1 2 3 4 5 6 7 8		, Inc. IT OF THE STATE OF CALIFORNIA JNTY OF SAN DIEGO
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11	Judicial Council Coordination Proceeding Special Title (Rule 1550(b))) JUDICIAL COUNCIL COORDINATION PROCEEDINGS NO. 4095
12	FIREARM CASES))
13	Coordinated actions:)
14 15 16 17 18 19 20	THE PEOPLE OF THE STATE OF CALIFORNIA, ex rel. the County of Los Angeles, et. al., v. ARCADIA MACHINE & TOOL, et. al., THE PEOPLE OF THE STATE OF CALIFORNIA, by and through JAMES K. HAHN, City Attorney of the City of Los	Superior Court of California City & County of San Francisco No. 303753 Superior Court of California County of Los Angeles No. BC210894 Superior Court of California County of Los Angeles No. BC214794 DEFENDANTS ANDREWS SPORTING GOODS' AND S. G. DISTRIBUTING'S NOTICE OF LODGING OF FEDERAL
21 22	Angeles, et. al.,	 AUTHORITIES IN SUPPORT OF SPECIAL MOTION TO STRIKE PURSUANT TO CAL. CODE OF CIVIL
23	v. ARCADIA MACHINE & TOOL, et. al.,) PROCEDURE §425.16
24		Date: Time: 8:30 a.m.
25	THE PEOPLE OF THE STATE OF CALIFORNIA, by and through San) Dept. 65) Hon. Vincent. P. DiFiglia
26	Francisco City Attorney Louise H. Renne, v.	
27	ARCADIA MACHINE & TOOL, et. al.	
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1	The following authorities are hereby lodged with the Court as authorities cited by	
2	Defendant Andrews Sporting Goods and S.G. Distributing in their Special Motion to Strike	
3	Pursuant to Cal. Code of Civil Procedure §425.16:	
4	FEDERAL CASES:	
5	1. Haskell v. Time, Inc. (E.D. Cal. 1994) 857 F.Supp. 1392	
6	2. Hoffman v. Capitol Cities/ABC, Inc. (9th Cir. 2001) 255 F.3d 1180	
7	3. Freeman v. Time, Inc. (9th Cal. 1995) 68 F.3d 285	
8	4. Mavilia v. Stoeger Industries (D. Mass. 1983) 574 F.Supp. 107	
9	5. Milkovich v. Lorain (1990) 497 U.S. 1	
10	6. Nordyke v County of Santa Clara (2000) 933 F.Supp 903	
11	7. Riley v. National Federation of the Blind (1988) 487 U.S. 781	
12		
13	Dated: January 3, 2003 TRUTANICH • MICHEL, LLP:	
14	C D M:-11	
15	C. D. Michel C. D. Michel	
16	Attorneys for Defendants	
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1	PROOF OF SERVICE
2	STATE OF CALIFORNIA
3	COUNTY OF LOS ANGELES
4	I, Haydee Villegas, declare:
5	1. That I am employed in the City of San Pedro, Los Angeles County, California. I am over
6	the age eighteen (18) years and am not a party to the within action. My business address is 407
7	North Harbor Boulevard, San Pedro, California 90731.
8	2. On January 3, 2003, I served the foregoing document(s) described as
9	DEFENDANTS ANDREWS SPORTING GOODS' AND S. G. DISTRIBUTING'S NOTICE
10	OF LODGING OF FEDERAL AUTHORITIES IN SUPPORT OF SPECIAL MOTION TO
11	STRIKE PURSUANT TO CAL. CODE OF CIVIL PROCEDURE §425.16 on the interested
12	parties in this action by JusticeLink Electronic filing on all persons appearing on the Service List.
13	I declare under penalty that the foregoing is true and correct. Executed this 3 rd day of
14	January, 2003 at San Pedro, California.
15	
16	Haydee Villegas
۱7	Haydee Villegas
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	NOTICE OF LODGING OF FEDERAL ALITHODITIES
i	NOTICE OF LODGING OF FEDERAL AUTHORITIES

EXHIBIT 1

857 F.Supp. 1392 30 Fed.R.Serv.3d 1109 (Cite as: 857 F.Supp. 1392)

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United States District Court, E.D. California.

Eben W. HASKELL, Plaintiff,

٧.

TIME, INC. and Time Warner, Inc., Defendants. Eben W. HASKELL, Plaintiff,

٧.

PUBLISHERS CLEARING HOUSE, Defendant. Eben W. HASKELL, Plaintiff,

٧.

The READER'S DIGEST ASSOC., INC., Defendant. Eben W. HASKELL, Plaintiff,

٧.

AMERICAN FAMILY PUBLISHERS, Defendant.

Nos. Civ-S-93-1165 DFL GGH through Civ-S-93-1167 DFL GGH and Civ-S-93-1313 DFL GGH.

June 13, 1994.

Consumer brought action for injunctive relief, monetary damages, and attorney fees on behalf of himself and general public of California against publishers using sweepstakes entries to solicit magazine subscriptions, alleging false advertising, unfair business practices, illegal sweepstakes, and illegal lotteries. On defendants' motions to dismiss, the District Court, Levi, J., held that: (1) exemplars of sweepstakes solicitations could be considered on motion to dismiss, despite not being included in complaint; (2) reasonable consumer rather than unwary consumer was appropriate standard in which to test claim of false or misleading advertising; (3) alleged misrepresentations were not misleading; (4) consumer failed to allege sufficient facts to pierce corporate veil of parent corporation as alter ego of magazine publisher; and (5) sweepstakes were not illegal contests or lotteries.

Dismissed.

West Headnotes

[1] Federal Civil Procedure 1832 170Ak1832 Most Cited Cases

Exemplars of sweepstakes solicitations submitted by defendants in their motions to dismiss complaint

alleging false advertising in sweepstakes entries included with their subscription advertisements could be considered with their motions, though examples of mailings were not attached as exhibits to complaints, where there was no challenge to authenticity of exemplars, and exemplars contained language specifically attacked in complaint; plaintiff's hope that discovery would somehow turn up favorable examples was not sufficient to deprive defendants of their opportunity to avoid burdens of discovery through motion to dismiss. Fed.Rules Civ.Proc.Rules 10(c), 12(b)(6), 28 U.S.C.A.

[2] Federal Civil Procedure 1832 170Ak1832 Most Cited Cases

Ordinarily motion to dismiss is addressed to four corners of complaint without consideration of other documents or facts outside complaint. <u>Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.</u>

[3] Federal Civil Procedure 1829 170Ak1829 Most Cited Cases

In considering motion to dismiss, court must accept as true allegations of complaint in question, construe pleading in light most favorable to party opposing motion, and resolve all doubts in pleader's favor. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[4] Federal Civil Procedure 628 170Ak628 Most Cited Cases

[4] Federal Civil Procedure 629 170Ak629 Most Cited Cases

Complaint is deemed to include any documents attached to it as exhibits and any documents incorporated by reference. <u>Fed.Rules Civ.Proc.Rule</u> 10(c), 28 U.S.C.A.

[5] Consumer Protection 7 92Hk7 Most Cited Cases

"Reasonable consumer," rather than "unwary consumer," was appropriate legal standard for evaluating false or misleading advertising and unfair business practices claim under California law; mailings were sent to millions of California residents, not to group of particularly susceptible and naive consumers. West's Ann.Cal.Bus. & Prof.Code § 17200.

[6] Consumer Protection 57 92Hk7 Most Cited Cases

Advertising that amounts to mere "puffery," which are vague, highly subjective claims, is not actionable in false advertising and unfair business practices claim because no reasonable consumer relies on puffery. West's Ann. Cal. Bus. & Prof. Code §§ 17200, 17204, 17500.

[7] Consumer Protection 38 92Hk38 Most Cited Cases

If alleged misrepresentation, in context, is such that no reasonable consumer could be misled, allegation of false or misleading advertising may be dismissed as matter of law. West's Ann.Cal.Bus. & Prof.Code § 17500.

[8] Consumer Protection 692Hk6 Most Cited Cases

Statements in sweepstakes solicitation that recipient has real chance to win were not actionable under California law, where any reasonable recipient would understand that these were mass mailings as part of advertising campaign, and rules clearly revealed projected odds of winning any prize. West's Ann.Cal.Bus. & Prof.Code § 17500.

[9] Consumer Protection € 6 92Hk6 Most Cited Cases

Statements and pictures of checks for \$5,000,000 in sweepstakes solicitations were not misleading under California law in not showing that amount will be reduced by taxes and paid over time; disclosure that prize is paid in annual payments over 30 years was repeatedly made with more than sufficient prominence, and rules stated that taxes were to be paid by winner. West's Ann.Cal.Bus. & Prof.Code § 17500.

[10] Consumer Protection 6 92Hk6 Most Cited Cases

Statements in sweepstakes solicitations that time is of essence and that failure to return entry by certain date will forfeit recipient's chances of winning were not misleading, though recipients may receive future opportunities to enter; statements suggested only that particular opportunity would be foreclosed if not acted upon. West's Ann. Cal. Bus. & Prof. Code § 17500.

[11] Consumer Protection 6 92Hk6 Most Cited Cases

Statement that recipients who order magazine subscription through sweepstakes solicitation are preferred customers was not misleading under California law, where term was never used in exemplar to imply that recipients will receive priority treatment or any advantage in sweepstakes. West's Ann.Cal.Bus. & Prof.Code § 17500.

[12] Consumer Protection 57 92Hk7 Most Cited Cases

Advertisements containing sweepstakes solicitation were not misleading on ground that sweepstakes rules appeared in smaller type than words in advertisement. West's Ann.Cal.Bus. & Prof.Code § 17500.

[13] Consumer Protection 692Hk6 Most Cited Cases

Statement in exemplar containing sweepstakes solicitation that "if address label below contains the winning number and you return it * * * you'll see on NBC TV that you've just won ten million dollars!" was not misleading under California law, since no reasonable recipient could view mass mailing as announcement that recipient had been selected as winner. West's Ann.Cal.Bus. & Prof.Code § 17500.

