No. 02-575

IN THE

Supreme Court of the United States

NIKE, INC., *et al.*,
Petitioners,

v.

MARC KASKY,
Respondent.

On Writ of Certiorari to the Supreme Court of California

BRIEF FOR RESPONDENT

Patrick J. Coughlin
Randi Dawn Bandman
Albert H. Meyerhoff
Frank J. Janecek, Jr.
Sylvia Sum
MILBERG WEISS BERSHAD HYNES & LERACH LLP
100 Pine Street, Suite 2600
San Francisco, CA 94111

Paul R. Hoeber
Counsel of Record
221 Pine Street, Suite 600
San Francisco, CA 94104
(415) 217-3800

Alan M. Caplan
Philip Neumark
Roderick P. Bushnell
April M. Strauss
BUSHNELL, CAPLAN & FIELDING, LLP
221 Pine Street, Suite 600
San Francisco, CA 94104

April 4, 2003

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

1. Whether the Court has jurisdiction under *ASARCO, Inc. v. Kadish*, 490 U.S. 605 (1989), and under the fourth exception to the final-judgment rule specified in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

2. Petitioner Nike, Inc., and the United States, as amicus curiae, seek reversal based on an argument that Nike did not raise below and that the California Supreme Court did not address. The question is whether Nike and the United States can rely on this argument as a ground for reversal and, if so, whether the First Amendment prohibits California from authorizing its citizens to sue on behalf of the general public under laws regulating false or misleading commercial messages.

3. Whether Nike's factual representations about the conditions under which its products are made, as alleged in the complaint, are commercial speech subject to laws regulating false or misleading commercial messages.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Constitution, Statutes, and Regulations

Miscellaneous

JURISDICTION

The Court does not have jurisdiction. See *infra* at 14-18.

STATUTES AND REGULATIONS INVOLVED

The following statutes and regulations are printed in the appendix to this brief: 15 U.S.C. §§ 45(a)(1), 1125(a); 16 U.S.C. § 1385; 18 U.S.C. § 1159(a); Cal. Bus. & Prof. Code §§ 17200-09, 17500, 17506, 17506.5, 17522, 17533.7, 17534-36.5, 17569, 17580.5; Cal. Civ. Code § 1770(a)(4); Cal. Civ. Pro. Code §§ 128.7, 425.16, 452, 472, 472c(a), 1021.5; Cal. Lab. Code § 1012; 16 C.F.R. Pt. 260 (cited as "App. __a").

STATEMENT OF THE CASE

Respondent Marc Kasky filed this suit against petitioner Nike, Inc. in San Francisco Superior Court on April 20, 1998. He subsequently filed an amended complaint as a matter of right. Cal. Civ. Pro. Code § 472 (App. 52a). This complaint is the entire record of factual allegations before the Court.

1. The complaint alleges that Nike, for the purpose of inducing consumers to buy its products, made false representations of fact about the conditions under which they are made.

This case is here on Nike's demurrer to the complaint. Basic pleading rules govern at this stage, with important consequences.

First, under California law, on demurrer the complaint's allegations must be taken as true. Pet. App. 2a. The Court must therefore disregard the factual assertions in the "Introduction" and elsewhere in Nike's brief that are unsupported by citations to the complaint.

Second, the complaint's allegations are based on respondent's "information and belief." Cmplt. ¶ 3. Contrary to Petr. Brief 5, 20, 28, 45, 47-48, pleading on information and belief is not a suspect device: "[T]he value of averments on information and belief in the procedure of the law is

recognized." *Berger v. United States*, 255 U.S. 22, 34 (1921); *see, e.g., People v. McKale*, 602 P.2d 731, 735 n.2 (Cal. 1979).

Third, in determining the sufficiency of a complaint, "its allegations must be liberally construed." Cal. Civ. Pro. Code § 452 (App. 52a); *see, e.g., Hudson v. Craft*, 204 P.2d 1, 5 (Cal. 1949). The law thus "commands us to construe the allegations of a complaint *liberally in favor of the pleader*." *Skopp v. Weaver*, 546 P.2d 307, 311 (Cal. 1976) (emphasis added). Nike's recitation of the complaint's allegations conflicts with this basic rule. Nike begins by attributing a "consistent pattern" to the complaint that misdescribes it in Nike's favor. Petr. Brief 6. Nike then treats the complaint, which by law must be liberally construed, as if it were a complete statement of the evidence that respondent will introduce to prove Nike's false representations at trial. *Id.* 7-11.

Fourth, in opposing Nike's demurrer, respondent has from the very outset relied on the same six false claims in the same nine Nike communications. See Cal. S. Ct. Open. Brief 3-6; Reply Brief 2-3. Yet, as will be noted, in reciting the allegations Nike omits false statements that respondent relies on and adds other statements that he does not rely on.[1]

Respondent will therefore set forth the complaint's material factual allegations, which by law must be used to determine its sufficiency against a demurrer.

Nike is in the business of manufacturing, distributing, marketing, and selling consumer goods in the form of athletic footwear and apparel. Cmplt. ¶¶ 5, 7, 13-17. In 1997, Nike spent almost $1 billion "to promote, advertise and market" its products. *Id.* ¶ 13.

---

[1] The complaint includes a seventh false claim relating to the Good-Works report. Cmplt. ¶¶ 1(f), 56-57, 61. Respondent has never relied on this claim in opposing Nike's demurrer. See Cal. S. Ct. Reply Brief 3. Nike knows this, but nevertheless asserts that respondent is relying on this claim. See Petr. Brief 11-12.

Nike manufactures almost all its athletic shoes in subcontracted factories in China, Vietnam, and Indonesia. The majority of the workers in these facilities are women under the age of 24. *Id.* ¶¶ 21, 40. Since 1993, under a memorandum of understanding between Nike and each of its subcontractors, Nike has assumed responsibility for their compliance with applicable local regulations governing minimum wages and overtime, occupational health and safety, and environmental protection. *Id.* ¶¶ 22-26.

In the mid-1990's, the complaint alleges, studies and reports issued by human-rights groups and other organizations brought to public attention the actual production practices and working conditions in the factories making Nike's shoes. One of the main sources of information about these conditions was an internal audit report prepared for Nike by Ernst & Young, "Report on Environmental and Labor Practice Audit," which Nike was able to keep secret for ten months before it was leaked to the public. *Id.* ¶¶ 18, 34-35, 41-43, 47, Ex. B. Other sources of information included the television news program, CBS News Report, "48 Hours," *id.* ¶ 29, Ex. F; a report by Vietnam Labor Watch, *id.* ¶¶ 18, 29, 36-37, 49, 53, Exs. E, BB; a study by Hong Kong Christian Industrial Committee and Asia Monitor Resource Center Ltd., "Working Conditions in the Sports Shoe Industry in China," *id.* ¶¶ 18, 32, 33, Ex. C; and "Briefing Paper: Sweating for Nike," published by Community Aid Abroad, *id.* ¶ 29, Ex. X.

The studies and reports referenced in the complaint documented, among other things, that workers in Nike's production facilities were forced to work overtime, often without overtime pay, and to work excessive overtime, in violation of local laws, *id.* ¶¶ 31-37; were in some cases paid less than the applicable minimum wage, *id.* ¶¶ 48-50; were subjected to physical punishment and abuse, *id.* ¶ 29; and were exposed to reproductive toxins and other harmful chemicals in the solvents and glue used in the production of Nike's shoes, as well as excessive heat, dust, and noise, without adequate safety

equipment, in violation of local laws, *id.* ¶¶ 40-43. For example, the internal audit that Ernst & Young conducted for Nike found that, in 96% of the cases examined, workers in one of the factories "were required to work above the maximum working hours." *Id.* ¶¶ 34-35, Ex. B. In that factory, which employed almost 10,000 workers, the Ernst & Young audit also found that the level of toluene, a reproductive toxin, "exceeded the standard from six to 177 times"; that the level of acetone, another toxic chemical, "exceeded the standard from six to 18 times"; and that dust "exceeded the standard by 11 times." *Id.* ¶¶ 42-43, Ex. B.

The complaint alleges that, in response to the public disclosure of these conditions and practices, Nike made false factual representations to California consumers about the production of its goods. *Id.* ¶ 18.

The United States, as amicus curiae, refers generically to these representations as being concerned with "the production of the goods that the company sells"; "Nike's means of production"; "the means used to produce goods"; "production practices"; and "the working conditions in its production facilities." U.S. Brief (I), 27-29. Respondent will use these and similar generic phrases, such as "the circumstances under which Nike's goods are produced" and "the conditions under which its products are made."

Specifically, the complaint alleges that Nike made six false representations:

- that its products are manufactured in compliance with applicable local laws and regulations governing wages and working hours, ¶¶ 1(b), 25, 30-38, Exs. D, R, Z. (Nike omits Exs. D and Z, while adding a statement in Ex. Q, which is not alleged to be false. Petr. Brief 9.);
- that the average line-workers in the factories are paid double the applicable local minimum wage, ¶¶ 1(d), 46-51, Exs. P, V, Z, DD. (Nike mentions this claim, but then says nothing about it. Petr. Brief 10-11.);

- that the workers receive free meals and health care, ¶¶ 1(e), 52-53, Exs. P, V, Z, DD. (Nike omits Exs. P and V and misrepresents ¶ 53 by describing and quoting from the wrong exhibit. Petr. Brief 11.);
- that Nike "guarantee[s] a living wage for all workers," ¶¶ 1(g), 18, 62-64, Ex. II;
- that the workers are protected from corporal punishment and abuse, ¶¶ 1(a), 28-29, Exs. D, U, V. (Nike omits Ex. D, while adding a statement in Ex. T, which is not alleged to be false. Petr. Brief 8.);
- that working conditions in the factories are in compliance with applicable local laws and regulations governing occupational health-and-safety and environmental standards, *id.* ¶¶ 1(c), 25, 39-45, Exs. Q, R, V, Z. (Nike omits Exs. Q, V, and Z, while adding a statement in ¶ 39, which is not relied on, and a statement in ¶ 44, which is not alleged to be false. Petr. Brief 9-10.).

The complaint alleges that Nike made these false representations in "its advertising, promotional campaigns, public statements and marketing." *Id.* ¶¶ 75, 79, 82(b), 84. The complaint identifies nine Nike communications in which the false representations appeared: a two-page letter with Nike's logo from Nike's Director of Sports Marketing to university presidents and directors of athletics, *id.*, Ex. R; a 33-page illustrated pamphlet, entitled "Nike Production Primer," *id.*, Ex. V; a posting with Nike's logo on Nike's Web site, *id.*, Ex. U; a posting of a press release with Nike's logo on Nike's Web site, *id.*, Ex. II; a three-page document on Nike's letterhead with Nike's logo, *id.*, Ex. P; a press release with Nike's logo, *id.*, Ex. Z; a five-page letter with Nike's logo from Nike's Director of Labor Practices to the Chief Executive Officer, YWCA of America, *id.*, Ex. D; a two-page letter with Nike's logo from Nike's PR Manager, Europe, to International Restructuring Education Network Europe, *id.*, Ex. Q; a letter to the editor of *The New York Times* from Nike's Chairman and Chief Executive Officer, *id.*, Ex. DD.

These communications promoted Nike and the goods it sells by extolling its production practices.

The complaint further alleges that Nike made the false representations "with intent to induce members of the public" to buy its products and "in order to maintain and/or increase its sales and profits." *Id.* ¶¶ 1, 75, 79, 82, 84. In particular, Nike sought to appeal to "consumers who do not want to purchase products made in sweatshop and/or under unsafe and/or inhumane conditions." *Id.* ¶ 27. Nike expressed this purpose in a letter to a leading California newspaper:

> "We'd like *consumers* to know that Nike has helped create 500,000 good-paying jobs all over the world. . . . .
>
> "During the [Christmas] shopping season, *we encourage shoppers to remember that Nike is the industry's leader in improving factory conditions*."

Id. ¶ 27, Ex. S (emphasis added). In sum, the complaint alleges that, in making the false representations about the conditions under which its products are made, Nike's purpose was to induce consumers to buy its products.

2. The complaint alleges that Nike's representations violated California laws regulating false or misleading commercial messages.

The complaint alleges that, by making the false representations set forth above, Nike violated California laws regulating unfair competition and false advertising. Cal. Bus. & Prof. Code §§ 17200 *et seq.*, 17500 *et seq.*

Originally enacted in 1933, California's unfair-competition law is often referred to as "one of the so-called 'little FTC Acts.'" *Rubin v. Green*, 847 P.2d 1044, 1052 (Cal. 1993). Section 5 of the Federal Trade Commission Act (FTC Act) prohibits "[u]nfair methods of competition" and "unfair or

deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1) (App. 1a). Similarly, the California law defines "unfair competition" to include "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." Cal. Bus. & Prof. Code § 17200 (App. 30a). As the California Supreme Court explained in the decision below, the purpose of the unfair-competition law "is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services." Pet. App. 5a. Because of "the similarity of language and obvious identity of purpose" of California's unfair-competition law and the "parallel" § 5 of the FTC Act, the California courts consider that "decisions of the federal court on the subject are more than ordinarily persuasive." *Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.*, 973 P.2d 527, 543 (Cal. 1999) (internal quotation marks omitted).

Originally enacted in 1915, the false-advertising law "is the major California legislation designed to protect consumers from false or deceptive advertising." *People v. Superior Court (Olson)*, 157 Cal. Rptr. 628, 634 (Cal. Ct. App. 1979). The law derives from "the so-called 'Printers' Ink Model Statute' drafted in 1911 at the behest of the advertising journal of the same name." *Id.* The model statute "made it a misdemeanor to place before the public any advertisement containing 'any assertion, representation or statement of fact which is untrue, deceptive or misleading.'" *Id.* More than 40 other states and the District of Columbia have also adopted statutes based on this model. *Id.* at 634 n.7. Unlike the strict-liability model statute, the California law requires negligence. *Id.* at 635-37. It forbids anyone, with intent to dispose of property, to disseminate any "statement" concerning the property "which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading." Cal. Bus. & Prof. Code § 17500

(App. 38a). A violation of the false-advertising law is also a violation of the unfair-competition law. Pet. App. 7a.

Under both California laws, to state a claim "based on false advertising or promotional practices, it is necessary only to show that members of the public are likely to be deceived." Pet. App. 7a (internal quotation marks omitted); *see Lavie v. Procter & Gamble Co.*, 129 Cal. Rptr. 2d 486, 495 (Cal. Ct. App. 2003) ("'Likely to deceive' . . . indicates that the ad is such that it is probable that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled."). This standard of deception is essentially the same as the standard applied by the Federal Trade Commission (FTC) in enforcing § 5. As the FTC explained in its Deception Policy Statement: "[T]he Commission will find deception if there is a representation, omission or practice that is likely to mislead the consumer acting reasonably under the circumstances, to the consumer's detriment." Letter from the FTC to The Honorable John D. Dingell, Chairman, Committee on Energy and Commerce, U.S. House of Representatives (Oct. 14, 1983), in *Cliffdale Assocs., Inc.*, 103 F.T.C. 110 app. at 176 (1984). California has no administrative agency equivalent to the FTC. But "California courts remain the ultimate arbiters of the meaning and scope of the unfair competition law, just as the federal courts are the ultimate arbiters of the meaning and scope of section 5 and the FTC's authority under it." *Cel-Tech*, 973 P.2d at 543; *see FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965) ("[I]n the last analysis the words 'deceptive practices' set forth a legal standard and they must get their final meaning from judicial construction.").

But "[w]hile the scope of conduct covered by the [unfair-competition law] is broad, its remedies are limited." *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134, 1144 (2003). The unfair-competition and false-advertising laws do not permit the recovery of damages, either compensatory or punitive. *Cel-Tech*, 973 P.2d at 539. The laws do provide for

civil penalties, but only in cases brought by public prosecutors. Cal. Bus. & Prof. Code §§ 17206, 17206.1, 17536 (App. 32a, 34a, 43a). Private plaintiffs, therefore, have only two potential remedies. First, the trial court may order injunctive relief that it finds to be "necessary" to prevent the unlawful practices. *Id.* §§ 17203, 17535 (App. 31a, 41a). Second, the court may order restitution by compelling the "defendant to return money obtained through an unfair business practice to those persons in interest from whom the property was taken." *Kraus v. Trinity Management Servs., Inc.*, 999 P.2d 718, 725 (Cal. 2000); *see Cortez v. Purolator Air Filtration Prods. Co.*, 999 P.2d 706, 715 n.10 (Cal. 2000) (noting that "restitutionary remedies" of §§ 17203 and 17535 "are identical and are construed in the same manner"). Thus, the laws provide "an equitable means through which both public prosecutors and private individuals can bring suit to prevent unfair business practices and restore money or property to victims of these practices." *Korea Supply*, 29 Cal.4th at 1150.

Since the filing of this case, the California Supreme Court has significantly limited the defendant's financial exposure in cases brought by private plaintiffs. The court has made clear that restitutionary relief "is limited to restoring money or property to *direct victims* of an unfair practice." *Id.* at 1151 (emphasis added). Thus, the court has held that "nonrestitutionary disgorgement of profits is not an available remedy in an individual action." *Id.* Similarly, the court has held that "disgorgement into a fluid recovery fund is not a remedy available" in individual actions that are not certified as class actions. *Kraus*, 999 P.2d at 721, 732. And because the law "does not mandate restitutionary or injunctive relief when an unfair business practice has been shown," the court has held that the defendant is entitled to assert "equitable considerations": "In deciding whether to grant the remedy or remedies sought by [the] plaintiff, the court must permit the defendant to offer such considerations." *Cortez*, 999 P.2d at 717. In

short, the court has maintained "the balance struck in this state's unfair competition law between broad liability and limited relief." *Korea Supply*, 29 Cal.4th at 1152.

Actions may be brought under these laws "by any person acting for the interests of itself, its members or the general public." Cal. Bus. & Prof. Code §§ 17204, 17535 (App. 31a, 41a). As authorized by this provision, respondent brought this suit "on behalf of the General Public of the State of California." Cmplt. ¶¶ 3, 8. Because the "action is equitable in nature," *Korea Supply*, 29 Cal.4th at 1144, the trial will be held without a jury, *see, e.g., C&K Eng'g Contractors v. Amber Steel Co.*, 587 P.2d 1136, 1139-41 (Cal. 1978). Thus, the trial judge will determine whether the allegations are proven and, if so, whether Nike's false representations meet the legal standard of being "likely to deceive" the public.

The complaint seeks injunctive relief and an order that Nike "disgorge all monies" acquired by means of its unfair business practices. Cmplt. at 34. As noted, however, the court cannot order nonrestitutionary disgorgement, as requested by respondent, because that is no longer an available remedy for a private plaintiff. Moreover, at this stage of the case, it is impossible to predict what remedy might be appropriate after trial. Nike, for example, might present "equitable considerations" that persuade the court not to grant any relief at all.

