’s Cooperation Enforcement Program, FDA state food safety inspection contracts, and increased fraud detection and prosecution training for state agencies; #12 expanding enforcement resources and law enforcement tools for with existing regulatory authority; #14 and # 15 develop and

⁴⁹ 159 CONG. REC. H1319 (daily ed. Mar. 6, 2013) (statement of Mr. Markey) (“A bill to strengthen Federal consumer protection and product traceability with respect to commercially marketed seafood, and for other purposes; to the Committee on Energy and Commerce, and in addition to the Committees on Agriculture, Natural Resources, and Ways and Means, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned.”); 159 CONG. REC. S1592 (daily ed. Mar. 11, 2013) (statement of Mr. Begich) (“A bill to strengthen Federal consumer protection and product traceability with respect to commercially marketed seafood, and for other purposes; to the Committee on Commerce, Science, and Transportation.”).

⁵⁰ Presidential Task Force on Combating IUU Fishing and Seafood Fraud members agencies (and sub agencies): Department of Agriculture, Department of Commerce (including NOAA), Department of Defense (Navy), Department of Health and Human Services (including FDA), Department of the Interior (including U.S. Fish and Wildlife Service), Department of Justice, Department of State (including the Bureau of Oceans and International Environmental and Scientific Affairs), Federal Trade Commission, U.S. Agency for International Development and the Executive Office of the President (including the Council on Environmental Quality, National Security Council, Office of Management and Budget, Office of Science and Technology Policy and the Office of the U.S. Trade Representative).

⁵¹ PRESIDENTIAL TASK FORCE ON COMBATING IUU FISHING AND SEAFOOD FRAUD *supra* note 11, at 3.

⁵² *Id.* at 10-39.

establish an international traceability program to track seafood from harvest through its entry into the stream of U.S. commerce.⁵³

Indeed, the traceability program detailed in the task force's report has been promulgated into a final rule creating the Seafood Traceability Program, which was published in December 2016, and will take effect in 2018.⁵⁴ The program requires the importer of record for certain species of seafood that are commonly mislabeled or harvested illegally⁵⁵ to receive a permit from NMFS, as well as to electronically file species, harvest event, point of origin (harvest area or aquaculture facility), processing information, and landing data for each shipment prior to entry.⁵⁶ Importers under this program may be subject to field audits, and are therefore also required to retain both electronic and paper records pertaining to each shipment for two-years.⁵⁷

These heightened documentary requirements will certainly help with NOAA OLE's existing enforcement priorities, but the Seafood Traceability Program remains an incomplete solution. While the Program applies to some of the most frequently substituted species, its coverage is far from comprehensive and only includes imported fish products at the time of entry. Thus, it provides no new protections for consumers of domestically harvested or processed seafood and continues. Moreover, even with increased traceability, national enforcement is still left to fewer than a hundred agents.

Additional administrative and legislative action will be required to actualize the remainder of the Task Force's recommendations, but it remains unclear how the Trump administration will allocate resources to fight economic fraud in general, or seafood substitution in particular. Given Congress's inability to pass even routine funding bills in a timely manner, executive leadership on the issue is a must. Unfortunately, barring some surge in personal interest from President Trump, or the Secretaries of Commerce or HHS, the Task Force's comprehensive recommendations are likely to remain hostage to Washington's legislative dysfunction and deregulatory zeal.

4. State Laws and Proposals

Reacting to public concern and increased press coverage of seafood fraud, the legislatures of New York and Massachusetts attempted to address seafood substitution at the retail level in 2013 and 2014, only to have the proposed bills die quietly in committee.⁵⁸ Virtually identical

⁵³ *See id.*

⁵⁴ *See generally* Magnuson-Stevens Fishery Conservation and Management Act; Seafood Import Monitoring Program, 81 Fed. Reg. 88975-02 (Dec. 9, 2016) (to be codified as 50 C.F.R. Parts 300 and 600.).

⁵⁵ *Id.* (to be codified as 50 C.F.R. § 300.324(a)(2)) (“Atlantic Cod; Pacific Cod; Blue Crab; Red King Crab; Dolphinfish (Mahi Mahi); Grouper; Red Snapper; Sea Cucumber; Sharks; Swordfish; Tunas (Albacore, Bigeye, Skipjack, Yellowfin, and Bluefin).”).

⁵⁶ *Id.* (to be codified as 50 C.F.R. § 300.324(b)(3)).

⁵⁷ *Id.* (to be codified as 50 C.F.R. § 300.324(d)).

⁵⁸ H.B. 1946, 188th Gen. Ct. (Mass. 2013) (reported favorably by Joint Committee on Public Health, referred to Committee on Ways and Means July 22 2013); A.B. 9620, 237th Leg. Sess. (N.Y. 2014) (Introduced and referred to the Agriculture Committee on May 13, 2014).

bills were reintroduced in both states during the 2015 and 2016 sessions, where New York's finally passed.⁵⁹ Massachusetts' third attempt remains parked in committee awaiting attention.⁶⁰

New York's law, which took effect in January 2017, is quite limited, but explicitly prohibits the marketing of escolar as "white tuna."⁶¹ Under the law, restaurants, retailers, and wholesalers mislabeling the dreaded "ex-lax fish" would face a \$600 fine for the first offense, with multiple offenses rising to \$1,200 per day of violation, and is enforced by the New York Department of Agriculture and Markets.⁶² It is not yet clear if the newly implemented provision will yield any noticeable enforcement action or change in restaurant marketing practices.

In Massachusetts, the most recent draft of the proposed bill bans the sale of escolar completely, fining purveyors \$400 for a first offense, and \$800 for further violations.⁶³ The proposed legislation also provided penalties for mislabeling local favorites, specifically Atlantic Cod, Atlantic Halibut, Grey Sole, and Red Snapper, and the mislabeling of Pacific Cod which is frequently used as a substitute.⁶⁴ Fines would start at \$800 for the first offense and \$1,600 for additional violations, along with the possible revocation of the fraudulent purveyor's commercial licenses.⁶⁵ Inspections would be handled by the Department of Public Health and the Department of Fish and Game.⁶⁶

Unlike states that have offered solutions targeted at seafood substitution, Florida has implemented a broad statute directly targeted at restaurant and retail mislabeling which has been applied to fish fraud. Florida Statute § 509.292 sets forth:

An operator may not knowingly and willfully misrepresent the identity of any food or food product to any of the patrons of such establishment. The identity of food or a food product is misrepresented if:

- (a) The description of the food or food product is false or misleading in any particular;
- (b) The food or food product is served, sold, or distributed under the name of another food or food product; or

⁵⁹ A.B. 1231, 238th Leg. Sess. (N.Y. 2015) (signed by governor on Sep. 9, 2016); H.B. 1939, 189th Gen. Ct. (Mass. 2015) (Joint Committee on Public Health reviewed as part of hearing on Sep. 17, 2015, report not yet available); H.B. 4066, 189th Gen. Ct. (Mass. 2016).

⁶⁰ H.B. 4066, 189th Gen. Ct. (Mass. 2016) (referred to House Committee on Bills in the Third Reading).

⁶¹ N.Y. AGRIC. & MKTS. LAW § 201-i(2) (2016) ("No person, wholesaler, distributor, retail food store or food service establishment shall willfully sell, offer for sale, distribute, import, or export the species of fish commonly known as escolar or oilfish under the name tuna, albacore tuna, white tuna, or any other species name, common or scientific, other than the recognized common or scientific species names for such species defined in subdivision one of this section."); *see also* N.Y. AGRIC. & MKTS. LAW § 201-i(1)(c) (2016) ("'white tuna' shall mean the fish species known as albacore tuna, long fin tuna, or the scientific species name *thunnus alalunga*.").

⁶² N.Y. AGRIC. & MKTS. LAW § 39 (2016).

⁶³ H.B. 4066, 189th Gen. Ct. (Mass. 2016).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

(c) The food or food product purports to be or is represented as a food or food product that does not conform to a definition of identity and standard of quality if such definition of identity and standard of quality has been established by custom and usage.⁶⁷

§ 509.292 violations carry penalties of up to \$800,⁶⁸ and are proven by comparing invoices and inventory with the menu, rather than the potentially costly DNA testing used in most NGO studies. Despite this, Florida has been comparatively aggressive in enforcement and between 2006 and 2012, 1,400 citations were issued for violation of the food code by restaurants.⁶⁹ Unfortunately, the scale of the violations makes clear that the penalty is not strong enough to deter the profit motive behind the fraud.

5. Relevant Maine Statutes

Intentional seafood mislabeling by restaurants, retailers, or wholesalers would appear to meet the elements of Deceptive Business Practices, a class D crime in Maine: “(1) A person is guilty of deceptive business practices if, in the course of engaging in a business, occupation or profession, he intentionally: (D) Sells, offers or exposes for sale any commodity which is adulterated or mislabeled.”⁷⁰ Further, Maine’s law on the labeling of shellfish states:

A person who is authorized to hold or possess shellfish under chapter 623 may not label shellfish sold alive using the words “product of Maine” or any other similar words or terms that misleadingly suggest the shellfish was taken from the waters of this State unless the shellfish was in fact taken from the waters of the State.

The sale of shellfish labeled in violation of this section is a deceptive business practice in violation of Title 17-A, section 901.⁷¹

The seafood mislabeling provision was passed in 2011 specifically to address concerns that shellfish from out of state was being processed in Maine and then relabeled as a native product and sold to tourists.⁷² While the statute is only on point for a very specific type of seafood substitution, it is a simple extrapolation that other instances of intentional seafood mislabeling could fall under Deceptive Business Practices, with two major caveats.

First, it provides authority only for the identification of shellfish by its place of origin (i.e. from Maine or not).⁷³ No other type of seafood is addressed by the statute, so extending Deceptive Business Practices further may be more problematic than is obvious. Recall that the

⁶⁷ FLA. STAT. ANN. § 509.292(1)(a)-(c) (LexisNexis through 2016 Reg. Sess.).

⁶⁸ See FLA. STAT. ANN. §§ 775.082 and 775.083 (LexisNexis through 2016 Reg. Sess.).

⁶⁹ Danna, *supra* note 3.

⁷⁰ ME. REV. STAT. tit. 17-A, § 901 (2016).

⁷¹ ME. REV. STAT. tit. 12, § 6005 (2016).

⁷² SHELLFISH--BRANDS, MARKS AND LABELS, 2011 Me. Legis. Serv. Ch. 234 (H.P. 1035) (L.D. 1409).

