IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

MARC KASKY, on Behalf of the General Public of the State of California,	)	No. S-087859
Plaintiff and Appellant	)	San Francisco Superior Court Case No. 994446
v.	)	
NIKE, INC., PHILIP KNIGHT, THOMAS CLARKE, MARK PARKER, and DAVID TAYLOR	)	Court of Appeal, First Dist., Div. One, No. A086142
Defendants and Respondents.	)	

BRIEF OF THE ATTORNEY GENERAL

AS AMICUS CURIAE

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INTRODUCTION

Image advertising has become an essential marketing tool stimulating product purchase by associating, often with great subtlety, use of the product with consumer achievement of the lifestyle, values, or aspiration promoted. At issue in this appeal is a challenge to Nike's alleged dissemination of false statements of fact about its own operations as part of a publicity campaign to defend its well-cultivated image as a socially responsible corporate citizen against charges that its products are manufactured under execrable conditions in foreign sweatshops.

Although the First Amendment and the "free speech" clause of the California Constitution protect commercial speech from unwarranted governmental regulation, fraud, false and misleading advertising, and the utterance of falsehood about one's own conduct have never found constitutional sanctuary. The Court of Appeal, however, affirmed the trial court's sustaining of a demurrer without leave to amend on the ground that the First Amendment fully protected Nike's alleged use of falsehood to promote its corporate image and deceive the public about the conditions under which its athletic footwear and apparel were produced. In the appellate court's view, the ongoing public debate about economic globalization included an attack on Nike's alleged mistreatment of workers as well as its reputation for social concern, and Nike could marshal data relevant to the public discourse even if the data included untrue statements about its own labor practices.

The Attorney General fully supports the expansive core First Amendment protection afforded to the debate of ideas and opinion in matters of public controversy, including the debate over the benefit and harm resulting from economic globalization. This case, however, is neither about ideas nor opinion. This case is about the constitutional protection to be afforded to product and corporate image promotion and the value to be placed on falsehood as an instrument of that promotion. Plaintiff essentially alleges that Nike disseminated false statements about its own labor practices to induce members of the public to buy Nike's products and to negate public criticism so that consumers would not participate in a boycott against Nike. As discussed below, image advertising is properly viewed as a form of commercial speech entitled to limited First Amendment protection, and the use of deceptive statements of fact about one's own operations is not entitled to First Amendment or state constitutional protection under any legal theory.

The Attorney General has a significant interest in this case. The false advertising laws

empower the Attorney General, the district attorneys, and other law enforcement agencies to bring actions in the name of the People of the State of California to obtain injunctive and other relief to redress false advertising for the protection of the public and the maintenance of fair business competition. (Bus. & Prof. Code, §§17203, 17204, 17206, 17535, 17536.) This Court has characterized these public actions as civil law enforcement actions. See *People* v. *Pacific Land Research Co.* (1977) 20 Cal.3d 10, 19. The opinion in this case may substantially affect the application of the false advertising laws and the free speech provisions of the federal and state constitutions, particularly to corporate and product "image" advertising campaigns, and, thus, may affect future law enforcement efforts.[1]

I. IN REVIEWING THE DEMURRER, THE COURT MUST ACCEPT THE COMPLAINT'S ALLEGATIONS THAT NIKE MADE FALSE STATEMENTS ABOUT ITS FOREIGN LABOR PRACTICES AS PART OF A PUBLICITY CAMPAIGN TO PROMOTE PRODUCT SALES

[1]Private parties may bring cases on behalf of the general public for injunctive and other equitable relief to redress false advertising. (Bus. & Prof. Code, §§17203, 17204, 17535). An appeal in a false advertising action commenced by a private party, such as the appeal in this case, may have profound ramifications for law enforcement agencies. Private parties must serve all appellate briefs on the Attorney General. (Bus. & Prof. Code, §§17209, 17536.5; Rule 16(d), Cal. Rules of Court.) The obvious purpose of this requirement is to afford the Attorney General with the opportunity to express the public agencies' concerns to the appellate court.

> Whether a complaint may withstand demurrer is reviewed under the following standard: "The rules by which the sufficiency of a complaint is tested against a general demurrer are well settled. We not only treat the demurrer as admitting all material facts properly pleaded, but also 'give the complaint a reasonable interpretation, reading it as a whole and its parts in their context.'
>
> "If the complaint states a cause of action under any theory, regardless of the title under which the factual basis for relief is stated, that aspect of the complaint is good against a demurrer. '[W]e are not limited to plaintiffs' theory of recovery in testing the sufficiency of their complaint against a demurrer, but instead must determine if the factual allegations of the complaint are adequate to state a cause of action under any legal theory. The courts of this state have . . . long since departed from holding a plaintiff strictly to the 'form of action' he has pleaded and instead have adopted the more flexible approach of examining the facts alleged to determine if a demurrer should be sustained.'
>
> "If a complaint does not state a cause of action, but there is a reasonable possibility that the defect can be cured by amendment, leave to amend must be granted."

(*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 38-9; internal citations omitted.) The complaint "should set forth the ultimate facts constituting the cause of action, not the evidence by which plaintiff proposes to prove those facts." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal. 3d 197, 212.) The truth of the pleaded ultimate facts must be assumed, and plaintiff's ability actually to prove its allegations is not at issue. (*Id*. at pp. 213-14.)

The complaint in this case, occupying two volumes of the joint appendix, is saturated not only with evidentiary allegations but also with more than 300 pages of attached press releases, newspaper articles, annual reports, and other documents. Stripped to its essence, the complaint alleges that Nike made a series of *false* representations as part of its "advertising, promotional campaigns, public statements and marketing" efforts "in order to maintain and/or increase its sales and profits." (First

Amended Complt., ¶¶75, 79, 82(b), 84 at 3 JA pp. 356-60.) Plaintiff contends that Nike *falsely* stated that it (1) complies with applicable foreign wage and hour rules, (2) guarantees workers who are employed by foreign subcontracting manufacturers a "living wage," (3) pays workers in subcontracted factories double the minimum wage, (4) provides workers with free meals and health care, (5) complies with worker health and safety and environmental standards, and (6) protects workers from physical abuse by the subcontractors who own the factories. (*Ibid.*) Nike, thus, allegedly made untrue statements concerning the conditions and circumstances under which its products were made to induce customers to buy its products.