3. The only result of the proceedings so far is the overruling of Nike's demurrer to the complaint.

Nike demurred to the complaint on several grounds, including a defense based on the First Amendment. Nike's Dem. ¶ 3. The Superior Court sustained the demurrer and dismissed the case. Pet. App. 80a-81a. Respondent appealed rather than requesting leave to amend. *See* Cal. Civ. Pro. Code § 472c(a) (App. 52a). The California Court of Appeal affirmed the dismissal in an opinion that has been vacated. Pet. App. 66a; see Cert. Opp. 1.

The California Supreme Court reversed, concluding that Nike's false representations, as alleged in the complaint, "are commercial speech for purposes of applying state laws barring false and misleading commercial messages." Pet. App. 1a-2a. The court summarized the basis of its conclusion as follows: "the messages in question were directed by a commercial speaker to a commercial audience, and . . . they made representations of fact about the speaker's own business operations for the purpose of promoting sales of its products." *Id.* 1a. The court remanded for further proceedings, noting that it had not decided whether the "complaint is vulnerable to demurrer for reasons not considered here." *Id.* 30a.

SUMMARY OF ARGUMENT

I. The Court has no jurisdiction in this case for two distinct reasons. First, Nike has failed to establish its standing to seek review under *ASARCO, Inc. v. Kadish*, 490 U.S. 605 (1989). No judgment of any kind has been entered against Nike, and *ASARCO* does not authorize review for every defendant who loses in an interlocutory appellate decision.

Second, Nike has failed to show that this case is within the fourth exception to the final-judgment rule specified in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). Nike has neither shown that reversal would necessarily preclude further litigation nor that the decision below has an impermissible chilling effect on protected speech.

II. Nike and the United States seek reversal based on the argument that the First Amendment prohibits California from authorizing its citizens to sue on behalf of the general public under laws regulating false or misleading commercial messages. This argument was neither pressed nor passed upon below, and therefore the Court should refuse to consider it.

In addition, the argument fails because Nike and the United States ignore important safeguards and protections embodied in California law. First, uninjured private plaintiffs have no financial incentive for bringing suit because these

laws do not provide for damages, and thus successful plaintiffs receive no monetary recovery. In addition, the defendant's financial exposure is limited because there can be no disgorgement of profits and no disgorgement into a fluid recovery fund. The only possible monetary remedy, restitution, is limited to direct victims of the unfair practice.

Other safeguards include the requirement that the action confer "a significant benefit" on the public as a condition of an award of attorney's fees; the right of a defendant with a First Amendment defense to file a "SLAPP" motion at the outset of the case, which will result in its dismissal unless the plaintiff establishes a "probability of prevailing" on the claim; the burden on the plaintiff to prove the case in a non-jury trial and then to establish that relief, which is not mandatory, should be granted; and the defendant's right to offer "equitable considerations" against granting the relief sought.

Nike and the United States also fail to show that the private-plaintiff provision has an impermissible chilling effect.

III. The complaint alleges that Nike's representations violated California laws regulating false or misleading comercial messages. The First Amendment permits the regulation of false or misleading commercial speech, and Nike's representations, alleged in the complaint to be false, are commercial speech. Hence, they are subject to regulation under these laws.

Nike's representations are commercial speech because, as alleged in the complaint, they gave consumers factual information to rely on in deciding whether to buy Nike's products. Many consumers do not want to buy goods made under illegal, unsafe, or inhumane conditions. Nike's representations assured these consumers that its goods are not made under such conditions. Companies make similar representations about the circumstances under which their goods are

produced in many familiar cases of commercial speech: they claim that their products are made in the United States or by union labor, that their tuna is "dolphin safe," and that their goods have been produced in ways that do not harm the environment. Consumers rely on this information in their purchasing decisions, and these claims are therefore subject to regulation if false. The United States makes this point forcefully. See U.S. Brief 28.

Nike sought to appeal to consumers who would believe its representations about the conditions under which its products are made and therefore buy them. With the purpose of inducing purchases by these consumers, Nike conveyed this information in prepared public statements and postings on its Web site. At the same time, these corporate communications told consumers that Nike knew the facts about the conditions and practices in its production facilities. These allegations are sufficient to meet the Court's tests for identifying commercial speech.

Nike's representations have no immunity from laws regulating false or misleading commercial messages. It is not enough that they addressed matters of "public importance." Petr. Brief 21-36. Such matters—in this case, the conditions in Nike's production facilities—are often the subject of commercial speech. Nor were these representations part of a broader debate about more general public matters. Nike implies that they were throughout its brief, but the complaint's allegations do not show any such broader debate. Nor were the representations direct comments on public issues. They were concerned only with the production of Nike's own goods.

Nike argues that its representations are not commercial speech because they were responses to others' allegations. *Id.* 28. According to this argument, companies responding to public allegations about their goods are immune from regulation under § 5 of the FTC Act and comparable state laws. This argument conflicts with an important precedent

upholding the FTC's enforcement authority, *National Comm'n on Egg Nutrition v. FTC*, 570 F.2d 157 (7th Cir. 1977). In addition, the argument arbitrarily disregards the interest of consumers in receiving truthful commercial information and fails to take into account the company's access to the facts about its own product. Moreover, companies have the ability to sue noncommercial speakers for product disparagement for making false statements about their products.

ARGUMENT

I. The Court has no jurisdiction in this case.

1. Respondent argued that the Court has no jurisdiction under *ASARCO* in Cert. Opp. 6-10. Having declined to confront the issue in its petition for certiorari, Nike replied to respondent's argument in Cert. Reply 1-3.

In *ASARCO*, the Arizona Supreme Court had remanded the case "with instructions to *enter summary judgment* for respondents." As this Court also phrased it, the Arizona Supreme Court had "*granted* plaintiffs *a declaratory judgment*." 490 U.S. at 610, 611 (emphasis added). In this procedural posture, this Court stated the question as "whether we may examine justiciability at this stage because the Arizona courts *heard the case* and *proceeded to judgment*." *Id.* at 612 (emphasis added). After concluding that the plaintiffs lacked federal standing, the Court explained that the Arizona courts had "let[] the case *go to final judgment*" and that the question was therefore "whether *a judgment rendered* by the state courts in these circumstances can support jurisdiction in this Court." *Id.* at 617 (emphasis added). The Court also noted that the state proceedings had "resulted in *a final judgment altering tangible legal rights*." *Id.* at 619 (emphasis added).

Respondent therefore argued in this case that, since no judgment of any kind, final or otherwise, had been entered against Nike, it could not seek review under *ASARCO*. See

Cert. Opp. 8-10. According to Nike, however, the California Supreme Court's decision "produce[d] a 'judgment' against Nike" just as the Arizona Supreme Court's decision "produced a 'judgment' against the private lessees." Cert. Reply 3 n.2. But that is so only in the limited sense that *any* appellate decision is the appellate court's "judgment." The reality is that the California Supreme Court only overruled Nike's demurrer to the complaint, sending the case back for possible further demurrer proceedings, followed by litigation and trial. Pet. App. 30a. In *ASARCO*, by contrast, the Arizona Supreme Court instructed the trial court to "*enter summary judgment*" against the lessees, and this Court was careful to specify that the state courts had "*proceeded to* judgment" and reached a "*final* judgment." This Court could not have been contemplating that it was authorizing review in these cases for every defendant who is the losing party in an interlocutory appellate decision.

Even assuming that *ASARCO* does not require the entry of a judgment of some kind against the petitioner, Nike fails to show that it meets Article III's injury requirement:

- Nike asserts that it "face[s] the prospect that an award will be entered against [it] in this case" and that there is a "distinct and present threat that such relief will be granted on remand." Cert. Reply 2, 3. But Nike is in the same position as any other defendant whose demurrer has been overruled: Nike must now proceed to the next stage of the litigation process.

- Nike asserts that it is "required to litigate the constitutionality of the state statutes' restriction on [its] speech." *Id.* 3. Again, Nike is in the same position as any other defendant with a federal defense.

- Nike asserts that it "labor[s] under the 'defined and specific legal obligation' . . . to conform [its] speech to the California Supreme Court's definitive construction of that state's statutes and its narrow reading of the First Amendment." *Id.* 2. In *ASARCO*, however, the quoted phrase referred to the

"definite shape" that "the case" had taken on "as a result of the state-court judgment." 490 U.S. at 618. But Nike's obligation "to conform [its] speech" to the court's decision is the same as anyone else's obligation and, indeed, is the same as it would be if the court had issued its decision not in this case, but in some earlier case.

- Nike asserts that its demurrer is "functionally indistinguishable from a request for a declaratory judgment" that the statutes are unconstitutional. Cert. Reply 3. By this argument, as soon as a defendant asserts a federal defense—by demurrer, answer, counterclaim, or otherwise—the defendant has Article III standing. If so, the *ASARCO* lessees had Article III standing as soon as they intervened to defend the state statute under federal law. 490 U.S. at 610.

2. Respondent argued that the Court has no jurisdiction under the final-judgment rule in Cert. Opp. 11-17. Nike replied by relying solely on "the so-called 'fourth *Cox* category.'" Cert. Reply 4. This exception has two requisite conditions, neither of which is met here.

To meet the first condition, Nike must show that "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action." *Cox*, 420 U.S. at 482-83; see Cert. Opp. 13-14 (citing cases). But reversal on one of the grounds Nike has urged would not terminate the litigation, because the California courts would allow respondent to amend his complaint.

One of Nike's contentions in this Court is that California law unconstitutionally imposes "[l]iability . . . without fault." Petr. Brief 20.[2] Nike did not make this contention below. Justice Brown, dissenting, suggested that the states could be

[2] Nike asserts that "liability attaches notwithstanding the speaker's best efforts to ensure the statements' accuracy"; that the law eliminates "any defense of good faith"; that "*no* degree of effort suffices to protect the speaker from the strict liability of California law"; and that the law imposes "*post hoc* strict liability." Petr. Brief 3, 20, 40, 41.

given "the flexibility to define the standard of liability for false or misleading representations in this context so long as the standard is not strict liability." Pet. App. 63a. If the Court reverses on this ground, respondent will file an amended complaint alleging that Nike negligently made each of the false representations at issue. Litigation will then continue on the same causes of action. See Cert. Opp. 14-15.

Nike replied that this reversal "would require dismissal of [the] complaint as pleaded." Cert. Reply 4. But the point is that it would not be "*preclusive of any further litigation* on the relevant cause of action." *Cox*, 420 U.S. at 482-83 (emphasis added). Nike also replied that this is only "the mere possibility that the complaint hypothetically could be amended to add allegations" to meet the Court's ruling. Cert. Reply 4. But it will be a simple matter for respondent to amend the complaint to allege, in addition to the allegations of negligence set forth in Cmplt. ¶¶ 30, 76, that Nike negligently made each of its false representations. Nike also replied that *Cox* does not require that reversal "negate every imaginable theory of liability." Cert. Reply 4-5. But Nike's own "imaginable theory" is the basis of this reversal, and, contrary to Nike's implication, it would *not* "dispose of 'the relevant cause of action.'" *Id.* 5. Finally, Nike replied that respondent "admitted below" that Nike's "'statements are immune from state regulation'" if they are not "'commercial speech.'" *Id.* But this reversal would mean that Nike's false representations *are* commercial speech.

In addition, in opposing Nike's demurrer, respondent has relied on six false representations in nine separate communications. See *supra* at 4-5. Nike has failed to show that the Court could not reverse on fewer than all of these representations. In that event, this litigation would continue on the others. Again, therefore, Nike has not shown that reversal would necessarily end this case.

To meet the second condition, Nike must show that "a refusal immediately to review the state-court decision might

seriously erode federal policy." *Cox*, 420 U.S. at 483; see Cert. Opp. 15-17. Nike argues that the decision below has an impermissible chilling effect on protected speech. See Cert. Reply 5-7; Petr. Brief 38-43. But Nike ignores important safeguards and protections embodied in California law and fails to show any such chilling effect. See *infra* at 20-26.

II. The First Amendment does not prohibit California from authorizing its citizens to sue on behalf of the general public under laws regulating false or misleading commercial messages.

The United States argues that the First Amendment does not "allow States to create legal regimes in which a private party who has suffered no actual injury may seek redress on behalf of the public for a company's allegedly false and misleading statements." U.S. Brief 8. Nike similarly argues that "the legal regime approved by the California Supreme Court violates the First Amendment" because it does not "limit relief to individuals personally pursuing the prevention or redress of actual injury." Petr. Brief 19-20, 44 (heading).

This argument was neither pressed nor passed upon below. In addition, the argument fails because Nike and the United States ignore important safeguards and protections embodied in California law and do not show that the private-plaintiff provision has an impermissible chilling effect.

A. Because their argument was neither pressed nor passed upon below, Nike and the United States cannot rely on it as a ground for reversal.

Nike did not raise this argument in the California Supreme Court, and that court did not address it. *See, e.g.*, *Campbell v. Louisiana*, 523 U.S. 392, 403 (1998); *Adams v. Robertson*, 520 U.S. 83, 86-87 (1997). This Court recently emphasized in a federal case that, in contrast to a respondent who is defending a judgment, "it is quite a different matter to allow a petitioner to assert new substantive arguments attacking, rather than defending, the judgment when those arguments

were not pressed in the court whose opinion we are reviewing, or at least passed upon by it." *United States v. United Foods, Inc*., 533 U.S. 405, 417 (2001). Accordingly, the Court should refuse to consider this new argument.

The United States suggests that the question is embraced within Question 2 of the petition for certiorari. U.S. Brief (I). If so, it is only because Question 2 is vague enough to embrace any question that mentions the First Amendment and relates to "the legal regime approved" below. It is notable that the petition did not make this argument in support of Question 2. See Cert. Pet. 19-23. Nike did contend that the decision below "chills protected speech . . . in a manner and to a degree *that requires this Court's immediate review*." *Id.* 23-30 (quoting heading, *id.* 23; emphasis added); see Cert. Reply 6-7. But that contention concerned the final-judgment rule.

In any event, the fact is that Nike failed to raise this argument below. This failure deprived the California Supreme Court, the California Attorney General, and respondent "of the ability to address significant matters" in response to the argument. *United States v. United Foods*, 533 U. S. at 416-17.

The provision of the unfair-competition law that authorizes suits by private plaintiffs on behalf of the general public has been part of the law since it was first enacted in 1933. *See Kraus*, 999 P.2d at 727. The Legislature has amended the law a number of times in the past 70 years, but has left this provision intact. *See* Deering's California Codes, Civil Code Annotated §§ 3369-70.2 (1984); Deering's California Codes, Business and Professions Code Annotated §§ 17200-09, 17500, 17534-36.5 (1992 & Supp. 2002); *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 950 P.2d 1086, 1096-97 (Cal. 1998). Had Nike raised this argument below, the California Attorney General would have had the opportunity to defend the constitutionality of this provision. The Attorney General filed an amicus brief supporting respondent below and could

have developed a record showing that these private suits assist law enforcement in combating consumer fraud.[3] And respondent would have had the opportunity to document the unsuccessful attempts by the law's opponents to persuade the Legislature to eliminate this provision.

The California Supreme Court would also have had the opportunity to address the issue. At the very least, the court could have elaborated on its view that these private actions, along with consumer class actions, "serve important roles in the enforcement of consumers' rights." *Kraus*, 999 P.2d at 724-25. In particular, they "supplement the efforts of law enforcement and regulatory agencies," and the court has therefore "repeatedly recognized the importance of these private enforcement actions." *Id.* at 725.

B. Nike and the United States ignore important safeguards and protections embodied in California law and fail to show that the provision for private-plaintiff suits has an impermissible chilling effect.

1. California law embodies important safeguards and protections for defendants in these private-plaintiff actions. First and foremost, private plaintiffs who have not suffered an injury have no financial incentive for bringing suit. As explained *supra* at 8, the unfair-competition and false-advertising laws do not permit the recovery of damages. Thus, successful plaintiffs receive no recovery for themselves, and they receive no "bounty" from any other recovery, as they do, for example, under the federal False Claims Act. *See Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 771-72 (2000).

---

[3] For an example of such a private suit, see *Mangini v. R.J. Reynolds Tobacco Co.*, 875 P.2d 73 (Cal. 1994), where the court unanimously held that California could exercise its police power to protect minors from an advertising campaign for Camel cigarettes featuring the cartoon character "Old Joe Camel."

Moreover, in cases brought by private plaintiffs under these laws, the defendant's financial exposure is limited. Not only can there be no recovery of damages, there can be no disgorgement of profits and no use of the class-action remedy of disgorgement into a fluid recovery fund. See *supra* at 9. Thus, in these cases, the *only* available monetary remedy is restitution, which is limited to "*[a]ctual direct victims* of unfair competition." *Korea Supply*, 29 Cal.4th at 1152 (emphasis added). This means that, when a trial court awards restitution, it must use a claims procedure that requires "notify[ing] the absent persons on whose behalf the action is prosecuted of their right to make a claim for restitution." *Kraus*, 999 P.2d at 732 n.18. Hence, in a case like this one, restitution is limited to those identified claimants who relied on the defendant's false representations in buying its product and who make individual claims for refunds.

The United States' view of California law thus rests on serious misconceptions. It is not true that the law allows "private parties to obtain substantial monetary awards," so that private lawsuits may be motivated "by the prospect of financial gain." U.S. Brief 22-23. Nor is it true that "the scope of restitutionary relief . . . provides potentially enormous awards to entrepreneurial plaintiffs." *Id.* 23. As just explained, uninjured private plaintiffs can recover *nothing*.

The United States also suggests that "[t]he potential for massive monetary liability" may deter the speech even of "a company of Nike's size." *Id.* at 25.[4] This suggestion seems to be based on the mistaken view that defendants in private-

[4] Nike refers to "potentially crushing relief," "devastating financial sanctions," "potentially crushing suits," a "potentially staggering amount," "an incalculable amount," and "the potential to impose crushing financial costs." Petr. Brief 20, 26, 38 (heading), 41, 42, 48. This is hyperbole, at best.

plaintiff cases may be "divest[ed] of their profits." *Id.*[5] It may also be based on a misunderstanding of restitution in these cases, reflected in the inapposite quotation from *Fletcher v. Security Pac. Nat'l Bank*, 591 P.2d 51, 56-57 (Cal. 1979). See U.S. Brief 24. As the California Supreme Court has made clear, *Fletcher* "held that once an unfair trade practice was established, *a class action could proceed* without individualized proof of lack of knowledge of the fraud." *Kraus*, 999 P.2d at 730 (emphasis added); *see id.* at 731 ("*Fletcher* addressed the propriety of a class action . . . .").[6] Similarly, Nike quotes the statement in *Bank of the West v. Superior Court*, 833 P.2d 545, 553 (Cal. 1992), that the court may "order restitution without individualized proof of deception, reliance, and injury." See Petr. Brief 4, 45. But that case too was concerned with the proof required for restitution in a class action, as were the two cases the court cited for the quoted statement, *Fletcher* and *Committee on Children's Television, Inc. v. General Foods Corp.*, 673 P.2d 660, 668-69 (Cal. 1983) (relying on *Fletcher*). Thus, while restitution may be ordered in class actions "without *individualized* proof of deception, reliance, and injury" (emphasis added), in private-plaintiff actions that are not certified as class actions restitution is limited to claimants who can be located and who make individual claims for refunds. See *supra* at 9, 21.