⁷³ ME. REV. STAT. tit. 12, § 6005.

FDA Seafood List does not have authority to create enforceable obligations,⁷⁴ moreover, there is no comprehensive state equivalent in Maine. While Maine could bolster enforcement, it may first require legislative action to create legal authority for seafood naming conventions. One may think that if ever there was something Maine's elected officials could agree on it would be protecting Maine's brand and the livelihood of local fishermen by providing enforcement against fraud "from away."

Yet, despite this impulse, the shellfish labelling statute remains a symbolic law with minimal teeth and limited and unpublicized enforcement.⁷⁵ Maine's former colonial master, Massachusetts, which has a similar cultural history glorifying the nobility and economic vitality of fishing (particularly fishing for Atlantic Cod), serves as a similarly contrary example. The Massachusetts Legislature is poised for its third consecutive failure to adopt anti-substitution laws to protect local specialties (Atlantic Cod, Atlantic Halibut, Grey Sole, and Red Snapper).⁷⁶

Second, given the minimal monetary damages from any individual instance of a consumer-facing seafood mislabeling, it is unlikely that Maine's law enforcement community will prioritize the issue without further prompting. What branch of law or code enforcement is responsible for detecting seafood substitution? Is it law enforcement such as Maine State Troopers or local police departments? It seems politically laughable to even consider asking such groups to prioritize economic fraud over more general public safety concerns. Could enforcement be handled by municipal code officers or perhaps the Department of Health? Would it be feasible? Would it be appropriate to task health inspectors with anti-fraud enforcement? Even in Portland, Maine's most populous city, and culinary hot spot,⁷⁷ the approximately 800 restaurants are subject to food service inspections less than once every six months on average.⁷⁸ Currently the inspection form contains a single relevant item under good retail practices, and food inspection, asking only if "Food properly labeled; original container."⁷⁹

6. The Enforcement Gap

Given that Federal agencies have limited enforcement resources to dedicate to prosecuting seafood substitution, a focus on the largest malefactors makes some degree of

⁷⁴ FDA Seafood List, *supra* note 10.

⁷⁵ No examples of enforcement have been obtained despite a reasonably exhaustive search.

⁷⁶ H.B. 4066, 189th Gen. Ct. (Mass. 2016); H.B. 1939, 189th Gen. Ct. (Mass. 2015); H.B. 1946, 188th Gen. Ct. (Mass. 2013).

⁷⁷ Patty Lee, *The 10 Hottest Restaurants in Portland, Maine*, ZAGATS, (July 8, 2016), <https://www.zagat.com/b/the-10-hottest-restaurants-in-portland-maine>; *See also*, Mathew Moragan, *Take to the High Seas in Portland, Maine*, THE NEW YORK TIMES MAGAZINE (Aug. 19, 2015), <http://nymag.com/travel/weekend-escapes/portlandmaine2015/>.

⁷⁸ *Food Service Establishment Inspection Reports*, PORTLAND MAINE, <http://www.portlandmaine.gov/640/Food-Service-Establishment-Inspection-Re> (last visited Nov 28, 2015) (diner complaints will prompt additional inspections, inspection failure also generates a remedial follow-up inspection).

⁷⁹ *See e.g.* 3 *Buoys Seafood Shanty & Grill*, STATE OF MAINE HEALTH INSPECTION REPORT (Nov 29, 2015), http://24.39.51.187/hhs/reports/3%20BUOYS%20SEAFOOD%20SHANTY%20&%20GRILL_81915.pdf.

economic sense as an efficient use of those resources. However, by only prosecuting multi-million dollar examples of fraud, the government is leaving the vast majority of consumer facing fish frauds undetected and allowing most fraudsters to operate essentially without consequence. Individual retailers and restaurants face minimal fines in a few jurisdictions, but for most of the country the penalties for being caught in even the most egregious of fish frauds is a bit of public shaming by the local press that appears to be quickly forgotten.⁸⁰ Given that state agency budgets are even more constrained than their federal counterparts, and the failure of most state legislatures to pass enforceable statutes to address the issue, it seems at best unrealistic to expect states to step into a traditional command and control method of regulating seafood sales. To that end, a more unconventional approach is required.

C. Insufficient Funds: Why Consumers Are Not Pursuing Claims for Fraudulent Misrepresentation

Seafood substitution meets the common law definition of fraudulent misrepresentation, and actions could be brought by consumers against restaurants or retailers if they could make a prima facie case. Under Maine law, for example, a claim of fraudulent misrepresentation for seafood substitution would require proof by clear and convincing evidence that:

(1) that [the fish seller] made a false representation (2) of a material fact (3) with knowledge of its falsity or in reckless disregard of whether it is true or false (4) for the purpose of inducing [the consumer] to act in reliance upon it, and (5) [the consumer] justifiably relied upon the representation as true and acted upon it to [their] damage.⁸¹

While it may be logistically difficult to acquire evidence of each element, for a proto-typical example of fish fraud, none of the elements are truly insurmountable. Elements (1), (2), (3) and (4) could be satisfied by documentation that the seafood listed on the menu and that which was delivered to the customer were materially different types of seafood. These elements could be proven through DNA sequencing of the diner's meal, if possible, but more likely they could be inferred through a comparison of the diner's receipt and the restaurant's supplier invoices from the relevant time period. The issue of damages (5) turns out to be the limiting factor, but not because they are unprovable.

For the potential consumer plaintiff and their prospective lawyer the largest barrier to bringing an action for fraudulent misrepresentation in a case of seafood substitution turns out to be the very limited nature of the damages involved. Simply put, it is hard to envision a situation involving any individual consumer subjected to intentional fish fraud where more than a few

⁸⁰ Jenn Abelson & Beth Daley, *Many Mass. Restaurants Still Serve Mislabeled Fish*, THE BOSTON GLOBE, Dec. 2, 2012, <http://www.bostonglobe.com/business/2012/12/02/dnasidebar/SAe6PdZMRqi6mZUDOdWz7M/story.html>; Lou, *Bait and Switch*, *supra* note 3; Daley & Abelson, *Fish Supply Chain Open to Abuse*, *supra* note 3.

⁸¹ *Maine Eye Care Associates P.A. v. Gorman*, 2006 ME 15, ¶ 19, 890 A.2d 707, 711 (*quoting* *Mariello v. Giguere*, 667 A.2d 588, 590 (Me. 1995)).

hundred dollars' worth of pecuniary damages is at stake (perhaps a few thousand if someone purchased a lobster dinner for a wedding party). This is assuming that damages will be assessed at some multiple (one to three times) of the face value of the mislabeled fish and not at the difference in value between the fish listed on the menu and that actually served. As such, it is simply not worth the time, effort, or legal bills, to pursue an individual claim for seafood substitution. Thus any workable solution will require related claims to be aggregated or organized into larger, economically viable cases.

III. ASSEMBLING A STATE BASED SOLUTION TO SEAFOOD SUBSTITUTION

A. *Defining Success*

The goal of this proposal is not to provide extensive damage awards to defrauded consumers, although that may be the short-term result. Fundamentally, the objective is to reduce or eliminate retail and restaurant based seafood substitution without requiring state (in this case Maine) or federal agencies to substantially increase or reallocate enforcement resources. The use of extensive damage provisions and/or fee shifting are merely tools that will be deployed to address a systemic problem. To be clear, while it is hard to predict the actual numeric relationship between enforcement funding and the incidence of fraud, it is easy to infer from current experience that increased spending on enforcement would indeed lead to a reduction.⁸² This self-imposed limit on additional government resources is not driven by any ideological dedication to smaller government, but rather by a “settled hopeless expectation”⁸³ that our dysfunctional political environment makes any further direct allocation of regulatory and enforcement resources virtually impossible. To that end, this comment makes the assumption that a workable proposal must find a way to promote detection of fraud by consumers, rather than by adding or redeploying highly trained law enforcement or code enforcement officials, and that enforcement/retributive actions must require the minimum viable use of government resources. When government involvement is inevitable, it must attempt to provide for those resources through recovery, fines, and penalties.

In addition to increasing the likelihood of exposure, a feasible proposal must provide an adequate economic deterrent to seafood substitution. This impacts both the calculation of damages, which could be some multiple of the price paid for the mislabeled seafood or some nominal fee amount per incident, as well as addressing ways to organize cases into larger judicial units,⁸⁴ such that recovery is large enough to support the legal action required. The economic consequences could be further enhanced by shifting legal fees for a prevailing plaintiff.

Finally, although invoking strict liability is likely a piece of the solution critical to streamlining the use of judicial resources, a workable proposal must differentiate bad faith actors engaged in active fraud from the hapless and easily duped. There is a certain truth to the culinary proverb that the deep fat fryer is the great equalizer—after a piece of seafood is breaded

⁸² See Lou, *Bait and Switch*, *supra* note 3; Wagner, *supra* note 15; see also Daley & Abelson, *Fish Supply Chain Open to Abuse*, *supra* note 3.

⁸³ Shepard v. United States, 290 U.S. 96, 100 (1933) (quoting Willes, J. in Reg. v. Peel, 2 F. & F. 21, 22).

⁸⁴ A hearty thank you to Prof. Petruccelli of the University of Maine School of Law for inserting this concept into the author's lexicon during Civil Procedure II.

and fried it is indeed rather difficult to identify, even for trained professionals.⁸⁵ Thus, there are probably some restaurants and retailers that have been confused or defrauded by their wholesalers and suppliers, and as such should be able to seek indemnity for any substitution liability from the ultimately responsible party.⁸⁶ Furthermore, as this proposal is intended to reduce fraudulent behavior it must avoid creating a new mechanism for legal harassment and nuisance suits. Thus some measure of fee shifting may also be employed to protect prevailing restaurants and retailers from plaintiffs caught acting in bad faith.⁸⁷

B. Modeling Effective Economic Deterrence

Seafood substitution is primarily driven by a desire to enhance profitability, either through lower costs or higher prices. If the fraudulent profitability can be wrung out, even statistically, the prevalence is likely to drop. Therefore, in contemplating the scale of the damages and fees required to align the retail and restaurant industries against seafood substitution, it is useful to explore quasi-mathematical models similar to Justice Learned Hand's famous $B < PL$ balancing test for the burden of prevention in negligence cases.⁸⁸ While this type of formula assumes that the actor considering mislabeling their fish is behaving rationally, a substantively and substantially debatable assumption, it provides a useful baseline from which to evaluate the economic considerations of this tortious behavior.