[14] Consumer Protection © 6 92Hk6 Most Cited Cases

Statement in sweepstakes solicitation that recipient is finalist who is now just one step away from winning was at most form of puffing, which would not be actionable as false or misleading under California law. West's Ann.Cal.Bus. & Prof.Code § 17500.

[15] Consumer Protection 38 92Hk38 Most Cited Cases

Recipient of sweepstakes solicitation failed to allege sufficient facts to warrant piercing corporate veil of parent corporation of magazine publishers, where corporations kept separate records, there was no allegation that subsidiary was fraudulently incorporated to protect parent, and subsidiary had sufficient annual sales to be able to respond to any restitutionary award.

[16] Corporations 1.4(1) 101k1.4(1) Most Cited Cases

Decision to pierce corporate veil is guided by amount of respect given to separate identity of corporation by its shareholders, degree of injustice visited on litigants by recognition of corporate entity, and fraudulent intent of incorporators.

[17] Lotteries 3 247k3 Most Cited Cases

Sweepstakes did not amount to illegal lotteries or contests, where only payment required was 29-cents postage. West's Ann.Cal.Penal Code § 319.

[18] Lotteries 3 247k3 Most Cited Cases

"Presidential Skill Contests" requiring listing of presidents in order of date of service, answering essay question and wordfind were contests, not illegal lotteries under California law, where game required skill and involved consideration, and rules explained how entries would be judged and players could improve their responses and their chances of winning. West's Ann.Cal.Bus. & Prof.Code § 17539.3(e).

[19] Lotteries €-3 247k3 Most Cited Cases

In considering whether game requires skill to qualify as contest under California law, court looks to whether players exercise some control over outcome. West's Ann.Cal.Bus. & Prof.Code § 17539.3(e).

*1394 <u>Harold A. Berliner.</u> <u>Richard Ellers</u>, Nevada City, CA, for Haskell.

Jeffrey N. Brown, <u>Laura A. Vossman</u>, Morgan, Lewis & Bockius, Los Angeles, CA, for Publishers Clearing House.

William I. Edlund, Emmett C. Stanton, Melanie A. Sherk, San Francisco, CA, for The Reader's Digest Assoc., Inc.

<u>Douglas E. Mirell</u>, Loeb & Loeb, Los Angeles, CA, for American Family Publishers.

*1395 MEMORANDUM OF DECISION AND ORDER

LEVI, District Judge.

Plaintiff seeks to enjoin various of the statements made by defendants in their widely distributed magazine sweepstakes solicitations. Plaintiff Eben Haskell brings suit on behalf of himself and the general public of California against defendants Time Warner, Inc. ("Time Warner"), Time, Inc. ("Time"), Publishers Clearing House ("PCH"), The Reader's Digest Association, Inc. ("RDA"), and American Family Publishers ("American"). [FN1] All defendants except Time Warner solicit magazine subscriptions through the

mail. [FN2] To enlist subscribers, defendants include "sweepstakes" entries with their subscription advertisements. In four separate complaints, Haskell asserts that each defendant's mailings amount to (1) false and misleading advertising in violation of Cal.Bus. & Prof. Code § 17500; (2) unfair business practices in violation of Cal.Bus. & Prof.Code §§ 17200 & 17204 [FN3]; (3) illegal sweepstakes in violation of California's contest regulations at Cal. Bus. & Prof. Code § 17539.3(f); and (4) illegal lotteries in violation of Cal.Penal Code §§ 319-328 and Cal.Bus. & Prof.Code §§ 17204 and 17535. Plaintiff seeks injunctive relief enjoining future conduct, appointment of a receiver to restore monies paid by California residents for magazine subscriptions as a result of defendants' sweepstakes promotions, and attorney's fees. Jurisdiction is premised upon diversity.

FN1. Haskell originally brought suit against all defendants jointly in Case No. Civ-S-93-515. This court ordered the severance of claims against each defendant in its June 30, 1993 order.

<u>FN2.</u> Time Warner, Inc. is joined as the parent corporation of Time, Inc. although Time Warner does not engage in any direct advertising through sweepstakes mailings.

<u>FN3.</u> The unfair business practice claim is based on the same conduct alleged in the false and misleading advertising claim.

As to the false advertising and unfair competition claims, plaintiff identifies certain allegedly misleading statements in each of the complaints and contends that these statements create a number of false impressions: (1) that the recipient has already been selected as the winner or has an excellent chance of winning when neither proposition is true; (2) that the prize will be awarded as a lump sum when in fact it is a payout over 30 years from which taxes must be paid; (3) that if merchandise is ordered with the return of the notification, the chances of winning will be improved when this is not the case; and (4) that the notification must be returned promptly, creating a false sense of urgency, when numerous future opportunities to participate in the same sweepstakes will be provided. [FN4] Each of the complaints specifically lists and quotes in some detail the defendant's false statements that contribute to these four misimpressions. summary of these statements is attached as appendices

A-D. Defendants contend that the alleged misstatements are pulled out of context and are not misleading when read in context or amount to harmless puffing of no significance to any reasonable recipient.

FN4. There is an overlap between the alleged misimpression as to urgency and the alleged misimpression concerning the recipient's chances of winning. Plaintiff alleges that recipients are led to believe that their chances have been improved because they have been particularly selected and have made it into a smaller group of so-called "finalists." The supposed urgency stems from the importance that the recipient not forego this special opportunity.

Plaintiff also claims that the sweepstakes are contests within section 17539.3(f), and that they fail to comply particularly with the statutory disclosure requirements for contests. In the alternative, plaintiff claims that the sweepstakes are illegal lotteries in violation of the Cal.Penal Code §§ 319-328 because they give the impression that thosewho order magazines will be favored and in fact do favor those who place orders. Finally, plaintiff contends that the "skill contests" conducted by defendants RDA and PCH are illegal lotteries because they are only open to addressees who order and because they do not require any "skill." Defendants contend that the Penal Code provisions cannot be enforced in a private civil suit; that the sweepstakes do not meet the definition of *1396 lottery in any event because of the absence of consideration; and that the RDA and PCH "skill contests" are not lotteries because they require both skill and consideration.

Defendants bring motions to dismiss all causes of action for failure to state claims on which relief may be granted. Defendant Time also moves to dismiss Time Warner as an improperly joined defendant. For the reasons stated below, defendants' motions to dismiss Haskell's claims are granted in major part without prejudice.

I. False Advertising and Unfair Business Practice Claims

A. Defendants' Exemplars

[1][2][3] A preliminary issue arises as to whether the exemplars of the sweepstakes solicitations, submitted by defendants with their motions, properly may be considered on a motion to dismiss. Ordinarily, a

motion to dismiss under Fed.R.Civ.P. 12(b)(6) is addressed to the four corners of the complaint without consideration of other documents or facts outside of the complaint. FN5 Although each of the complaints at issue contains numerous quotations from each of the defendant's sweepstakes mailers, plaintiff has not attached any examples of the particular mailers under consideration as exhibits to the complaints. Defendants seek to argue that the statements attacked by plaintiff, when viewed in context of the entire mailing, are either not misleading or are non-actionable puffery. They contend that such an argument is proper on a motion to dismiss and need not wait for summary judgment. See Cook. Perkiss & Liehe v. Northern Cal. Collection Serv., Inc., 911 F.2d 242 (9th Cir.1990). And they argue that it is unfair to defendants that they should be disabled from making a motion to dismiss, based on the context of the statements at issue, simply because plaintiff has chosen not to attach exemplars to his complaints. Defendants ask the court to consider exemplars of the mailings on this motion to dismiss without converting the motion to a summary judgment motion under Fed.R.Civ.P. 56. [FN6]

> FN5. In considering a motion to dismiss, the court must accept as true the allegations of the complaint in question, Hospital Bldg. Co. v. Rex Hospital Trustees, 425 U.S. 738, 740, 96 S.Ct. 1848, 1850-51, 48 L.Ed.2d 338 (1976), construe the pleading in the light most favorable to the party opposing the motion and resolve all doubts in the pleader's favor. Jenkins v. McKeithen, 395 U.S. 411, 421, 89 S.Ct. 1843, 1848-49, 23 L.Ed.2d 404 reh'g denied, 396 U.S. 869. 90 S.Ct. 35, 24 L.Ed.2d 123 (1969). A motion to dismiss for failure to state a claim should not be granted unless it appears beyond doubt that plaintiff can prove no set of facts in support of the claim that would entitle him to relief. "A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S.Ct, 2229, 2232, 81 L.Ed.2d 59 (1984), citing Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957); see also Palmer v. Roosevelt Lake Log Owners Ass'n, 651 F.2d 1289, 1294 (9th Cir.1981).

> <u>FN6.</u> Both the defendants and the plaintiff have stated that they do not wish this motion to be treated as one for summary judgment.

("[A]]ll parties to this motion agree that this is not a motion for summary judgment and should not be treated as one." (Pl.'s Mem.Opp.Mot. Dismiss at 4.))

[4] Under Fed.R.Civ.P. 10(c), the complaint is deemed to include any documents attached to it as exhibits as well as any documents incorporated into the complaint by reference. If the court chooses to look to other documents, such as those attached by a defendant to its motion to dismiss, "the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Fed.R.Civ.P. 12(b). This rule is mandatory. See Carter v. Stanton, 405 U.S. 669, 671, 92 S.Ct. 1232, 1234, 31 L.Ed.2d 569 (1972).

Defendants argue that there is an exception to the general rule barring consideration of documents outside the complaint in cases in which specific documents lie at the heart of a complaint but are not attached to the complaint. In these circumstances, defendants suggest, the court fairly may consider the documents as incorporated by reference into the complaint without violating the rule that motions to dismiss should be resolved without reference to materials extrinsic to the complaint.