Furthermore, these laws do not provide for attorney's fees. *See Cel-Tech*, 973 P.2d at 539. Thus, the only way to obtain

---

[5] The United States seems to have been misled by a sentence that was removed from the opinion below. See U.S. Brf 24 (citing Pet. App. 6a; for modification of opinion, see *id.* 65a). In the underlying quotation from *Kraus*, 999 P.2d at 725, the court was simply explaining what "disgorgement" means. *See Korea Supply*, 29 Cal.4th at 1145.

[6] At Petr. Brief 4, Nike quotes from *Kraus*, 999 P.2d at 730, but fails to note that *Kraus* was summarizing and discussing *Fletcher*. Nike also quotes from *State Farm Fire & Casualty Co. v. Superior Court*, 53 Cal. Rptr. 2d 229, 235 (Cal. Ct. App. 1996), but the statement quoted concerns proof of a violation, not restitution.

an award of attorney's fees is to meet the requirements of the generally applicable "'private attorney general' attorney fee doctrine." *Woodland Hills Residents Ass'n, Inc. v. City Council*, 593 P.2d 200, 208 (Cal. 1979). As specified by statute, the action must have "resulted in the enforcement of an important right affecting the public interest," and it must also, among other things, have conferred "a significant benefit . . . on the general public or a large class of persons." Cal. Civ. Pro. Code § 1021.5 (App. 52a). The trial court applies these statutory criteria in determining "whether or not plaintiff's counsel is entitled to any attorney fees and, if so, what constitutes a 'reasonable' fee.'" *Stop Youth Addiction*, 950 P.2d at 1101.

The defendant also has the right to file a "SLAPP" motion under California's anti-Strategic Lawsuits Against Public Participation statute. Cal. Civ. Pro. Code § 425.16 (App. 49a). A SLAPP suit asserts a claim against a defendant "arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue." *Id.* § 425.16(b)(1). As the Ninth Circuit has explained, the "anti-SLAPP statute was 'enacted to allow early dismissal of meritless first amendment cases aimed at chilling expression through costly, time-consuming litigation.'" *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1109 (9th Cir. 2003). The statute enables a defendant to move to strike the complaint at the outset of the case before any discovery, which is then stayed. § 425.16(f), (g). If the defendant shows that "'the plaintiff's suit arises from an act in furtherance of the defendant's rights of petition or free speech,'" the burden shifts to the plaintiff to establish "'a probability of prevailing on the challenged claim.'" *Vess*, 317 F.3d at 1110. If the motion is granted, the defendant is awarded attorney's fees and costs; if denied, the defendant has the right to an immediate appeal, in which the ruling is reviewed de novo. § 425.16(c), (j); *see, e.g.*, *Matson v. Dvorak*, 46 Cal. Rptr. 2d

880, 886 (Cal. Ct. App. 1995). The Legislature has instructed the courts to construe the statute "broadly," § 425.16(a), and they have: "California and federal courts have repeatedly permitted defendants to move to strike under the anti-SLAPP statute despite the fact that they were neither small nor championing individual interests." *Vess*, 317 F.3d at 1109.

The judicial process provides additional safeguards. Unlike the FTC Act, California law does not authorize cease-and-desist orders. See U.S. Brief 15. The unfair-competition law is "a meaningful consumer protection tool" because it allows consumers "to combat unfair competition by seeking an injunction against unfair business practices." *Korea Supply*, 29 Cal.4th at 1152. In seeking such an injunction, private plaintiffs are required in a non-jury trial both to prove the elements of the claim and to prove that they "qualify, in light of all relevant considerations, for an actual award of injunctive relief." *Stop Youth Addiction*, 950 P.2d at 1101 n.12. Moreover, upon challenge by the defendant, the trial court must determine whether the action is "one brought by a competent plaintiff for the benefit of injured parties." *Kraus*, 999 P.2d at 733. And because relief is not mandatory, the defendant is entitled to offer "equitable considerations" against the remedy sought. See *supra* at 9.

Also, the attorney filing the complaint "certif[ies]" that the asserted claims are legally "warranted" and that the factual allegations have "evidentiary support." Cal. Civ. Pro. Code § 128.7(b) (App. 46a). "If these standards are violated, the court can impose an appropriate sanction sufficient to deter future misconduct, including a monetary sanction." *Stop Youth Addiction*, 950 P.2d at 1101. Finally, because the California Attorney General has "a particular interest" in the interpretation of these laws, the Legislature has required that the Attorney General and the local district attorney receive notice and copies of the briefs in any appellate proceeding. *Lavie*, 129 Cal. Rptr. 2d at 491; *see* Cal. Bus. & Prof. Code §§ 17209, 17536.5 (App. 38a, 44a).

2. The United States contends that the provision for private-plaintiff suits "has the capacity to chill protected speech." U.S. Brief 20. This contention fails because it ignores the safeguards and protections just outlined. It also effectively amounts to the contention that private plaintiffs lack Article III standing. See *id.* 26-27. But federal standing requirements do not bind the states, *see, e.g., ASARCO,* 490 U.S. at 617, and there is no showing of any incremental chilling effect from actions brought by plaintiffs without federal standing.

Nike likewise ignores California's safeguards and protections and fails to show an impermissible chilling effect. See Petr. Brief 38-43. Nike asserts that the ruling below reflects the "court's commitment to construe the already broad terms of the [unfair-competition and false-advertising laws] as expansively as possible." *Id.* 38. The court, however, was not construing these laws. It was deciding whether Nike's representations were "commercial speech." And since the laws do not go beyond the limits of commercial speech, their breadth is beside the point anyway.

Nike adds an interpretation of the laws' "'deterrence' rationale." *Id.*; also *id.* 3. The California Supreme Court has explicitly rejected this kind of distorted interpretation: "While . . . the Legislature considered deterrence of unfair practices to be an important goal, . . . deterrence by means of monetary penalties is not the act's sole objective. A court cannot . . . award whatever form of monetary relief it believes might deter unfair practices." *Korea Supply*, 29 Cal.4th at 1148.

Nike next contends that "[t]he chilling effect of the legal regime approved by the court below is fact," the proof being that it has caused Nike to restrict "its communications on social issues that could reach California consumers." Petr. Brief 38-39. When Nike made this claim in its petition for certiorari, respondent pointed out that Nike continued to discuss the very same issues on its Web site. See Cert. Opp. 27. Nike replied that its claim is "indisputable." Cert. Reply

7 n.4. Nike is still discussing these issues (e.g., "Factory Conditions") on its Web site. See <http://www.nike.com/nikebiz/nikebiz.jhtml?page=0> (visited Mar. 31, 2003). No doubt Nike will reply that its claim remains "indisputable."

Nike then asserts that California's laws impose "strict liability"; go beyond "traditional advertising"; apply to speech "in any format and in any forum"; attach liability to "entirely truthful communications" that have less value to a company's "bottom line" than the cost of litigation; apply to "misleading" statements that "allegedly 'omit'" any of a "range of supposed 'facts'"; and "restrain statements of fact." Petr. Brief 40-42. Each of these assertions is equally true of § 5 of the FTC Act.

Nike also supports the claimed chilling effect by asserting that "obviously" it was under a "'practical compulsion'" to speak, so that its commercial speech was "'inextricably intertwined' with noncommercial speech." *Id.* 43. But Nike fails to identify anything in the complaint to show that it was required, either legally or in the nature of things, to engage in this commercial speech. *See Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 474 (1989). And Nike fails to identify any noncommercial speech in the complaint with which its commercial speech was assertedly intertwined.

C. Nike fails to show that the "actual malice" standard is required.

Nike contends that, "[w]holly apart from the unique features" of California's laws, respondent's "causes of action violate the First Amendment because they would impose strict liability, or at least liability based on mere negligence, for misstatements on matters of public concern." Petr. Brief 44. Nike assumes here that its false representations are commercial speech. *Id.* 19-20, 37. Thus, according to Nike, "the 'actual malice' standard" is required in cases of false commercial speech on matters of public concern. *Id.* 43 (heading). Nike did not raise this argument below, and the

California Supreme Court did not address it. Hence, this Court should refuse to consider it. See *supra* at 18-20.

In addition, if this argument is accepted, the actual-malice standard will be required as well in cases under § 5 of the FTC Act and comparable state laws. See U.S. Brief 15 n.5. Moreover, as Justice Brown noted, dissenting below, "an actual malice standard may be too high because these representations undoubtedly influence some consumers in their buying decisions, and the government has a strong interest in minimizing consumer deception." Pet. App. 63a.

III. Nike's factual representations about the conditions under which its products are made, as alleged in the complaint, are commercial speech subject to laws regulating false or misleading commercial messages.

A. The First Amendment permits the government to regulate false or misleading commercial speech.

The First Amendment protects commercial speech to safeguard "the free flow of commercial information." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763, 764, 765 (1976). As relevant here, this means that commercial speech is protected because it conveys truthful information to consumers for them to rely on in making informed purchasing decisions. *See, e.g., Greater New Orleans Broadcasting Assoc., Inc. v. United States*, 527 U.S. 173, 195 (1999); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 496 (1996) (plurality opinion). By contrast, when commercial information is false or misleading, it causes "commercial harms." *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426 & n.21 (1993). Hence, the Court has repeatedly declared that false or misleading commercial speech "is not protected by the First Amendment." *Thompson v. Western States Medical Ctr.*, 122 S.Ct. 1497, 1504 (2002); *accord Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554 (2001); *Greater New Orleans*, 527 U.S. at 183; *Florida Bar v. Went For It, Inc.*, 515 U.S. 618,

623-24 (1995); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 482 (1995); *Board of Trustees*, 492 U.S. at 475; *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 340 (1986); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 68-69 (1983); *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 507 (1981) (plurality opinion); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980).

Thus, the First Amendment permits the government to regulate "false, deceptive, or misleading commercial speech." *Ibanez v. Florida Dept. of Bus. & Prof. Regulation*, 512 U.S. 136, 142 (1994); *see, e.g., Edenfield v. Fane*, 507 U.S. 761, 768 (1993); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 638 (1985). The complaint alleges that Nike's representations violated California laws regulating just this kind of commercial speech. Hence, the only regulatory interest implicated here is "the State's interest in preventing deception of consumers." *Zauderer*, 471 U.S. at 651. This case therefore raises no issue about other grounds for regulating commercial speech; in particular, it raises no issue about "applying the *Central Hudson* framework." *Thompson*, 122 S.Ct. at 1504.

B. Nike's false representations of fact about the conditions under which its products are made, as alleged in the complaint, are properly classified as commercial speech.

Respondent will argue that Nike's false representations, as alleged in the complaint, are commercial speech and are thus subject to laws regulating false or misleading commercial messages.[7]

Nike's contrary argument would greatly limit the category of commercial speech. See Petr. Brief 21-36. According to

[7] The false representations alleged in the complaint are affirmative representations of fact. See *supra* at 4-5. Hence, Nike's references to liability for "literally true statements" and for acting "by omission" are irrelevant. Petr. Brief 3, 6; also *id.* 41, 42.

Nike, speech is not commercial unless it "addresses the qualities of a product as such (like its price, availability, or suitability)" and appears in an "advertisement" or a "product label." *Id.* 21 (also *id.* 6, 24, 27, 30 (heading), 34 & n.9, 35, 36). As will be shown, commercial speech is not so limited. The United States agrees. See U.S. Brief 27-28.

1. Nike's representations about the conditions under which its products are made provided factual information for consumers to rely on in their purchasing decisions.

Representations concerning a company's production practices give consumers information to rely on in making informed purchasing decisions, as the United States points out: "In today's environment, the means used to produce goods, no less than the quality of the goods themselves, have profound significance for some consumers, who are willing to pay more to achieve desirable environmental or social ends." U.S. Brief 28. Thus, many consumers do not want to buy goods made under illegal, unsafe, or inhumane conditions. See *supra* at 6. For these consumers, it is important to know, for example, whether Nike's shoes are produced in compliance with laws governing wages and working hours in the countries of manufacture and whether conditions in the factories satisfy those countries' laws governing health-and-safety and environmental standards. Hence, Nike's representations about the conditions under which its products are made gave consumers factual information to rely on in their purchasing decisions. If this information was false, as alleged in the complaint, these representations caused commercial harm.

There is nothing unusual in requiring that claims like these be truthful. In familiar cases of commercial speech, companies give consumers information about the circumstances under which their goods are produced. These representations

are subject to laws regulating false or misleading commercial messages:

U.S. origin. For over 60 years, the FTC has regulated claims that a product is of U.S. origin under § 5 of the FTC Act. *See* "Made in USA" and Other U.S. Origin Claims, 62 Fed. Reg. 63,755 at 63,756 & n.1 (1997).[8] Indeed, when this Court wished to illustrate commercial speech that is of "general public interest," it chose, as a clear example, the "domestic producer" who "advertises his product as an alternative to imports that tend to deprive American residents of their jobs." *Virginia Pharmacy*, 425 U.S. at 764.

In 1995, the FTC undertook a policy review to consider whether its traditional standard—that a product must be "all or virtually all" made in the United States to support such a claim—"remained consistent with consumer perceptions and continued to be appropriate in today's global economy." 62 Fed. Reg. at 63,756. In 1997, after finding that consumers "prefer buying U.S.-made goods" and "feel very strongly that the current standard should be retained," the FTC announced that it would continue to enforce its traditional standard. *Id.* at 63,764-65. At the same time, the FTC issued an Enforcement Policy Statement on U.S. Origin Claims outlining the factors that it would consider in determining whether such claims are

[8] Other laws regulating false U.S.-origin claims include the Lanham Act § 43(a), 15 U.S.C. § 1125(a)(1)(B) (App. 1a) (prohibits making "false or misleading representation of fact" that, "in commercial advertising or promotion, misrepresents the . . . geographic origin of . . . goods"); Cal. Bus. & Prof. Code § 17533.7 (App. 40a) (prohibits selling product that is not made in United States if on product or its container "there appears the words 'Made in U.S.A.,' 'Made in America,' 'U.S.A.,' or similar words"); Cal. Civ. Code § 1770(a)(4) (App. 46a) (in "transaction intended to result" in sale of goods, prohibits "deceptive representations or designations of geographic origin").

deceptive. *Id.* at 63,766-71.[9] The FTC applies the principles in this Statement "to U.S. origin claims included in labeling, advertising, other promotional materials, and all other forms of marketing." *Id.* at 63,767. Since that time, the FTC has successfully brought a number of enforcement actions against companies for violating § 5 by falsely representing that their goods are made in the United States.[10]

Nature of labor. The FTC long ago determined that false representations that goods are made by members of a labor union violate § 5. In *Columbia Pants Mfg. Co.*, 13 F.T.C. 61 (1929), the FTC found that "[a] substantial portion of the purchasing public . . . prefers to purchase . . . articles manufactured in factories . . . employing . . . workers belonging to, or affiliated with, some union of organized labor." *Id.* at 64. The FTC barred the seller from "advertising or in any manner representing" that its products were "'Union Made'" unless they were in fact "made by union labor." *Id.* at 66. An example of recent vintage would be a coffee chain promoting a particular blend of its coffee as "Fair Trade" coffee, claiming that the coffee beans are purchased from small farmers and cooperatives at a price above the world market price.[11]

---

[9] Nike asserts that a U.S.-origin claim concerns a matter "entirely within the corporation's control." Petr. Brief 40. This assertion is incorrect. *See* 62 Fed. Reg. at 63,768-69.

[10] *See, e.g., Black & Decker Corp.*, 2001 FTC LEXIS 20 (Feb. 8, 2001) (locks and lock systems); *Stanley Works*, 127 F.T.C. 807 (1999) (mechanics tools); *American Honda Motor Co.*, 127 F.T.C. 461 (1999) (lawn mowers); *Kubota Tractor Corp.*, 127 F.T.C. 444 (1999) (lawn and garden tractors); *Johnson Worldwide Assocs., Inc.*, 127 F.T.C. 430 (1999) (fishing line).

[11] Other laws regulating false representations about the nature of the labor employed in making a product include Cal. Lab. Code § 1012 (App. 53a) (prohibits "falsely stat[ing] that members of trades unions, labor associations, or labor organizations" were employed in making product); Cal. Bus. & Prof. Code § 17522 (App. 40a) (prohibits falsely indicating by "label, symbol, trade name, or name of manufacturer" that goods were

Dolphin-safe tuna. In the Dolphin Protection Consumer Information Act, Congress expressed its findings that dolphins "are frequently killed in the course of tuna fishing operations" and that "consumers would like to know if the tuna they purchase is falsely labeled as to the effect of the harvesting of the tuna on dolphins." 16 U.S.C. § 1385(b) (App. 1a). The Act prescribes that, if tuna was harvested by certain fishing methods, it is a violation of § 5 of the FTC Act to include on the label of the tuna product "the term 'Dolphin Safe' or any other term or symbol that falsely claims or suggests that the tuna contained in the product was harvested using a method of fishing that is not harmful to dolphins." *Id.* § 1385(d)(1). The Department of Commerce has issued detailed implementing regulations. 50 C.F.R. 216.90-96. The FTC would find that a company violated § 5 by making a false "dolphin safe" claim, whether on its tuna label or in its advertising or other promotional material. See U.S. Brief 28.

Environmental marketing. The FTC's Guides for the Use of Environmental Marketing Claims "address the application of Section 5 of the FTC Act to environmental advertising and marketing practices." 16 C.F.R. 260.1 (App. 5a); *see Association of Nat'l Advertisers, Inc. v. Lungren*, 44 F.3d 726, 733 (9th Cir. 1994) (noting that environmental claims appeal to "ecologically-minded consumers").[12] The Guides apply to claims "about the environmental attributes of a product" that are "included in labeling, advertising, promotional materials and all other forms of marketing." 16 C.F.R. 260.2(a) (App.

"made by blind workers"); 18 U.S.C. § 1159(a) (App. 4a) (prohibits selling product "in a manner that falsely suggests it is Indian produced"); Cal. Bus. & Prof. Code § 17569 (App. 45a) (prohibits selling article falsely "represented as made by authentic American Indian labor").