The complaint, however, went further to allege that Nike made these false representations of fact "in response to the public exposure of Nike's labor practices in Southeast Asia" by human rights groups that harshly criticized the working conditions supposedly existing in the factories producing Nike's shoes and clothing. (First Amended Complt., ¶18, 3 JA at pp. 332-33.) Moreover, plaintiff alleged that Nike's success in marketing products was the result of a multi-year marketing effort, costing as much as $1 billion per year and involving pervasive ties to, and endorsements by, professional sports stars and college athletic teams. (First Amended Complt., ¶¶13-16, 3 JA at pp. 333-32.) Plaintiff claims that Nike's marketing success was so complete that its "Just Do It" slogan tapped into and came to symbolize, from a social historical perspective, the ethos of the "baby boom" generation. (First Amended Complt., ¶17, 3 JA at p.332.) The complaint and the mountain of attached evidence strongly imply that Nike's products, product image, and corporate image are inextricably linked in the public's mind so that a consumer's purchase of the product leads to participation in the image. The product is not just a shoe but an emblem reflecting the wearer's chic and daring willingness to break way from social inhibitions and "Just Do It." Consequently, an attack on the circumstances of the product's manufacture taints not only the product itself but jeopardizes the image of the product and the corporation that produces it. How chic is it to wear a shoe produced through the alleged exploitation of Third World labor? Accordingly, Nike's alleged false representations are purportedly designed to overcome what the complaint describes as a "sweatshop stigma" (First Amended Complt., 3 JA at p. 332, l. 18) to preserve both product and corporate image and thereby maintain and promote the desirability of the product and its sales.

Nike demurred to the complaint on First Amendment and state constitutional grounds. Nike's central contention was that it was drawn into a debate about globalization, economic policy, and labor standards and that its response to public attacks was absolutely protected. Plaintiff, however, argued that Nike made the allegedly false statements to fend off the call for a boycott and to preserve and, indeed, foster its reputation as a socially responsible company with which the public could deal without fear of promoting labor exploitation. Plaintiff, thus, argued that Nike's statements were designed to promote sales and were a form of false commercial speech that receives no First Amendment protection. The parties have framed the constitutional issue as an "either/or" proposition: either Nike's alleged untrue statements were made as part of a public debate and are, therefore, subject to absolute constitutional protection notwithstanding their alleged falsity, or the statements are commercial speech and are entitled to no protection whatsoever because they are false. The trial court sustained Nike's demurrer, after finding the constitutional distinction between commercial and noncommercial speech to be dispositive.

II. THE COURT OF APPEAL'S OPINION

The Court of Appeal affirmed after concluding that Nike's statements at issue were part of a public debate and entitled to full First Amendment protection.

The Attorney General is most troubled by the Court of Appeal's unwarranted limitation of commercial speech doctrine to statements involving product characteristics. As the court observed,

> "[commercial speech] cases differ in one fundamental respect: they concern communications conveying information or representations about specific characteristics of goods. In contrast, the speech at issue here was intended to promote a favorable corporate image of the company so as to induce consumers to buy its products. . . .
>
> "The fact that the communications at issue here serve to promote a favorable corporate image through press releases and letters takes them outside two of the three characteristics of commercial speech noted in the *Bolger* decision – advertising format and reference to a specific product. . . . [W]e think that a public relations campaign focusing on corporate image, such as that at issue here, calls for a different analysis than that applying to product advertisement. . . .
>
> "Nike exemplifies the perceived evils or benefits of labor practices associated with the processes of economic globalization . . . . Nike's strong corporate image and widespread consumer market places its labor practices in the context of a broader debate about the social implications of employing low-cost foreign labor for manufacturing functions once performed by domestic workers. We take judicial notice that this debate has given rise to urgent calls for action ranging from international labor standards to consumer boycotts. Information about the labor practices at Nike's overseas plants thus constitutes data relevant to a controversy of great public interest in our times."

(79 Cal.App.4th 165, 174-76 (advance sheets); 93 Cal.Rptr.2d 854, 860-61).

III. NIKE HAS MANUFACTURED AN IMAGE OF SOCIAL RESPONSIBILITY AS A MEANS OF PROMOTING PRODUCT SALES

A. Image Promotion Is an Essential Aspect of Product Promotion

The Court of Appeal did not recognize that modern marketing techniques may so inextricably link a product to an image that the promotion of the product's image or the image of the product's manufacturer is the promotion of the product.

Advertising experts contend that the greatest challenge faced in the increasingly competitive marketplace is corporate and product image management. (See S. Howard, Corporate Image Management: A Marketing Discipline For The 21st Century (1998), p. 217.) As a commentator has observed,

> "Image vs. product-corporate 'image' advertising and product advertising aren't mutually exclusive, and it's wrong to automatically position discussion on corporate advertising by labeling it 'corporate vs. product advertising'. . . . The best product advertising also sells the company as a good source for the product, and the best image advertising recognizes that the company itself is a 'product' over and above its subordinate products. . . ."