*1397 Defendants rely particularly on securities cases in which consideration of documents integral to the complaint has been held proper on a motion to dismiss even though the documents were not attached to the complaint. Thus, in Kramer v. Time Warner Inc., 937 F.2d 767, 774 (2d Cir.1991), the court found that it was permissible to take judicial notice of publicly filed disclosure documents and to consider such documents on a motion to dismiss. [FN7] The rule in Kramer for publicly filed documents was broadened in I. Meyer Pincus & Assocs., P.C. v. Oppenheimer & Co., Inc., 936 F.2d 759 (2d Cir.1991), to include documents, whether or not publicly filed, that are central to the complaint and on which plaintiff has relied in drafting the complaint. The court in I. Meyer Pincus reasoned that a plaintiff who pleads misrepresentations in a particular document ought not be permitted to defeat a motion to dismiss through the artifice of not attaching the critical document to the complaint. [FN8] In these circumstances the rationale for converting a motion to dismiss into one for summary judgment-that plaintiff must have sufficient notice--"is largely dissipated" because the plaintiff had ample notice of a critical document on which the complaint is based. Cortec Indus., Inc. v. Sum Holding L.P., 949 F.2d 42, 47-48 (2d Cir.1991); see Brass v. American Film <u>Technologies</u>, <u>Inc.</u>, 987 F.2d 142, 150 (2d Cir,1993) (on 12(b)(6) motion, proper to consider "documents either in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing suit").

FN7. "[I]t is highly impractical and inconsistent with Fed.R.Evid. 201 to preclude a district court from considering [public disclosure documents] when faced with a motion to dismiss a securities action based on allegations of material misrepresentations or omissions. First, the documents are required by law to be filed with the SEC, and no serious question as to their authenticity can exist. Second, the documents are the very documents that are alleged to contain the various misrepresentations or omissions and are relevant not to prove the truth of their contents but only to determine what the documents stated. Third, a plaintiff whose complaint alleges that such documents are legally deficient can hardly show prejudice resulting from a court's studying of the documents. Were courts to refrain from considering such documents, complaints that quoted only selected and misleading portions of such documents could not be dismissed under Rule 12(b)(6) even though they would be doomed to failure." 937 F.2d at 774.

FN8. "The prospectus is integral to the complaint. The claims pleaded therein are based only on an alleged written misrepresentation appearing within the plaintiff alleges prospectus; misrepresentations stemming from any other source, such as words, conduct, or other documentation. We therefore decline to close our eyes to the contents of the prospectus and to create a rule permitting a plaintiff to evade a properly argued motion to dismiss simply because plaintiff has chosen not to attach the prospectus to the complaint or to incorporate it by reference." 936 F.2d at 762 (citing Kramer).

This exception to the general rule is not unique to the Second Circuit, see <u>Townsend v. Columbia Operations</u>, 667 F.2d 844, 848-49 (9th Cir.1982) (suggesting that in securities case four documents containing alleged misrepresentations, although not literally incorporated within the complaint, may be considered on a motion to dismiss); <u>Watterson v. Page</u>, 987 F.2d 1, 3 (1st

Cir.1993) ("courts have made narrow exceptions for documents the authenticity of which are not disputed by the parties; for official public records; for documents central to plaintiffs' claim; or for documents sufficiently referred to in the complaint"); *In re Wade*, 969 F.2d 241, 249 & n. 12 (7th Cir.1992), nor to securities cases, see *Fudge v. Penthouse International*, *Ltd.*, 840 F.2d 1012, 1015 (1st Cir.1988) (libel); 5 C. Wright & A. Miller, Federal Practice and Procedure § 1327 (2d ed. 1990).

Plaintiff does not challenge the authenticity of the exemplars submitted by each defendant, and the exemplars indeed contain the language specifically attacked by plaintiff in the complaint. Plaintiff does not deny that the exemplars, or virtually identical other mailings, are in his possession, are central to his claim, and are referred to in detail in the complaint. Rather, he argues that the exemplars are not the exact or only mailings on which he bases his claims and that they were handpicked by the defendants to succeed on their motions to dismiss. He suggests that he may have exemplars in which the challenged statements appear in a more misleading context or that such examples may turn up through discovery. But plaintiff does not provide any basis in fact for these conclusory *1398 assertions. He certainly had exemplars either identical or very similar to the ones provided by defendants when drafting the complaints. He has been on notice for some time--at least since the first status conference--that defendants intended to make this motion to dismiss based on exemplars. And he has provided no competing examples in which the context of the alleged misrepresentations is different from the exemplars. His hope that discovery will somehow turn up favorable examples is not sufficient to deprive defendants of their opportunity to avoid the burdens of discovery through a motion to dismiss.

In light of the circumstances here, the exemplars provided by defendants may be considered as if incorporated by reference into the complaints under Rule 10(c). [FN9] A ruling to the contrary would permit a plaintiff in a case such as this, involving allegedly misleading statements, to deprive the defendant of the opportunity to make a motion to dismiss based on the context of the particular statements on the bare claim that there may be more damaging contexts. This would be inconsistent with case law that permits the court to decide as a matter of law whether allegedly misleading statements amount to mere "puffery" or are factual claims on which a reasonable consumer could rely. See Cook. Perkiss & Liehe v. Northern Cal. Collection Serv., Inc., 911 F.2d 242, 245 (9th Cir.1990); In re All Terrain Vehicle Litig., 771 F.Supp. 1057, 1060-61 (C.D.Cal.1991).

VeriFone Sec. Litig., 11 F.3d 865 (9th Cir.1993) (district court properly dismisses securities claims on basis that the statements at issue are not material); Raab v. General Physics Corp., 4 F.3d 286 (4th Cir.1993) (on motion to dismiss court finds that no reasonable investor would rely on certain of the allegedly false statements).

<u>FN9.</u> Plaintiff asserts that he relies not only on the mailings but also on television advertising in making his claims of false advertising and unfair business practice. But the allegedly false television advertising is not identified in the complaints in violation of <u>Fed.R.Civ.P.</u> <u>9(b)</u>. Since the court grants leave to amend the complaints, if indeed there are specific allegations to be made concerning television advertising, plaintiff may include them in the amended complaints.

B. Reasonable Person or Unwary Consumer

[5] The parties disagree as to whether the "reasonable consumer" is the appropriate standard by which to test a claim of false or misleading advertising in violation of § 17200. Plaintiff argues that the "unwary consumer" is the appropriate legal standard for determining deceptiveness. Defendants contend that the "reasonable person" standard should be applied because this is the common standard in the law and because it is the standard used by the Federal Trade Commission in interpreting section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1), on which the California Unfair Business Practices Act is based.

Defendants have the better of this argument for a number of reasons. First, the reasonable person standard is well ensconced in the law in a variety of legal contexts in which a claim of deception is brought. It is the standard for false advertising and unfair competition under the Lanham Act, see Cook, Perkiss & Liehe, Inc., supra, 911 F.2d at 246; Saxony Products, Inc. v. Guerlain, Inc., 513 F.2d 716, 723 (9th Cir.1975), for securities fraud, VeriFone, supra. 11 F.3d at 869 ("our central inquiry is whether a reasonable investor would have been misled about the nature of his investment"), for deceit and misrepresentation, Kruse v. Bank of America. 202 Cal.App.3d 38, 248 Cal.Rptr. 217, 226 (1988) ("guileless action in relying on a statement on which no reasonable person would rely is not justifiable reliance"); Lynch v. Cook, 148 Cal.App.3d 1072, 196 Cal. Rptr. 544 (1983), and for common law unfair competition, Sunset House Distrib. Corp. v. Coffee

Dan's, Inc., 240 Cal.App.2d 748, 50 Cal.Rptr. 49, 54 (1966) ("unfair competition rests on a confusion ... on the part of the public as a whole, acting as reasonable persons"). This list no doubt could be much expanded. Section 17500 of the Business and Professions Code, on which plaintiff proceeds, in no way expressly departs from the "reasonable person" standard so well rooted in the law. In the absence of language indicating that the statute does depart, the court will not infer such a departure in a case involving mass mailings to a large portion of the public. *1399 Indeed, by explicitly imposing a "reasonable care" standard on advertisers, § 17500 impliedly adopts such a standard for consumers as well: unless particularly gullible consumers are targeted, a reasonable person may expect others to behave reasonably as well. See Ford Dealers Ass'n v. Department of Motor Vehicles, 32 Cal.3d 347. 185 Cal. Rptr. 453, 466, 650 P.2d 328, 341 (1982) (society must conform to reasonable person standard and advertiser must conform to abilities of the average reader). [FN10]

FN10. The statement in some of the case law to the effect that § 17500 protects "unwary consumers" is only descriptive of the effect of § 17500 and does not set the standard for liability. The reasonable consumer may well be unwary. The use of this language does not suggest that the Act protects the unwary, unreasonable consumer. Nor do statements that the Act protects the "public as a whole" suggest a different standard from the average or reasonable member of the public. See Sunset House Distrib. Corp. v. Coffee Dan's. Inc., supra, 240 Cal.App.2d748, 50 Cal.Rptr. at 54 ("the public as a whole, acting as reasonable persons").

It bears emphasis that the complaints in this case allege that defendants' mailings are sent to millions of California residents and not to a group of "particularly susceptible and naive" consumers, such as preschool children. See Committee on Children's Television, Inc. v. General Foods Corp., 35 Cal.3d 197, 197 Cal.Rptr. 783, 793, 673 P.2d 660, 670 (1983). In such a situation a reasonable advertiser could be held to a different standard.