[12] In California, it is unlawful to make any "untruthful, deceptive, or misleading environmental marketing claim," which is defined to include any claim contained in the FTC's Guides. Cal. Bus. & Prof. Code § 17580.5(a) (App. 45a).

5a). The Guides explain that, under § 5, it is deceptive to misrepresent, for example, that goods offer a general environmental benefit, such as that they are "Environmentally Friendly," or that they are biodegradable, compostable, recyclable, or "ozone safe." *Id.* 260.7(a)-(d), (h) (App. 11a-21a, 27a). Some of the examples given describe claims that are deceptive because of the environmental effects of a "product's manufacture" or "production." *Id.* 260.6(c) (ex. 4), 260.7(a) (ex. 2) (App. 10a, 12a). Typical instances of environmental claims about the means of production would include companies' claiming that produce is grown without using pesticides that cause harmful environmental effects; that electricity is produced in an environmentally safe way (e.g., from wind or solar power); and that wood products are made using sustainable harvesting practices. The United States suggests another example: the FTC would find that a coffee company violated § 5 by falsely representing that its coffee was grown using "rain-forest-protective practices." U.S. Brief 28.

In these cases, then, companies provide consumers with information about the circumstances under which goods are produced so that they can rely on the information in their purchasing decisions. Consumers want this information because, in deciding whether to buy the products, they are concerned about preserving American jobs, supporting union (or other types of) labor, preventing harm to dolphins, or protecting the environment. As the United States observes with regard to its own examples: "Although those representations say nothing about the actual quality of the product and deal with production practices thousands of miles away, they nevertheless influence consumer choice and allow sellers to command premiums from consumers who are willing to pay more to protect rain forests or marine mammals." *Id.*

According to Nike, however, this case has to do not with commercial harm, but with consumers' "moral judgments." Petr. Brief. 35-36 (quoting heading, *id.* 35). But contrary to Nike's assertion, the complaint does not allege an attack on

"the public's perception of Nike as a moral company." *Id.* 5. Nor is there any such "theory" in the complaint. *Id.* 36. Moreover, what Nike actually means by a consumer's "'*moral* judgment' about the *seller*" is that the consumer's decision to buy a product is not based "just on price and quality." *Id.* 27. Nike's terminology therefore adds nothing to its contention that speech is commercial only if it "addresses the qualities of a product as such (like its price, availability, or suitability)." *Supra* at 29.[13]

2. In making these representations, Nike's purpose was to induce purchases by consumers.

Nike's representations were "promotional in nature," seeking "to benefit the economic interests of the speaker by promoting sales of its products." *R.J. Reynolds Tobacco Co.*, 111 F.T.C. 539, 546 (1988); *see In re Primus*, 436 U.S. 412, 438 n.32 (1978) (distinguishing between noncommercial speaker whose speech was "intended to advance 'beliefs and ideas'" and commercial speaker whose "purpose was the advancement of his own commercial interests"). It is true that almost anything a company does or says may have an economic motivation, whether the company is building a new plant or supporting favorable legislation, and thus may ultimately serve the purpose of "promoting sales of its products." But Nike's purpose was much more specific.

Nike sought to maintain its sales and profits by appealing to consumers, such as directors of athletics, who would believe its representations about the conditions in its production facilities and therefore buy its goods. In making these representations, then, Nike's purpose was "to affect purchasing decisions by the receivers of the information." *R.J. Reynolds*, 111 F.T.C. at 546. Nike's speech thus sought

[13] If one were to accept Nike's idiosyncratic and self-serving terminology, one would have to say that consumers are making a "moral judgment about the seller" in all of the examples discussed above, including those cited by the United States.

to "benefit the economic interests of the speaker by influencing the reader or listener in the role of consumer." *Id.* In short, as the complaint alleges, Nike's purpose was to induce consumers to buy its products. See *supra* at 6.

3. The Nike communications containing these representations are recognized forms of expressing commercial speech.

The classification of speech as commercial depends on "the content of the expression." *Consolidated Edison Co. of N.Y., Inc. v. Public Serv. Comm'n,* 447 U.S. 530, 538 n.5 (1980); *see Bates v. State Bar of Ariz.*, 433 U.S. 350, 363 (1977). No particular form of communication is required. *See, e.g., Ibanez,* 512 U.S. at 138 (attorney referred to accounting credentials "in her advertising and other communications with the public"). Thus, the FTC applies § 5 to false claims that are "included in labeling, advertising, promotional materials and all other forms of marketing." Guides, 16 C.F.R. 260.2(a) (App. 5a); Enforcement Policy Statement, 62 Fed. Reg. at 63,767. Put the other way, no particular type of communication can be ruled out in advance as a means of expressing commercial speech. The United States agrees. See U.S. Brief 28 n.13 ("The forum for such statements is simply not dispositive.").

Here, the letter from Nike's Director of Sports Marketing to university presidents and directors of athletics was a direct mailer to customers and potential customers. Cmplt. ¶¶ 14, 25, Ex. R. Nike's illustrated pamphlet, entitled "Nike Production Primer," was a marketing tool like those distributed by many companies in which the company promotes its goods in various ways, in this case on the basis of Nike's production practices. *Id.*, Ex. V.

The page with Nike's logo posted on its Web site was a direct communication with consumers, like other marketing statements on the Internet. *Id.*, Ex. U. For example, in one of the FTC's enforcement actions against false U.S.-origin

claims, the company stated on its Web site that it "produces all of its products in the United States." *Black & Decker Corp.*, 2001 FTC LEXIS 20, at *2, *12 (Feb. 8, 2001). The same point applies to the press release with Nike's logo posted on its Web site. Cmplt., Ex. II. The term "press release" is a misnomer for such a posting, since viewers read it directly.[14]

The document on Nike's letterhead with Nike's logo was another direct communication with consumers. *Id.*, Ex. P. The other Nike communications were public statements that are also acknowledged means of conveying commercial speech. *Id.*, Exs. D, Q, Z, DD. Thus, securities-fraud liability may be based on disseminating false or misleading information in press releases and public documents. *See, e.g.*, *Basic Inc. v. Levinson*, 485 U.S. 224, 227 & n.4, 228, 247 (1988) ("public material misrepresentations" in newspaper news item, press release, and report to shareholders); *In re Cabletron Sys., Inc.*, 311 F.3d 11, 35 (1st Cir. 2002) ("direct statements to public" in press releases and "quotes of company officials" in news media). It is possible to provide consumers with false commercial information in the same ways. Indeed, press releases and public letters may be considered "free advertising." *See Semco, Inc. v. Amcast, Inc.*, 52 F.3d 108, 114 (6th Cir. 1995) ("The phrase 'free advertising,' far from being an oxymoron, aptly describes the publicity manufacturers may receive in press releases, news interviews, or trade publications.").

In sum, these public statements and postings on Nike's Web site were written corporate communications, prepared for publication and designed to reach consumers. They are all recognized forms of expressing commercial speech.

---

[14] Nike frequently promotes its products in this way. See <http://www.nike.com/nikebiz/nikebiz.jhtml?page=11> (visited Mar. 31, 2003) (Nike "press releases" promoting, inter alia, basketball shoe on Feb. 5, 2003; children's athletic shoe on Nov. 6, 2002; apparel assertedly made of "organic" cotton on Oct. 7, 2002).

4. Nike's representations have the characteristics supporting the government's right to regulate false or misleading commercial speech.

The Court has explained that "[t]wo features of commercial speech permit regulation of its content." *Central Hudson*, 447 U.S. at 564 n.6. First, "commercial speakers have extensive knowledge of both the market and their products. Thus, they are well situated to evaluate the accuracy of their messages . . . . " *Id.* Without citing the complaint, Nike claims that this characteristic is lacking here, because its representations were not subject to "easy verification." Petr. Brief 20; also *id.* 21 n.3. But the circumstances under which its goods are produced are objectively verifiable matters, and Nike's corporate communications assured consumers that it knew the facts about the conditions and practices in its production facilities. Thus, Nike was eager to tell consumers that, on a daily basis, it has "1,000 Nike employees monitoring working conditions." Cmplt., Ex. S (Petr. Lodg. 193); also Exs. P, Q, R, U, V, Z (Petr. Lodg. 184, 187, 190, 198, 208, 270). Nike also claimed that it had the "great advantage" of "know[ing] what is happening on wages." Ex. D (Petr. Lodg. 122). Indeed, Nike prepared a graphic table to show that the average workers are paid twice the minimum wage. Exs. V, Z (Petr. Lodg. 220, 270).

Second, "commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not 'particularly susceptible to being crushed by overbroad regulation.'" *Central Hudson*, 447 U.S. at 564 n.6. Without citing the complaint, Nike claims that this characteristic is lacking, too, because its representations did not make "an essential contribution to the speaker's financial bottom-line." Petr. Brief 20; also *id.* 21 n.3. In fact, the complaint alleges that Nike made the representations in order to maintain and increase its sales and profits. See *supra* at 6.

The Court has also noted another characteristic: "[A]ny concern that strict requirements for truthfulness will unde-

sirably inhibit spontaneity seems inapplicable because commercial speech generally is calculated." *Bates*, 433 U.S. at 383. Without citing the complaint, Nike claims that it made "on-the-spot responses to accusations." Petr. Brief 40. But the complaint does not allege any such extemporaneous statements. On the contrary, Nike's representations were in written corporate communications that were prepared for publication. See *supra* at 5-6, 35-36. One of them for example, was a 33-page illustrated pamphlet. See Cmplt., Ex. V.

5. Nike's representations meet the Court's tests for commercial speech.

1. The Court has consistently held that "speech proposing a commercial transaction" is commercial speech. *Cincinnati*, 507 U.S. at 422; *see Board of Trustees*, 492 U.S. at 473-74; *Zauderer*, 471 U.S. at 637; *see also Lorillard*, 533 U.S. at 554 (noting Court's "recognition of the 'distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech'"); *accord, e.g.*, *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 426 (1993); *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 455-56 (1978). The complaint meets this test, because it alleges that Nike sought to induce sales transactions by making factual representations about its production practices aimed at consumers who do not want to buy goods made under illegal, unsafe, or inhumane conditions.

For example, Nike's Director of Sports Marketing wrote to university presidents and directors of athletics, including those at the more than 200 schools with which Nike has "promotional arrangements." Cmplt. ¶¶ 14, 25, Ex. R. The recipients were officials of entities that have business relationships with Nike, that are major purchasers and potential purchasers of its products, and that represent the huge market of student-consumers, who buy its goods at campus stores. Nike's purpose in making the representations in this letter

was, the complaint alleges, to maintain and increase its sales and profits by persuading these consumers to buy or continue to buy its products. See s*upra* at 6.

The letter conveyed factual information about the production of Nike's goods for the officials to rely on in their purchasing decisions. As relevant here, Nike represented that its goods are made in compliance with the laws governing wages and overtime, occupational health-and-safety, and environmental standards in the countries of manufacture. Cmplt. ¶¶ 25, 30, 39, Ex. R. Thus, the letter provided assurances to these officials on issues important to them and their students about the circumstances under which Nike's products are made. This information, if believed, allayed their concerns and made them more likely to remain or become Nike's customers. *See* FTC Deception Policy Statement, in *Cliffdale*, 103 F.T.C. at 182 ("A 'material' misrepresentation . . . is one which is likely to affect a consumer's choice of or conduct regarding a product. In other words, it is information that is important to consumers."). Hence, Nike's representations promoted transactions with consumers and therefore "proposed commercial transactions."

2. Relying on a combination of three factors, the Court has also determined that "informational pamphlets discussing the desirability and availability of prophylactics" were commercial speech. *Bolger*, 463 U.S. at 62, 66-67. These factors are present here. One is the speaker's "economic motivation," which is present because Nike's purpose was to induce consumers to buy its goods. *Id.* at 67.

The informational pamphlets were also "conceded to be advertisements." *Id.* at 66. But the eight-page pamphlet, "Plain Talk About Venereal Disease," was not in advertising "format," a word the Court did not use. *Id.* at 62 n.4. Thus, it was an "advertisement" because it was promotional material. *See Cincinnati*, 507 U.S. at 422 (referring to *Bolger* mailings as "promotional materials"). Here, the Nike communications,

including the representations at issue, were likewise promotional materials. See *supra* at 5-6, 35-36.

The other *Bolger* factor is "reference to a specific product." 463 U.S. at 66. The same informational pamphlet, however, discussed condoms "without any specific reference" to the company's products until the end, where the company was identified "as the distributor of Trojan-brand prophylactics." *Id.* at 66 n.13. The parallel would be a Nike pamphlet discussing athletic shoes without any specific reference to Nike's products until the end, where Nike would be identified as the producer of Nike's athletic shoes. Here, by contrast, the Nike communications referred specifically to its products, and the representations at issue gave consumers information about the means used to produce those products.

3. The Court has also characterized commercial speech as "expression related solely to the economic interests of the speaker and its audience." *Central Hudson*, 447 U.S. at 561. This is a "broader definition of commercial speech." *Cincinnati*, 507 U.S. at 423. It also is met here. As to the audience, the *Central Hudson* regulation applied to the promotion of "electricity consumption by touting its environmental benefits." 447 U.S. at 562 n.5. Thus, speech meets this test when it seeks to sell a product by appealing to consumers' concern about the environment. Similarly, here, Nike's appeal was to consumers' concern about buying products made under illegal working conditions. As to the speaker, the *Central Hudson* regulation applied to "all advertising 'clearly intended to promote sales.'" *Id.* Nike's representations were likewise intended to promote sales. See *supra* at 6.

Without citing the complaint, Nike asserts that it was "also concerned" with government action and with employee morale. Petr. Brief 22-23. The complaint alleges no such purposes. Nike then misrepresents the California Supreme Court as having "deemed it irrelevant that *Nike's statements . . . sought to* 'influence lenders, investors, or lawmakers.'" *Id.*

23 (emphasis added). The court was discussing a general proposition, not "Nike's statements." See Pet. App. 28a.

C. Nike's representations about the conditions under which its products are made, as alleged in the complaint, have no immunity from laws regulating false or misleading commercial messages.

1. Nike's false representations are not immune from regulation on the ground that they addressed matters of public importance.

1. Nike asserts that the false representations at issue addressed "matters of public importance." Petr. Brief 21-36 (quoting heading, *id.* 21; also *id.* 26, 29, 32, 34). But it has never been doubted that the subject of commercial speech—the information conveyed to consumers to rely upon in making informed purchasing decisions—may be a matter of public importance or "public concern." *Id.* 25 (heading); *see Greater New Orleans*, 527 U.S. at 184-85; *Bolger*, 463 U.S. at 69; *Carey v. Population Servs. Int'l*, 431 U.S. 678, 700-01 (1977); *Linmark Assocs., Inc. v. Willingboro*, 431 U.S. 85, 96 (1977); *Virginia Pharmacy*, 425 U.S. at 764; *Bigelow v. Virginia*, 421 U.S. 809, 822 (1975). Thus, the importance of the subject matter—Nike's own production practices—does not mean that Nike's representations have immunity from laws regulating false or misleading commercial messages.

2. But Nike's repeated assertions that its speech addressed issues of "public importance" (and the use of similar phrases, such as "important social, political, and moral issues," Petr. Brief 36) may create the false impression that Nike made these representations in "a broader debate on more general matters of public concern." U.S. Brief 27. The complaint's allegations do not show any such broader debate. The only "debate" in the complaint concerned factual questions about the circumstances under which Nike's goods are produced, such as whether the female workforce was being illegally exposed to dangerous reproductive toxins. See *supra* at 3-5.

Moreover, it is possible for a company to engage in commercial speech as part of a broader debate on more general public matters. *See Bolger*, 463 U.S. at 67-68; *Central Hudson*, 447 U.S. at 563 n.5. The United States agrees. See U.S. Brief 28 n.13 (citing examples of commercial speech in context of issues "such as sound forest or ocean management"). This speech is not immune from regulation if false, because the "company has the full panoply of protections available to its *direct* comments on public issues." *Bolger*, 463 U.S. at 68 (emphasis added); *see Posadas*, 478 U.S. at 340 n.7; *Zauderer*, 471 U.S. at 638 n.7; *Pittsburgh Press Co v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 391 (1973).

When a company comments *directly* on a public issue, it discusses a subject that is independent of itself and its products and activities. *See, e.g.*, *Consolidated Edison*, 447 U.S. at 532-33 (utility placed inserts in billing envelopes expressing its "'opinions or viewpoints on controversial issues of public policy,'" such as "'the desirability of future development of nuclear power'"); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 769 (1978) (bank opposed state constitutional amendment submitted to voters as referendum that would have allowed new income tax); *Pacific Gas & Elec. Co. v. Berkeley*, 131 Cal. Rptr. 350, 351, 353 (Cal. Ct. App. 1976) (utility opposed local measure authorizing city to take over utility's facilities within city). In doing so, the company may make statements of fact in support of its position, and presumably its speech is economically motivated, but it is not seeking to persuade consumers to buy its goods, and its speech does not serve "the informational function of commercial decision-making." *R.J. Reynolds*, 111 F.T.C. at 546. Rather, the company is expressing its views on the public issue that is the subject of debate. Thus, it is not engaged in commercial speech.

Here, Nike was not commenting directly on any public issues. Nike's representations concerned only the production of its own goods. See *supra* at 4-5.

3. Nike contends that this case "presents a classic dispute between business and labor of the precise sort" protected by *Thornhill v. Alabama*, 310 U.S. 88 (1940). Petr. Brief 27; also *id.* 19, 32-33. *Thornhill* concerned the freedom to publicize "the facts of a labor dispute." 310 U.S. at 99-104. But Nike's representations, as alleged in the complaint, did not concern "the facts of a labor dispute." Hence, Nike's reliance on *Thornhill* raises no issue here.

Moreover, *Thornhill* did not deal with the regulation of false statements. *See* 310 U.S. at 99 ("The statute . . . leaves room for no exceptions based upon . . . the accurateness of the terminology used in notifying the public of the facts of the dispute."). Thus, *Thornhill* emphasized the right "to discuss publicly *and truthfully* all matters of public concern" and the protection afforded to "peaceful *and truthful* discussion of matters of public interest." *Id.* at 101, 104 (emphasis added). Nor does it help Nike to cite the *Thornhill* passage defining public issues as "issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Id.* at 102, quoted in Petr. Brief 32. *Bolger* applied this same definition in holding that the communications there were commercial speech even though they contained "discussions of important public issues." 463 U.S. at 67-68 & n.15. *Thornhill* therefore does not show that Nike's representations have immunity from laws regulating false or misleading commercial messages.

2. Nike's false representations are not immune from regulation on the ground that they were responses to others' allegations.