Where Justice Hand's formula was concerned with the burden of prevention (B), and the probability of an injury (P) if not prevented multiplied by the likely damages caused by the injury (L), the economic motivations of seafood substitutions is comprised of: excess/fraudulent profit generated by seafood substitution (denoted as π_f); the probability of detection (D); and the penalty for detection (P_d). In order to align against substitution, the penalty, multiplied by the likelihood of detection, must exceed the fraudulent profit generated ($\pi_f < DP_d$). Or stated in reverse, a rational fish fraudster will engage in seafood substitution so long as the profit exceeds the chance of detection times the penalty ($\pi_f > DP_d$). Using this lens to analyze the current situation, where the likelihood of detection is anemic, and the possible legal⁸⁹ and extra-legal⁹⁰

⁸⁵ See also *This American Life: Doppelgängers*, CHICAGO PUBLIC RADIO (Jan. 11, 2013), available at: <https://www.thisamericanlife.org/radio-archives/episode/484/doppelgangers?act=1> (Act 1: investigating the veracity of an anecdotal report that pork bung (a.k.a. pork rectum) is sold as imitation calamari, and then examining the practicality of doing so through a side-by-side taste-test). While somewhat disconcerting, this is one of the most entertaining media reports on the issue of seafood substitution. Early in the episode is also a hilarious imitation of Ira Glass by *Portlandia* creator Fred Armisen.

⁸⁶ Daley & Abelson, *Fish Supply Chain Open to Abuse*, *supra* note 3.

⁸⁷ E.g., *Fair Debt Collection Practices Act*, 15 U.S.C.A. § 1692k (2016) (“On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.”).

⁸⁸ See generally *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947).

⁸⁹ A conviction for Deceptive Business Practices in Maine (Title 17-A, § 901) is a Class D crime carrying a maximum penalty of \$2,000 or one year in county jail. Ignoring the possibility of jail time, imagine a scenario where the probability of detection is roughly 2%. Analyzed through the lens of $\pi_f < DP_d$ and $\pi_f > DP_d$, any profit of greater than \$40 ($.02 \times \$2,000 = \40) a month in

penalties are minimal to nonexistent, there is no effective economic deterrent. Unsurprisingly, the market is rampant with mislabeled fish. However, this exercise reveals that as the possibility of detection rises, the penalty can fall while still maintaining the incentive against fish fraud. Conversely, if the detection rate approaches zero, the formula makes clear that the nominal deterrent will need to increase towards infinity to be effective. An impractical and daunting solution. Indeed, a workable proposal to address consumer facing seafood substitution should attempt to increase both the probability of detection and the resulting penalty in order to maximize deterrence.

It is worth noting that the formula assumes away a great deal of complexity that could seriously impact the practicality of enforcement – including any probable correlation between variables, even those that could work to the advantage of any prevention scheme. What we see from federal enforcement of mislabeled seafood under the Lacey Act is that the scale of the fraud, and thus the possible scale of the fines and penalties, anecdotally appears to have a positive correlation with the allocation of investigative resources. Moreover, economic ramifications of setting the nominal penalty for detection, modified by the scope of time over which an individual case can consider infractions, will determine the viability of all of the possible mechanisms outlined below. A penalty that is too low will fail to align incentives and thus fail to deter the behavior. Conversely, a penalty that is too high could result in certain closure for retailers and restaurants that were merely negligent and not engaged in a systematic fraud. The total value of the penalty will be determined by the scope of the actual or nominal damages to the consumer, as well as any imposition of a per claim or per incident (each piece of mislabeled fish) statutory penalty. Possible penalty levels will be further discussed under each legal mechanism considered in the following section.

C. Borrowing From Other Areas of Law

1. Qui Tam Actions under the False Claims Act and Similar Statutes

One possible tool that could be brought to bear against the seafood substitution epidemic would be *qui tam*⁹¹ lawsuits in the model enabled by the Federal False Claims Act (“FFCA”).⁹²

Maine would be statistically sustainable, and the fraudster would have no economic incentive to change behavior. For perspective, \$40 is the potential excess profit generated by substituting frozen Pacific cod for fresh Atlantic cod in eight to twelve entrees. That is less than six pounds of mislabeled cod (assuming very generous portions)—an amount that any seaside fish house could sell in the first few minutes of the lunch rush in July.

⁹⁰ Such as reputational damage, boycotts, customer switching, etc., which would increase the nominal value of P_d in *supra* note 89. However, it should be noted that follow-up articles tend to reveal that even well documented mislabeling at restaurants is usually not corrected despite public shaming and extensive negative coverage (*see* Daley & Abelson, *Fish Supply Chain Open to Abuse*, *supra* note 3; Abelson & Daley, *On the Menu*, *supra* note 3; Abelson & Daley, *Many Mass. Restaurants Still Serve Mislabeled Fish*, *supra* note 80). This implies that the extra-legal costs to restaurants caught substituting seafood are relatively low.

⁹¹ “‘Qui Tam,’ comes from the Latin phrase, ‘*qui tam pro domino rege quam pro se ipso in hac parte sequitur*,’ [which] translates into ‘who pursues this action on our Lord the King’s behalf as

Under the FFCA (and many state equivalents) any person (individual or corporate entity) that submits certain types of fraudulent demands or claims for payment to the U.S. government is liable for \$5,000 to \$10,000 in civil penalties, plus triple any damages the government would have suffered because of the fraudulent demand.⁹³ Actions under the FFCA can be brought by the U.S. Attorney General or by private parties, dubbed “relators,” that are an “original source” of the information regarding the false claim.⁹⁴

Roughly outlined, when a relator brings an action under the FFCA the complaint is filed *in camera* and remains under seal for at least 60 days to give the Government the opportunity to receive the complaint and all relevant evidence, and decide whether or not to elect to intervene.⁹⁵ Should the Government choose to intervene and proceed with a relator initiated action it shall assume “primary responsibility for prosecuting the action,” but does have discretion to dismiss the action, settle with the defendant, or engage in alternative remedies (such as other administrative procedures) with only limited review by the court for reasonableness and fairness.⁹⁶ If the Government then prevails in the FFCA claim, the initiating relator shall receive fifteen to twenty-five percent of the recovered amount depending on their contribution to the prosecution of the claim.⁹⁷ Should the Government elect not to pursue a relator’s claim, the relator shall have the right to bring the action themselves.⁹⁸ If the relator then prevails, they shall receive twenty-five to thirty percent of the proceeds recovered on the Government’s behalf, as well as reasonable attorney’s fees, necessary expenses and costs.⁹⁹

In order to follow a similar model, the enabling legislation would first have to establish a civil penalty for seafood substitution payable to the State, similar to the rules in Florida,¹⁰⁰ or that proposed in Massachusetts.¹⁰¹ To properly discourage substitution, the total civil penalties related to an incident of fish fraud would need to be substantially higher than the \$2,000 criminal penalty currently provided in Maine for those convicted under Deceptive Business Practices (Title 17-A, § 901), or the shellfish labeling provision (Title 12, § 6005).¹⁰²

well as his own.”” Joseph E. B. White, *U.S. False Claims Act: Deputizing the Public to Combat Fraud*, 38 FALSE CL. ACT AND QUI TAM Q. REV. 17 (July 2005).

⁹² 31 U.S.C §§ 3729-3733 (2016).

⁹³ 31 U.S.C §3729(a)(1) (flush language); *but see*, 31 U.S.C. §3729(a)(2) (reduced damages of not less than double the amount sustained by the government can be awarded in situations where the liable party provides timely cooperation without knowledge of any investigation).

⁹⁴ “‘Original source’ means an individual who either (i)(sic) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section.”

31 U.S.C. § 3730(e)(4)(B).

⁹⁵ 31 U.S.C. § 3730(b)(2).

⁹⁶ 31 U.S.C. § 3730(c).

⁹⁷ 31 U.S.C. §3730(d)(1).

⁹⁸ 31 U.S.C. §3730(c)(3).

⁹⁹ 31 U.S.C. §3730(d)(2).

¹⁰⁰ See FLA. STAT. ANN. § 509.292, § 775.082, and § 775.083.

¹⁰¹ H.B. 4066, 189th Gen. Ct. (Mass. 2016).

¹⁰² See author’s analysis using $\pi_f < DP_d$ and $\pi_f > DP_d$ formulas, *supra* note 89.

In considering the total possible penalty (P_d), there are a number of potential sub variables that will be determinative. Since the State has not suffered any direct loss based on the true value of the seafood actually provided, or the nominal value of the seafood substituted, neither could rationally serve as a basis for the damages. However, the options still include arbitrarily set penalties constructed as a single large nominal fine for being caught, say \$5,000 to \$10,000, or a smaller per incident (every plate of mislabeled fish proven to be served) that could quickly accumulate from a pattern of misbehavior. For example, a \$100 per incident penalty for a high-volume restaurant, serving 100 portions of mislabeled fish a week, would potentially add up to tens, or even hundreds, of thousands in fines depending on the time frame opened through discovery.¹⁰³ While such a system could differentiate between incidental/infrequent negligence in labeling and systemic fraudulent behavior and business models, if the threat of exponential liability surpasses the potential value of the ongoing enterprise it will encourage business abandonment by rational bad actors.

A more nuanced, but complex scheme of civil penalties, could match the mechanism to the type of malefactor. For the first violation, or a violation below a certain scale (based on pounds of mislabeled fish or its nominal dollar value) could trigger a single civil penalty large enough to incentivize possible relators to instigate the suit, but ultimately not large enough to threaten the immediate economic viability of most restaurants or retailers. A second or third violation, or violations over a certain metric of scale (number of incidents or perhaps number of pounds of fraudulent fish) could open the floodgates. Certainly there is some level of systemically fraudulent behavior that is of a character so noxious that any just solution should warrant an existential threat to the survival of the enterprise (or chain/franchise location). That said, multiple penalty tiers could unnecessarily complicate enforcement, and leave businesses with a lack of clarity about their potential liability.