(Allen, Corporate Advertising–Out of the Ivory Tower, Into Marketing, Sourcebook on Corporate Image and Corporate Advocacy Advertising, Federal Trade Commission (1978), p. 570.) Indeed, company image is important because it relates directly "to how comfortable customers feel about buying and using products." (Gregory, Marketing Corporate Image: The Company As Your Number One Product (1991), p. 96.) Companies, however, now operate in a "business climate influenced by major societal themes," one of which involves adherence to "global responsibility standards." (Kartalia, Reputation At Risk?, 47 Risk Management No. 7 (July 1, 2000).) If consumers believe that a company is not acting as a good corporate citizen, consumers will look to other product providers:

"The 'new consumer' is one who will, or will not, buy a product or service based on a

> company's reputation. A recent Walker Group study found that 48 percent of consumers refused to buy from companies whose business practices they found objectionable. Thus, as the pocketbook has become an all-powerful weapon, shaping positive perceptions is critical to maintaining a competitive edge. Criteria for judging corporations are based on broader measures than in the past . . . . [C]orporations are also being judged on their public responsibility behavior."

(Garone (edit.), *Designing A Consumer Awareness Campaign,* Shaping A Superior Corporate Image: A Conference Report (1996) p. 40.)

B. Nike Has Cultivated A Corporate Image Of Social Progressivity As A Marketing Tool To Promote Product Sales

Nike's ability to create, manage, and manipulate image over decades has made it a "business school case study for brand building." (Martinson, *The Sweet Swoosh of Success: Brand Values Nike*, The Guardian (July 8, 2000); see, e.g., Stabile, *Nike, Social Responsibility, and the Hidden Abode of Production*, 17 Critical Studies in Media Communication, No. 2 (June 1, 2000), 2000 WL 19325193 (Nike "offers an instructive case study of how multinational corporations produce and manage their public images.").) Indeed, Nike has been recognized for being "brilliant in the way it creates a mood, an attitude for what it sells. Nike talks very little about the product – sometimes it's hard to figure out what's being advertised." (Crain, *Miller Sacrilege Latest To Ignore What The Product's All About*, Advertising Age (January 20, 1997).)

Nike has made a celebrated effort to depict itself as a socially responsible company whose athletic shoes had a transformational quality enabling people to break out of the social roles to which age, race, and sex may have confined them. For example, Nike's "Just Do It" campaign featured African-American sports stars in its commercials, particularly basketball hero Michael Jordan, long before African-Americans were generally employed to make endorsements. Nike's ads featured wheelchair-bound athletes, a middle-aged woman marathon champion, and an eighty-year-old man who ran seventeen miles through the streets of San Francisco. (Shaw, Reclaiming America at p. 17.) Nike's "If You Let Me Play" series showed young women athletes praising the benefit of sports and linking Nike to the elevation of women's self-esteem, even to the point of suggesting that women would be less likely to endure domestic abuse and more likely to seek preventive breast cancer care. (*Id.* at p. 71.) These advertisements –

> "conveyed the idea that Nike sneakers were worn by people of all ages, genders, and disabilities, and that the buyers of Nike shoes had the grit and determination to take on the type of challenges included in the advertisements. A widely distributed Nike poster reflected the company's apparent recognition of the country's social, economic, and racial injustices. The text, 'There are clubs you can't belong to. Neighborhoods you can't live in. Schools you can't get into,' appeared above a photo

> of a lone runner on a country road. The text then concluded, 'But the roads are always open. Just Do It.' Wearing Nikes offered a route to spiritual if not political salvation."

(*Id*. at p. 17.) As the head of the marketing program at the University of Oregon observed, Nike's image advertising campaign "shows the product to be part of a bigger picture or part of a bigger image. It suggests that if you use Nike, you're not just covering your feet, you're participating in the athletic lifestyle . . . . It's part of expressing who you are, what you stand for and what you believe in." (Suo, *Nike Takes Own Advice In Changing Its Slogan*, Portland Oregonian (January 4, 1998).)

If product success is predicated on emotional connections between the consumer and the company or product, consumers may feel betrayed when the company falls from grace. Nike's carefully engineered image of social progressivity – and the commercial success built on that image – may turn like the image of Dorian Gray if the company's professed commitment to social responsibility is untrue:

> "one can believe that Nike's 'If you let me play sports' ad signifies a commitment to women's liberation and empowerment, as long as the Vietnamese women who make Nike shoes, working 12-hour days for a wage of between $2.10 and $2.40 a day, are kept off the screen. Similarly, middle-class consumers may very well believe that Nike's use of African-American spokespersons indicates its commitment to people of color as long as nothing in the field of the media contradicts such a belief, or perhaps as long as journalists avoid mentioning that Michael Jordan's salary may well be greater than the combined annual payroll of the six Indonesian factories that make Nike shoes."

(Stabile, *supra, op. cit.)* Consumers appear to be particularly sensitive to issues of labor and human rights abuses:

> "in a Corporate Edge survey, 58% of the consumers polled said that they would boycott a brand if they knew that the company was employing children to make their product. A 1995 survey showed that 78% of their sample would patronize retail

> stores committed to stopping the abuse of garment workers. The same survey showed that 84% of the consumers sampled would pay $1 extra on a $20 purchase if the item was manufactured in a worker-friendly environment. Corporations have also recognized the materiality of human rights in the process of consumer decision making. For example, PepsiCo suffered for its operations in Myanmar when Harvard University reversed its plan to transfer $200,000 worth of cola purchases to Pepsi as a result of student concern over PepsiCo's contribution to human rights abuses in Myanmar. A spokesperson from Reebok openly stated that 'consumers today hold companies accountable for the way products are made, not just the quality of the product itself.'"

(Su-Ping Lu, *Corporate Codes of Conduct and the FTC: Advancing Human Rights Through Deceptive Advertising Law,* 38 Colum. J. Transnat'l L. 603, 624 (2000).)

Nike incurred a consumer backlash when its foreign labor practices were assailed as creating sweatshop working conditions; the company became the target of a call for a consumer boycott, the company suffered losses in 1998 for the first time in 13 years, and the entire imbroglio was viewed as a "PR disaster." (See Curtis, *Public Relations: PR Takes Center Stage,* Campaign (March 10, 2000).) Nike responded, in part, with the statements that are at issue in this appeal. Nike's effort to portray its labor practices, however, have not been limited to the evidence of statements attached to the complaint.

