



## **NIKE'S NON-VICTORIOUS CAMPAIGN**

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By: Jim Astrachan

NIKE, the Beaverton, Oregon distributor of athletic wear lodged its AIR JORDANs in the proverbial bucket when the California Supreme Court treated its in-defense-of-itself public relations campaign as commercial speech, subject to the same standards as advertising. The case is now before the United States Supreme Court, and dozens of groups have filed *amicus* briefs on NIKE's side.

Much of NIKE's footwear is made by women in Indonesia, Vietnam and China, and the company had been widely accused in the media, including TV's *48 Hours* of using vendors who abuse workers through low pay, physical and sexual harassment. NIKE was put under an unusual degree of public scrutiny as a company exemplifying what was referred to as a "perceived social publicized evil caused by the globalizing economy". A besieged NIKE management decided to tell its version through its PR professionals. But what started as a PR professional's dream assignment, quickly became a nightmare from which NIKE has yet to awaken.

In press releases and letters to editors; in full page "open letters" from management; and in letters to college presidents and athletic directors, NIKE asserted it was a responsible member of the international community, that it did not exploit or

mistreat its workers, and said, in essence, the public “during this holiday season” should buy, buy, buy NIKE products.

Whether NIKE was truthful or not would have made little difference to affect the outcome of this matter had it been allowed to assert its First Amendment rights and claim an absolute privilege to defend itself from these charges of public interest.

The suit alleged that NIKE's PR campaign made six misrepresentations regarding its labor practices, including that NIKE products were made in accordance with all applicable governmental laws and regulations governing wages and hours. The suit contended that NIKE's rebuttal was false advertising because its speech was commercial and deceitful.

Should the speech be Constitutionally protected, even if false, or was it commercial speech, that if false or likely to mislead, gets no protection?

The Constitution protects commercial speech, but to a lesser degree than non-commercial speech. If the speech is non-commercial, content-based regulations by a government are valid only if the regulation is the least restrictive means to protect a compelling government intent.

But if the speech is commercial, a term defined a bit differently by the Supreme Court on several occasions, it must concern lawful activity and not mislead, otherwise it can be prohibited. For example, Rhode Island's attempt to prevent liquor stores from advertising prices on the pretext that doing so encourages drinking, was struck

down because the sale of liquor was lawful, the ads truthful, and the state could educate its citizens on the evils of drinking without abrogating an advertiser's right to freely speak. Contrast this with weight-loss ads that promise what can't be delivered.

Whether NIKE's speech was commercial or non-commercial is a pivotal question. For if the speech was non-commercial, a person refuting derogatory statements in the same media in which they were made should not be censored by the state, even if the rebuttal is not accurate. But if commercial, and false or likely to deceive, then under various decisions of the Supreme Court, California can ban the statements.

Well, the court decided that NIKE's speech was indeed commercial, finding that it proposed a commercial transaction. To support its holding the court reasoned that NIKE engaged in commerce, being the production and sale of goods, and that NIKE's intended audience was likely to be actual or potential buyers of its products. In addition, the factual content of the public relations campaign for the most part, was commercial in character. This followed because the public relations campaign consisted of representations of fact about the business operations of NIKE, e.g., that workers who made NIKE products are protected from physical and sexual abuse. And, finally, the campaign was launched (campaigns like boats, are "launched", not undertaken or embarked upon) to promote the sale of NIKE's products.

NIKE's audience included college presidents and athletic directors and other actual and potential buyers of athletic clothing. The Plaintiff alleged that NIKE launched its campaign "to maintain and/or increase its sales and profits", because

consumers want to associate with companies who are upstanding citizens. NIKE addressed working conditions in a factual manner. It specifically addressed wages, hours, health and safety laws and factory conditions.

Assuming that under the right (or wrong) circumstances statements made in a public relations campaign can be considered commercial speech, thus advertising, and worthy of less protection than non-commercial speech, there are several valuable lessons to be learned from this case. First, false advertising is a tort. Second, PR professionals and their clients can be jointly and severally liable for injuries caused by torts. Joint and several means a judgment can be satisfied entirely against the PR professional without the need to chase the client. Fourth, the indemnification provision contained in the agency-client contract is only as strong as the integrity of the client and its financial where-with-all. Fifth, if you ask, "what indemnification clause in what contract", you need more help than this article can give.

Okay. What does this mean? Unless the Supreme Court says no, statements made by a PR person, if they encourage commerce, are commercial and are subject to the same false advertising standards as product claims made by a pitch man in a used car dealer's TV ad. The outcome is hard to call, but I think the court will let stand the ruling.

The next time you are called as a spokesperson for a campaign designed to defend the honor of your client, be careful. The reputation you save may be your own.

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