A possible flaw in a *qui tam* scheme to address seafood substitution is that it would depend on government involvement. Presumably, the State Attorney General could be given the option, for each suit brought by a relator, to elect to assume control of the claim, or to decline to pursue it directly. Currently, seafood substitution is not directly covered by any division of the Office of the Maine Attorney General, but could conceivably be included under the duties of the Consumer Protection Division.¹⁰⁴ However, the statutory damages levied could self-fund the AG's involvement in enforcement, assuming some measure of successful discretion in selecting targets. Further, if the Government's assumption of responsibility for the case is structured in the same way as the FFCA, the AG's office would be able to step in with authority to settle cases that it felt were marginal. The AG's opportunistic intervention in the process would also provide some discretionary protection for restaurants, retailers, and wholesalers accused of fish fraud by bad faith actors or competitors. Where the AG's office feels that prosecution should be stayed in the interests of justice, it would have the power to do so.

2. Class Action

¹⁰³ A three month discoverable period based on a prima facie showing of fish fraud would open such a restaurant to roughly \$130,000 in possible penalty liability under this scheme.

¹⁰⁴ See *Office Organization*, OFFICE OF THE MAINE ATTORNEY GENERAL, http://www.maine.gov/ag/about/office_organization.html (last visited Jan 17, 2017).

Given the systemic entrenchment of fish fraud in the U.S. food supply and consolidation in the restaurant industry, class action suits seem a ripe tool to organize common cases that seek to address seafood mislabeling and fraud claims. Unfortunately, Maine has few directly on-point examples of class action suits used to address consumer fraud. Regardless, it is clear that courts across other jurisdictions in the United States maintain a high bar for class certification, particularly in food labeling cases.¹⁰⁵ Notwithstanding the critical eye of the courts, conceivable claims of seafood substitution and mislabeling against restaurants and retailers, resembling those reported in the press in recent years,¹⁰⁶ could be pursued using Maine’s existing default class action rules, and the usefulness of class actions as a tool to address this specific issue could be enhanced through legislative findings in a supporting statute. This would be an expansion of the type of findings and statements of purpose attached to many pieces of legislation, such as the Fair Credit Reporting Act,¹⁰⁷ and the Fair Debt Collection Practices Act.¹⁰⁸

Me. R. Civ. P. 23(a) establishes the prerequisites for certification of a class action provided:

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.¹⁰⁹

¹⁰⁵ See also *Everest v. Leviton Mfg. Co.*, 2007 WL 4692839 (Me. Super. Ct. Jan 5, 2007) (denying class certification of UTPA claim for unjust enrichment for failure to meet ME. R. CIV. P. 23(b)(1), no danger posed by inconsistent adjudication, and 23(b)(3), lack of predominance or common questions of law and fact); *Jones v. ConAgra Foods, Inc.*, 2014 WL 2702726 (N.D. Cal. June 13, 2014) (class certification denied due for failure to meet Fed. R. Civ. P. 23(b)(3), commonality/predominance of claims); *Werdebaugh v. Blue Diamond Growers*, No. 12-CV-02724-LHK, 2014 WL 7148923 (N.D. Cal. Dec. 15, 2014) (class decertified for failure to meet Fed. R. Civ. P. 23(b)); *Astiana v. Ben & Jerry's Homemade, Inc.*, 2014 WL 60097 (N.D. Cal. Jan. 7, 2014) (lack of ascertainable class of purchasers of disputed natural Dutch processed cocoa).

¹⁰⁶ See, e.g., *Lou, Bait and Switch*, *supra* note 3; *Danna*, *supra* note 3; *Abelson & Daley, On the Menu*, *supra* note 3; *Daley & Abelson, Fish Supply Chain Open to Abuse*, *supra* note 3.

¹⁰⁷ 15 U.S.C. § 1681(b) (2015) (“It is the purpose of this subchapter to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization.”).

¹⁰⁸ 15 U.S.C. § 1692(e) (2015) (“It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.”).

¹⁰⁹ ME. R. CIV. P. 23(a) (2016).

While “[t]here is no threshold number of class members that automatically satisfies [the numerosity requirement]” of Rule 23(a)(1),¹¹⁰ it is arguably under the discretion of the court to consider the geographic distribution and identifiability of class members as well as the size of the damages claimed, in regard to the practicality of joinder, a relatively small number of actual plaintiffs would suffice.¹¹¹ Although a small number of plaintiffs may be legally sufficient, if damages sought are presumed at triple actual damages, the action may still not be economically viable regardless of the legal sufficiency.¹¹² The barriers posed by Rule 23(a)(2), commonality of questions of law and fact, and Rule 23(a)(3), typicality of claims and defenses, could also be lowered through legislative findings that call out to the unifying characterization of seafood substitution. This could include a statement to the effect that all of the consumer purchasers of allegedly mislabeled seafood within the statute of limitations from any specific retailer or restaurant have been injured by the same conduct, and thus share obviously common questions of law and fact subject to similarly typical claims and defenses.

Such a statement of legislative intent could also assist cases in meeting the certification prerequisites of Rule 23(a) to meet 23(b)’s requirements to maintain the class action.¹¹³

¹¹⁰ *Van Meter v. Harvey*, 272 F.R.D. 274, 280 (D. Me. 2011).

¹¹¹ *See Richman, et al v. PCS, et al.*, No. BCD-WB-CV-10-53, at *3 (Me. Super. Ct. Jul . 12, 2011) (order granting class certification).

¹¹² Assuming an exceedingly generous \$100 per class member actual damages from seafood substitution, and that the class pursues a treble damages award, a seafood substitution class action seeking \$50,000, excluding fees, would require 167 class members. Which is certainly impractical for joinder. However, a more conservative \$25 per class member under an identical situation would require 667 class members to reach the same economic threshold, which, for the same nominal damages, may exponentially increase the cost of administering the class.

¹¹³ ME. R. CIV. P. 23(b) provides:

- (1) the prosecution of separate actions by or against individual members of the class would create a risk of
 - (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
 - (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests, or
- (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
- (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:
 - (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;

Moreover, contemplating a case based around systemic mislabeling of local specialties, say substituting langoustine for Maine lobster, and envisioning the minimum required number of class members for economic viability, it is reasonable to argue that individual adjudication would be impractical (23(b)(1)(B)). Similarly, one could argue that the common issues of fact and law lend credence to class action being the most “fair and efficient adjudication of the controversy.”¹¹⁴

One easily dismissed concern about using consumer class action suits as a primary enforcement tool is that when launched against out-of-state wholesalers or restaurant corporations (i.e. the owners of national restaurant chains), the cases would be subject to removal to federal court under diversity jurisdiction, 28 U.S.C. § 1332. While a motion to remove could be a possible tactic for delay, or an attempt to increase the cost of litigation, subjecting the case to the amount in controversy requirements would lead to remand.¹¹⁵ Further, obvious bad faith attempts at removal are subject to sanction or awards of fees.¹¹⁶

Of greater potential concern is that the average restaurant in Maine generates roughly \$450,000 to \$500,000 in annual revenue.¹¹⁷ Therefore, except for larger restaurants, chain establishments, or restaurants specifically focused on seafood, it is unlikely that restaurants in the lower fifty percent of the revenue distribution in Maine would have a large enough pool of defrauded patrons to make up a viable economic class action even if they were engaged in regular substitution. Given that the goal is to root out systemic fraud at any scale, this limits the usefulness of class actions as a general purpose enforcement tool.

Moreover, the economic incentive for third party action is diminished by the structural reality of class action remedies. Assuming a contingent fee arrangement, only the law firm

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- (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
 - (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;
 - (D) the difficulties likely to be encountered in the management of a class action.

¹¹⁴ ME. R. CIV. P. 23(b)(3).

¹¹⁵ See 28 U.S.C. § 1332(a) (2016) (\$75,000 exclusive of interest and costs); § 1332(d)(2) (\$5,000,000 for aggregate class action damages); *Karofsky v. Abbott Labs.*, 921 F. Supp. 18, 20 (D. Me. 1996) (remanded on plaintiff’s motion before class certification under ME. R. CIV. P. 23 or FED. R. CIV. P. 23 for failure to meet \$50,000 amount in controversy requirement under 28 U.S.C. § 1332(a)), *class cert. denied*, 1997 WL 34504652, at *15 (Me. Super. Ct. Oct. 16, 1997) (failure to meet predominance/commonality and management requirements of ME. R. CIV. P. 23(b)(3)).

¹¹⁶ See, e.g., *Peltier v. Peltier*, 548 F.2d 1083, 1084 (1st Cir. 1977).

¹¹⁷ Figure on average Maine restaurant revenue is extrapolated from: *2014 Maine Tourism Highlights*, VISITMAINE.COM, available at <http://visitmaine.com/assets/downloads/FactSheet2014.pdf> (last visited Mar 3, 2016), and Matt Wolff, *Restaurant Growth Index: The Best Places to Open a Restaurant*, RESTAURANT BUSINESS (March 2011), available at <http://www.nielsen.com/content/dam/corporate/us/en/public%20factsheets/restaurant-growth-index.pdf>.

representing the class has an economic incentive large enough to push the case forward, as there would be no direct participatory role for nonprofit consumer groups, and the award to any individual consumer would be *de minimis*. To that end, even if enabled by legislative findings and statements of purpose, class actions for seafood substitution would still be rarely pursued. Therefore, while class action is a potential tool for recovery of individual damages, it remains less viable as a general purpose deterrent to fish fraud, and as such, will be excluded from further consideration in this proposal.

3. Statutory Damages and Fee Shifting

Rather than relying on actual damages, or some multiple of actual damages, seafood substitution claims could follow the example of Maine statutes setting minimum levels of damages or alternative damages calculation to actual damages (or multiple of actual damages) for specific claims in health care information protection,¹¹⁸ misbehavior by residential mortgage brokers,¹¹⁹ or the unlawful cutting of trees.¹²⁰ Federal law similarly provides a range of statutory damages for copyright violations.¹²¹

Statutory provisions that allow judicial discretion to award fees to the prevailing party, more commonly referred to as fee shifting, have been used extensively in Maine (and Federal) law as a method to strike a balance between the frivolity deterrence of the “British Rule,” and the rising economic costs that pose a barrier to small but meritorious claims under the “American Rule.”¹²² The most prominent federal example of awarding fees to the prevailing party is in civil rights litigation, but the same theory has been employed in a variety of less weighty contexts including the Hobby Protection Act.¹²³ In Maine, fee shifting has been used to assist in

¹¹⁸ ME. REV. STAT. ANN. tit. 18-A, § 5-810(a) (2016) (“A health-care provider or institution that intentionally violates this Part is subject to liability to the aggrieved individual for damages of \$500 or actual damages resulting from the violation, whichever is greater, plus reasonable attorney's fees.”).