Second, the Unfair Business Practices Act is one "of the so-called 'little FTC Acts' of the 1930's, enacted by many states in the wake of amendments to the Federal Trade Commission Act enlarging the commission's regulatory jurisdiction to include unfair business practices that harmed, not merely the interest of business competitors, but of the general public as well." Rubin v. Green, 4 Cal.4th 1187, 17 Cal.Rptr.2d 828, 836, 847 P.2d 1044, 1052 (1993). See Bank of the West v. Superior Court, 2 Cal.4th 1254, 10 Cal.Rptr.2d 538, 544, 833 P.2d 545, 551 (1992). Because of this relationship between the Unfair Business Practices Act and the Federal Trade Commission Act, judicial interpretations of the federal act have persuasive force. See Mangini v. R.J. Reynolds Tobacco Co., 22 Cal.App.4th 628, 21 Cal.Rptr.2d 232, 240-41 (1993); People ex rel. Mosk v. National Research Co. of Cal., 201 Cal.App.2d 765, 20 Cal.Rptr. 516, 522 (1962). Since 1982 the FTC has interpreted "deception" in Section 5 of the Federal Trade Commission Act to require a showing of "potential deception of 'consumers acting reasonably in the circumstances,' not just any consumers." Southwest Sunsites, Inc. v. F.T.C., 785 F.2d 1431, 1436 (9th Cir.1986) relying on Cliffdale Assocs., Inc., 3 CCH Trade Reg.Rep. ¶ 22,137, 103 F.T.C. 110 (1984).

In short, in view of the allegations here, the false or misleading advertising and unfair business practices claim must be evaluated from the vantage of a reasonable consumer.

C. The Allegations

1. Standards

[6][7] Advertising that amounts to "mere" puffery is not actionable because no reasonable consumer relies on puffery. The distinguishing characteristics of puffery are vague, highly subjective claims as opposed to specific, detailed factual assertions. See <u>Cook</u>, <u>Perkiss & Liehe</u>, 911 F.2d at 246. Whether the alleged misrepresentations amount to mere puffery may be determined on a motion to dismiss. <u>Id. at 247</u>. Similarly, if the alleged misrepresentation, in context, is such that no reasonable consumer could be misled, then the allegation may also be dismissed as a matter of law.

2. Haskell v. The Reader's Digest Association

At paragraph 11 of the complaint, the alleged misrepresentations are detailed. (See Appendix A.)

[8] (a) ¶ 11(A), (B), (F), and (I) address statements to the effect that the recipient has a real chance to win, for example, "You've never been closer to having a chance to win \$5,000,000.00" or that the recipient is lucky or pre-selected. At worst these statements are mere puffing. Any reasonable recipient, even if unsophisticated, understands that these are mass mailings as part of an advertising campaign. The rules

are *1400 set forth clearly, in a box headed "How the Sweepstakes Works," and reveal the projected odds of winning any prize. These allegations are dismissed.

[9] (b) M 11(C), (G), (H), and (O) address statements concerning the amount of the prize as \$5 million. Plaintiff contends that the statements and pictures of checks are misleading because the amount will be reduced by taxes and will be paid over time. Yet the disclosure that the prize is paid in annual payments over 30 years is repeatedly made with more than sufficient prominence. The rules state that taxes are to be paid by the winner, and even if they did not, no misrepresentation as to responsibility for taxes is made or is fairly inferred. These claims fail.

[10] (c) ¶ 11(D) and (K) concern statements to the effect that time is of the essence and that failure to return the entry by a certain date will forfeit the recipients' chances of winning. Alternatively, an early entrant is entitled to an additional \$100,000 and is a "preferred customer." The plaintiff claims that statements such as these are misrepresentations because recipients may well receive future opportunities to enter. But the statements do not suggest that other opportunities will not be provided, only that this opportunity is foreclosed if not acted upon. There is nothing misleading about these statements. To the extent that they seek to create a sense of urgency they are a form of puffing typical of the "don't delay" exhortation that consumers hear and ignore daily. [FN11] These allegations are dismissed.

<u>FN11.</u> The court notes that RDA does not cite to the place in the exemplars where the statements quoted in the complaint are made concerning the one time nature of the solicitation.

[11] (d) ¶ 11(E) attacks the statement that recipients who order will receive priority handling as a "preferred customer." Plaintiff contends that this statement, in conjunction with the statements in ¶ 11(L) and (M), providing a special contest for those who do order, suggests that the chances of winning will be enhanced if the recipient orders a subscription when this is not true (and would violate the California Lottery Statute were it true). RDA argues that in numerous places the solicitation states that those who do not order are still eligible for the sweepstakes if they return the entry form in the "no" envelope. The "preferred customer" language appears in several places in the mailing to describe recipients who have ordered magazines in the past and are eligible for an additional \$10,000 prize.

But the term "preferred customer" is never used in the exemplar to imply that such recipients will receive "priority" treatment or any advantage in the sweepstakes. It is possible that plaintiff may have other exemplars in which a suggestion of priority or advantage is made, and this would provide a basis for an amended complaint. As it is, however, the allegation is unsupported by the exemplar and no reasonable recipient would understand the "preferred customer" language in the way alleged in the complaint. This allegation is dismissed.

[12] (e) ¶ 11(J) concerns the fashion in which the official rules are printed but alleges no misrepresentation. Although the sweepstakes rules appear in smaller type than the words in the advertisement, they are not illegible or misleading. ¶ 11(N) addresses the statement that the letter is from the "treasury department" or contains "official business." All of the envelopes clearly state that the sender is the Reader's Digest Association, and this is made equally apparent by the contents of the envelope. Both of these allegations are dismissed.

3. Haskell v. American Family Publishers

[13] At paragraph 10 of the complaint, the alleged misrepresentations are identified as follows: [FN12]

FN12. (See Appendix B.)

(a) ¶ 10(A) and (M) address statements allegedly to the effect that the recipient is a finalist or winner who has already won \$10 million. Viewed in context this allegation is not well taken. The complaint alleges that the solicitation states that the recipient "has just won Ten Million Dollars!" In fact, the *1401 exemplar states, "If the Address Label below contains the winning number and you return it ... you'll see on NBC TV that you've just won ten million dollars!" No reasonable recipient could view this mass mailing as an announcement that the recipient in fact had been selected as the winner. The solicitation clearly requires additional action by the recipient before the recipient could even be eligible for the prize. This claim is dismissed.

[14] (b) ¶ 10(B) and (N) address statements to the effect that the recipient is a finalist who is now just one step away from winning. The exemplar reveals that the use of the word "finalist" and "winner" are at most a form of puffing. Indeed, the exemplar implicitly acknowledges that many who receive the solicitation ignore it by warning that in some instances those who

ignored the solicitation had a winning number. These allegations are dismissed.

(c) ¶ 10(C), (D), (H), and (K) address statements to the effect that the winner will be a millionaire and that the value of the grand prize is \$10 million to be paid in "cash." The official rules, the photographs of the prize money, and the official prize registration contained in the mailing clearly convey that the prizes are paid in installments. To the extent that plaintiff contends that the term "cash" is misleading because payments are actually made by check, the allegation is dismissed. The term "cash" means payment "in money or by check." American Heritage Dictionary 244 (2d Coll.Ed.1985). There is no false statement concerning tax consequences. These allegations are dismissed.

(d) ¶ 10(E) addresses a statement to the effect that failure timely to return the entry papers will forfeit the recipient's right to compete for the prizes. American Family Publishers does not address this allegation in its separate brief and the court is unable to locate in the exemplar the language paraphrased in the complaint. The exemplar states that if the recipient has the winning entry and fails to return it then the recipient will lose his or her place to someone else. This is not a misleading statement, and this allegation is dismissed. [FN13]

<u>FN13</u>. Plaintiff may be able to demonstrate by other exemplars that the alleged statements are misleading in context. The complaint does not quote the precise language.

(e) ¶10(F), (G), and (O) address statements allegedly implying that those who purchase magazines will be better postured to win by receiving "priority treatment." IFN14| For example, the exemplar states that by ordering magazines and affixing the "express stamp," "you're sure of getting the FASTEST ENTRY AND PROCESSING." Also, by affixing the "yes" stamp--indicating a magazine order---we'll be able to spot your order immediately and give it top priority." The exemplar also warns that failure to order could lead to the dropping of the recipient from future mailings:

FN14. The allegation in part (O) of paragraph 10 concerns a statement that the recipient is a preferred customer because of past purchases. The exemplar does not include this language.

We really regret it, but we simply cannot afford to keep on writing to groups of people who never buy magazines ... Those who are dropped now will miss out-- there's no guarantee of another chance for them. There are some terrific opportunities coming up, and you can protect YOUR place.

By contrast, those who do order will "be included in all the great news just ahead!"

Defendant points out that the exemplar also states in the official rules that no purchase is necessary. According to defendant, all that is intended, or that can reasonably be understand, by the "priority" language is that those who order magazines will have their envelopes opened first.

Viewed in context, the language arguably is misleading to a reasonable consumer. The language is artfully drafted to imply some consequence for not ordering magazines which may affect the recipient's chances in the sweepstakes. Defendant does not demonstrate that no reasonable recipient could be misled by the language cited in ¶ 10(F), (G), and (O) of the complaint. The motion to dismiss is denied as to these sections.

*1402 (f) ¶ 10(I) alleges that statements and pictures create a false statement of the lifestyle a winner could reasonably expect. These statements are either not misleading or constitute harmless puffing. The allegation is dismissed.

(g) ¶ 10(J) and (L) allege that various statements in the mailer imply sponsorship by NBC or that the winner will be announced "on" the show as opposed to "during" the show in a commercial break. These allegations are without substance and are dismissed.

(h) ¶ 10(M) attacks the print size used for the sweepstakes rules in comparison to the size of the advertising language. The rules are not illegible and their size alone does not make them misleading. The allegation is dismissed.

4. Haskell v. Publisher's Clearing House

The alleged false statements are detailed at paragraph 10 of the complaint. (See Appendix C.)

(a) ¶ 10(A), (B), (L), (N), and (Q) allegedly exaggerate the recipient's chances of winning or imply that the recipient has already won. In context the alleged statements are not misleading as a matter of law but are at worst a form of puffing. No reasonable consumer would believe that the solicitation amounted to a declaration that the recipient had already won or that the recipient's status as a "finalist" or "guaranteed finalist" was of any material significance.