1. Nike argues that "[i]f the full protections of the First Amendment apply to the allegations," "claim[s]," and "assert[ions]" of noncommercial speakers about the production of Nike's goods, "so too they apply when Nike *responds* to

those allegations." Petr. Brief 28. According to this argument, a company responding to public allegations about the goods it sells is not engaged in commercial speech and, as a result, is "permitted to immunize false or misleading product information from government regulation." *Bolger*, 463 U.S. at 68. This argument conflicts with an important precedent upholding the FTC's enforcement authority; it arbitrarily disregards the interest of consumers in receiving truthful commercial information; and it fails to take into account the company's access to the facts about its own product.

Nike's argument conflicts with *National Comm'n on Egg Nutrition*. In that case, the egg industry had formed a trade association "to counteract what the FTC described as 'anti-cholesterol attacks on eggs which had resulted in steadily declining per capita egg consumption.'" 570 F.2d at 159. The trade association placed newspaper advertisements representing that "there is no scientific evidence linking the eating of eggs to an increased risk of heart and circulatory disease." The FTC found these representations "false and misleading" under §§ 5 and 12 of the FTC Act and ordered the trade association to stop disseminating them. *Id.* at 159-60.

On review of the FTC's order, the trade association argued that its statements were not commercial speech, because they concerned "an important and controversial public issue." *Id.* at 163. The Seventh Circuit disagreed: "[T]he right of government to restrain false advertising can hardly depend upon the view of an agency or court as to the relative importance of the issue to which the false advertising relates." *Id.* According to Nike's argument, however, this decision was wrong: the egg industry was responding to public attacks on its product, and thus its statements were not commercial speech and could not be subject to regulation as false or misleading under § 5 of the FTC Act.

Many kinds of companies might be in the position of the egg industry in the egg-cholesterol controversy. For example:

- A producer of lock systems is alleged to be using components made in other countries. In response, the company claims that its locks are produced entirely in the United States.
- A rug importer is alleged to be selling rugs made with child labor. In response, the company claims that it enforces strict age standards that prevent the use of child labor in making its rugs.
- A tuna producer is alleged to be selling tuna harvested with fishing methods that are harmful to dolphins. In response, the company claims that its tuna is "dolphin safe."
- "[A] manufacturer of artificial furs" is alleged to be selling real fur. In response, the company claims that it sells only artificial fur, and it "promotes [its] product as an alternative to the extinction by [its] competitors of fur-bearing mammals." *Virginia Pharmacy*, 425 U.S. at 764.

In each of these examples, the company's representation about its product addresses a matter of public importance, and the representation is false.

According to Nike's argument, however, because the companies are responding to charges against their goods, these representations are not commercial speech. Once public allegations have been made about a company's goods, the company is free to respond by making false claims, knowing that it is immune from regulation under § 5 of the FTC Act and state laws regulating false or misleading commercial messages. Put another way, Nike's argument means that a company's claims about its goods are commercial speech subject to regulation under § 5 and comparable state laws, until someone publicly alleges that the claims are false.

This is an arbitrary result. Consumers have no reason to suppose that, when public allegations are made, the same

claim that was previously subject to government regulation is now immune from that regulation. Whether or not a company's product is the target of allegations, consumers expect to receive, and have the same interest in receiving, truthful commercial information, and the government has the same interest in protecting consumers from commercial deception.

Nor does the company's situation justify this result. First, "there is no constitutional value in false statements of fact." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). And second, when responding to such charges, the company can ensure that it does not make false statements of fact about its own product. Whatever information it wishes to convey about its product, the company always has "access to the truth": it is always "in a position to verify the accuracy of [its] factual representations before [it] disseminates them." *Virginia Pharmacy*, 425 U.S. at 777 (Stewart, J., concurring). Hence, there is no need to immunize a company's responses to public allegations about its goods from regulation under § 5 and comparable state laws.

2. The company also has recourse against noncommercial speakers for making false statements of fact about its product. The company can sue them for damages for the injurious falsehood of their statements, whether the cause of action is called product or business disparagement, trade libel, or something else. *See* Restatement (Second) of Torts §§ 623A, 626 & annots. (1977). In particular, "media" defendants are subject to such actions. *See Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 492 n.8 (1984). Three recent cases are illustrative:

- Consumers Union (CU) reported that the Isuzu Trooper, a sports utility vehicle, was prone to roll over, that it was unsafe to operate, and that Isuzu had ignored the "safety problems and thus knowingly placed consumers at risk." *Isuzu Motors Ltd. v. Consumers Union of U.S., Inc.*, 66 F. Supp.2d 1117, 1120 (C.D. Cal. 1999). Isuzu brought suit for product disparagement and defamation, alleging that these

statements were false and that CU had published its test results on the Trooper, in part, "to pressure the National Highway Traffic Safety Administration . . . into adopting rollover safety standards." *Id.* In finding that Isuzu was a limited "public figure," the court noted that Isuzu had "injected itself into the public controversy concerning rollover standards" before CU published its results and that, after the publication, Isuzu had "vigorously defended its position" and had "participated in public debate about the Trooper's safety and the efficacy of CU's testing procedures." *Id.* at 1123. The court cited evidence that Isuzu had "distributed several press releases and held a news conference that was broadcast live" nationwide and had "sent letters to Trooper owners, published pamphlets, and made videotapes concerning the Trooper and CU." *Id.* The court also noted that "[t]he safety of the Isuzu Trooper and the steps that Isuzu did or did not take to enhance that safety are clearly a matter of public controversy." *Id.* The court then ruled that Isuzu had raised a genuine issue of fact as to whether CU had acted with actual malice and therefore denied CU's motion for summary judgment on that issue. *Id.* at 1124-26.

- A new variant of a fatal brain disease was diagnosed in Britain and linked with the consumption of beef infected with "Mad Cow Disease." This postulated link "caused panic in Britain." *Texas Beef Group v. Winfrey*, 201 F.3d 680, 682 (5th Cir. 2000). American news media "ran numerous stories on the subject," including articles in *The New York Times*, *The Wall Street Journal*, and *Newsweek*; and "*Dateline*, a popular, 'prime time' television news program, broadcast a report on the subject." In addition, the *Oprah Winfrey Show* addressed the issue in a program on "Dangerous Food." *Id.* Following this broadcast, the fed-cattle markets in the United States dropped drastically. *Id.* at 684. Cattle ranchers then sued Oprah Winfrey, the producers and distributors of the show, and a guest on the show asserting that the program had falsely depicted American beef as unsafe. *Id.* at 682. The

plaintiffs alleged violations of the Texas False Disparagement of Perishable Food Products Act and damages arising from various torts, including business disparagement. *Id.* Only the claim for business disparagement was submitted to the jury. *Id.* at 685. The jury rejected the claim, and the Fifth Circuit affirmed. *Id.* at 689-90 (holding that plaintiffs had not preserved their objection to district court's instructions on business-disparagement claim).

- The Suzuki Samurai, a sports utility vehicle, had been "the subject of news stories that highlighted its instability and propensity to tip over" when CU published an article rating the Samurai "'Not Acceptable' based on its propensity to roll over during accident avoidance tests." *Suzuki Motor Corp. v. Consumers Union of U.S., Inc.*, 292 F.3d 1192, 1194 (9th Cir. 2002). CU submitted a copy of the article and backup information to the National Highway Traffic Safety Administration "in support of a petition to establish a minimum stability standard to protect against unreasonable risk of rollover." *Id.* at 1197. Thereafter, CU continued to refer publicly to the negative Samurai rating, and Suzuki brought suit for product disparagement. *Id.* at 1198. CU moved for summary judgment on the ground that there was insufficient evidence of actual malice. *Id.* The district court granted CU's motion, but the Ninth Circuit reversed, holding that Suzuki had raised a genuine issue of fact as to whether CU had acted with actual malice. *Id.* at 1201-05.

Thus, damages suits can be and are brought against noncommercial speakers, including "media" defendants, for false statements about a company's products, even where the noncommercial speech concerns issues of public health and safety. In these cases, liability may require proof of the noncommercial speaker's "actual malice," i.e., knowledge or reckless disregard of the statements' falsity. *See Bose*, 466 U.S. at 489-90, 492 & n.8, 513 (assuming without deciding that actual malice is required in product-disparagement action by public-figure plaintiff against "media" defendant). But the

jury instructions in *Texas Beef Group* did not require a finding of actual malice. *See* 201 F.3d at 685; *see also* Restatement (Second) of Torts § 623A caveats & com. d (additional common-law standards). Furthermore, the actual-malice requirement is currently under challenge. *See Suzuki*, 292 F.3d at 1200 n.11 ("*Amicus* Washington Legal Foundation devotes a substantial portion of its brief to arguing that the First Amendment does not demand a showing of actual malice for product disparagement claims."). But whatever the scienter standard may be, companies have an available damages remedy against noncommercial speakers.

Injunctions can also be obtained against noncommercial speakers for their false or misleading statements. For example, in the course of a labor dispute with a construction company working at a hospital, a union displayed a banner near the construction site to publicize its dispute with the company. The banner stated that the hospital was "full of rats." *San Antonio Community Hosp. v. Southern Cal. Dist. Council of Carpenters*, 125 F.3d 1230, 1232-33 (9th Cir. 1997). The hospital sued the union for trade libel and libel, and the district court issued a preliminary injunction restricting the union's use of the tern "rats" on its banner. *Id.* at 1233, 1234-35. On appeal, the union argued that it was "publicizing the facts of its labor dispute" and that "its statement was both 'literally and factually' true." *Id.* 1235-36. But the Ninth Circuit affirmed, holding that the hospital had shown a reasonable probability of proving actual malice at trial and that the manner in which the term "rats" was used "was so misleading as to be fraudulent." *Id.* at 1235-37, 1239.

In sum, noncommercial speakers who make statements of fact about a company's product are subject to suit by the company if it thinks that the statements are false. According to Nike's argument, however, when the company responds to the noncommercial speakers by making false statements of fact about the product, the company is immune from regulation under § 5 of the FTC Act and comparable state laws.

3. Nike contends that California's unfair-competition and false-advertising laws amount to unconstitutional "viewpoint discrimination," *R.A.V. v. St. Paul*, 505 U.S. 377, 388 (1992), because they "apply to commercial sellers but *not* to persons and entities that launch accusations against those sellers." Petr. Brief 35. But the same is true of § 5 of the FTC Act and, presumably, of every other comparable state law. The FTC, for example, had no jurisdiction to apply § 5 to those who made the "'anti-cholesterol attacks on eggs'" in *National Comm'n on Egg Nutrition*, 570 F.2d at 159. See *supra* at 44. Thus, according to Nike's argument, § 5 and the other state laws are unconstitutional and cannot be enforced. In addition, *R.A.V.*'s point was that even though the government may be entitled to prohibit an entire category of speech, such as fighting words, it cannot regulate speech within that category in the face of constitutional limitations, for example, by prohibiting only fighting words that express a particular point of view. *See* 505 U.S. at 388-89, 391-92. Here, California's laws regulate the entire category of false or misleading commercial speech. Hence, they regulate commercial speech only because of its "constitutionally proscribable content." *Id.* at 383 (emphasis deleted). Finally, Nike's factual representations, as alleged in the complaint, were not expressions of "ideas" or "points of view." Petr. Brief 35; see *supra* at 4-5. In any event, then, this contention raises no issue.

CONCLUSION

For these reasons, the writ of certiorari should be dismissed as improvidently granted or, alternatively, the judgment of the California Supreme Court should be affirmed.

Respectfully submitted,

Patrick J. Coughlin
Randi Dawn Bandman
Albert H. Meyerhoff
Frank J. Janecek, Jr.
Sylvia Sum
MILBERG WEISS BERSHAD
HYNES & LERACH LLP
100 Pine Street, Suite 2600
San Francisco, CA 94111

Paul R. Hoeber
Counsel of Record
221 Pine Street, Suite 600
San Francisco, CA 94104
(415) 217-3800

Alan M. Caplan
Philip Neumark
Roderick P. Bushnell
April M. Strauss
BUSHNELL, CAPLAN &
FIELDING, LLP
221 Pine Street, Suite 600
San Francisco, CA 94104

April 4, 2003

APPENDIX

Federal Trade Commission Act § 5, 15 U.S.C. § 45(a)(1)

Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

Lanham Act § 43(a), 15 U.S.C. § 1125(a)

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

> (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or
>
> (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

Dolphin Protection Consumer Information Act, 16 U.S.C. § 1385

(a) This section may be cited as the "Dolphin Protection Consumer Information Act."

(b) The Congress finds that—

> (1) dolphins and other marine mammals are frequently killed in the course of tuna fishing operations in the eastern

tropical Pacific Ocean and high seas driftnet fishing in other parts of the world;

(2) it is the policy of the United States to support a world-wide ban on high seas driftnet fishing, in part because of the harmful effects that such driftnets have on marine mammals, including dolphins; and

(3) consumers would like to know if the tuna they purchase is falsely labeled as to the effect of the harvesting of the tuna on dolphins.

(c) For purposes of this section—

(1) the terms "driftnet" and "driftnet fishing" have the meanings given those terms in section 4003 of the Driftnet Impact Monitoring, Assessment, and Control Act of 1987 (16 U.S.C. 1822 note);

(2) the term "eastern tropical Pacific Ocean" means the area of the Pacific Ocean bounded by 40 degrees north latitude, 40 degrees south latitude, 160 degrees west longitude, and the western coastlines of North, Central, and South America;

(3) the term "label" means a display of written, printed, or graphic matter on or affixed to the immediate container of any article;

(4) the term "Secretary" means the Secretary of Commerce; and

(5) the term "tuna product" means a food item which contains tuna and which has been processed for retail sale, except perishable sandwiches, salads, or other products with a shelf life of less than 3 days.

(d)(1) It is a violation of section 45 of title 15 for any producer, importer, exporter, distributor, or seller of any tuna product that is exported from or offered for sale in the United States to include on the label of that product the

term “Dolphin Safe” or any other term or symbol that falsely claims or suggests that the tuna contained in the product was harvested using a method of fishing that is not harmful to dolphins if the product contains—

(A) tuna harvested on the high seas by a vessel engaged in driftnet fishing; or

(B) tuna harvested in the eastern tropical Pacific Ocean by a vessel using purse seine nets which do not meet the requirements for being considered dolphin safe under paragraph (2).

(2) For purposes of paragraph (1)(B), a tuna product that contains tuna harvested in the eastern tropical Pacific Ocean by a fishing vessel using purse seine nets is dolphin safe if—

(A) the vessel is of a type and size that the Secretary has determined is not capable of deploying its purse seine nets on or to encircle dolphin; or

(B)(i) the product is accompanied by a written statement executed by the captain of the vessel which harvested the tuna certifying that no tuna were caught on the trip in which such tuna were harvested using a purse seine net intentionally deployed on or to encircle dolphin;

(ii) the product is accompanied by a written statement executed by (I) the Secretary or the Secretary's designee, or (II) a representative of the Inter-American Tropical Tuna Commission, which states that there was an approved observer on board the vessel during the entire trip and that purse seine nets were not intentionally deployed during the trip on or to encircle dolphin; and

(iii) the statements referred to in clauses (i) and (ii) are endorsed in writing by each exporter, importer, and processor of the product.

(e) Any person who knowingly and willfully makes a statement or endorsement described in subsection (d)(2)(B) of this section that is false is liable for a civil penalty of not to exceed $100,000 assessed in an action brought in any appropriate district court of the United States on behalf of the Secretary.

(f) The Secretary, in consultation with the Secretary of the Treasury, shall issue regulations to implement this section not later than 6 months after November 28, 1990, including regulations establishing procedures and requirements for ensuring that tuna products are labeled in accordance with subsection (d) of this section.

(g) Omitted.

(h) The Secretary of State shall immediately seek, through negotiations and discussions with appropriate foreign governments, to reduce and, as soon as possible, eliminate the practice of harvesting tuna through the use of purse seine nets intentionally deployed to encircle dolphins.

(i) Subsections (d) and (e) of this section shall take effect 6 months after November 28, 1990.

18 U.S.C. § 1159(a)

It is unlawful to offer or display for sale or sell any good, with or without a Government trademark, in a manner that falsely suggests it is Indian produced, an Indian product, or the product of a particular Indian or Indian tribe or Indian arts and crafts organization, resident within the United States.

Code of Federal Regulations, Title 16, Part 260

Sec. 260.1 Statement of purpose.

The guides in this part represent administrative interpretations of laws administered by the Federal Trade Commission for the guidance of the public in conducting its affairs in conformity with legal requirements. These guides specifically address the application of Section 5 of the FTC Act to environmental advertising and marketing practices. They provide the basis for voluntary compliance with such laws by members of industry. Conduct inconsistent with the positions articulated in these guides may result in corrective action by the Commission under Section 5 if, after investigation, the Commission has reason to believe that the behavior falls within the scope of conduct declared unlawful by the statute.

Sec. 260.2 Scope of guides.

(a) These guides apply to environmental claims included in labeling, advertising, promotional materials and all other forms of marketing, whether asserted directly or by implication, through words, symbols, emblems, logos, depictions, product brand names, or through any other means, including marketing through digital or electronic means, such as the Internet or electronic mail. The guides apply to any claim about the environmental attributes of a product, package or service in connection with the sale, offering for sale, or marketing of such product, package or service for personal, family or household use, or for commercial, institutional or industrial use.

(b) Because the guides are not legislative rules under Section 18 of the FTC Act, they are not themselves enforceable regulations, nor do they have the force and effect of law. The guides themselves do not preempt regulation of other federal agencies or of state and local bodies governing the use of environmental marketing claims. Compliance with federal,

state or local law and regulations concerning such claims, however, will not necessarily preclude Commission law enforcement action under Section 5.

Sec. 260.3 Structure of the guides.

The guides are composed of general principles and specific guidance on the use of environmental claims. These general principles and specific guidance are followed by examples that generally address a single deception concern. A given claim may raise issues that are addressed under more than one example and in more than one section of the guides. In many of the examples, one or more options are presented for qualifying a claim. These options are intended to provide a "safe harbor" for marketers who want certainty about how to make environmental claims. They do not represent the only permissible approaches to qualifying a claim. The examples do not illustrate all possible acceptable claims or disclosures that would be permissible under Section 5. In addition, some of the illustrative disclosures may be appropriate for use on labels but not in print or broadcast advertisements and vice versa. In some instances, the guides indicate within the example in what context or contexts a particular type of disclosure should be considered.

Sec. 260.4 Review procedure.

The Commission will review the guides as part of its general program of reviewing all industry guides on an ongoing basis. Parties may petition the Commission to alter or amend these guides in light of substantial new evidence regarding consumer interpretation of a claim or regarding substantiation of a claim. Following review of such a petition, the Commission will take such action as it deems appropriate.

Sec. 260.5 Interpretation and substantiation of environmental marketing claims.