¹¹⁹ ME. REV. STAT. ANN. STAT. tit. 8-A, § 8-506(6) (2016) (“This subsection applies to any violation of this section in connection with the origination, brokering or servicing of a residential mortgage loan. . . (A) Any person who has been found in violation of this section . . . may be liable to the borrower for . . . (4)(b) . . . statutory damages in the amount of \$5,000 per violation.”).

¹²⁰ ME. REV. STAT. ANN. tit. 17, § 2510(2) (2016) (“The following forfeitures may be adjudged for each tree over 2 inches in diameter that has been cut or felled: (A) if the tree is no more than 6 inches in diameter, a forfeiture of \$25 . . . (F) [i]f the tree is greater than 22 inches in diameter, a forfeiture of \$150.”).

¹²¹ 17 U.S.C. § 504(c)(1) (2016) (“The copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action . . . in a sum of not less than \$750 or more than \$30,000 as the court considers just.”).

¹²² See Jonathan Fischbach & Michael Fischbach, *Rethinking Optimality in Tort Litigation: The Promise of Reverse Cost-Shifting*, 19 BYU J. PUB. L. 317, 318 (2005) (Under the British Rule the losing party pays the legal cost for both parties, under the American Rule each party pays their own legal fees.).

¹²³ 42 U.S.C. § 1988(b) (2016) (“[T]he court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.”); 15 U.S.C. §

enforcement of healthcare claims, insurance fraud, illegal gambling, and litigation to enforce remediation of a bedbug infestation.¹²⁴ In the case of seafood substitution the award of reasonable attorney’s fees serves both as an enabling mechanism to pay for meritorious but economically insufficient claims, but also serves to increase the penalty for fish fraud in a manner that encourages the defendant to settle smaller or indefensible claims.¹²⁵

Setting the level of statutory damage (including fees or not) is an exercise in game theory—minimizing the repetition of fraudulent seafood substitution by purveyors through the creation of an outsized deterrent. As discussed in section III(B), Modeling Effective Economic Deterrence, the goal of this proposal is to wring out any likely profit from systemic fish fraud. In doing so, the policy must consciously deal with the often conflicting secondary consideration of providing discretion to prevent abuse, while accelerating the learning curve for industry players and incentivizing action by consumer or third-party relators. The weight of these factors must be considered under the specific implementation schedule for the statutory damages and strict liability provisions. Again, analyzing possible penalties through the $\pi_f < DP_d$ (or $\pi_f > DP_d$) formula,¹²⁶ a mechanical system of civil fines (including attorney’s fees) that increases the penalty in direct response to the scale of the fraud, seems to be the best approach towards balancing these factors, promoting third party enforcement, and punishing misbehavior. Specific levels of penalties will be explored in Section IV.

4. Strict Liability

Strict liability, codified in statute, could help to minimize the use of court resources to adjudicate any specific incidence of fish fraud, and cut through the endemic finger pointing between suppliers and restaurants or retailers that act as barriers to establishing if purveyors knew, or should have known, that they were selling mislabeled fish. Examples among Maine statutes include defective or unreasonably dangerous goods,¹²⁷ and Maine’s “Dog Bite”

2102(a) (2016) (“[T]he court may award the costs of the suit, including reasonable attorneys’ fees.”).

¹²⁴ ME. REV. STAT. ANN. tit. 18-A, § 5-810 (2016) (Uniform Healthcare Decisions Act); ME. REV. STAT. ANN. tit. 24-A, § 2164-E (2016) (Maine Insurance Code); ME. REV. STAT. ANN. tit. 10, § 1344 (2016) (Regulation of sales representation); ME. REV. STAT. ANN. tit. 8, § 300-A (2016) (Illegal bookmaking on harness racing); ME. REV. STAT. ANN. tit. 14, § 6021-A (2016) (Treatment of bedbug infestation).

¹²⁵ Under a fee shifting regime, P_d will increase rapidly, and in direct correlation, with the time spent litigating the case. Thus, for unambiguous cases of seafood substitution, a rational actor would seek to settle and limit the penalty.

¹²⁶ See author’s analysis/application of formula, *supra* note 88.

¹²⁷ ME. REV. STAT. ANN. tit. 14, § 221 (2016) (“One who sells any goods or products in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to a person whom the manufacturer, seller or supplier might reasonably have expected to use, consume or be affected by the goods, or to his property, if the seller is engaged in the business of selling such a product and it is expected to and does reach the user or consumer without significant change in the condition in which it is sold.”).

statute.¹²⁸ Unlike these examples, however, there is no reasonable purpose for including the comparative fault of, or misuse by, the consumer as a defense to seafood substitution. Instead, the statute must make explicit provisions to allow a defendant in a seafood substitution case to implead their suppliers as third party defendants. In such situations the restaurant or retailer will need to offer some proof, likely through invoices or order documentation, that the impleader made good faith purchases of what they believed to be properly labeled fish and were defrauded themselves. The goal of such procedure is to undermine the quiet collusion between wholesalers and retailers/restaurants with a healthy dose of foreseeable adversity and the potential for mistrust. Moreover, if the Seafood Traceability Program survives the change in administrations and is implemented, the wholesaler would in turn be able to seek indemnification from the importer of record for any mislabeled imported fish, provided that species is covered under the program. Regardless, a wholesaler is far less likely to enable a restaurant to serve mislabeled fish through doctored or misleading invoices if faced with a credible likelihood of discovery and potentially disastrous economic consequences.¹²⁹

5. Insurance as Quasi-Regulator of Ongoing Behavior

As discussed above, systemic seafood substitution is enabled by the lack of enforcement and detection resources. While the previous subsections of this comment have addressed ways to encourage non-governmental/outsourced detection and prosecution for fish fraud, the ongoing encouragement of compliance, a role frequently played by government employees (code enforcement, health inspectors, etc.), will also need to be outsourced. This proposal seeks to create a deterrent to systemic fish fraud, by increasing both the probability of discovery and the penalty for misbehavior. In essence, this proposal seeks to transfer some of the underlying risk of purchasing seafood as a consumer towards the commercial purveyors of seafood, creating new business risks that owners and entrepreneurs will need to address both financially and operationally.¹³⁰

Insurers are uniquely situated in the modern economy to address business risk, and to assist their clientele in mitigating those risks.¹³¹ Insurance, in and of itself, is a financial management tool that can, through a reasonable premium payment, prevent unavoidable or routine disasters from causing business failure. In an effort to provide superior service and to reduce payout expenses, insurers have developed extensive operational expertise in loss prevention.¹³² Insurers also act as quasi-regulators through a variety of complimentary tools, including: (1) differentiating premiums, (2) refusal to insure/exclusions, (3) encouraging safer

¹²⁸ ME. REV. STAT. ANN. tit. 7, § 3961(2) (2016) (“Notwithstanding subsection 1, when a dog injures a person who is not on the owner's or keeper's premises at the time of the injury, the owner or keeper of the dog is liable in a civil action to the person injured for the amount of the damages. Any fault on the part of the person injured may not reduce the damages recovered for physical injury to that person unless the court determines that the fault of the person injured exceeded the fault of the dog's keeper or owner.”).

¹²⁹ See also, e.g., Daley & Abelson, *Fish Supply Chain Open to Abuse*, *supra* note 3.

¹³⁰ See Omri Ben-Shahar & Kyle D. Logue, *Outsourcing Regulation: How Insurance Reduces Moral Hazard*, 111 MICH. L. REV. 197, 204 (2012).

¹³¹ *Id.*

¹³² *Id.* at 204-205.

conduct and implementing private safety codes, and (4) claims administration.¹³³ In the context of seafood substitution these tools could help transform the enhanced risk of discovery and increased penalties into operational policies.

First, differentiated premiums exist in part to prevent moral hazard and adverse selection on the part of businesses seeking insurance.¹³⁴ In a completely opaque insurance market, where the insurer has no information regarding the behavior of the insured, the price of insurance will gravitate towards the average possible damage.¹³⁵ In such an imperfect market, adverse selection manifests through risky businesses purchasing higher coverage, seeing the price as a discount of their true risk; meanwhile careful businesses will drop coverage, as they see the cost of insurance as unreasonably high.¹³⁶ Differentiated premium prices allow the insurer to utilize what they know about how a specific business operates – leading to the obvious proposition that purveyors that have been caught substituting seafood are obviously operating at a higher level of risk, have a higher probability of generating liability, and thus should pay higher premiums for insurance coverage.

Second, general business liability insurance is a contractual relationship that cannot be forced upon the insurer. Businesses that have engaged in systemic fish fraud as a business model may swiftly reach the point where the insurer does not believe they represent a viable risk at any premium level, leading to rescission for making a material misrepresentation, a refusal to renew, or a refusal to insure in the first place.¹³⁷ Insurers can also insert exclusions into the policy for criminal activity and/or intentional violations of statutes.¹³⁸ Thus, business models based on intentionally deceptive mislabeling will be excluded from insurance coverage, but a purveyor that makes a good faith mistake, is defrauded by its suppliers, or makes a negligent labeling error, will not be subject to fatal sanctions.

Third, insurers develop tremendous expertise in business operations and risk mitigation and can promote best practices in day-to-day operations. Both the refusal to insure and the use of differentiated premiums can be leveraged in this way, either by refusing to underwrite unless remedial procedures are implemented, or by offering a premium reduction for specific policy implementations.¹³⁹ For seafood substitution, best practices would suggest that restaurants maintain a record of invoices documenting the chain of custody behind seafood purchases, and businesses that demonstrate during onsite audits that they meet record keeping requirements could be offered a discounted premium. Alternatively, insurers may engage in ex-post underwriting by denying coverage of claims where the business failed to keep sufficient purchasing records.¹⁴⁰ Further, such best practices could be codified into an industry safety doctrine.

Finally, claims management and adjustment practices operate like a non-governmental judiciary, providing investigative resources and the ability to quantify damages before the

¹³³ *Id.* at 204-215.

¹³⁴ See Peter Siegelman, *Adverse Selection in Insurance Markets: An Exaggerated Threat*, 113 *YALE L.J.* 1223, 1223-24 (2004).

¹³⁵ *Id.*

¹³⁶ *Id.* at 1224.

¹³⁷ Ben-Shahar & Logue, *supra* note 130, at 209.

¹³⁸ *Id.* at 215.

¹³⁹ *Id.* at 209-12.