Nike currently uses its Internet web site to make a variety of statements about its present labor practices that counter the charges levied against it and are of the same character as the statements incorporated into the allegations of the complaint. (See Nike Homepage <http://nikebiz.com>; an excerpt is included in the Appendix to this brief].) In the category labeled "responsibility," Nike affirmatively presents its position on environmental, worker diversity, "global community," and foreign labor practice issues. Some of the statements are general in nature, while others consist of specific statements of objective facts. With regard to labor practices, for example, Nike generally represents that workers in its foreign factories "are benefitting from a range of improvements in their working conditions such as increased overtime pay, new counseling programs, better ventilation,

cleaner working environments, and enhanced training programs." (See <http://nikebiz.com/labor/index.shtml>.) Nike discusses specific programs it sponsors to ameliorate working and living conditions in Third World countries; for example, Nike lists its involvement with other organizations in attempting to end child labor in the Pakistani soccer ball industry and in making micro-loans to provide start-up capital for 3,100 small businesses involving rural Vietnamese women and 1,300 incipient Indonesian enterprises. (See <http://nikebiz.com/labor/ngo.shtml>.)

Nike also has a section named "Frequently Asked Questions" that simulates a question and answer dialog between Nike and a hypothetical member of the public. Nike's answers include specific factual claims about Nike's practices. For example, in answer to the question of whether Nike uses child labor, Nike states that it has a "zero tolerance for child labor" and insists that --

> "No contract worker making Nike footwear product can be under the age of 18. No contract worker making Nike apparel, equipment or accessories can be under the age of 16. In rare cases where local standards are higher, the manufacturer must conform to that higher standard."

(See <http://nikebiz.com/labor/faq.shtml>.) As another example, Nike posed the question "Does Nike pay the full legal minimum wage in Indonesia?" and answered, in part, that the minimum cash monthly wage of its Indonesian workers was raised to 300,000 Indonesian rupiahs and is at least Rp. 351,000 with food and transportation subsidies, a majority of the Nike work force earns Rp. 400,000 per month, the government minimum wage is Rp. 286,000 per month, and the government has determined cost of living expenses to equal Rp. 332,000 per month.[2] (*Ibid.*)

Through these and other factual statements, Nike establishes the circumstances and manufacturing environment in which its products are produced. What if Nike lied? While the Attorney General does not in this brief question Nike's integrity or subscribe to the allegations of the complaint, the Attorney General asks the question to state the proposition that state law may constitutionally redress factual misrepresentations made as part of a publicity campaign. As discussed

[2]On November 30, 2000, the rupiah to dollar exchange rate was Rp. 9,510 to $1.

below, neither the First Amendment nor the free speech clause of the California Constitution sanction the misrepresentation of objective fact about one's own operations or products as part of a publicity campaign aimed at stimulating product sales regardless of whether the promotional effort is focused on the product, its image, or the image of its maker.

IV. THE FIRST AMENDMENT AND THE CALIFORNIA CONSTITUTION DO NOT PROTECT A COMPANY'S FALSE STATEMENT OF FACT ABOUT ITS OWN PRODUCT OR BUSINESS OPERATIONS

The parties' debate of the First Amendment issues in this case largely revolves around the question of whether Nike's alleged false statements constitute commercial speech. Plaintiff contends the statements constitute false commercial speech unentitled to any constitutional protection, while Nike argues that the statements were uttered as part of political discourse entitled to complete First Amendment protection. Framed by the allegations of the complaint which must be accepted as true on the review of a demurrer, the case involves commercial speech. However, a determination of the constitutional protection to be afforded the allegedly false statements does not hinge on the characterization of the statements as commercial speech. Under the facts alleged in this case, Nike's alleged use of falsehoods about its own products and business affairs finds no federal or state constitutional protection.

A. The Commercial Speech Doctrine

Although framed in absolute terms, the First Amendment's protection of speech has never been considered absolute; for example, libel, slander, misrepresentation, obscenity, perjury, false advertising, solicitation of crime, aiding and abetting by encouragement, and conspiracy have never enjoyed full First Amendment safeguard. (See *Konigsberg v. State Bar* (1961) 366 U.S. 36, 49, fn.10.) Until 1976, commercial speech was also not accorded any First Amendment protection. (See *Valentine v. Chrestensen* (1942) 316 U.S. 52, 54; see also *Breard v. Alexandria* (1951) 341 U.S. 622.)

In *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.* (1976) 425 U.S. 748, 762, the United States Supreme Court abandoned its long-standing categorical rejection of

commercial speech from the ambit of First Amendment protection. The Court invalidated a state restriction on the publication of prescription drug prices that the Court found to be an insupportable restriction on the free flow of accurate commercial information. (*Id.* at pp. 771-72.)

The Court, however, did not recognize unqualified First Amendment protection for commercial speech: "Some forms of commercial speech regulation are surely permissible." (*Id.* at p. 770.) The Court specifically acknowledged the right to prohibit false and misleading commercial speech. (*Id.* at pp. 771-772.) In the Court's view, the truthfulness of commercial speech could be verified by its disseminator and its vital role in generating commercial profits made it a particularly hardy form of speech less likely to be chilled by proper regulation than other forms of speech. (*Id*. at pp.771-22 and fn. 24.) The high Court has never wavered in holding that "The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading . . . ." (*Zauderer v. Office of Disciplinary Counsel* (1985) 471 U.S. 626, 638; see, e.g., *Central Hudson Gas & Electric Corp v. Public Service Com.* (1980) 447 U.S. 557, 563; *Bates v. State Bar of Arizona* (1977) 433 U.S. 350, 383; see also *People v. Columbia Research Corp.* (1977) 71 Cal.App.3d 607, 614, cert. den. *sub. nom. Columbia Research Corp. v. California* (1977) 434 U.S. 904 [upholding an injunction issued under former Civ. Code §3369 (predecessor section to Bus. & Prof. Code §17200) and Bus. & Prof. Code § 17500 [restraining false and misleading advertising].)