Section 5 of the FTC Act makes unlawful deceptive acts and practices in or affecting commerce. The Commission's criteria for determining whether an express or implied claim has been made are enunciated in the Commission's Policy Statement on Deception.[1] In addition, any party making an express or implied claim that presents an objective assertion about the environmental attribute of a product, package or service must, at the time the claim is made, possess and rely upon a reasonable basis substantiating the claim. A reasonable basis consists of competent and reliable evidence. In the context of environmental marketing claims, such substantiation will often require competent and reliable scientific evidence, defined as tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results. Further guidance on the reasonable basis standard is set forth in the Commission's 1983 Policy Statement on the Advertising Substantiation Doctrine. 49 FR 30999 (1984); appended to Thompson Medical Co., 104 F.T.C. 648 (1984). The Commission has also taken action in a number of cases involving alleged deceptive or unsubstantiated environmental advertising claims. A current list of environmental marketing cases and/or copies of individual cases can be obtained by calling the FTC Consumer Response Center at (202) 326-2222.

---

[1] Cliffdale Associates, Inc., 103 F.T.C. 110, at 176, 176 n.7, n.8, Appendix, reprinting letter dated Oct. 14, 1983, from the Commission to The Honorable John D. Dingell, Chairman, Committee on Energy and Commerce, U.S. House of Representatives (1984) ("Deception Statement").

Sec. 260.6 General principles.

The following general principles apply to all environmental marketing claims, including, but not limited to, those described in Sec. 260.7. In addition, Sec. 260.7 contains specific guidance applicable to certain environmental marketing claims. Claims should comport with all relevant provisions of these guides, not simply the provision that seems most directly applicable.

(a) Qualifications and disclosures. The Commission traditionally has held that in order to be effective, any qualifications or disclosures such as those described in these guides should be sufficiently clear, prominent and understandable to prevent deception. Clarity of language, relative type size and proximity to the claim being qualified, and an absence of contrary claims that could undercut effectiveness, will maximize the likelihood that the qualifications and disclosures are appropriately clear and prominent.

(b) Distinction between benefits of product, package and service. An environmental marketing claim should be presented in a way that makes clear whether the environmental attribute or benefit being asserted refers to the product, the product's packaging, a service or to a portion or component of the product, package or service. In general, if the environmental attribute or benefit applies to all but minor, incidental components of a product or package, the claim need not be qualified to identify that fact. There may be exceptions to this general principle. For example, if an unqualified "recyclable" claim is made and the presence of the incidental component significantly limits the ability to recycle the product, then the claim would be deceptive.

Example 1: A box of aluminum foil is labeled with the claim "recyclable," without further elaboration. Unless the type of product, surrounding language, or other context of the phrase establishes whether the claim refers to the foil or the

box, the claim is deceptive if any part of either the box or the foil, other than minor, incidental components, cannot be recycled.

Example 2: A soft drink bottle is labeled "recycled." The bottle is made entirely from recycled materials, but the bottle cap is not. Because reasonable consumers are likely to consider the bottle cap to be a minor, incidental component of the package, the claim is not deceptive. Similarly, it would not be deceptive to label a shopping bag "recycled" where the bag is made entirely of recycled material but the easily detachable handle, an incidental component, is not.

(c) Overstatement of environmental attribute: An environmental marketing claim should not be presented in a manner that overstates the environmental attribute or benefit, expressly or by implication. Marketers should avoid implications of significant environmental benefits if the benefit is in fact negligible.

Example 1: A package is labeled, "50% more recycled content than before." The manufacturer increased the recycled content of its package from 2 percent recycled material to 3 percent recycled material. Although the claim is technically true, it is likely to convey the false impression that the advertiser has increased significantly the use of recycled material.

Example 2: A trash bag is labeled "recyclable" without qualification. Because trash bags will ordinarily not be separated out from other trash at the landfill or incinerator for recycling, they are highly unlikely to be used again for any purpose. Even if the bag is technically capable of being recycled, the claim is deceptive since it asserts an environmental benefit where no significant or meaningful benefit exists.

Example 3: A paper grocery sack is labeled "reusable." The sack can be brought back to the store and reused for

carrying groceries but will fall apart after two or three reuses, on average. Because reasonable consumers are unlikely to assume that a paper grocery sack is durable, the unqualified claim does not overstate the environmental benefit conveyed to consumers. The claim is not deceptive and does not need to be qualified to indicate the limited reuse of the sack.

Example 4: A package of paper coffee filters is labeled "These filters were made with a chlorine-free bleaching process." The filters are bleached with a process that releases into the environment a reduced, but still significant, amount of the same harmful byproducts associated with chlorine bleaching. The claim is likely to overstate the product's benefits because it is likely to be interpreted by consumers to mean that the product's manufacture does not cause any of the environmental risks posed by chlorine bleaching. A claim, however, that the filters were "bleached with a process that substantially reduces, but does not eliminate, harmful substances associated with chlorine bleaching" would not, if substantiated, overstate the product's benefits and is unlikely to be deceptive.

(d) Comparative claims: Environmental marketing claims that include a comparative statement should be presented in a manner that makes the basis for the comparison sufficiently clear to avoid consumer deception. In addition, the advertiser should be able to substantiate the comparison.

Example 1: An advertiser notes that its shampoo bottle contains "20% more recycled content." The claim in its context is ambiguous. Depending on contextual factors, it could be a comparison either to the advertiser's immediately preceding product or to a competitor's product. The advertiser should clarify the claim to make the basis for comparison clear, for example, by saying "20% more recycled content than our previous package." Otherwise, the advertiser should be prepared to substantiate whatever comparison is conveyed to reasonable consumers.

Example 2: An advertiser claims that "our plastic diaper liner has the most recycled content." The advertised diaper does have more recycled content, calculated as a percentage of weight, than any other on the market, although it is still well under 100% recycled. Provided the recycled content and the comparative difference between the product and those of competitors are significant and provided the specific comparison can be substantiated, the claim is not deceptive.

Example 3: An ad claims that the advertiser's packageing creates "less waste than the leading national brand." The advertiser's source reduction was implemented sometime ago and is supported by a calculation comparing the relative solid waste contributions of the two packages. The advertiser should be able to substantiate that the comparison remains accurate.

Sec. 260.7 Environmental marketing claims.

Guidance about the use of environmental marketing claims is set forth in this section. Each guide is followed by several examples that illustrate, but do not provide an exhaustive list of, claims that do and do not comport with the guides. In each case, the general principles set forth in Sec. 260.6 should also be followed.[2]

(a) General environmental benefit claims. It is deceptive to misrepresent, directly or by implication, that a product, package or service offers a general environmental benefit. Unqualified general claims of environmental benefit are difficult to interpret, and depending on their context, may convey a wide range of meanings to consumers. In many cases, such claims may convey that the product, package or service has specific and far-reaching environmental benefits.

[2] These guides do not currently address claims based on a "lifecycle" theory of environmental benefit. The Commission lacks sufficient information on which to base guidance on such claims

As explained in the Commission's Advertising Substantiation Statement, every express and material implied claim that the general assertion conveys to reasonable consumers about an objective quality, feature or attribute of a product or service must be substantiated. Unless this substantiation duty can be met, broad environmental claims should either be avoided or qualified, as necessary, to prevent deception about the specific nature of the environmental benefit being asserted.

Example 1: A brand name like "Eco-Safe" would be deceptive if, in the context of the product so named, it leads consumers to believe that the product has environmental benefits which cannot be substantiated by the manufacturer. The claim would not be deceptive if "Eco-Safe" were followed by clear and prominent qualifying language limiting the safety representation to a particular product attribute for which it could be substantiated, and provided that no other deceptive implications were created by the context.

Example 2: A product wrapper is printed with the claim "Environmentally Friendly." Textual comments on the wrapper explain that the wrapper is "Environmentally Friendly because it was not chlorine bleached, a process that has been shown to create harmful substances." The wrapper was, in fact, not bleached with chlorine. However, the production of the wrapper now creates and releases to the environment significant quantities of other harmful substances. Since consumers are likely to interpret the "Environmentally Friendly" claim, in combination with the textual explanation, to mean that no significant harmful substances are currently released to the environment, the "Environmentally Friendly" claim would be deceptive.

Example 3: A pump spray product is labeled "environmentally safe." Most of the product's active ingredients consist of volatile organic compounds (VOCs) that may cause smog by contributing to ground-level ozone formation. The claim is deceptive because, absent further qualification, it is

likely to convey to consumers that use of the product will not result in air pollution or other harm to the environment.

Example 4: A lawn care pesticide is advertised as "essentially non-toxic" and "practically non-toxic." Consumers would likely interpret these claims in the context of such a product as applying not only to human health effects but also to the product's environmental effects. Since the claims would likely convey to consumers that the product does not pose any risk to humans or the environment, if the pesticide in fact poses a significant risk to humans or environment, the claims would be deceptive.

Example 5: A product label contains an environmental seal, either in the form of a globe icon, or a globe icon with only the text "Earth Smart" around it. Either label is likely to convey to consumers that the product is environmentally superior to other products. If the manufacturer cannot substantiate this broad claim, the claim would be deceptive. The claims would not be deceptive if they were accompanied by clear and prominent qualifying language limiting the environmental superiority representation to the particular product attribute or attributes for which they could be substantiated, provided that no other deceptive implications were created by the context.

Example 6: A product is advertised as "environmentally preferable." This claim is likely to convey to consumers that this product is environmentally superior to other products. If the manufacturer cannot substantiate this broad claim, the claim would be deceptive. The claim would not be deceptive if it were accompanied by clear and prominent qualifying language limiting the environmental superiority representation to the particular product attribute or attributes for which it could be substantiated, provided that no other deceptive implications were created by the context.

(b) Degradable/biodegradable/photodegradable: It is deceptive to misrepresent, directly or by implication, that a product or package is degradable, biodegradable or photodegradable. An unqualified claim that a product or package is degradable, biodegradable or photodegradable should be substantiated by competent and reliable scientific evidence that the entire product or package will completely break down and return to nature, i.e., decompose into elements found in nature within a reasonably short period of time after customary disposal. Claims of degradability, biodegradability or photodegradability should be qualified to the extent necessary to avoid consumer deception about: (1) The product or package's ability to degrade in the environment where it is customarily disposed; and (2) The rate and extent of degradation.

Example 1: A trash bag is marketed as "degradable," with no qualification or other disclosure. The marketer relies on soil burial tests to show that the product will decompose in the presence of water and oxygen. The trash bags are customarily disposed of in incineration facilities or at sanitary landfills that are managed in a way that inhibits degradation by minimizing moisture and oxygen. Degradation will be irrelevant for those trash bags that are incinerated and, for those disposed of in landfills, the marketer does not possess adequate substantiation that the bags will degrade in a reasonably short period of time in a landfill. The claim is therefore deceptive.

Example 2: A commercial agricultural plastic mulch film is advertised as "Photodegradable" and qualified with the phrase, "Will break down into small pieces if left uncovered in sunlight." The claim is supported by competent and reliable scientific evidence that the product will break down in a reasonably short period of time after being exposed to sunlight and into sufficiently small pieces to become part of the soil. The qualified claim is not deceptive. Because

the claim is qualified to indicate the limited extent of breakdown, the advertiser need not meet the elements for an unqualified photodegradable claim, i.e., that the product will not only break down, but also will decompose into elements found in nature.

Example 3: A soap or shampoo product is advertised as "biodegradable," with no qualification or other disclosure. The manufacturer has competent and reliable scientific evidence demonstrating that the product, which is customarily disposed of in sewage systems, will break down and decompose into elements found in nature in a short period of time. The claim is not deceptive.

Example 4: A plastic six-pack ring carrier is marked with a small diamond. Many state laws require that plastic six-pack ring carriers degrade if littered, and several state laws also require that the carriers be marked with a small diamond symbol to indicate that they meet performance standards for degradability. The use of the diamond, by itself, does not constitute a claim of degradability.[3]

(c) Compostable.

(1) It is deceptive to misrepresent, directly or by implication, that a product or package is compostable. A claim that a product or package is compostable should be substantiated by competent and reliable scientific evidence that all the materials in the product or package will break down into, or otherwise become part of, usable compost (e.g., soil-conditioning material, mulch) in a safe and timely manner in an appropriate composting program or facility, or in a home compost pile or device. Claims of compostability should be qualified to the extent necessary

[3] The guides' treatment of unqualified degradable claims is intended to help prevent consumer deception and is not intended to establish performance standards for laws intended to ensure the degradability of products when littered.

to avoid consumer deception. An unqualified claim may be deceptive if: (i) The package cannot be safely composted in a home compost pile or device; or (ii) The claim misleads consumers about the environmental benefit provided when the product is disposed of in a landfill.

(2) A claim that a product is compostable in a municipal or institutional composting facility may need to be qualified to the extent necessary to avoid deception about the limited availability of such composting facilities.

Example 1: A manufacturer indicates that its unbleached coffee filter is compostable. The unqualified claim is not deceptive provided the manufacturer can substantiate that the filter can be converted safely to usable compost in a timely manner in a home compost pile or device. If this is the case, it is not relevant that no local municipal or institutional composting facilities exist.

Example 2: A lawn and leaf bag is labeled as "Compostable in California Municipal Yard Trimmings Composting Facilities." The bag contains toxic ingredients that are released into the compost material as the bag breaks down. The claim is deceptive if the presence of these toxic ingredients prevents the compost from being usable.

Example 3: A manufacturer makes an unqualified claim that its package is compostable. Although municipal or institutional composting facilities exist where the product is sold, the package will not break down into usable compost in a home compost pile or device. To avoid deception, the manufacturer should disclose that the package is not suitable for home composting.

Example 4: A nationally marketed lawn and leaf bag is labeled "compostable." Also printed on the bag is a disclosure that the bag is not designed for use in home compost piles. The bags are in fact composted in yard trimmings composting programs in many communities around the country, but such

programs are not available to a substantial majority of consumers or communities where the bag is sold. The claim is deceptive because reasonable consumers living in areas not served by yard trimmings programs may understand the reference to mean that composting facilities accepting the bags are available in their area. To avoid deception, the claim should be qualified to indicate the limited availability of such programs, for example, by stating, "Appropriate facilities may not exist in your area." Other examples of adequate qualification of the claim include providing the approximate percentage of communities or the population for which such programs are available.

Example 5: A manufacturer sells a disposable diaper that bears the legend, "This diaper can be composted where solid waste composting facilities exist. There are currently [X number of] solid waste composting facilities across the country." The claim is not deceptive, assuming that compost-ing facilities are available as claimed and the manufacturer can substantiate that the diaper can be convert-ed safely to usable compost in solid waste composting facilities.

Example 6: A manufacturer markets yard trimmings bags only to consumers residing in particular geographic areas served by county yard trimmings composting programs. The bags meet specifications for these programs and are labeled, "Compostable Yard Trimmings Bag for County Composting Programs." The claim is not deceptive. Because the bags are compostable where they are sold, no qualification is required to indicate the limited availability of composting facilities.

(d) Recyclable. It is deceptive to misrepresent, directly or by implication, that a product or package is recyclable. A product or package should not be marketed as recyclable unless it can be collected, separated or otherwise recovered from the solid waste stream for reuse, or in the manufacture should be qualified to the extent necessary to avoid consumer deception about any limited availability of recycling

programs and collection sites. If an incidental component significantly limits the ability to recycle a product or package, a claim of recyclability would be deceptive. A product or package that is made from recyclable material, but, because of its shape, size or some other attribute, is not accepted in recycling programs for such material, should not be marketed as recyclable.[4]

Example 1: A packaged product is labeled with an unqualified claim, "recyclable." It is unclear from the type of product and other context whether the claim refers to the product or its package. The unqualified claim is likely to convey to reasonable consumers that all of both the product and its packaging that remain after normal use of the product, except for minor, incidental components, can be recycled. Unless each such message can be substantiated, the claim should be qualified to indicate what portions are recyclable.

Example 2: A nationally marketed 8 oz. plastic cottage-cheese container displays the Society of the Plastics Industry (SPI) code (which consists of a design of arrows in a triangular shape containing a number and abbreviation identifying the component plastic resin) on the front label of the container, in close proximity to the product name and logo. The manufacturer's conspicuous use of the SPI code in this manner constitutes a recyclability claim. Unless recycling facilities for this container are available to a substantial majority of consumers or communities, the claim should be

[4] The Mercury-Containing and Rechargeable Battery Management Act establishes uniform national labeling requirements regarding certain types of nickel-cadmium rechargeable and small lead-acid rechargeable batteries to aid in battery collection and recycling. The Battery Act requires, in general, that the batteries must be labeled with the three-chasing-arrows symbol or a comparable recycling symbol, and the statement "Battery Must Be Recycled Or Disposed Of Properly." 42 U.S.C. 14322(b). Batteries labeled in accordance with this federal statute are deemed to be in compliance with these guides.

qualified to disclose the limited availability of recycling programs for the container. If the SPI code, without more, had been placed in an inconspicuous location on the container (e.g., embedded in the bottom of the container) it would not constitute a claim of recyclability.

Example 3: A container can be burned in incinerator facilities to produce heat and power. It cannot, however, be recycled into another product or package. Any claim that the container is recyclable would be deceptive.

Example 4: A nationally marketed bottle bears the unqualified statement that it is "recyclable." Collection sites for recycling the material in question are not available to a substantial majority of consumers or communities, although collection sites are established in a significant percentage of communities or available to a significant percentage of the population. The unqualified claim is deceptive because, unless evidence shows otherwise, reasonable consumers living in communities not served by programs may conclude that recycling programs for the material are available in their area. To avoid deception, the claim should be qualified to indicate the limited availability of programs, for example, by stating "This bottle may not be recyclable in your area," or "Recycling programs for this bottle may not exist in your area." Other examples of adequate qualifications of the claim include providing the approximate percentage of communities or the population to whom programs are available.

Example 5: A paperboard package is marketed nationally and labeled, "Recyclable where facilities exist." Recycling programs for this package are available in a significant percentage of communities or to a significant percentage of the population, but are not available to a substantial majority of consumers. The claim is deceptive because, unless evidence shows otherwise, reasonable consumers living in communities not served by programs that recycle paperboard packaging may understand this phrase to mean that such

programs are available in their area. To avoid deception, the claim should be further qualified to indicate the limited availability of programs, for example, by using any of the approaches set forth in Example 4 above.

Example 6: A foam polystyrene cup is marketed as follows: "Recyclable in the few communities with facilities for foam polystyrene cups." Collection sites for recycling the cup have been established in a half-dozen major metropolitan areas. This disclosure illustrates one approach to qualifying a claim adequately to prevent deception about the limited availability of recycling programs where collection facilities are not established in a significant percentage of communities or available to a significant percentage of the population. Other examples of adequate qualification of the claim include providing the number of communities with programs, or the percentage of communities or the population to which programs are available.