(b) ¶ 10(C), (D), (H), (I), (K) and (M) allege that the

mailing exaggerates the amount and value of the prize by misrepresenting, through photographs of houses and cars and the like, the lifestyle available to a prizewinner, by failing to disclose that the payments are made over time, and by failing to discuss tax consequences. These claims are without merit. The photographs are not misleading. The official rules are not in illegibly small print, and clearly set forth that the payments are to be made over time and that tax consequences are the responsibility of the winner.

(c) ¶ 10(J) concerns the television announcement of the winner and the allegation that the mailing implies an endorsement of the sweepstakes by NBC. The statement as to when and where the winner will be announced is not misleading and does not imply an endorsement. At most the language implies that the winner could be announced on the news itself, suggesting that the event is of national interest. If this is misleading, it is nothing more than puffing.

(d) \$\mathbb{M}\$ 10(B) and (O) address statements in the mailings that allegedly create a false sense of urgency regarding the time for reply. In particular, plaintiff complains that the mailing does not reveal that there will be future opportunities to enter the sweepstakes. These statements are not misleading. The mailing does not disguise that there may be future opportunities to enter the sweepstakes. Indeed, the official rules explain that "you can improve your chances of winning by entering every time you hear from us."

(e) ¶¶ 10(F) and (G) address plaintiffs claim that the mailing suggests that a magazine order enhances one's chances of winning the prize. Unlike the American solicitation, however, the PCH mailing does not remotely imply that an order increases one's chances of success. The "express entry" form, available to those who order, states that if the recipient orders a magazine, "we'll automatically enter you in every contest in this Bulletin ... That's all you have to do." It does not claim Indeed, it disclaims any "priority" treatment. advantage to those who order: "If you're not ordering this time, enter our Sweeps the way you normally would. Either way, Good luck!" (Exhibit A-6.) The official rules state in bold, capitalized print: "NO PURCHASE NECESSARY TO ENTER AND WIN." (Exhibit A-4.) The statement that those who do not order may be dropped from future mailings is also couched in terms that do not suggest any adverse consequence to the recipient's chances of prevailing with this entry form. After stating that this may be the last mailing, the form states "Even if you decide not to order, enter and try your luck in our Sweeps anyway." There is none of the vague language about foregoing future good news that is included in American's warning. These claims are dismissed.

*1403 (e) ¶¶ 10(P), (Q), and (R) deal with statements concerning the skill contest. 10(Q) and (R) are but puffing. 10(P) is not misleading and does not suggest that a magazine order will enhance one's chances of winning the sweepstakes. These claims are dismissed.

4. Haskell v. Time Warner, Inc., Time Inc.

a. Time Warner's Motion to Dismiss

[15][16] Plaintiff sues defendant Time Warner as the alter ego of Time, Inc. and American Family Publishers. Time Warner seeks dismissal on the basis that there is no reason to ignore its corporate structure. The decision to pierce the corporate veil is guided by three factors: (1) the amount of respect given to the separate identity of the corporation by its shareholders; (2) the degree of injustice visited on the litigants by recognition of the corporate entity; and (3) the fraudulent intent of the incorporators. Board of Trustees v. Valley Cabinet & Mfg. Co., 877 F.2d 769. 772 (9th Cir.1989). In Valley Cabinet, the Ninth Circuit refused to pierce the corporate veil to force the majority shareholders to pay the corporation's debts where there was adequate capitalization at the inception, separate federal and statetax returns were filed and separate records had been kept. Here, Time and Time Warner also keep separate records. With annual sales of \$2 billion, Time should be able to respond to any restitutionary award. Also, Haskell has not alleged that Time was fraudulently incorporated in order to protect Time Warner. Because Haskell has failed to allege sufficient facts to warrant piercing the corporate veil, Time Warner is dismissed from the suit.

b. Time, Inc.'s Sweepstakes

The alleged misstatements in Time's sweepstakes are detailed at paragraph 24 of the complaint. (See Appendix D.)

(a) \$\mathbb{T}\$ 24(A), (H), and (K) address statements in the mailings that allegedly exaggerate the recipient's chances of succeeding, imply that the recipient is lucky, or state that the recipient is already a winner. These statements, in context, are not misleading. It is clear from the exemplar that no reasonable addressee could believe that the mailing announced that the addressee was already the winner or was particularly lucky. The official rules disclose that distribution of the sweepstakes mailer "is estimated not to exceed 900 million." (Exhibit A.) The statement "you're the winner" is preceded by "if you return the grand prize winning entry, we'll say." (Id.) These allegations are

dismissed.

(b) ¶ 10(B), (C), (E), (F), (G) and (J) address the amount of the prize and plaintiffs claim that the mailer exaggerates the prize by failing to disclose that it is paid over time and that taxes may be levied. The exemplar demonstrates, however, that Time fully and repeatedly discloses that the payments are made in installments rather than as a lump sum. The mailing also discloses that a hefty tax can be expected on the prize winnings by providing for a tax bonus prize. (Exhibit A.) The pictures of the lifestyle a winner might attain and the replicas of checks are either not misleading or constitute harmless puffing. These allegations are dismissed.

(c) ¶10(D) addresses the alleged false sense of urgency generated by the statement that the entry must be returned by a specified date. In fact, the exemplar explains clearly that only eligibility for a bonus prize requires a prompt response by a certain date. This allegation is dismissed.

(d) ¶ 10(K) alleges that the use of terms such as "valued customer" creates the impression that a purchase order will increase the odds of winning. This claim is dismissed. The rules and materials repeatedly state that no purchase is required. Nor is there any language suggesting that those who order will receive "priority" or any other advantage.

(e) ¶ 10(I) attacks the size in which the rules are printed. The rules are not illegible or misleading. The allegation is dismissed.

II. Contest and Lottery Claims

[17] Defendants also move to dismiss plaintiff's claim that the sweepstakes constitute illegal contests or lotteries. Under California *1404 law, contests are subject to special disclosure requirements. See Cal.Bus. & Prof.Code §§ 17539.1-3 (West 1987). The term "contest" is defined to include

any game, contest, puzzle, scheme or plan which holds out or offers to prospective ... participants the opportunity to receive or compete for gifts, prizes, or gratuities as determined by skill or any combination of chance and skill and which is, or in whole or in part may be, conditioned upon the payment of consideration.

<u>Cal.Bus. & Prof.Code § 17539.3(e)</u> (West 1987). A lottery is defined as

any scheme for the disposal or distribution of property by chance, among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property ...

Cal.Penal Code § 319 (West 1988).

Haskell asserts that defendants' "sweepstakes" [FN15] are actually contests that require skill and that are conditioned upon payment of consideration. In the alternative, Haskell asserts that these sweepstakes are "illegal lotteries."

<u>FN15</u>. The term "sweepstakes" is used in text to refer to the mass mailing entries that do not require any purchase to enter. The term "skill contest" is used to describe the mailings that are sent only to customers after they have placed their subscription orders.

These allegations are without merit. Plaintiff concedes that no purchase is required to enter defendants' sweepstakes, but instead asserts that the payment of twenty-nine cents postage is "valuable consideration." This assertion is untenable. The California Supreme Court has held that a requirement that a sweepstakes entrant deposit the entry form at the sponsor's place of business is not "valuable consideration" sufficient to state a cause of action under California law. California Gas Retailers v. Regal Petroleum Corp., 50 Cal.2d 844, 861-62, 330 P.2d 778 (1958). The time, energy, and expense required under those rules exceeds the twenty-nine cents required here. [FN16] Thus, plaintiff's claim that the sweepstakes themselves amount to illegal lotteries or contests is dismissed since the definitions of both "contest" and "lottery" require the payment of consideration. Plaintiff's causes of action under California's contest and lottery statutes are dismissed. [FN17]

FN16. Haskell urges the court to follow the reasoning in <u>State v. Reader's Digest Assoc.</u>, <u>Inc.</u>, 81 Wash.2d 259, 501 P.2d 290 (1972). In <u>State v. RDA</u>, the Washington Supreme Court held that "the time, thought, attention and energy expended by members of the public in studying ... advertising" is consideration sufficient to transform the Reader's Digest sweepstakes into an illegal lottery under Washington law. Haskell has failed to distinguish <u>State v. RDA</u> from <u>California Gas Retailers</u> and the court declines to give short shrift to a decision of the California Supreme Court on an issue of California law.

FN17. It is also apparent from review of the

exemplars that the sweepstakes do not require any skill. Similarly, the allegations in the complaints, even if true, do not establish any requirement of skill to enter the sweepstakes. This is an alternative ground on which the illegal contest claims are dismissed.

[18][19] To the extent that Haskell attacks the separate "skill contests" which RDA and PCH concededly administer, the claims are also dismissed. These skill contests are distinct from the sweepstakes and are only open to those who make an order and enter the contest. With respect to RDA, plaintiff appears to attack the invitation to play the contest, which RDA agrees involves no skill. But the invitation to enter the contest is not the contest itself, and plaintiff fails to detail any claims regarding the actual skill contest. This claim against RDA is dismissed for failure to plead with particularity. Fed.R.Civ.P. 9(b). With respect to PCH, its "Presidential Skill Contest" requires listing presidents in order of date of service, answering an essay question, and a "wordfind." Exs.Supp.Mot.Dismiss, Ex. B.) In order to qualify as a contest under the statute, the game must require some combination of skill and chance, but skill need not dominate the game. See Cal.Bus. & Prof.Code § 17539.3(e) (West 1987); In re Allen, 59 Cal.2d 5, 6, 27 Cal.Rptr. 168, 169, 377 P.2d 280, 281 (1962). In considering whether a game requires skill, the court looks to whether the players "exercise some control over the outcome." Finster v. Keller, 18 Cal.App.3d 836, 844, 96 Cal.Rptr. 241, 246 (1971). PCH's game requires skill. The rules explain how entries are judged and *1405 players can improve their responses and, thus, their chances of winning. These contests include both skill and consideration and are not, therefore, illegal lotteries. Plaintiff's claim that PCH's skill contest is an illegal lottery is dismissed.