The "precise bounds of the category of expression that may be termed commercial speech" is subject to doubt. (*Zauderer, supra,* 471 U.S. at p. 637; see *In re Primus* (1978) 436 U.S. 412, 438 fn.32 [line between commercial and noncommercial speech "will not always be easy to draw"].) Moreover, "the diverse motives, means, and messages of advertising may make speech 'commercial' in widely varying degrees." (*Bigelow v. Virginia* (1975) 421 U.S. 809, 826.) Various iterations of a standard exist for determining whether speech is commercial. The most common description of the "core notion" of commercial speech is speech that does "no more than propose a commercial transaction." (*Bolger v. Youngs Drug Products Corp.* (1983) 463 U.S. 60, 66.) The U.S. Supreme Court has also referred to commercial speech as "expression solely related to the economic interests of the speaker and its audience." (*Central Hudson, supra,* 447 U.S. at p. 561.) This Court has described commercial speech as "that which has but one purpose – to advance an economic transaction." (*Spiritual Psychic Science Church v. City of Azusa* (1985) 39 Cal.3d 501, 511.)

The United States Supreme Court has resisted advertisers' attempts to gain core First Amendment protection for commercial speech by conflating a commercial message with a discussion of public issues. The high court recognized that "many, if not most, products may be tied to public concerns about the environment, energy, economic policy, or individual health and safety" and that the linkage of commercial speech to matters of public debate does not elevate commercial speech to core First Amendment protection. (*Central Hudson, supra,* 447 U.S. at p. 562 fn. 5.) Accordingly, in *National Commission on Egg Nutrition v. FTC* (7th Cir. 1977) 570 F.2d 157, cert. den. (1978) 439 U.S. 821, a federal appellate court rejected a trade association's assertion that it was participating in a fully First Amendment-protected public health debate when it made statements minimizing health concerns about cholesterol and encouraging consumers to buy eggs. The court found that the statements were commercial speech promoting egg consumption merely disguised by the rhetoric of a public health debate.

In *Bolger,* a manufacturer of condoms distributed pamphlets touting its products and discussing the general use of condoms in halting the spread of venereal disease. The Supreme Court noted that the pamphlets were advertisements, the pamphlets referred to specific products, and the distribution of the pamphlets was economically motivated. Each of these factors, standing alone, would not necessarily make the speech commercial in character, but the combination of these factors established that the speech was commercial notwithstanding the discussion of public health issues. (*Bolger, supra,* 463 U.S. at pp. 66-68.)

In *Board of Trustees of the State Univ. of New York v. Fox* (1989) 492 U.S. 469, 474-75, the Supreme Court went further by indicating that the linkage between commercial speech and public issues would have to be inextricable to give the speech fully protected First Amendment status. The high court concluded that a promotion of Tupperware was commercial speech despite inclusion of a home economics discussion: "No law of man or of nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares." (*Id*. at p. 474.)

The three factors found in *Bolger* to indicate commercial speech -- advertising, specific product referral, and economic motivation -- need not all be present to find that speech was commercial in character. (*Bolger, supra,* 463 U.S. at p. 67.) For example, an economically

motivated statement that offered specific services may be commercial speech. (See *Leoni v. State Bar* (1985) 39 Cal.3d 609, 623.)

The gist of the complaint in this action is that Nike made a series of false statements about its foreign labor practices as part of a publicity campaign to encourage the public to purchase its products and assuage public concern about the labor conditions under which Nike products are manufactured. (First Amended Complt., ¶¶75, 79, 82(b), and 84, 3 JA at pp. 356-60.) Plaintiff alleged that Nike's publicity campaign was designed to "entice consumers who do not want to purchase products made in sweatshop and/or unsafe and/or inhumane conditions" and set forth the following statement allegedly made by Nike before Christmas:

> "Consumers are savvy and want to know they support companies with good products and practices . . . . During the shopping season, we encourage shoppers to remember that NIKE is the industry's leader in improving factory conditions. Consider that Nike established the sporting goods industry's first code of conduct to ensure our workers know and can exercise their rights."

(First Amended Complt., ¶27, 3 JA at p. 336.)

These allegations, which must be assumed true on demurrer, demonstrate that the alleged misrepresentations involve commercial speech. The statement quoted above is obviously an invitation to buy. More fundamentally, the criticism of Nike's labor practices created an impediment to purchase because socially conscious consumers do not want to buy products manufactured under unfair and exploitative conditions. (See discussion in Section III above.) Moreover, given the fusion of the product and image, Nike shoes lost the luster of social acceptability. Thus, Nike intended to stimulate sales transactions by removing the impediment to sales created by the criticism.

The alleged factual misrepresentations about Nike's own labor practices do not lose their character as commercial speech by being linked to a public debate. Nike can freely participate in a public debate about the benefits of economic globalization without reference to whether Nike employs underage workers or pays them twice the minimum wage. Indeed, the public debate argument in this case is far less compelling than in *Bolger*. One cannot imagine a discussion of the prevention of venereal disease without mention of condoms; indeed, public health officials

undoubtedly exhort their use. To paraphrase *Fox*, no law of man or nature requires Nike to discuss globalization by making specific objective factual claims about practices at its own particular factories.