Example 7: A label claims that the package "includes some recyclable material." The package is composed of four layers of different materials, bonded together. One of the layers is made from the recyclable material, but the others are not. While programs for recycling this type of material are available to a substantial majority of consumers, only a few of those programs have the capability to separate the recyclable layer from the non-recyclable layers. Even though it is technologically possible to separate the layers, the claim is not adequately qualified to avoid consumer deception. An appropriately qualified claim would be, "includes material recyclable in the few communities that collect multi-layer products." Other examples of adequate qualification of the claim include providing the number of communities with programs, or the percentage of communities or the population to which programs are available.

Example 8: A product is marketed as having a "recyclable" container. The product is distributed and advertised only in

Missouri. Collection sites for recycling the container are available to a substantial majority of Missouri residents, but are not yet available nationally. Because programs are generally available where the product is marketed, the unqualified claim does not deceive consumers about the limited availability of recycling programs.

Example 9: A manufacturer of one-time use photographic cameras, with dealers in a substantial majority of communities, collects those cameras through all of its dealers. After the exposed film is removed for processing, the manufacturer reconditions the cameras for resale and labels them as follows: "Recyclable through our dealership network." This claim is not deceptive, even though the cameras are not recyclable through conventional curbside or drop off recycling programs.

Example 10: A manufacturer of toner cartridges for laser printers has established a recycling program to recover its cartridges exclusively through its nationwide dealership network. The company advertises its cartridges nationally as "Recyclable. Contact your local dealer for details." The company's dealers participating in the recovery program are located in a significant number—but not a substantial majority—of communities. The "recyclable" claim is deceptive unless it contains one of the qualifiers set forth in Example 4. If participating dealers are located in only a few communities, the claim should be qualified as indicated in Example 6.

Example 11: An aluminum beverage can bears the statement "Please Recycle." This statement is likely to convey to consumers that the package is recyclable. Because collection sites for recycling aluminum beverage cans are available to a substantial majority of consumers or communities, the claim does not need to be qualified to indicate the limited availability of recycling programs.

(e) Recycled content.

(1) A recycled content claim may be made only for materials that have been recovered or otherwise diverted from the solid waste stream, either during the manufacturing process (pre-consumer), or after consumer use (post-consumer). To the extent the source of recycled content includes pre-consumer material, the manufacturer or advertiser must have substantiation for concluding that the pre-consumer material would otherwise have entered the solid waste stream. In asserting a recycled content claim, distinctions may be made between pre-consumer and post-consumer materials. Where such distinctions are asserted, any express or implied claim about the specific pre-consumer or post-consumer content of a product or package must be substantiated.

(2) It is deceptive to misrepresent, directly or by implication, that a product or package is made of recycled material, which includes recycled raw material, as well as used,[5] reconditioned and remanufactured components. Un-qualified claims of recycled content may be made if the entire product or package, excluding minor, incidental components, is made from recycled material. For products or packages that are only partially made of recycled material, a recycled claim should be adequately qualified to avoid consumer deception about the amount, by weight, of recycled content in the finished product or package. Additionally, for products that contain used, reconditioned or remanufactured components, a recycled claim should be adequately qualified to avoid consumer deception about the nature of such components. No such qualification would be necessary in cases where it would be clear to consumers

[5] The term "used" refers to parts that are not new and that have not undergone any type of remanufacturing and/or reconditioning.

from the context that a product's recycled content consists of used, reconditioned or remanufactured components.

Example 1: A manufacturer routinely collects spilled raw material and scraps left over from the original manufacturing process. After a minimal amount of reprocessing, the manufacturer combines the spills and scraps with virgin material for use in further production of the same product. A claim that the product contains recycled material is deceptive since the spills and scraps to which the claim refers are normally reused by industry within the original manufacturing process, and would not normally have entered the waste stream.

Example 2: A manufacturer purchases material from a firm that collects discarded material from other manufacturers and resells it. All of the material was diverted from the solid waste stream and is not normally reused by industry within the original manufacturing process. The manufacturer includes the weight of this material in its calculations of the recycled content of its products. A claim of recycled content based on this calculation is not deceptive because, absent the purchase and reuse of this material, it would have entered the waste stream.

Example 3: A greeting card is composed 30% by fiber weight of paper collected from consumers after use of a paper product, and 20% by fiber weight of paper that was generated after completion of the paper-making process, diverted from the solid waste stream, and otherwise would not normally have been reused in the original manufacturing process. The marketer of the card may claim either that the product "contains 50% recycled fiber," or may identify the specific pre-consumer and/or post-consumer content by stating, for example, that the product "contains 50% total recycled fiber, including 30% post-consumer."

Example 4: A paperboard package with 20% recycled fiber by weight is labeled as containing "20% recycled fiber." Some of the recycled content was composed of material collected from consumers after use of the original product. The rest was composed of overrun newspaper stock never sold to customers. The claim is not deceptive.

Example 5: A product in a multi-component package, such as a paperboard box in a shrink-wrapped plastic cover, indicates that it has recycled packaging. The paperboard box is made entirely of recycled material, but the plastic cover is not. The claim is deceptive since, without qualification, it suggests that both components are recycled. A claim limited to the paperboard box would not be deceptive.

Example 6: A package is made from layers of foil, plastic, and paper laminated together, although the layers are indistinguishable to consumers. The label claims that "one of the three layers of this package is made of recycled plastic." The plastic layer is made entirely of recycled plastic. The claim is not deceptive provided the recycled plastic layer constitutes a significant component of the entire package.

Example 7: A paper product is labeled as containing "100% recycled fiber." The claim is not deceptive if the advertiser can substantiate the conclusion that 100% by weight of the fiber in the finished product is recycled.

Example 8: A frozen dinner is marketed in a package composed of a cardboard box over a plastic tray. The package bears the legend, "package made from 30% recycled material." Each packaging component amounts to one-half the weight of the total package. The box is 20% recycled content by weight, while the plastic tray is 40% recycled content by weight. The claim is not deceptive, since the average amount of recycled material is 30%.

Example 9: A paper greeting card is labeled as containing 50% recycled fiber. The seller purchases paper stock from

several sources and the amount of recycled fiber in the stock provided by each source varies. Because the 50% figure is based on the annual weighted average of recycled material purchased from the sources after accounting for fiber loss during the production process, the claim is permissible.

Example 10: A packaged food product is labeled with a three-chasing-arrows symbol without any further explanatory text as to its meaning. By itself, the symbol is likely to convey that the packaging is both "recyclable" and is made entirely from recycled material. Unless both messages can be substantiated, the claim should be qualified as to whether it refers to the package's recyclability and/or its recycled content. If a "recyclable" claim is being made, the label may need to disclose the limited availability of recycling programs for the package. If a recycled content claim is being made and the packaging is not made entirely from recycled material, the label should disclose the percentage of recycled content.

Example 11: A laser printer toner cartridge containing 25% recycled raw materials and 40% reconditioned parts is labeled "65% recycled content; 40% from reconditioned parts." This claim is not deceptive.

Example 12: A store sells both new and used sporting goods. One of the items for sale in the store is a baseball helmet that, although used, is no different in appearance than a brand new item. The helmet bears an unqualified "Recycled" label. This claim is deceptive because, unless evidence shows otherwise, consumers could reasonably believe that the helmet is made of recycled raw materials, when it is in fact a used item. An acceptable claim would bear a disclosure clearly stating that the helmet is used.

Example 13: A manufacturer of home electronics labels its video cassette recorders ("VCRs") as "40% recycled." In fact, each VCR contains 40% reconditioned parts. This claim is

deceptive because consumers are unlikely to know that the VCR's recycled content consists of reconditioned parts.

Example 14: A dealer of used automotive parts recovers a serviceable engine from a vehicle that has been totaled. Without repairing, rebuilding, remanufacturing, or in any way altering the engine or its components, the dealer attaches a "Recycled" label to the engine, and offers it for resale in its used auto parts store. In this situation, an unqualified recycled content claim is not likely to be deceptive because consumers are likely to understand that the engine is used and has not undergone any rebuilding.

Example 15: An automobile parts dealer purchases a transmission that has been recovered from a junked vehicle. Eighty-five percent by weight of the transmission was rebuilt and 15% constitutes new materials. After rebuilding[6] the transmission in accordance with industry practices, the dealer packages it for resale in a box labeled "Rebuilt Transmission," or "Rebuilt Transmission (85% recycled con-tent from rebuilt parts)," or "Recycled Transmission (85% recycled content from rebuilt parts)." These claims are not likely to be deceptive.

(f) Source reduction: It is deceptive to misrepresent, directly or by implication, that a product or package has been reduced or is lower in weight, volume or toxicity. Source reduction claims should be qualified to the extent necessary to avoid consumer deception about the amount of the source reduction and about the basis for any comparison asserted.

---

[6] The term "rebuilding" means that the dealer dismantled and reconstructed the transmission as necessary, cleaned all of its internal and external parts and eliminated rust and corrosion, restored all impaired, defective or substantially worn parts to a sound condition (or replaced them if necessary), and performed any operations required to put the transmission in sound working condition.

Example 1: An ad claims that solid waste created by disposal. Immediately preceding product or to a competitor's product. The "10% less waste" reference is deceptive unless the seller clarifies which comparison is intended and substantiates that comparison, or substantiates both possible interpretations of the claim.

(g) Refillable: It is deceptive to misrepresent, directly or by implication, that a package is refillable. An unqualified refillable claim should not be asserted unless a system is provided for the collection and return of the package for refill or the later refill of the package by consumers with product subsequently sold in another package. A package should not be marketed with an unqualified refillable claim, if it is up to the consumer to find new ways to refill the package.

Example 1: A container is labeled "refillable x times." The manufacturer has the capability to refill returned containers and can show that the container will withstand being refilled at least x times. The manufacturer, however, has established no collection program. The unqualified claim is deceptive because there is no means for collection and return of the container to the manufacturer for refill.

Example 2: A bottle of fabric softener states that it is in a "handy refillable container." The manufacturer also sells a large-sized container that indicates that the consumer is expected to use it to refill the smaller container. The manufacturer sells the large-sized container in the same market areas where it sells the small container. The claim is not deceptive because there is a means for consumers to refill the smaller container from larger containers of the same product.

(h) Ozone safe and ozone friendly: It is deceptive to misrepresent, directly or by implication, that a product is safe for or "friendly" to the ozone layer or the atmosphere. For example, a claim that a product does not harm the ozone layer

is deceptive if the product contains an ozone-depleting substance.

Example 1: A product is labeled "ozone friendly." The claim is deceptive if the product contains any ozone-depleting substance, including those substances listed as Class I or Class II chemicals in Title VI of the Clean Air Act Amendments of 1990, Public Law 101-549, and others subsequently designated by EPA as ozone-depleting substances. Chemicals that have been listed or designated as Class I are chlorofluorocarbons (CFCs), halons, carbon tetrachloride, 1,1,1-trichloroethane, methyl bromide and hydrobromofluorocarbons (HBFCs). Chemicals that have been listed as Class II are hydrochlorofluorocarbons (HCFCs).

Example 2: An aerosol air freshener is labeled "ozone friendly." Some of the product's ingredients are volatile organic compounds (VOCs) that may cause smog by contributing to ground-level ozone formation. The claim is likely to convey to consumers that the product is safe for the atmosphere as a whole, and is therefore, deceptive.

Example 3: The seller of an aerosol product makes an unqualified claim that its product "Contains no CFCs." Although the product does not contain CFCs, it does contain HCFC-22, another ozone depleting ingredient. Because the claim "Contains no CFCs" may imply to reasonable consumers that the product does not harm the ozone layer, the claim is deceptive.

Example 4: A product is labeled "This product is 95% less damaging to the ozone layer than past formulations that contained CFCs." The manufacturer has substituted HCFCs for CFC-12, and can substantiate that this substitution will result in 95% less ozone depletion. The qualified comparative claim is not likely to be deceptive.

Sec. 260.8 Environmental assessment.

(a) National Environmental Policy Act. In accordance with section 1.83 of the FTC's Procedures and Rules of Practice[7] and section 1501.3 of the Council on Environmental Quality's regulations for implementing the procedural provisions of National Environmental Policy Act, 42 U.S.C. 4321 et seq. (1969),[8] the Commission prepared an environmental assessment when the guides were issued in July 1992 for purposes of providing sufficient evidence and analysis to determine whether issuing the Guides for the Use of Environmental Marketing Claims required preparation of an environmental impact statement or a finding of no significant impact. After careful study, the Commission concluded that issuance of the Guides would not have a significant impact on the environment and that any such impact "would be so uncertain that environmental analysis would be based on speculation."[9] The Commission concluded that an environmental impact statement was therefore not required. The Commission based its conclusions on the findings in the environmental assessment that issuance of the guides would have no quantifiable environmental impact because the guides are voluntary in nature, do not preempt inconsistent state laws, are based on the FTC's deception policy, and, when used in conjunction with the Commission's policy of case-by-case enforcement, are intended to aid compliance with section 5(a) of the FTC Act as that Act applies to environmental marketing claims.

(b) The Commission has concluded that the modifications to the guides in this part will not have a significant effect on the environment, for the same reasons that the issuance of the original guides in 1992 and the modifications to the guides in 1996 were deemed not to have a significant effect on the

---

[7] 16 CFR 1.83.
[8] 40 CFR 1501.3.
[9] 16 CFR 1.83(a).

environment. Therefore, the Commission concludes that an environmental impact statement is not required in conjunction with the issuance of the 1998 modifications to the Guides for the Use of Environmental Marketing Claims.

California Business and Professions Code § 17200

As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code.

California Business and Professions Code § 17201

As used in this chapter, the term person shall mean and include natural persons, corporations, firms, partnerships, joint stock companies, associations and other organizations of persons.

California Business and Professions Code § 17201.5

As used in this chapter:

(a) "Board within the Department of Consumer Affairs" includes an commission, bureau, division, or other similarly constituted agency within the Department of Consumer Affairs.

(b) "Local consumer affairs agency" means and includes any city or county body which primarily provides consumer protection services.

California Business and Professions Code § 17202

Notwithstanding Section 3369 of the Civil Code, specific or preventive relief may ranted to enforce a penalty, forfeiture, or penal law in a case of unfair competition.

California Business and Professions Code § 17203

Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.

California Business and Professions Code § 17204

Actions for any relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by the Attorney General or any district attorney or by any county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, or any city attorney of a city, or city and county, having a population in excess of 750,000, and, with the consent of the district attorney, by a city prosecutor in any city having a full-time city prosecutor or, with the consent of the district attorney, by a city attorney in any city and county in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation or association or by any person acting for the interests of itself, its members or the general public.

California Business and Professions Code § 17204.5

In addition to the persons authorized to bring an action pursuant to Section 17204, the City Attorney of the City of San Jose, with the annual consent of the Santa Clara County District Attorney, is authorized to prosecute such actions.

This section shall remain in effect until such time as the population of the City of San Jose exceeds 750,000, as deter-

mined by the Population Research Unit of the Department of Finance, and at that time shall be repealed.

California Business and Professions Code § 17205

Unless otherwise expressly provided, the remedies or penalties provided by this chapter are cumulative to each other and to the remedies or penalties available under all other laws of this state.

California Business and Professions Code § 17206

(a) Any person who engages, has engaged, or proposes to engage in unfair competition shall be liable for a civil penalty not to exceed two thousand five hundred dollars ($2,500) for each violation, which shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General, by any district attorney, by any county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, by any city attorney of a city, or city and county, having a population in excess of 750,000, with the consent of the district attorney, by a city prosecutor in any city having a full-time city prosecutor, or, with the consent of the district attorney, by a city attorney in any city and county, in the in any court of competent jurisdiction.

(b) The court shall impose a civil penalty for each violation of this chapter. In assessing the amount of the civil penalty, the court shall consider any one or more of the relevant circumstances presented by any of the parties to the case, including, but not limited to, the following: the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant's misconduct, and the defendant's assets, liabilities, and net worth.

(c) If the action is brought by the Attorney General, one-half of the penalty collected shall be paid to the treasurer of the

county in which the judgment was entered, and one-half to the State General Fund. If the action is brought by a district attorney or county counsel, the penalty collected shall be paid to the treasurer of the county in which the judgment was entered. Except as provided in subdivision (d), if the action is brought by a city attorney or city prosecutor, one-half of the penalty collected shall be paid to the treasurer of the city in which the judgment was entered, and one-half to the treasurer of the county in which the judgment was entered.

(d) If the action is brought at the request of a board within the Department of Consumer Affairs or a local consumer affairs agency, the court shall determine the reasonable expenses incurred by the board or local agency in the investigation and prosecution of the action.

Before any penalty collected is paid out pursuant to subdivision (c), the amount of any reasonable expenses incurred by the board shall be paid to the state Treasurer for deposit in the special fund of the board described in Section 205. If the board has no such special fund, the moneys shall be paid to the state Treasurer. The amount of any reasonable expenses incurred by a local consumer affairs agency shall be paid to the general fund of the municipality or county that funds the local agency.

(e) If the action is brought by a city attorney of a city and county, the entire amount of the penalty collected shall be paid to the treasurer of the city and county in which the judgment was entered. However, if the action is brought by a city attorney of a city and county for the purposes of civil enforcement pursuant to Section 17980 of the Health and Safety Code or Article 3 (commencing with Section 11570) of Chapter 10 of Division 10 of the Health and Safety Code, either the penalty collected shall be paid entirely to the treasurer of the city and county in which the judgment was entered or, upon the request of the city attorney, the court may order that up to one-half of the penalty, under court

supervision and approval, be paid for the purpose of restoring, maintaining, or enhancing the premises that were the subject of the action, and that the balance of the penalty be paid to the treasurer of the city and county.

California Business and Professions Code § 17206.1

(a) In addition to any liability for a civil penalty pursuant to Section 17206, any person who violates this chapter, and the act or acts of unfair competition are perpetrated against one or more senior citizens or disabled persons, may be liable for a civil penalty not to exceed two thousand five hundred dollars ($2,500) for each violation, which may be assessed and recovered in a civil action as prescribed in Section 17206. Subject to subdivision (d), any civil penalty shall be paid as prescribed by subdivisions (b) and (c) of Section 17206.

(b) As used in this section, the following terms have the following meanings:

(1) "Senior citizen" means a person who is 65 years of age or older.

(2) "Disabled person" means any person who has a physical or mental impairment which substantially limits one or more major life activities.

(A) As used in this subdivision, "physical or mental impairment" means any of the following: (i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss substantially affecting one or more of the following body systems: neurological; muscoloskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; or endocrine. (ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term "physical or mental impairment"

includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech and hearing impairment, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, and emotional illness.