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For the reasons stated above, the court orders:

- Plaintiff's claims of false or misleading advertising and unfair competition are dismissed in major part as identified above. This dismissal is without prejudice.
- 2. Plaintiff's claims of violation of California's contest and lottery statutes are dismissed for failure to state a claim on which relief may be granted. This dismissal is without prejudice although it seems unlikely that plaintiff can allege the necessary consideration or skill.
- 3. Plaintiff may file amended complaints within 60 days. Any amended complaint should include, as an attachment, exemplars of the mailings relied upon in the

complaint. [FN18]

<u>FN18.</u> At oral argument, counsel for plaintiff displayed a box of mailings and indicated that it might be necessary to file the entire box. If it is necessary to do so, so be it. But it seems unlikely that a multitude of exemplars must be filed to withstand a motion to dismiss, and the court would discourage such a response to this order.

4. Defendant Time Warner is dismissed from suit.

IT IS SO ORDERED.

APPENDIX A

As to RDA, Haskell points to the following as false statements:

- (1) "You are currently in possession of a very unique AND valuable piece of mail." "You are being given an opportunity that only a select group of CALIFORNIA residents are receiving. And that is the opportunity to enter the \$12,000,000.00 Sweepstakes."
- (2) On the envelope, statements that the addressee "Will Win Millions" "Your chance to win is real--more real than you're probably aware of," and "This could be the closest you've ever been to a lifetime of financial security."
- (3) "You've never been closer to having a chance to win \$5,000,000.00" and "You're only one stage away."
- (4) "Five Million Dollars Guaranteed" and "Grand Prize" has a value of \$5 million.
- (5) "Failure to respond by July 8, 1993 will result in forfeiture of your five million dollar eligibility."
- (6) If the addressee orders merchandise, he or she will receive "priority in handling" as a "Preferred Customer."
- (7) "Have you ever wondered where some of your Nevada County neighbors get all their money from? New color TV sets--New Clothes--Big Vacations-HOW DO THEY DO IT? Some of the answers may surprise you. Some of the money your neighbors are spending probably came from READER'S DIGEST."
- (8) "You could build a fabulous home in any neighborhood you choose ... buy a new carevery year ...

take exciting vacations across America or anywhere in the world ... and still have plenty left to insure a 'worry free' life for your entire family ..."

- (9) The winners will be "millionaires," "multi-millionaires" and "being a multi-millionaire means no spending limits."
- (10) The recipient is "lucky;" "Your name could be Lucky;" and "Thousands have been eliminated in the process. And I am delighted to inform you that your name ... is one of the lucky ones."
- (11) The Official Rules are "in exceedingly fine print and printed on the back of the entry form" so that recipient must return the rules with his or her entry.
- (12) If the entrant returns the entry by an early date he or she will be entitled to an additional \$100,000.00 as a "preferred customer."
- (13) Only people who order will be entitled to participate in a "Special Skill Contest."
- (14) Only people who order will be entitled to participate in a "Find the Lucky Dominoes" game.
- (15) The letter is sent from the "Treasury Department" and is "Official Business."
- *1406 (16) Replicas of 30 checks made out in addressee's name along with statements that "With your first check for \$167,000 you could pay off all your debts and buy whatever you want." "With a check for \$167,000.00 you could buy a new house in the best part of town," or "charter an oceanliner for a six- month cruise."

APPENDIX B

As to American, plaintiff points to the following alleged misstatements:

- (1) Addressee "has just won Ten Million Dollars!"
- (2) "These Finalist Papers have been issued ..." to the addressee "in recognition of the fact that you have made it through all of the preliminary phases and are now one of the Grand Finalists in the only group from which the \$10,000,000.000 winner can emerge."
- (3) The addressee has won \$10 million "Cash" and that the prize is "All cash-- All for you."
- (4) Prior winners have been paid their prizes of \$1 million, \$2 million and \$10 million in "cash."

- (5) If the addressee orders merchandise, "American Family will give your reply top priority ..." and "Customer replies are processed first."
- (6) "Warning: if you do not upgrade your status by ordering, you could forfeit any rights to future mailings."
- (7) Pictorial depiction of houses, cars, vacations, trips and boats.
- (8) Statement of the lifestyle a winner could expect to live, including "parlay your Ten Million into Twenty Million Dollars ... Thirty Million Dollars ... or even Fifty Million Dollars over the years," and "The home of your dreams—anywhere in the world! ... fly away on a first class vacation—at a moment's notice! ... buy your favorite car—in every color!" and "You could move into the home of your dreams—a villa by the sea perhaps, or a private chalet in the mountains. Fill it with servants ... hire a chauffeur ... park a fleet of luxury cars in the driveway ..."
- (9) The winners will be announced "June 30--On NBC's Today Show."
- (10) The winners will be "millionaires."
- (11) "If you are as *lucky* as Marjorie Godzik, we'll announce your name on NBC's Today Show, June 30th."
- (12) The Official Rules printed in 8 point medium condensed type while the statement that the recipient is a winner is in 36 point extra bold type.
- (13) The addressee is "now only one step away from winning the Ten Million Dollars ..."
- (14) The addressee is a preferred customer due to past merchandise orders and is awarded additional chances of winning by way of additional assigned numbers.
- (15) If the addressee fails to reply by a certain date, the right to compete for certain prizes will be forfeited.

APPENDIX C

As to PCH, plaintiff cites the following false statements:

(1) The addressee "may already have won \$10,000.00 or \$10,000,000.00" and in smaller type: "You've won at least \$10,000.00 if one of your personal prize numbers matches the winning number on the check list below" and "One prize number on this check list is a

Guaranteed Winner."

- (2) "Thousands have fallen by the wayside ... but you have survived, and are now one step away from the FINAL ROUND where you could win \$10,000,000.00."
- (3) The "prize value" is "\$10,000,000.00."
- (4) Prior winners have won \$10 million and a letter from a prior winner that states "So listen to a real live \$10,000,000.00 winner."
- (5) If the addressee fails to return the entry by a certain date, he or she will forfeit the right to compete for a specific prize.
- (6) If the addressee orders magazines, the entry will receive priority in handling, e.g., "An order gets you express entry," and "The fastest way to enter you've ever seen! If your entry comes in on time with at least one Order Coupon on it, we'll automatically enter you in every contest in this bulletin."
- *1407 (7) A threat to drop the addressee from future mailings if the addressee does not order at this time.
- (8) Photographs of the type of house, cars, vacations, trips and boats the winner will be able to purchase with the prize money.
- (9) "Financial security is foremost in everyone's thoughts these days ... Will you buy that brand-new sports car you see zipping down the highway ... take an extended world tour ... relax on your private island retreat ... skim across the ocean in your own new speed boat."
- (10) Statements that winning numbers will be announced on "NBC Nightly News with Tom Brokaw."
- (11) Winners will be "millionaires" or "multi-millionaires."
- (12) Statements that the recipient is "lucky."
- (13) The Official Rules appear in fine print on the back of the entry return envelope.
- (14) "You are one step away from winning \$10,000,000.00" and that the entry documents are "final round" and the recipient a "finalist" or a "guaranteed finalist."
- (15) The addressee will receive an additional advantage if he or she enters by an early date entitling

- the addressee to membership in the President's Club and a chance to receive an extra "Instant \$1,000,000.00."
- (16) Only those who order will be entitled to participate in a "Special Skill Contest."
- (17) The recipient has tied for the \$1,000,000,00 prize and an entry in the contest could break the tie in the recipient's favor.

APPENDIX D

As to Time and Time Warner, plaintiff attacks the following statements:

- (1) "You have just won One Million Dollars!" "Congratulations! You are the guaranteed winner of \$1,000,000.00" and "You're our biggest winner in history."
- (2) The addressee has won \$1,666,675 in "Cash," and the prize has a "Certified Prize Value" of \$1,666,675.
- (3) Prior winners have been awarded their prizes of \$1,000,000.
- (4) If the addressee fails to return the entry by a certain date, the addressee will forfeit the right to compete for a specific prize.
- (5) A false pictorial depiction of what the winner will be able to purchase with the prize money.
- (6) A false statement of the lifestyle a winner would reasonably expect to be able to live.
- (7) The winners will be "millionaires" and their names will be placed on an "official millionaires list."
- (8) The recipient is "lucky."
- (9) The official rules are confusing, reinforcing the impression that a purchase improves the odds, and in small print.
- (10) Graphic replicas of checks in the sum of \$1,000,000.
- (11) "... as a valued customer, here's another chance to win ..."

857 F.Supp. 1392, 30 Fed.R.Serv.3d 1109

END OF DOCUMENT

EXHIBIT 2

255 F.3d 1180 59 U.S.P.Q.2d 1363, 29 Media L. Rep. 1993, 1 Cal. Daily Op. Serv. 5695, 2001 Daily Journal D.A.R. 6987 (Cite as: 255 F.3d 1180)

⊳

United States Court of Appeals, Ninth Circuit.

Dustin HOFFMAN, Plaintiff-Appellee,
v.
CAPITAL CITIES/ABC, INCORPORATED,
Defendant,
and
L.A. Magazine, Inc., Defendant-Appellant.

Nos. 99-55563, 99-55686.

Argued and Submitted Oct. 10, 2000. Filed July 6, 2001.

Actor brought suit in state court against magazine and its publisher, seeking to recover on state law claims for violation of right to publicity and for unfair competition, and for violation of federal Lanham Act, based on allegations that magazine used, without authorization, still photograph of actor from motion picture to create composite computer-generated image of actor which falsely depicted him wearing fashion designers' women's clothes. Following removal and bench trial, the District Court, Dickran M. Tevrizian, Jr., J., 33 F.Supp.2d 867, entered judgment in favor of actor, and magazine appealed. The Court of Appeals, Boochever, Circuit Judge, held that: (1) magazine was not pure commercial speech, and thus was entitled to full protection under the First Amendment, and (2) magazine did not publish article with actual malice.