B. The Court of Appeal Erred By Failing To Apply Commercial Speech Doctrine

While the First Amendment ordinarily prohibits regulation of speech based on the content of the communicated message, the government may regulate the content of commercial speech to further a substantial governmental interest including preventing the dissemination of information that is false, deceptive or misleading, or that proposes an illegal transaction. (See, e.g., *Bolger, supra,* 463 U.S. at p. 65; *Central Hudson, supra,* 447 U.S. at pp. 561-62.) Had Nike expressed its political beliefs or opinions, commercial speech would not be at issue and Nike's viewpoint would be accorded full core First Amendment protection. However, by presenting crucial *facts* about the wages, hours, and working conditions in Nike's Southeast Asian shoe factories in order to appeal to consumers concerned about inhumane sweatshop conditions (First Amended Complt., ¶¶ 1, 27, JA, Vol. 3, pp. 327, 336), Nike is not immune from governmental regulation.

The Court of Appeal erred in this case by reading commercial speech precedent as limited to situations involving information or representations about the specific characteristics of goods. The appellate court also erred in holding that the commercial speech doctrine does not apply to corporate image advertising.

No prior case has ever limited the commercial speech doctrine to speech involving only product characteristics. For example, in *Friedman v. Rogers* (1979) 440 U.S. 1, the Court upheld a generic ban on the use of trade names by optometrists which did not directly involve any misrepresentation concerning optometric services.

Product characteristics were also not involved in the determination made by the federal appellate court in *Briggs & Stratton Corp. v. Baldrige* (7th Cir. 1984) 728 F.2d 915, that speech affecting commercial interests was commercial speech subject to government regulation. Briggs & Stratton contended that the government could not prohibit it from responding to a questionnaire prepared by Arab governments to ferret out and boycott businesses that had transactions with Israel.

The appellate court concluded that the questionnaire responses were aimed at maintaining advantageous commercial relationships with Arab nations, not at influencing public debate over foreign trade and international relations, and could be regulated as commercial speech incident to the regulation of trade.

The commercial speech doctrine has also been applied to a deceptive advertisement placed by a major tobacco company that misrepresented the conclusions of a medical study on the effects of tobacco. (See *In re R.J. Reynolds Tobacco Co.* (1988) 111 F.T.C. 539.) The advertisement did not deal specifically with the company's products and purported to relate only to the public health debate in general and the contents of this specific scientific study in particular. The advertisement, however, obviously implicated tobacco sales by attempting to minimize public fear about tobacco use by a discussion of the medical study.

Moreover, a seller may propose a commercial transaction with statements about factors other than product characteristics; for example, a seller may focus on who, how, or where a product is made. Specific statutes have long prohibited misrepresentations about the circumstances or context of a product's manufacture or sale. For example, state law proscribes false or misleading statements regarding whether products were made by blind workers (Bus. & Prof. Code, §17522), American Indians (Bus. & Prof. Code, §17569), or union labor (Lab. Code, §1012). Misrepresentations regarding the kind, character, or nature of the labor employed are also prohibited. (Lab. Code, §1011, subd. (a).) Neither the source or sponsorship of a product nor the affiliation or certification of a seller may be misrepresented. (Civ. Code, §§1770, subd. (a)(2) and (3).) Special rules also govern untrue or misleading statements regarding how a product was produced (see 50 C.F.R. §216.91 ["dolphin safe" tuna products]) or where a product was produced. (See Bus. & Prof. Code, §17533.7 ["Made in U.S.A."]; Civ. Code, §1770, subd. (a)(4) [geographic origin].) Accordingly, the proposal of a commercial transaction has attributes that extend beyond the particular characteristics of the product offered: a false statement of fact that products were produced by the hands of disabled army veterans or were not produced by the forced labor of Chinese political dissidents may be more important to consumers than price or product quality in determining whether to purchase a product.

Dicta in *Spiritual Psychic Science Church, supra*, 39 Cal.3d at p. 511, suggests in a hypothetical that an advertisement that cherries were picked by union workers may not be commercial

speech because the information is not used to "advance an economic transaction." The Attorney General respectfully submits, however, that this view does not comport with the importance currently placed by many consumers on the conditions of manufacture as a factor guiding purchasing decisions. For example, Nike's alleged misleading press releases and public letters about its labor practices were created to directly "advance an economic transaction" with consumers concerned about the labor conditions in overseas factories.

In a broader sense, the image of a corporation may be an essential factor in influencing consumer purchasing decisions. As discussed in Section III above, some of the most effective marketing involves a fusion of product and image advertising; the product becomes the embodiment of the aspirations and emotions engendered by product and corporate image advertising.

The political or social context in which goods are produced or offered for sale may guide buying patterns. For example, consumers may prefer to purchase products from companies that protect the environment, support community projects, or foster employment opportunity for racially and ethnically diverse workers. Indeed, Nike itself cultivates the image of a socially constructive and responsible corporate citizen: the Nike web site makes specific factual assertions about its contributions to the environment, the improvement of conditions for foreign workers, and the diversity of its domestic employees.

The proposal of a commercial transaction, thus, may not only involve the offer of Product A at Price B but the offer of a product produced under moral, social, or political circumstances that transcend the particular physical characteristics of the product. Indeed, the socially conscious manufacture and sale of products may not only furnish the commercial lure of the product but may be a factor justifying a higher price because of the implicit increased cost of manufacturing and selling in a socially responsible way. The advertisement of false facts to inflate a corporate image may also mislead employees and investors who would not otherwise be attracted to the company. (See *Pittsburgh Press Co. v. Human Rel. Com.* (1973) 413 U.S. 376 [advertisements for employment are commercial speech].)

The Court of Appeal also declined to apply commercial speech doctrine because the alleged misrepresentations of fact were not made in conventional advertisements. The complaint, however, alleges that the misrepresentations were made in advertisements as well as in promotional campaigns,

public statements, and marketing. (See, e.g., First Amended Complt., ¶75, 3 JA at p. 356.) None of the commercial speech cases requires that speech be contained in a conventional advertising format for that speech to be reviewed under the commercial speech doctrine. *Bolger*, for example, involved an informational pamphlet (see *Bolger, supra,* 463 U.S. at p. 66), and *Fox* involved an in-person sales presentation to small groups. (See *Fox, supra,* 492 U.S. at p. 472.) The complaint pleads the existence of a publicity campaign, and in the world of modern advertising, an advertising message need not come packaged as an advertisement.