¹⁴⁰ See *id.* at 215-16.

incident escalates to legal action.¹⁴¹ Given that damage awards are often restricted by the nominal amount of applicable liability coverage, claim management practices provide an efficient method of sorting quantifiable meritorious claims from the frivolous or nebulous, and quickly settling disputes in a uniform manner.¹⁴² For purveyors of seafood, having the insurer step in to manage the claims for substitution could reduce stress on operations, but also allow the insurer to rationally assess whether or not to settle, take the matter to trial, and/or implead suppliers to seek indemnification.

D. Evidentiary Burden/Science of Fish Fraud Detection

While the courts will need to develop a functional definition for a prima facie showing of seafood substitution, there are two obvious possibilities: (1) DNA sequencing, or (2) evidence of mismatched purchases and menu items, either through business records or employee testimony. A third possibility, specific to eating escolar, presents itself as well (i.e. documentation of extreme gastro-intestinal distress). While DNA sequencing offers definitive proof as to what any given piece of fish actually is, the process is expensive and potentially time consuming. Moreover, it requires both specialized equipment and the development and use of protocol to address the sample's chain of custody. Detecting seafood substitution through invoice checking is much more practical, but it requires access to the records. Invoice checking works well under legal regimes enforced by trained government agents, like in Florida or in investigations conducted by NOAA, but likely cannot be used to open the discovery door under this proposal.

DNA bar coding has recently been rolled out by the FDA, but requires testing equipment costing upwards of \$150,000.¹⁴³ Once implemented, the FDA system costs as little as \$10 per sample to test against a database of 250 common species.¹⁴⁴ Several companies have developed technology that allows DNA testing in as little as forty five minutes to two hours,¹⁴⁵ and has brought down the price for the equipment from hundreds of thousands of dollars to as little as two thousand for a single species test machine.¹⁴⁶ This trend will likely continue, but until testing is cheap and easy enough to be conducted from a smartphone while eating out, the cumbersome reality of DNA testing will prevent widespread adoption by the general public.

¹⁴¹ *Id.* at 214-15.

¹⁴² See Ben-Shahar & Logue, *supra* note 130, at 213-16; Tom Baker & Rick Swedloff, *Regulation by Liability Insurance: From Auto to Lawyers Professional Liability*, 60 UCLA L. REV. 1412, 1421 (2013).

¹⁴³ Clare Leschin-Hoar, *Specious Species: Fight against Seafood Fraud Enlists DNA Testing*, SCIENTIFIC AMERICAN (Nov. 10, 2011), <https://perma.cc/3SUQ-EPHV>.

¹⁴⁴ *Id.*

¹⁴⁵ *Harness the power of real-time PCR to get fast and accurate DNA-based species identification*, INSTANTLABS, available at: <https://perma.cc/SM5N-M75L> (last visited Jan. 9, 2017). Instantlabs offers testing for Blue Crab, Atlantic Salmon (farmed), Coho Salmon (wild), Chinook Salmon (wild), Sockeye Salmon (wild), and U.S. Catfish (coming soon), Horsemeat, Pork, and can develop custom testing for a target species.

¹⁴⁶ Robert Trigaux, *USF scientists unveil device to unmask 'fake' grouper*, TAMPA BAY TIMES, Feb. 3 2015, <https://perma.cc/7L5T-BPGB>; Christine Blank, *Faster DNA testing could aid in seafood fraud, mislabeling in U.S. restaurants*, SEAFOODSOURCE (Feb. 12, 2015), <https://perma.cc/R4GP-R35B>.

Consumer advocacy groups, local tourism associations, and health advocacy organizations, however, can sustain the economic cost of purchasing and operating the new lower priced equipment or, more likely, can undertake to pay the testing fee to third party laboratories. Further, provided a strong handling protocol is developed, coalitions of non-profits could operate national testing centers where consumers could send in preserved samples for testing.

Currently, commercial testing services are available, and while pricing remains opaque, inquiries yielded DNA species identification tests at a range of \$100 to \$180 per test depending on volume.¹⁴⁷ While an individual consumer, considering their own damages (the \$5-10 they overpaid for their fish), would find the testing cost to be prohibitive, as part of a larger consolidated case, or a *qui tam* action alleging many instances of fish fraud, the cost of testing could be reduced to a rounding error.

IV. RESTATEMENT OF THE PROPOSAL

To reiterate from section III(A), the primary goal of this proposal is to substantially reduce or virtually eliminate intentional consumer facing seafood substitution. To be successful the provisions must (1) enhance the penalties for selling fraudulently mislabeled fish and organize the cases into large enough judicial units such that recovery can support legal action; (2) increase the likelihood of discovery of the fraud with minimal or no additional government enforcement resources (such as field agents, investigators); (3) impose strict liability for selling mislabeled fish to minimize the additional burden on the judicial system; (4) provide enough flexibility to differentiate between good faith mistakes and bad faith systemic fraud, such as allowing retailers and restaurants to seek indemnification from suppliers if that is the source of the mislabeling; and (5) provide a mechanism to discourage or prevent harassment and nuisance suits against retailers and restaurants. This section will discuss how the tools discussed above can be used to craft a legal framework to deter and punish seafood substitution while addressing the requirements based on the preceding analysis using Maine as an example.

A. *Assembling the Framework of the “Seafood Substitution Prevention and Fish Fraud Deterrence Act”*

1. Monetary Deterrent: Statutory Civil Penalties, Fee & Cost Shifting

Assembling a post-regulatory regulatory framework to deter and punish seafood substitution is a recursive process, but a functional, if arbitrary, point to begin is with the scale and scope of possible penalties, and how to organize systemic fraud into particular sustainable cases. As discussed in section II(c) and III(b) the current criminal penalties in Maine (\$2,000) for fraudulent misrepresentation are woefully inadequate to the deterrence task, let alone to support litigation activity and incentivize detection.¹⁴⁸ Given the limits of actual damages (\$5-\$20 per pound of fish) in the case of any individual fraud, the solution appears to be a per

¹⁴⁷ E-mail from LeAnn Applewhite, Applied Food Technologies, Inc., to Sage M. Friedman, Student, University of Maine School of Law (Mar. 22, 2016) (on file with author); e-mail from Joy Bolster, Account Services, Genetic ID, to Sage M. Friedman, Student, University of Maine School of Law (Mar. 21, 2016) (on file with author).

¹⁴⁸ See author’s analysis and application of formula, *supra* note 89.

incident statutory penalty. Per incident is defined as each mislabeled seafood item sold: thus in a retail setting the sale of ten pounds of salmon mislabeled as wild, when in fact farm raised, would count as a single incident, as would the sale of one pound of mislabeled salmon; while in a restaurant setting each entrée or appetizer would count as an individual incident of fraudulent fish selling. This penalty structure would mechanically increase the penalty for each bad act, appropriately scaling the fine to the scope of the malfeasance.

While the statutory civil penalty is the largest component of the monetary deterrent (P_d), this proposal would also allow the court to stray from the traditional “American” model of legal fees, by awarding reimbursement of reasonable attorney’s fees, court fees, and testing expenditures, particularly the cost of DNA sequencing or DNA species matching, to a prevailing plaintiff.¹⁴⁹ Thus, P_d is further increased in response to the size of the fraudulent activity and provides a monetary incentive for rational actors, such as liability insurers, to settle claims quickly and implement appropriate control systems to prevent future liability. The potential for enhanced liability through automatically increasing fees could play an even more substantial role in settling follow-on suits and the impleading of third-party defendants, where the primary insurers to consumer-facing seafood sellers are seeking indemnification from negligent or fraudulent suppliers.

In evaluating the mathematical outcome of this scheme, P_d is now defined as the statutory civil penalty (\$150) per incident, plus reasonable attorney’s fees, court fees, and testing costs.¹⁵⁰ The scale of those penalties, however, is determined by the period of time over which the fraud is considered and over which a *prima facie* case of fish fraud would enable discovery. These matters will be discussed in more detail below.

2. Incentivizing and Outsourcing Detection; Addressing Burden of Production

Now that a penalty baseline has been established, the most obvious question is what portion of the penalty is available to consumers or NGOs to incentivize them to bring a case? Given the deficiency of class action suits, as discussed in III(C)(2), to provide an easily usable deterrent or avenue for NGOs or other third parties (including the government) to participate in enforcement, this proposal looks to the Federal False Claims Act (FFCA)¹⁵¹ and similar *qui tam* enforcement systems. Just as with the FFCA, cases could be brought on behalf of the State by private parties (consumers and NGOs), relators that are an “original source” for accusation of seafood substitution.¹⁵² Similar to the FFCA, the State of Maine’s Attorney General’s office would have some period of time, likely 30 or 60 days in which to receive all relevant evidence and decide whether or not to intervene in the case directly.¹⁵³ Under this scheme, the relator (be they individual or NGO) would receive the lion’s share (fifty-five to seventy-five percent) of the civil penalties awarded if they were prosecuting the case directly, and a lesser rate when the

¹⁴⁹ Subject to the procedure and process outlined in ME. R. CIV. P. 54.

¹⁵⁰ $P_d = \$150(\#F) + \text{Attorney's Fees} + \text{Court Fees} + \text{Testing Costs}$, where #F is the number of incidents of fish fraud under consideration, and fees & costs are totaled for the case as a whole and subject to award under ME. R. CIV. P. 54 and the enabling statute.

¹⁵¹ 31 U.S.C §§ 3729-3733.

¹⁵² 31 U.S.C. § 3730(e)(4)(B).

¹⁵³ 31 U.S.C. § 3730(b)(2).

government assumes control of the prosecution (twenty-five to thirty-five percent).¹⁵⁴ Additionally, to ensure that government supersession does not break the monetary incentives towards detection, attorney's fees and associated costs could still be reimbursed up to some reasonable cost threshold considered adequate to make a *prima facie* showing (say \$2,500 or \$5,000). Thus, even if the AG's office then chooses to settle for a lower penalty, the relator who brings a credible claim would at least cover their costs, and not be left in the cold by government pragmatism.

This again brings up the question of what would be required for a *prima facie* showing of fish fraud. There are two non-exhaustive but obvious answers: (1) DNA testing of samples of fish sold, and (2) documentary or testimonial proof of a mismatch between the label on fish sold and that on fish purchased. DNA evidence could be gathered directly by consumers, with samples taken from fish purchased at restaurants or retailers and sent to testing facilities in accordance with accepted evidentiary protocols, with expert reports being issued in response.¹⁵⁵ Testimonial evidence could consist of restaurant employees providing sworn statements averring to mislabeling based on personal knowledge of the packaging fish arrives in or the purchasing habits of the establishment. Documentary evidence could include supplier invoices from the relevant time period that demonstrate the purchase of a different fish than that appearing to be sold.¹⁵⁶ Any such showing should be enough to bring an initial case for review by the AG, and if the AG demurs to step in to prosecute directly, could open the doors for formal discovery and document production under the traditional standards of the court.