Reversed.

West Headnotes

[1] Torts € 8.5(6) 379k8.5(6) Most Cited Cases

Under California law, the right of a person whose identity has commercial value, most often a celebrity, to control the commercial use of that identity is recognized.

[2] Constitutional Law 590.1(1) 92k90.1(1) Most Cited Cases

 Courts evaluate First Amendment defense in right of publicity cases aware of the careful balance that courts have gradually constructed between the right of publicity and the First Amendment and federal intellectual property laws. <u>U.S.C.A. Const.Amend. 1</u>.

[3] Constitutional Law 90.1(5) 92k90.1(5) Most Cited Cases

[3] Torts \$\infty\$8.5(6) \\
379k8.5(6) Most Cited Cases

[3] Trade Regulation 575 382k575 Most Cited Cases

Actor who sued magazine and its publisher for allegedly misappropriating his likeness in violation of his right to publicity under California law and in violation of Lanham act had burden, as a public figure, to show that magazine acted with actual malice, that is, with knowledge that the photograph was false, or with reckless disregard for its falsity. <u>U.S.C.A.</u> Const. Amend. 1; Lanham Trade-Mark Act, § 43(a), 15 U.S.C.A. § 1125(a).

[4] Constitutional Law 50.2 92k90.2 Most Cited Cases

Core notion of "commercial speech," within its special meaning in the First Amendment context, is that it does no more than propose a commercial transaction. U.S.C.A. Const.Amend. 1.

[5] Constitutional Law © 90.2 92k90.2 Most Cited Cases

Commercial speech is entitled to a measure of First Amendment protection, but commercial messages do not receive the same level of constitutional protection as other types of protected expression. <u>U.S.C.A.</u> Const.Amend. 1.

[6] Constitutional Law 90.2 92k90.2 Most Cited Cases

False or misleading commercial speech is not protected under the First Amendment. <u>U.S.C.A. Const. Amend. 1</u>.

7 Constitutional Law 90.2 92k90.2 Most Cited Cases

When false speech is properly classified as commercial,

for purposes of First Amendment protection, a public figure plaintiff does not have to show that the speaker acted with actual malice. <u>U.S.C.A. Const.Amend. 1</u>.

[8] Constitutional Law 590.3 92k90.3 Most Cited Cases

[8] Torts \$\infty 8.5(6)\$
379k8.5(6) Most Cited Cases

In many right of publicity cases, the question of actual malice does not arise, because the challenged use of a celebrity's identity occurs in an advertisement that does no more than propose a commercial transaction and is clearly commercial speech, and such use does not implicate First Amendment's protection of expressions of editorial opinion. <u>U.S.C.A. Const.Amend. 1</u>.

[9] Constitutional Law 90.2 92k90.2 Most Cited Cases

[9] Torts \$\infty 8.5(6)\$
379k8.5(6) Most Cited Cases

[9] Trade Regulation 375.1 382k375.1 Most Cited Cases

Magazine's use of still photograph from actor's motion picture was not pure commercial speech, and thus magazine article warranted full protection under the First Amendment from actor's right of publicity claims under California law and actor's Lanham Act claims, where magazine did not receive consideration for featuring designer's clothing, photograph appeared as part of feature article that combined fashion photography, humor, and commentary, any commercial aspects of article could not be separated out from fully protected whole, and fact that article was intended to increase sales did not remove it from protection of First Amendment. <u>U.S.C.A. Const.Amend. 1</u>; Lanham Trade-Mark Act, § 43(a), <u>15 U.S.C.A. § 1125(a)</u>.

[10] Constitutional Law 50.2 92k90.2 Most Cited Cases

A printed article meant to draw attention to the for-profit magazine in which it appears does not fall outside of the protection of the First Amendment as purely commercial speech because it may help to sell copies. <u>U.S.C.A. Const.Amend. 1</u>.

[11] Constitutional Law 90.1(5) 92k90.1(5) Most Cited Cases

[11] Libel and Slander € 51(5) 237k51(5) Most Cited Cases

[11] Torts 8.5(3) 379k8.5(3) Most Cited Cases

A public figure can recover damages for noncommercial speech from a media organization only by proving actual malice in that medium acted with reckless disregard for the truth or a high degree of awareness of probable falsity. <u>U.S.C.A. Const.Amend.</u> 1.

[12] Federal Courts 776 170Bk776 Most Cited Cases

District court's finding of actual malice in public figure plaintiff's action involving noncommercial speech is reviewed de novo.

[13] Federal Courts 763.1 170Bk763.1 Most Cited Cases

[13] Federal Courts 844 170Bk844 Most Cited Cases

Appellate courts give to credibility determinations in public figure plaintiffs' actions involving noncommercial speech the special deference to which they are entitled, and then determine whether the believed evidence establishes actual malice.

[14] Libel and Slander 112(2) 237k112(2) Most Cited Cases

[14] Torts 27 379k27 Most Cited Cases

Appellate courts must satisfy themselves that public figure plaintiff in actions involving noncommercial speech proved actual malice by clear and convincing evidence, which is a heavy burden, far in excess of the preponderance sufficient for most civil litigation.

[15] Torts \$\infty\$-8.5(6) 379k8.5(6) Most Cited Cases

[15] Torts € 27 379k27 Most Cited Cases

[15] Trade Regulation € 333 382k333 Most Cited Cases

[15] Trade Regulation 595 382k595 Most Cited Cases

To show actual malice, actor who sued magazine and its publisher for allegedly misappropriating his likeness in violation of his right to publicity under California law and in violation of Lanham Act had burden to demonstrate by clear and convincing evidence that magazine intended to create false impression in minds of its readers that when they saw altered photograph from actor's motion picture they were seeing actor's body; it was not enough to show that magazine unknowingly misled readers into thinking actor had actually posed for altered photograph. Lanham Trade-Mark Act, § 43(a), 15 U.S.C.A. § 1125(a).

[16] Libel and Slander 51(5) 237k51(5) Most Cited Cases

[16] Torts \$\infty\$ 8.5(3) 379k8.5(3) Most Cited Cases

Mere negligence is not enough to demonstrate actual malice, in public figure plaintiff's actions involving noncommercial speech; rather, subjective or actual intent is required and there is no actual malice where journalists unknowingly mislead the public.

[17] Torts \$\infty\$ 8.5(6) 379k8.5(6) Most Cited Cases

[17] Trade Regulation 333 382k333 Most Cited Cases

In determining whether magazine intended to create false impression in minds of its readers that when they saw altered photograph from actor's motion picture they were seeing actor's body, as would establish actual malice, appellate court had to go beyond altered photograph itself and examine totality of magazine's presentation.

[18] Torts \$\infty\$ 8.5(6) 379k8.5(6) Most Cited Cases

[18] Trade Regulation € 333 382k333 Most Cited Cases

Magazine's editors did not intend to suggest falsely to ordinary reader that reader was seeing actor's body in altered still photograph from actor's motion picture, as would establish actual malice required for actor's claims under California law and federal Lanham Act, alleging misappropriation of his likeness, although style editor testified that she chose a model who had same body type as actor, where references to article in magazine made it clear that digital techniques were used to substitute current fashions for clothes worn in original stills, and original stills were presented for comparison at end of article. Lanham Trade-Mark Act, § 43(a), 15 U.S.C.A. § 1125(a).

[19] Federal Courts \$\infty\$844 170Bk844 Most Cited Cases

Court of appeals defers to the district court when it makes a credibility determination.

*1182 <u>Steven M. Perry</u>, Munger, Tolles & Olson, Los Angeles, California, for the defendant-appellant.

<u>Charles N. Shephard</u>, Greenberg Glusker Fields Claman & Machtinger, Los Angeles, California, for the plaintiff-appellee.

Mark S. Lee, Manatt, Phelps & Phillips, Los Angeles, California, for amicus curiae Elvis Presley Enterprises, Inc.

Floyd Abrams and Landis C. Best, Cahill Gordon & Reindel, New York, New York, for amici curiae of Various Magazine and Newspaper Publishers, Broadcasters, Television Syndicators, and Media Associations.

Appeal from the United States District Court for the Central District of California; Dickran M. Tevrizian, District Judge, Presiding. D.C. No. CV-97-03638-DT.

Before: <u>BOOCHEVER</u>, <u>TASHIMA</u>, and <u>TALLMAN</u>, Circuit Judges.

BOOCHEVER, Circuit Judge:

In 1982, actor Dustin Hoffman starred in the movie "Tootsie," playing a male actor who dresses as a woman to get a part on a television soap opera. One memorable still photograph from the movie showed Hoffman in character in a red long-sleeved sequined evening dress and high heels, posing in front of an American flag. The still carried the text, "What do you get when you cross a hopelessly straight, starving actor with a dynamite *1183 red sequined dress? You get America's hottest new actress."

In March 1997, Los Angeles Magazine ("LAM") published the "Fabulous Hollywood Issue!" An article from this issue entitled "Grand Illusions" used computer technology to alter famous film stills to make it appear that the actors were wearing Spring 1997 fashions. The sixteen familiar scenes included movies and actors such as "North by Northwest" (Cary Grant), "Saturday Night Fever" (John Travolta), "Rear Window" (Grace Kelly and Jimmy Stewart), "Gone with the Wind" (Vivian Leigh and Hattie McDaniel), "Jailhouse Rock" (Elvis Presley), "The Seven Year Itch" (Marilyn Monroe),

"Thelma and Louise" (Susan Sarandon and Geena Davis), and even "The Creature from the Black Lagoon" (with the Creature in Nike shoes). The final shot was the "Tootsie" still. The American flag and Hoffman's head remained as they appeared in the original, but Hoffman's body and his long-sleeved red sequined dress were replaced by the body of a male model in the same pose, wearing a spaghetti-strapped, cream-colored, silk evening dress and high-heeled sandals. LAM omitted the original caption. The text on the page identified the still as from the movie "Tootsie," and read, "Dustin Hoffman isn't a drag in a butter-colored silk gown by Richard Tyler and Ralph Lauren heels."