Marketing consultants advise companies to project their message in various ways. Image advertising campaigns, for example, can be conducted in "Op-Ed" articles:

> "Op-Ed articles are an excellent way to explore complicated issues in a forum that is accorded a tremendous amount of respect. Many people feel that even if they violently disagree with you on what you are saying, the fact that you are saying it on the Op-Ed page of the *New York Times* implies a certain credibility."

(Sauerhaft and Atkins, Image Wars: Protecting Your Company When There's No Place To Hide (1989) at p. 62.) Sauerhaft and Atkins also advise companies to promote corporate image through press releases, press conferences, media alerts, press kits, bylined articles, meetings with newspaper editorial boards, one-on-one interviews with reporters, seminars, and newsletters. (*Id*. at pp. 76-95.) The complaint in this case alleges this type of concerted and orchestrated public relations effort.

In order to protect consumers from deception or coercion under the guise of freedom of expression, the commercial speech doctrine should be interpreted so that false statements of fact involving the producer, the product, and the context of the manufacture and sale of the product are subject to redress under the state's false advertising law without any constitutional impediment.

C. The Dissemination Of False Facts About One's Own Business Operations Is Not Entitled To Protection Under Core First Amendment Principles

Even if Nike's alleged misrepresentations of fact are considered to be noncommercial speech, Nike's dissemination of false facts about its business operations is not subject to First Amendment protection.

The First Amendment's guaranty of freedom of speech provides the "liberty to discuss publicly and truthfully all matters of public concern . . . ." (*Thornhill v. Alabama* (1940) 310 U.S. 88, 101). In our heritage,

> "Freedom of speech is 'indispensable to the discovery and spread of political truth,' and the 'best test of truth is the power of the thought to get itself accepted in the competition of the market . . . .' The First and Fourteenth Amendments remove 'governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity . . . .'"

(*Consolidated Edison Co. v. Public Service Comm'n* (1980) 447 U.S. 530, 534 [internal citations omitted].) Accordingly, the message, ideas, and subject matter of speech are beyond the reach of regulation. (See, e.g., *Police Dept. of Chicago v. Mosley* (1972) 408 U.S. 92, 95.)

Although there is no false idea under the First Amendment,

> "there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues. They belong to that category of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'"

(*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 340.) Accordingly, the false statement of fact "has never been protected for its own sake." (*Va. State Bd. of Pharmacy, supra,* 425 U.S. at p. 771.)

Although the utterance of falsehood has no constitutional value or protection, false statements may be made about others during the course of a spirited debate of public issues. Since "erroneous statement is inevitable in free debate," some false statements about others must be tolerated to promote free discussion; consequently, the courts have tempered the libel laws to permit a measure of falsity to ensure that "the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" (*New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 271-72.) To avoid self-censorship, publishers and broadcasters enjoy constitutional protection against libel action by public officials and public figures on matters of public controversy unless the false statements are disseminated with "actual malice" consisting of knowledge of the falsity of the statements or reckless disregard of whether the statements are false. (See *New York Times, supra,* 376 U.S. at pp. 279-80; *Curtis Publishing Co. v. Butts* (1967) 388 U.S. 130.) A lesser standard exists for private individuals defamed by statements that involve a public controversy. As long as some fault is required, the states may set the standards for the recovery of actual damages without proof of actual malice although actual malice is required for the recovery of presumed and punitive damages. (See *Gertz, supra,* 418 U.S. at pp. 347, 349-50.) A still lesser standard exists for private individuals defamed by statements that do not involve a public matter; presumed and punitive damages can be awarded without any showing of actual malice. (See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* (1985) 472 U.S. 749, 761)

At issue in the libel cases is the speaker's knowledge of the truth of his own statements, and the degree to which the speaker is obliged to discover the truth or falsity of a statement before speaking. Speakers without the requisite degree of knowledge concerning the falsity of their statements may escape liability for their utterance. The false statement itself, however, is not protected.

The self-censorship issue at work in the libel cases has no bearing in the factual context pleaded in the case at bar. Unlike the press which must often rush to compose a story from often unclear and conflicting facts under the pressure of a news deadline, a company has unique knowledge of, and access to, information about itself. Erroneous statement is not inevitable when a company

speaks of itself, and a speaker does not need to be insulated by a constitutional "breathing space" for statements about itself in order to participate in a vigorous public debate.

For example, an employer has a First Amendment right to communicate with employees, but the employer can be forced to limit its predictions on the effects of labor activities to those comments that are "carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences . . . ." (*NLRB v. Gissel Packing Co.* (1969) 395 U.S. 575, 618.) To the Supreme Court, it was not difficult for the employer to "avoid coercive speech simply by avoiding conscious overstatements he has reason to believe will mislead his employees." (*Id*. at p. 620.) In addition, "Numerous examples could be cited of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, corporate proxy statements, [and] the exchange of price and production information among competitors. . . ." (*Ohralik v. Ohio State Bar Assn.* (1978) 436 U.S. 447, 456.) These areas share in common the notion that the speaker may be obliged to provide truthful information about itself.

The complaint in this case alleges that Nike made statements in the overarching context of a publicity campaign to rebut specific criticism about its practices so that customers would not be dissuaded from buying Nike products. The alleged false statements may be objectively verified. Nike, for example, knows or can easily determine what it pays its employees. Presumably, no one in the world is better suited than Nike to know the facts about Nike's own business operations. Moreover, the alleged false facts do not in themselves form any part of ideological expression despite their inclusion in a general discussion about the global economy. Surely, Nike's ability to speak out on public issues is not dependent on its ability allegedly to fabricate favorable but false facts about itself to project an image attractive to potential purchasers of its products.