Once discovery is enabled there are several possible ways to meet the required evidentiary burden to proceed past summary judgment: (1) the accused establishment's inventory of seafood could be subject to random or comprehensive sampling and DNA testing, providing conclusive evidence that as of a certain date the fish in inventory was or was not what the establishment's management claimed it was; or (2) the business records of the establishment would be subject to scrutiny including invoices, sales records, and menus. An obvious disconnect between the fish bought and the fish sold would provide a strong inference that mislabeled fish was sold over the covered time frame.

3. Strict Liability and Indemnification

¹⁵⁴ Civil penalties as defined as the per incident penalty of \$150 multiplied by the number of incidents included in the case.

¹⁵⁵ This comment leaves the questions of exactly how and why a court promulgates a specific functional definition of an acceptable evidence handling protocol for private parties to other capable authors at other more broadly-themed legal journals to discuss in detail. Instead, this comment assumes that such a protocol is either readily available "off the shelf" or easily adaptable to this purpose.

¹⁵⁶ To function properly this proposal will also require statutory authority to be vested in a comprehensive database of the legal and scientific names for commonly sold seafood. Notwithstanding the FDA's protestations that its database does not have any such authority, FDA Seafood List, *supra* note 10, the simplest solution would be to adopt the Seafood List as the standard for labeling requirements; *see* Daley & Abelson, *Fish Supply Chain Open to Abuse*, *supra* note 3.

Again, it is worth reiterating that this proposal's primary concern is not the punishment of wrongdoers, although that is a desirable outcome, but to deter ongoing systemic seafood substitution. To that end, removing the issue of intent from consideration through strict statutory liability is expeditious in terms of minimizing the court resources required to adjudicate a case, and in allowing the conduct to fall under traditional business liability insurance unless explicitly excluded by the insurer. As sophisticated managers of business risk, insurers will most certainly develop criteria for exclusion/inclusion of coverage for seafood substitution claims, including minimum record keeping requirements and claim management procedures that could develop into a private code of conduct, or *de facto* industry operating procedure. Such quasi-regulatory activity is a highly desirable secondary goal of this proposal that will contribute to its overall effectiveness.¹⁵⁷

Under this strict liability scheme all that is required to implicate the defendant in the sale of mislabeled seafood would be clear and convincing evidence that mislabeled seafood was sold from the defendant's establishment. Whether that sale was the product of intentional systemic fraud, or merely a negligent error, no longer requires inquiry, as in either case the purveyor has failed to meet their duty to the customer. To avoid excessive punishments to those merely negligent (or easily duped) it is critically important that the seafood purveyor accused of fraudulent mislabeling be able to seek indemnification from suppliers that were either complicit in the fraud or the truly responsible party. Existing court rules on third-party practice in Me. R. Civ. P. 14 should be sufficient to allow this, but it is still recommended that the enabling legislation should reiterate this intention to provide a clear signal to the courts of that expectation.

4. Flexibility to Distinguish Between Good Faith Mistakes and Bad Faith Actors; Protection Against Abusive Litigation

Indemnification, discussed above, provides one important mechanism for differentiating bad actors from those merely negligent. The FFCA also provides a model for additional safeguards to prevent abuse, and provide the government and the courts the flexibility to tailor the solution to the needs of the case. Under the model proposed, after receiving all relevant evidence, the Maine AG will have the opportunity to take over the prosecution of any case. This will allow it both to assume command of particularly egregious cases where public policy dictates aggressive prosecution, but also allows the state to step in and settle marginal cases, setting a functional floor, under which prosecution is discouraged but corrective action is still taken.

This capacity to intervene and settle also gives the State AG the ability to protect business owners from abusive litigation by extinguishing the suit before it proceeds to trial. Such protection could be further enhanced by adding explicit sanction language for non-meritorious suits brought in bad faith and authorizing reverse fee shifting to the prevailing defendant in those extreme cases in line with the Fair Debt Collection Practices Act¹⁵⁸ that the court could utilize at its discretion. Additional flexibility is provided in the structure of the

¹⁵⁷ See Section III(C)(5), *supra*.

¹⁵⁸ 15 U.S.C. § 1692k (2016) ("On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.").

penalties—as unintentional negligent mislabeling should be limited in scale or scope to a specific order of seafood from a supplier, a change to the menu, or some other distinct time period, limiting the number of incidents under consideration and thus the overall liability. Systemic fraud, such that it is obviously part of the purveyor’s business plan, will not be so discretely contained temporally or monetarily, and should therefore open up the defendant to liability substantial enough that it poses a risk to the ongoing viability of the business.

B. Phase in and Statute of Limitations

This proposal is forward looking, and does not seek to redress wrongful conduct from before it goes into effect. To that end, the enabling legislation should have an effective date of no less than six months, but ideally closer to a year, from its date of passage. No claims related to conduct taking place before the implementation of a comprehensive anti-seafood substitution framework would be considered, so as to allow the seafood industry and its insurers’ time to develop appropriate record keeping procedures and to adjust their operations accordingly before undertaking a new variety of potential liability. Such a cleaning of the slate may be excessively generous to fraudulent purveyors, given the current statute of limitations on fraud in Maine of six years from discovery,¹⁵⁹ but seems a practical way to avoid any assertions of due process violations in the first examples of litigation. Additionally, it puts all restaurants and retailers on the same footing regarding their potential liability under the new scheme and provides businesses an opportunity to learn the lessons of the proposal before the penalty becomes an existential threat to their survival. Regardless, once the anti-substitution framework has been implemented, a six-year-from-discovery statute of limitation would resume.

V. ENFORCEMENT SCENARIOS

To ground the proposal in reality, this comment now considers several probable, but admittedly speculative, enforcement scenarios that would be addressed within the first few years of any enforcement system based on this proposal, hypothetically dubbed the Seafood Substitution Prevention and Fish Fraud Deterrence Act (“The Act”). These scenarios are not by any means exhaustive, but illustrate many of the considerations and potential pitfalls involved for the consumer, the relator, the defendant, the insurers, the AG’s office, and the court. The primary differentiation between scenarios is the scale of the fraud and the intention of the purveyor. All of these scenarios are considered at least several years after the passage of the Act, but all are envisioned as an early test of the new law. Scenarios include: (A) systemic intentional mislabeling at a large scale tourist restaurant, (B) systemic mislabeling caused by a third party supplier, (C) negligent mislabeling, and (D) abusive/bad faith claims of mislabeling by an aggrieved former employee.

A. Systemic Intentional Fraud at Scale

¹⁵⁹ ME. REV. STAT. ANN. tit. 14, § 859 (2016).

In this scenario, a large restaurant with annual revenues in excess of five million dollars,¹⁶⁰ called for convenience, the Tourist Trap (“the Trap”¹⁶¹), has engaged in systemic fraud for its entire operating history. Particularly, the Trap offers for sale “Wild Salmon” that is actually farm-raised, “Native Maine Shrimp” that are actually farm-raised in Thailand, “local day-boat caught Atlantic Cod” that is actually frozen Pacific cod, and a variety of other white fishes on special, all of which are actually imported swai (Asian catfish) regardless of what the staff might call them. The Trap operates as an LLC and is locally owned by a family, all of whom are involved directly in the Trap’s daily operations. Located in a tourist-centric part of southern Maine, the Trap serves an average of 400 customers per day.

The action is brought by the Maine Federation of Seafood Consumers (“MFCS”), a non-profit group formed after the Act’s passage specifically to investigate and pursue claims of seafood substitution in Maine restaurants. After receiving a tip from a former employee that the Trap was mislabeling its seafood, the MFSC had ten members dine at the restaurant and take samples, subject to appropriate handling procedures, that were sent for DNA testing. The testing results clearly demonstrated mislabeling in all ten cases. The testing costs roughly \$1,000. The MFSC then filed a *qui tam* complaint alleging ongoing seafood substitution in violation of the Act. Despite the potential scale of the fraud, and the clear showing of preliminary evidence from the testing, the AG’s office decided not to intervene because this is the first large scale test of the Act.

During discovery the lawyers for the MFSC successfully acquire both the purchasing records of the Trap, and that of its point of sale system, thus accessing a record of virtually every sale made over the previous three-year period and the corresponding invoices for fish from its suppliers. While the individual damages to any given consumer are minimal, only a few dollars per plate, the scale of the mislabeling is quite substantial in terms of customers defrauded—even if only five-percent of meals served featured one of the fraudulently mislabeled seafood items, that is still an average of 20 incidents of mislabeling per day of operation. Thus over the course of a single year the Trap has served 7,280 mislabeled dishes, and under the Act, is liable for \$1,092,000 in penalties. If they are caught after six years of post-Act conduct this egregious, the penalty liability mechanically rises to six million dollars, plus reasonable attorney’s fees and costs. However, due to incomplete point-of-sale records and mismanaged purchasing records, at trial the record provides clear and convincing evidence of only 20,000 incidents of mislabeled fish. The court calculates the penalty at the lowest level possible, awarding the State and MFSC \$3,000,000 plus fees & costs (20,000 x \$150 per incident).

If the Trap has adequate liability insurance it will likely survive its first brush with the Seafood Substitution Prevention and Fish Fraud Deterrence Act, but even if it does its insurance premiums will skyrocket. That is if any insurance company is willing to extend the Trap liability coverage in the future at any possible rate. Regardless, in response to this litigation every insurance company in Maine will be adjusting its policies to reflect the potential risk from systemic seafood substitution and take steps to implement purchasing audits for policies where fish fraud liability could exceed one million dollars. These quasi-regulatory actions would lead

¹⁶⁰ For reference, average per unit (restaurant) sales for the Olive Garden was \$4.5 million annually in 2015. DARDEN, 2015 ANNUAL REPORT: BACK TO BASICS, at 3 (2015), *available at*: https://s2.q4cdn.com/922937207/files/doc_financials/Darden-2015-Annual-Report-Final.pdf.