(B) “Major life activities” means functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(c) In determining whether to impose a civil penalty pursuant to subdivision (a) and the amount thereof, the court shall consider, in addition to any other appropriate factors, the extent to which one or more of the following factors are present:

(1) Whether the defendant knew or should have known that his or her conduct was directed to one or more senior citizens or disabled persons.

(2) Whether the defendant’s conduct caused one or more senior citizens or disabled persons to suffer: loss or encumbrance of a primary residence, principal employment, or source of income; substantial loss of property set aside for retirement, or for personal or family care and maintenance; or substantial loss of payments received under a pension or retirement plan or a government benefits program, or assets essential to the health or welfare of the senior citizen or disabled person.

(3) Whether one or more senior citizens or disabled persons are substantially more vulnerable than other members of the public to the defendant's conduct because of age, poor health or infirmity, impaired understanding, restricted mobility, or disability, and actually suffered substantial physical, emotional, or economic damage resulting from the defendant's conduct.

(d) Any court of competent jurisdiction hearing an action pursuant to this section may make orders and judgments as may be necessary to restore to any senior citizen or disabled person any money or property, real or personal, which may have been acquired by means of a violation of this chapter. Restitution ordered pursuant to this subdivision shall be given priority over recovery of any civil penalty designated by the court as imposed pursuant to subdivision (a), but shall not be given priority over any civil penalty imposed pursuant to subdivision (a) of Section 17206. If the court determines that full restitution cannot be made to those senior citizens or disabled persons, either at the time of judgment or by a future date determined by the court, then restitution under this subdivision shall be made on a pro rata basis depending on the amount of loss.

California Business and Professions Code § 17206.5

In addition to the persons authorized to bring an action pursuant to Section 17206, the City Attorney of the City of San Jose, with the annual consent of the Santa Clara County District Attorney, is authorized to prosecute those actions.

This section shall remain in effect until such time as the population of the City of San Jose exceeds 750,000, as determined by the Population Research Unit of the Department of Finance, and at that time shall be repealed.

California Business and Professions Code § 17207

(a) Any person who intentionally violates any injunction prohibiting unfair competition issued pursuant to Section 17203 shall be liable for a civil penalty not to exceed six thousand dollars ($6,000) for each violation individual, and any corrective action taken by the defendant.

(b) The civil penalty prescribed by this section shall be assessed and recovered in a civil action brought in any county in which the violation occurs or where the injunction was

issued in the name of the people of the State of California by the Attorney General or by any district attorney, any county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, or any city attorney in any court of competent jurisdiction within his or her jurisdiction without regard to the county from which the original injunction was issued. An action brought pursuant to this section to recover civil penalties shall take precedence over all civil matters on the calendar of the court except those matters to which equal precedence on the calendar is granted by law.

(c) If such an action is brought by the Attorney General, one-half of the penalty collected pursuant to this section shall be paid to the treasurer of the county in which the judgment was entered, and one-half to the State Treasurer. If brought by a district attorney or county counsel the entire amount of the penalty collected shall be paid to the treasurer of the county in which the judgment is entered. If brought by a city attorney or city prosecutor, one-half of the penalty shall be paid to the treasurer of the county in which the judgment was entered and one-half to the city, except that if the action was brought by a city attorney of a city and county the entire amount of the penalty collected shall be paid to the treasurer of the city and county in which the judgment is entered.

(d) If the action is brought at the request of a board within the Department of Consumer Affairs or a local consumer affairs agency, the court shall determine the reasonable expenses incurred by the board or local agency in the investigation and prosecution of the action.

Before any penalty collected is paid out pursuant to subdivision (c), the amount of the reasonable expenses incurred by the board shall be paid to the State Treasurer for deposit in the special fund of the board described in Section 205. If the board has no such special fund, the moneys shall be paid to the State Treasurer. The amount of the reasonable

expenses incurred by a local consumer affairs agency shall be paid to the general fund of the municipality or county which funds the local agency.

California Business and Professions Code § 17208

Any action to enforce any cause of action pursuant to this chapter shall be commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section shall be revived by its enactment.

California Business and Professions Code § 17209

If a violation of this chapter is alleged or the application or construction of this chapter is in issue in any proceeding in the Supreme Court of California, a state court of appeal, or the appellate division of a superior court, the person who commenced that proceeding shall serve notice thereof, including a copy of the person's brief or petition and brief, on the Attorney General, directed to the attention of the Consumer Law Section, and on the district attorney of the county in which the lower court action or proceeding was originally filed. The notice, including the brief or petition and brief, shall be served within three days after the commencement of the appellate proceeding, provided that the time may be extended by the Chief Justice or presiding justice or judge for good cause shown. No judgment or relief, temporary or permanent, shall be granted until proof of service of this notice is filed with the court.

California Business and Professions Code § 17500

It is unlawful for any person, firm, corporation or association, or any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services, professional or otherwise, or anything of any nature whatsoever or to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made

or disseminated before the public in this state, or to make or disseminate or cause to be made or disseminated from this state before the public in any state, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatever, including over the Internet, any statement, concerning that real or personal property or those services, professional or otherwise, or concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof, which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading, or for any person, firm, or corporation to so make or disseminate or cause to be so made or disseminated any such statement as part of a plan or scheme with the intent not to sell that personal property or those services, professional or otherwise, so advertised at the price stated therein, or as so advertised. Any violation of the provisions of this section is a misdemeanor punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding two thousand five hundred dollars ($2,500), or by both that imprisonment and fine.

California Business and Professions Code § 17506

As used in this chapter, "person" includes any individual, partnership, firm, association, or corporation.

California Business and Professions Code § 17506.5

As used in this chapter:

(a) "Board within the Department of Consumer Affairs" includes any commission, bureau, division, or other similarly constituted agency within the Department of Consumer Affairs.

(b) "Local consumer affairs agency" means and includes any city or county body which primarily provides consumer protection services.

California Business and Professions Code § 17522

No goods or articles which are determined by label, symbol, trade name, or name of the manufacturer to indicate that they are made by blind workers shall be delivered or offered by any person, partnership, firm, corporation, institution, or association, for sale in this state unless at least 75 percent of the total hours of direct labor of producing such goods or articles purported to be made by the blind shall have been performed by the blind. No goods or articles which do not have a label, symbol, or other printed matter indicating that at least 75 percent of the total hours of direct labor of producing such goods or articles were made by the blind, as herein defined, shall be offered for sale directly or indirectly as being made by the blind unless such goods or articles were in fact so made by the blind as herein defined.

Any violation of this section is a misdemeanor, punishable by a fine of not more than one thousand dollars ($1,000) or imprisonment in the county jail for not more than one year, or by both the fine and imprisonment, and any such violation or threatened violation shall be actionable under Section 17535 of this chapter.

California Business and Professions Code § 17533.7

It is unlawful for any person, firm, corporation or association to sell or offer for sale in this State any merchandise on which merchandise or on its container there appears the words “Made in U.S.A.” “Made in America,” “U.S.A.,” or similar words when the merchandise or any article, unit, or part thereof, has been entirely or substantially made, manufactured, or produced outside of the United States.

California Business and Professions Code § 17534

Any person, firm, corporation, partnership or association or any employee or agent thereof who violates this chapter is guilty of a misdemeanor.

California Business and Professions Code § 17534.5

Unless otherwise expressly provided, the remedies or penalties provided by this chapter are cumulative to each other and to the remedies or penalties available under all other laws of this state.

California Business and Professions Code § 17535

Any person, corporation, firm, partnership, joint stock company, or any other association or organization which violates or proposes to violate this chapter may be enjoined by any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person, corporation, firm, partnership, joint stock company, or any other association or organization of any practices which violate this chapter, or which may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of any practice in this chapter declared to be unlawful.

Actions for injunction under this section may be prosecuted by the Attorney General or any district attorney, county counsel, city attorney, or city prosecutor in this state in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation or association or by any person acting for the interests of itself, its members or the general public.

California Business and Professions Code § 17535.5

(a) Any person who intentionally violates any injunction issued pursuant to Section 17535 shall be liable for a civil penalty not to exceed six thousand dollars ($6,000) for each violation. Where the conduct constituting a violation is of a continuing nature, each day of such conduct is a separate and distinct violation. In determining the amount of the civil penalty, the court shall consider all relevant circumstances,

including, but not limited to, the extent of harm caused by the conduct constituting a violation, the nature and persistence of such conduct, the length of time over which the conduct occurred, the assets, liabilities and net worth of the person, whether corporate or individual, and any corrective action taken by the defendant.

(b) The civil penalty prescribed by this section shall be assessed and recovered in a civil action brought in any county in which the violation occurs or where the injunction was issued in the name of the people of the State of California by the Attorney General or by any district attorney, county counsel, or city attorney in any court of competent jurisdiction within his jurisdiction without regard to the county from which the original injunction was issued. An action brought pursuant to this section to recover such civil penalties shall take special precedence over all civil matters on the calendar of the court except those matters to which equal precedence on the calendar is granted by law.

(c) If such an action is brought by the Attorney General, one-half of the penalty collected pursuant to this section shall be paid to the treasurer of the county in which the judgment was entered, and one-half to the State Treasurer. If brought by a district attorney or county counsel, the entire amount of the penalty collected shall be paid to the treasurer of the county in which the judgment is entered. If brought by a city attorney or city prosecutor, one-half of the penalty shall be paid to the treasurer of the county in which the judgment was entered and one-half to the city.

(d) If the action is brought at the request of a board within the Department of Consumer Affairs or a local consumer affairs agency, the court shall determine the reasonable expenses incurred by the board or local agency in the investigation and prosecution of the action.

Before any penalty collected is paid out pursuant to subdivision (c), the amount of such reasonable expenses incurred by the board shall be paid to the State Treasurer for deposit in the special fund of the board described in Section 205. If the board has no such special fund, the moneys shall be paid to the State Treasurer. The amount of such reasonable expenses incurred by a local consumer affairs agency shall be paid to the general fund of the municipality or county which funds the local agency.

California Business and Professions Code § 17536

(a) Any person who violates any provision of this chapter shall be liable for a civil penalty not to exceed two thousand five hundred dollars ($2,500) for each violation, which shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General or by any district attorney, county counsel, or city attorney in any court of competent jurisdiction.

(b) The court shall impose a civil penalty for each violation of this chapter. In assessing the amount of the civil penalty, the court shall consider any one or more of the relevant circumstances presented by any of the parties to the case, including, but not limited to, the following: the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant's misconduct, and the defendant’s assets, liabilities, and net worth.

(c) If the action is brought by the Attorney General, one-half of the penalty collected shall be paid to the treasurer of the county in which the judgment was entered, and one-half to the State Treasurer. If brought by a district attorney or county counsel, the entire amount of penalty collected shall be paid to the treasurer of the county in which the judgment was entered. If brought by a city attorney or city prosecutor, one-

half of the penalty shall be paid to the treasurer of the county and one-half to the city.

(d) If the action is brought at the request of a board within the Department of Consumer Affairs or a local consumer affairs agency, the court shall determine the reasonable expenses incurred by the board or local agency in the investigation and prosecution of the action.

Before any penalty collected is paid out pursuant to subdivision (c), the amount of such reasonable expenses incurred by the board shall be paid to the State Treasurer for deposit in the special fund of the board described in Section 205. If the board has no such special fund the moneys shall be paid to the State Treasurer. The amount of such reasonable expenses incurred by a local consumer affairs agency shall be paid to the general fund of the municipality which funds the local agency.

(e) As applied to the penalties for acts in violation of Section 17530, the remedies provided by this section and Section 17534 are mutually exclusive.

California Business and Professions Code § 17536.5

If a violation of this chapter is alleged or the application or construction of this chapter is in issue in any proceeding in the Supreme Court of California, a state court of appeal, or the appellate division of a superior court, the person who commenced that proceeding shall serve notice thereof, including a copy of the person's brief or petition and brief, on the Attorney General, directed to the attention of the Consumer Law Section, and on the district attorney of the county in which the lower court action or proceeding was originally filed. The notice, including the brief or petition and brief, shall be served within three days after the commencement of the appellate proceeding, provided that the time may be extended by the Chief Justice or presiding justice or judge for good cause shown. No judgment or relief, temporary or

permanent, shall be granted until proof of service of this notice is filed with the court.

California Business and Professions Code § 17569

It is unlawful to barter, trade, sell, or offer for sale or trade, any article represented as made by authentic American Indian labor or workmanship, unless the basic article was produced wholly by American Indian labor or workmanship.

Any article bearing a trademark or label registered by Indian persons, groups, bands, tribes, pueblos, or communities with the Indian Arts and Crafts Board in Washington, D.C., or with the American Indian Historical Society, Incorporated, in San Francisco, California, shall be presumed to be authentic.

Only those articles bearing a registered trademark or label of authentic Indian labor or workmanship may be deemed an art or craft of authentic Indian labor or workmanship.

California Business and Professions Code § 17580.5

(a) It is unlawful for any person to make any untruthful, deceptive, or misleading environmental marketing claim, whether explicit or implied. For the purpose of this section, "environmental marketing claim" shall include any claim contained in the "Guides for the Use of Environmental Marketing Claims" published by the Federal Trade Commission.

(b) It shall be a defense to any suit or complaint brought under this section that the person's environmental marketing claims conform to the standards or are consistent with the examples contained in the "Guides for the Use of Environmental Marketing Claims" published by the Federal Trade Commission.

California Civil Code § 1770(a)

The following unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer are unlawful:

(4) Using deceptive representations or designations of geographic origin in connection with goods or services.

California Code of Civil Procedure § 128.7

(a) Every pleading, petition, written notice of motion, or other similar paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise provided by law, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) By presenting to the court, whether by signing, filing, submitting, or later advocating, a pleading, petition, written notice of motion, or other similar paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, all of the following conditions are met:

(1) It is not being presented primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(2) The claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

(3) The allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

(4) The denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation. In determining what sanctions, if any, should be ordered, the court shall consider whether a party seeking sanctions has exercised due diligence.

(1) A motion for sanctions under this section shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). Notice of motion shall be served as provided in Section 1010, but shall not be filed with or presented to the court unless, within 21 days after service of the motion, or any other period as the court may prescribe, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(2) On its own motion, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b),

unless, within 21 days of service of the order to show cause, the challenged paper, claim, defense, contention, allegation, or denial is withdrawn or appropriately corrected.

(d) A sanction imposed for violation of subdivision (b) shall be limited to what is sufficient to deter repetition of this conduct or comparable conduct by others similarly situated. Subject to the limitations in paragraphs (1) and (2), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorney's fees and other expenses incurred as a direct result of the violation.

(1) Monetary sanctions may not be awarded against a represented party for a violation of paragraph (2) of subdivision (b).

(2) Monetary sanctions may not be awarded on the court's motion unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

(e) When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this section and explain the basis for the sanction imposed.

(f) In addition to any award pursuant to this section for conduct described in subdivision (b), the court may assess punitive damages against the plaintiff upon a determination by the court that the plaintiff's action was an action maintained by a person convicted of a felony against the person's victim, or the victim's heirs, relatives, estate, or personal representative, for injuries arising from the acts for which the person was convicted of a felony, and that the

plaintiff is guilty of fraud, oppression, or malice in maintaining the action.

(g) This section shall not apply to disclosures and discovery requests, responses, objections, and motions.

(h) A motion for sanctions brought by a party or a party's attorney primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation, shall itself be subject to a motion for sanctions. It is the intent of the Legislature that courts shall vigorously use its sanctions authority to deter that improper conduct or comparable conduct by others similarly situated.

(i) This section shall apply to a complaint or petition filed on or after January 1, 1995, and any other pleading, written notice of motion, or other similar paper filed in that matter.

(j) This section shall remain in effect only until January 1, 2006, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2006, deletes or extends that date.

California Code of Civil Procedure § 425.16

(a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.

(b)(1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the

court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

(2) In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(3) If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination.

(c) In any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5.

(d) This section shall not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor.

(e) As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in

furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

(f) The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper. The motion shall be noticed for hearing not more than 30 days after service unless the docket conditions of the court require a later hearing.

(g) All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.

(h) For purposes of this section, "complaint" includes "cross-complaint" and "petition," "plaintiff" includes "cross-complainant" and "petitioner," and "defendant" includes "cross-defendant" and "respondent."

(i) On or before January 1, 1998, the Judicial Council shall report to the Legislature on the frequency and outcome of special motions made pursuant to this section, and on any other matters pertinent to the purposes of this section.

(j) An order granting or denying a special motion to strike shall be appealable under Section 904.1.

(k)(1) Any party who files a special motion to strike pursuant to this section, and any party who files an opposition to a special motion to strike, shall, promptly upon so filing, transmit to the Judicial Council, by e-mail or fax, a copy of the endorsed-filed caption page of the motion or opposition, a copy of any related notice of appeal or petition for a writ, and a conformed copy of any order issued pursuant to this section, including any order

granting or denying a special motion to strike, discovery, or fees.

(2) The Judicial Council shall maintain a public record of information transmitted pursuant to this subdivision for at least three years, and may store the information on microfilm or other appropriate electronic media.

California Code of Civil Procedure § 452

In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties.

California Code of Civil Procedure § 472

Any pleading may be amended once by the party of course, and without costs, at any time before the answer or demurrer is filed, or after demurrer and before the trial of the issue of law thereon, by filing the same as amended and serving a copy on the adverse party, and the time in which the adverse party must respond thereto shall be computed from the date of notice of the amendment.

California Code of Civil Procedure § 472c(a)

When any court makes an order sustaining a demurrer without leave to amend the question as to whether or not such court abused its discretion in making such an order is open on appeal even though no request to amend such pleading was made.

California Code of Civil Procedure § 1021.5

Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if:

(a) a significant benefit, whether pecuniary or nonpecuniary,

has been conferred on the general public or a large class of persons,

(b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and

(c) such fees should not in the interest of justice be paid out of the recovery, if any.

With respect to actions involving public entities, this section applies to allowances against, but not in favor of, public entities, and no claim shall be required to be filed therefor, unless one or more successful parties and one or more opposing parties are public entities, in which case no claim shall be required to be filed therefor under Part 3 (commencing with Section 900) of Division 3.6 of Title 1 of the Government Code.

Attorneys' fees awarded to a public entity pursuant to this section shall not be increased or decreased by a multiplier based upon extrinsic circumstances, as discussed in *Serrano v. Priest*, 20 Cal.3d 25, 49.

California Labor Code § 1012

Any person engaged in the production, manufacture, or sale of any article of merchandise in this state, or any person engaged in the performance of any acts or services of a private, public, or quasi-public nature for profit, who willfully misrepresents or falsely states that members of trades unions, labor associations, or labor organizations were engaged or employed in the manufacture, production, or sale of such article or in the performance of such acts or services, is guilty of a misdemeanor punishable by a fine of not more than one thousand dollars ($1,000), or by imprisonment in the county jail for not more than 90 days, or both.