D. The Dissemination Of False Facts About One's Own Business Operations Is Not Entitled To Protection Under The California Constitution

The "free speech" clause of the California Constitution provides that:

"Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or

abridge liberty of speech or press."

(Cal. Const., art. I, §2, subd. (a).) The second sentence prohibiting laws restraining or abridging the freedom of speech and press parallels the language of the First Amendment. See *Gerawan Farming, Inc. v. Lyons* (2000) 2000 Daily Journal D.A.R. 12507, 12512 (hereafter "*Gerawan*"); *Pines v. Tomson* (1984) 160 Cal.App.3d 370, 393. The first sentence of California's free speech clause, however, affirms a right to freedom of speech on all subjects and thereby expresses broader protection for the free exercise of speech than does the First Amendment. See *Gerawan, supra,* 2000 Daily Journal D.A.R. at p. 12512; *Spiritual Science Psychic Church, supra,* 39 Cal.3d at p. 519; *Wilson v. Superior Court* (1975) 13 Cal.3d 652, 658. *Gerawan* recognizes that the right to speak on all subjects includes the right to speak on commercial matters. *Gerawan, supra,* 2000 Daily Journal D.A.R. at p. 12513.

The first sentence of the "free speech" clause of our state constitution, however, does not countenance the dissemination of false and misleading *facts* to further commercial goals as alleged in the case at bench. The "free speech" clause guarantees the right to publish one's "sentiments" about any subject. (Cal. Const., art. I, §2, subd. (a).) The word "sentiment" means "an attitude, thought, or judgment permeated or prompted by feeling: a complex of emotion and idea." Webster's Third Int. Dict., p. 2069 (1976). Accordingly, at least one appellate court has determined that the constitutional reference to "sentiments" means "statements of editorial thought, emotion, and opinion." *Pines, supra,* 160 Cal.App.3d at pp. 394-95.

This view of the term "sentiments" is consistent with the common law antecedents of the "free speech" clause. This Court, for example, quoted Blackstone's observation that:

> "'Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press. But, if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity. To subject the press to the restrictive power of a licensor . . . is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government. . . . Thus the will of individuals is still left free; the abuse only of that free will is the object

of legal punishment.'"

(*Dailey v. Superior Court* (1896) 112 Cal. 94, 98 [first set of ellipsis added].)

The "free speech clause," thus, provides a bulwark against the censorship of thoughts and feelings on diverse matters, including, in Blackstone's words, "controverted points in learning, religion, and government." (*Ibid.*) The "free speech" clause, however, has never been interpreted to sanction the dissemination of false statements of objective fact, especially in the context of furthering commercial objectives.

Moreover, the right to free speech is qualified by the imposition of responsibility "for the abuse of this right." (Cal. Const., art. I, §2, subd. (a).) As Justice Traynor observed, "the right of free speech does not guaranty immunity from liability for those who abuse it." (*Werner v. Southern Cal. etc. Newspapers* (1950) 35 Cal.2d 121, 124-25.) At the very least, the provision on "abuse" preserves defamation actions.[3] (*Ibid.*) The rejection of defamatory statements from the realm of constitutional protection demonstrates that the "free speech" clause was never designed to safeguard the dissemination of false facts. Indeed, this Court repeatedly confined its recognition of full free speech protection for commercial speech under the state constitution to commercial speech "in the form of truthful and nonmisleading messages about lawful products and services . . . ." (*Gerawan, supra*, 2000 Daily Journal D.A.R. at pp. 12513-14, 12518-19; see *In re Morse* (1995) 11 Cal.4th 184, 200 fn.4 ["we see no reason why Morse's misleading advertisements would be protected commercial speech under the California Constitution."].) Consequently, the first sentence of the "free speech" clause does not protect the dissemination of false and misleading statements uttered to advance a

[3]Interpreting a similar provision in the Oregon Constitution, the Oregon Supreme Court held that "Defamatory statements, of course, have throughout the history of this state been recognized as an abuse of the right of free expression for which a person is to be held responsible . . . ." *Wheeler v. Green* (1979) 286 Or. 118, 593 P.2d 777, 788. Accord *Marlin Fire Arms Co. v. Shields* (1902) 171 N.Y. 384, 64 N.E. 163, 165.

commercial objective.

The alleged false facts at issue in this appeal also find no constitutional protection in the second sentence of the "free speech" clause prohibiting laws that abrogate free speech. As stated above, the second sentence of the "free speech" clause is similar to the First Amendment. (See *Id.* at 12512.) This Court has long held that "cogent reasons must exist before a state court in construing a provision of the state Constitution will depart from the construction placed by the Supreme Court of the United States on a similar provision in the federal constitution." (*Gabrielli v. Knickerbocker* (1938) 12 Cal.2d 85, 89.) This Court found that differences between the first sentence of the "free speech" clause and the First Amendment counseled for rejection of First Amendment precedent in determining whether a business could be constitutionally compelled to pay for commercial speech that it did not support. (See *Gelawan, supra,* 2000 Daily Journal D.A.R. at 12519-20.) The similarity, however, between the *second* sentence of the "free speech" clause and the First Amendment militates for upholding application of the false advertising laws based on the First Amendment principles discussed in Section III A-C, above. (See, e.g., *Leoni v. State Bar, supra,* 39 Cal.3d 609, 622-23.)

CONCLUSION

For the foregoing reasons, the Court of Appeal erred in concluding that the First Amendment protects a company's dissemination of allegedly false statements of objective, verifiable facts about the company's products and business operations as part of a publicity campaign intended to encourage consumption of its products. Likewise, these alleged false statements of fact //

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are unprotected under the California Constitution. The judgment should be reversed.

DATED: November 30, 2000 Respectfully submitted,

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