¹⁶¹ “The Tourist Trap” is a completely fictional creation, and is not meant to represent any actual restaurant in Maine or elsewhere.

many other restaurants to clean up their act, and give insurance companies the leverage they need to insure good behavior or deny coverage to fish fraud claims. The now very well-funded MFSC, which received fifty to seventy-five percent of the penalty for prosecuting the claim as well as having had its entire legal costs reimbursed, also has the Trap on its watch list and sends diners in frequently for follow-up testing.

B. Supplier Shenanigans in Fine Dining

In this scenario the MFSC brings a claim against a high-end seafood restaurant, called for convenience “Marla’s Oyster Shack.”¹⁶² Marla’s advertises itself heavily as a farm-to-table establishment that sources all of its meat, poultry, and fish from within 150 miles of its location in Portland, Maine. Marla’s has annual revenues of about \$500,000, serving roughly fifty customers on an average day. Marla’s staple menu items are local Maine oysters, and Maine lobster rolls. As it turns out, for the past few years Marla’s primary seafood supplier, Fake Fischer & Co, has been selling them farmed European oysters and shelled lobster meat from Connecticut, both falsely labeled as local Maine product. Once again, the MFSC has members dine at Marla’s and sample the food for genetic testing, which provided a clear showing of mislabeling. The MFSC files a complaint and awaits the AG’s office’s response. In this case, the AG’s office decides to intervene and assumes control of the prosecution.

The business records of invoices and the point of sale system uncovered during discovery clearly and convincingly reveal a pattern of systemic fraud, but in this case at the supplier level, implicating Fake Fischer. Marla’s insurance company steps in to mount a defense, and impleads Fake Fischer & Co as a third-party defendant seeking indemnification on all counts, as well as reimbursement of legal fees. The case is resolved by summary judgment, as Fake Fischer & Co. can offer nothing on the record to dispute the sale of mislabeled seafood by it to Marla’s and then to the general public. Approximately fifty percent of Marla’s patrons ordered one of the mislabeled items, thus over its two years of operation approximately 2,600 fraudulent orders of fish were sold, with corresponding penalties totaling \$390,000.

Marla’s, while thoroughly inconvenienced by the lawsuit and having weathered a few cycles of bad press, emerges whole –recouping its legal fees from Fake Fischer’s insurance coverage. The MFSC receives twenty-five percent of the penalty for its trouble and is reimbursed its minimal legal fees and testing costs. It decides to spend that money investigating the labeling of fish at Fake Fischer & Co.’s other customer restaurants, and in many cases works directly with the defrauded restaurant owners to mount follow-on cases against their duplicitous supplier. Fake Fischer’s insurance company refuses to renew their general liability policy, and while other coverage is available, it is prohibitively expensive. Facing higher operating costs, ongoing liability from its history of fraudulent mislabeling, and the loss of its most profitable accounts, Fake Fischer & Co. ceases operation and files Chapter 7 bankruptcy for liquidation of its minimal assets. Other similar suppliers take notice, and implement appropriate control systems to avoid a similar fate.

C. Negligent Mislabeling – A.K.A. the Chowder Fish Problem

¹⁶² “Marla’s Oyster Shack” is a completely fictional creation, and is not meant to represent any actual restaurant in Maine or elsewhere.

Bob the Fishmonger¹⁶³ (“Bob’s”) offers a variety of fresh and frozen seafood from Maine and away in one of Maine’s darling Mid-Coast cities. Among its many offerings is an assortment of fish scraps for \$5.99 a pound. Labeled as “Chowder Fish,” the mix could contain an assortment of ground fish including cod, haddock, hake, pollack, grouper, flounder, tilapia, red (or other) snapper, and at least half a dozen other species. When asked about it, the employees working the counter at Bob’s always say that it is mostly cod and haddock. However, because the “chowder fish” is made up of scraps and undersized pieces of other fish, Bob has no records available to offer proof. Further, operating mostly on cash, Bob’s record keeping for the sale of “chowder fish” is essentially non-existent. Mary, a summertime resident of the neighborhood and semi-retired attorney, incensed by the low quality of the “chowder fish” her spouse brought home to make into cioppino,¹⁶⁴ sent a sample in for testing that revealed the scraps to be mostly inexpensive farm-raised tilapia. Mary decides to file a complaint under the Act, alleging the sale of mislabeled fish.

The AG’s office decides to intervene and settle the case. While Bob’s conduct is clearly a violation of the Act, the documentary record, even after discovery, is thin and the actual damages to Mary and other patrons are arguable at best.¹⁶⁵ As part of the settlement Bob agrees to reimburse Mary’s legal fees, which are covered by Bob’s insurance policy. Bob also enters into a consent agreement with the AG’s office requiring it to label its “Chowder Fish” more clearly. Patrons to Bob the Fishmonger can now buy “Assorted fish pieces for chowder or stew^{*}” at \$5.99 a pound. Bob, under pressure from his insurer, has upgraded his record keeping procedures and point of sale system to avoid similar problems in the future.

D. Abusive Litigation

James was a waiter at the Green Lobster in South Portland, Maine. The Green Lobster is part of a national seafood restaurant chain known for its low-cost lobster dinners.¹⁶⁶ James was fired for taking excessively long breaks and writing in false tip amounts on customer checks. After he was fired, James files a series of complaints alleging sale of mislabeled seafood at all of the Green Lobster’s five locations throughout Maine. James attests that the Green Lobster’s Maine Lobster Tail Dinner actually features spiny lobster (a.k.a. rock lobster or langostas) tails harvested in Florida. James has no actual proof of these claims, neither genetic testing nor business records, but in pursuit of a perceived windfall he has filed nonetheless. James’ lawyer should have investigated the claim enough to believe it was filed in good faith, as required under Me. R. Civ. P. 11, but that is not what happened, and these frivolous complaints reach the court.

¹⁶³ Bob the Fishmonger is a fictional creation.

¹⁶⁴ Italian Seafood Stew. *See, e.g.*, Giada De Laurentiis, *Cioppino*, THE FOOD NETWORK, <http://www.foodnetwork.com/recipes/giada-de-laurentiis/cioppino-recipe.html> (last visited April 15, 2016).

¹⁶⁵ In the author’s opinion \$5.99 a pound for tilapia is a reasonably good price as of January 2017.

* This assortment is offered as a special and may or may not include Cod, Haddock, Hake, Tilapia, Pollock, Flounder, Grouper, Snapper, and an assortment of other fish depending on availability each day.

¹⁶⁶ “The Green Lobster” is obviously modeled on a well-known American chain-restaurant but is fictional, and is not meant to imply any misbehavior by its real-world inspiration.

The case proceeds to discovery, only to be revealed as lacking all merit. The court disposes of the allegations via summary judgment, sanctioning James' lawyer and James himself jointly by awarding Green Lobster a reimbursement of reasonable attorney's fees and discovery costs. James, being an out of work waiter who was fired for cause, is unable to pay the judgment. More importantly, lawyers hearing similar complaints from disgruntled former employees in the future learn to apply a more rigorous investigation to accusations of fish fraud before bringing suit under the Act.

VI. CONCLUSION

Rampant, systemic, intentional seafood substitution is a threat to public health, to the environment, to conservation of endangered species, to the economy of communities dependent on the bounty of the ocean, and to the integrity of the U.S. food supply chain. It is a problem so large, so massive in scale, that it costs consumers in the United States alone as much as twenty-five billion dollars each year.¹⁶⁷ Yet, seafood substitution is a problem that the Federal government provides less than a hundred trained agents to fight.¹⁶⁸ In response to this terminal, intractable disconnect between the scale of the problem and the resources marshalled to address it, this comment has proposed a radical solution to shift the economics of the industry against mislabeling.

As the narratives of possible enforcement scenarios above demonstrate, this scheme could lead to penalties of a magnitude that cast doubt on the survival of fraudulent purveyors. Indeed, such a solution may seem outsized when measured against the circumstances of any individual example of mislabeling, but it is a draconian solution tailored to a systemic problem that existing laws and regulation have been unable to curtail. The goal is deterrence of obviously fraudulent conduct by the purveyors of seafood, who have strayed outside of legal and ethical behavior because of the profit motive, and whose bad behavior has been enabled by lax enforcement. This is a radical solution offered because there seems to be no hope that the simple solutions, such as hiring more trained regulators and inspectors, the interim solutions, such as the SAFE Seafood Act, or the comprehensive solutions, such as implementing and funding all the recommendations of the Presidential Task Force on Combating IUU Fishing and Seafood Fraud, can be enacted in the dysfunctional environment of modern American politics.

In an ideal world this proposal, if implemented, would be enforced no more than handful of times – the idea being that by bringing the full might of the penalty down on a few of the most egregiously bad actors, likely ending their businesses, the rest of the industry will take notice and rationally change their behavior to reflect the new economics of fish fraud. If business operators fail to notice and change their behavior, the insurance industry will step in to protect its own interests by requiring proof of better behavior in order to maintain liability coverage. That said, for all the fearsome scale of the potential penalties, this proposal offers a state-based solution, crafted from tested legal tools, which should limit any concern about unforeseen consequences and market disruption.

In closing, please note that this proposal is not offered as a comprehensive or best-practices solution, but as a counterpoint to the inaction of the status quo. It is an effort to stop floundering around on seafood substitution and finally align the interests of consumers, retailers

¹⁶⁷ Lou, *Bait and Switch*, *supra* note 3.

¹⁶⁸ Rentz, *supra* note 6.

and restaurants against the regulatory and marketing failures that continue to allow widespread mislabeling and outright fraud. By borrowing the *qui tam* structure and checks of the Federal False Claims Act, fee shifting from civil rights law, and harnessing the quasi-regulatory power of the market for business liability insurance, this proposal crafts a deterrent large enough to shift monetary incentives; to realign the structure of the consumer facing seafood industry against substitution through the use of a scalable, flexible deterrent and incentives to promote third-party detection. These measures would not only increase the independent probability of detection and the monetary penalty for being caught, but also link the two variables in a virtuous cycle where higher penalties attract more scrutiny, which in turn results in more severe consequences for bad behavior. This approach would drive the level of illicit profits required to support systemic fraud to increasingly unsustainable heights, and by wringing out the fraudulent profits accomplish the goal of reducing consumer facing seafood substitution.¹⁶⁹

¹⁶⁹ As D and P_d rise, π_f must also rise or a rational fraudster would discontinue mislabeling because the risk of the consequences would exceed the expected value of the profits. Further, under this proposal P_d increases with every fraudulent act, making the only way to cap liability to cease the behavior. See $\pi_f < DP_d$ and $\pi_f > DP_d$ analysis and application, *supra* note 89.