LAM did not ask Hoffman for permission to publish the altered photograph. Nor did LAM secure permission from Columbia Pictures, the copyright holder. In April 1997, Hoffman filed a complaint in California state court against LAM's parent company, Capital Cities/ABC, Inc. (now ABC, Inc. or "ABC"). The complaint alleged that LAM's publication of the altered photograph misappropriated Hoffman's name and likeness in violation of (1) the California common law right of publicity; (2) the California statutory right of publicity, Civil Code § 3344; (3) the California unfair competition statute, Business and Professions Code § 17200; and (4) the federal Lanham Act, 15 U.S.C. § 1125(a).

ABC removed the case to federal court. Hoffman added LAM as a defendant. After a bench trial, the district court found for Hoffman and against LAM on all of Hoffman's claims, rejecting LAM's defense that its use of the photograph was protected by the First Amendment. The court awarded Hoffman \$1,500,000 in compensatory damages, and held that Hoffman was entitled to punitive damages as well. Hoffman v. Capital Cities/ABC, Inc., 33 F.Supp.2d 867 (C.D.Cal.1999). After a hearing, the court awarded Hoffman \$1,500,000 in punitive damages. It also held that ABC was not liable for any of LAM's actions.

Hoffman moved for an award of \$415,755.41 in attorney fees. The district court granted the motion, but reduced the amount to \$269,528.50.

In these appeals, LAM appeals the district court's judgment in Hoffman's favor, and the court's award of attorney fees.

ANALYSIS

[1] California recognizes, in its common law and its statutes, "the right of a person whose identity has commercial value-most often a celebrity-to control the

commercial use of that identity." Waits v. Frito-Lay. Inc., 978 F.2d 1093, 1098 (9th Cir.1992) (as amended). Hoffman claims that LAM violated his state right of publicity by appropriating his name and likeness. He also claims that LAM violated his rights under the federal Lanham Act.

[2] LAM replies that its challenged use of the "Tootsie" photo is protected under the First Amendment. We evaluate this defense aware of "the careful balance that courts have gradually constructed between *1184 the right of publicity and the First Amendment and federal intellectual property laws." Landham v. Lewis Galoob Toys, Inc., 227 F.3d 619, 626 (6th Cir.2000).

[3] LAM argues that the "Grand Illusions" article and the altered "Tootsie" photograph contained therein are an expression of editorial opinion, entitled to protection under the First Amendment. Hoffman, a public figure, [FN1] must therefore show that LAM, a media defendant, acted with "actual malice," that is, with knowledge that the photograph was false, or with reckless disregard for its falsity. See New York Times Co. v. Sullivan, 376 U.S. 254, 279-80, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). Because Hoffman did not produce clear and convincing evidence that LAM acted with actual malice, LAM contends that all Hoffman's claims are barred by the First Amendment.

<u>FN1.</u> Hoffman does not contest that he is a public figure. In fact, Hoffman alleges that he is a readily-identifiable individual whose persona has commercial value under his right of publicity claim.

The district court rejected this argument. First, it concluded that the magazine article was commercial speech not entitled to constitutional protection: "[t]he First Amendment does not protect the exploitative commercial use of Mr. Hoffman's name and likeness." Hoffman, 33 F.Supp.2d at 874. Second, the court found that LAM acted with actual malice, and "the First Amendment does not protect knowingly false speech." Id. at 875. [FN2]

FN2. In Comedy III Prods., Inc. v. Gary Saderup, Inc., 25 Cal.4th 387, 106 Cal.Rptr.2d 126, 21 P.3d 797 (2001), the California Supreme Court held that there was no First Amendment defense to a California right of publicity claim when "artistic expression takes the form of a literal depiction

or imitation of a celebrity for commercial gain." Id. at 808. An artist who added "significant transformative elements" could still invoke First Amendment protection. Id. Even if we were to consider LAM an "artist" and the altered "Tootsie" photograph "artistic expression" subject to the Comedy III decision, there is no question that LAM's publication of the "Tootsie" photograph contained "significant transformative elements." Hoffman's body was eliminated and a new, differently clothed body was substituted in its place. In fact, the entire theory of Hoffman's case rests on his allegation that the photograph is not a "true" or "literal" depiction of him, but a false portrayal. Regardless of the scope of Comedy III. it is clear to us that it does not strip LAM of First Amendment protection.

Commercial speech

The district court concluded that LAM's alteration of the "Tootsie" photograph was an "exploitative commercial" use not entitled to First Amendment protection. We disagree.

[4][5][6][7] "Commercial speech" has special meaning in the First Amendment context. Although the boundary between commercial and noncommercial speech has yet to be clearly delineated, the "core notion of commercial speech" is that it "does no more than propose a commercial transaction." Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983) (quotations omitted). Such speech is entitled to a measure of First Amendment protection. See, e.g., Greater New Orleans Broad. Ass'n, Inc. v. United States, 527 U.S. 173, 183, 119 S.Ct. 1923, 144 L.Ed.2d 161 (1999) (setting out four-part test to evaluate constitutionality of governmental regulation of "speech that is commercial in nature"). Commercial messages, however, do not receive the same level of constitutional protection as other types of protected expression. See 44 Liquormart, Inc. v. Rhode Island. 517 U.S. 484, 498, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996). False or misleading commercial speech is not protected. See *1185Florida Bar v. Went For It, Inc., 515 U.S. 618, 623-24, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995) (commercial speech receives limited amount of protection compared to speech at core of First Amendment and may freely be regulated if it is misleading). When speech is properly classified as commercial, a public figure plaintiff does not have to show that the speaker acted with actual malice. See Procter & Gamble Co. v. Amway Corp., 242 F.3d 539, 556 (5th Cir.2001) ("Supreme Court precedent prevents us from importing the actual-malice standard into cases involving false commercial speech.").

[8] In many right of publicity cases, the question of actual malice does not arise, because the challenged use of the celebrity's identity occurs in an advertisement that "does no more than propose a commercial transaction" and is clearly commercial speech. See, e.g., Newcombe v. Adolf Coors Co., 157 F.3d 686, 691 (9th Cir.1998) (use of pitcher's image in printed beer advertisement); Abdul-Jabbar v. Gen. Motors Corp., 85 F.3d 407, 409 (9th Cir. 1996) (use of basketball star's former name in television car commercial); Waits, 978 F.2d at 1097-98 (use of imitation of singer's voice in radio snack-food commercial); White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1396 (9th Cir.1992) (as amended) (use of game-show hostess's "identity" in print advertisements for electronic products); Midler v. Ford Motor Co., 849 F.2d 460, 461 (9th Cir.1988) (use in television car commercial of "sound-alike" rendition of song singer had recorded). In all these cases, the defendant used an aspect of the celebrity's identity entirely and directly for the purpose of selling a product. Such uses do not implicate the First Amendment's protection of expressions of editorial opinion. Cf. White, 971 F.2d at 1401 (advertisement in which "spoof" is entirely subservient to primary message to "buy" identified product not protected by First Amendment).

Hoffman points out that the body double in the "Tootsie" photograph was identified as wearing Ralph Lauren shoes and that there was a Ralph Lauren advertisement (which does not feature shoes) elsewhere in the magazine. (Insofar as the record shows, Richard Tyler, the designer of the gown, had never advertised in LAM.) Hoffman also points to the "Shopper's Guide" in the back of the magazine, which provided stores and prices for the shoes and gown.

[9] These facts are not enough to make the "Tootsie" photograph pure commercial speech. If the altered photograph had appeared in a Ralph Lauren advertisement, then we would be facing a case much like those cited above. But LAM did not use Hoffman's image in a traditional advertisement printed merely for the purpose of selling a particular product. Insofar as the record shows, LAM did not receive any consideration from the designers for featuring their clothing in the fashion article containing the altered movie stills. Nor did the article simply advance a commercial message. "Grand Illusions" appears as a feature article on the cover of the magazine and in the table of contents. It is a complement to and a part of the issue's focus on Hollywood past and present. Viewed

in context, the article as a whole is a combination of fashion photography, humor, and visual and verbal editorial comment on classic films and famous actors. Any commercial aspects are "inextricably entwined" with expressive elements, and so they cannot be separated out "from the fully protected whole." Gaudiva Vaishnava Soc'y v. City & County of San Francisco, 952 F.2d 1059, 1064 (9th Cir.1990) (as amended); see Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 796, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988). "[T]here are commonsense differences between speech that does no more than propose *1186 a commercial transaction and other varieties," Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council. Inc., 425 U.S. 748, 771 n. 24, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976) (quotations and citation omitted), and common sense tells us this is not a simple advertisement.

[10] The district court also concluded that the article was not protected speech because it was created to "attract attention." 33 F.Supp.2d at 874. A printed article meant to draw attention to the for-profit magazine in which it appears, however, does not fall outside of the protection of the First Amendment because it may help to sell copies. Cf. Dworkin v. Hustler Magazine, Inc., 867 F.2d 1188, 1197-98 (9th Cir.1989) (although defendant may have published feature solely or primarily to increase circulation and therefore profits, article is not thereby purely commercial or for purposes of advertising); Leidholdt v. L.F.P. Inc., 860 F.2d 890, 895 (9th Cir.1988) (same). While there was testimony that the Hollywood issue and the use of celebrities was intended in part to "rev up" the magazine's profile, that does not make the fashion article a purely "commercial" form of expression.

We conclude that LAM's publication of the altered "Tootsie" photograph was not commercial speech.

Actual malice

The district court went on to state that even if LAM could raise a First Amendment defense, LAM acted with actual malice, and "the First Amendment does not protect knowingly false speech," 33 F.Supp.2d at 875 (citing New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964)). The court found that the magazine altered Hoffman's image, and then published that image knowing it was false and intending that the readers believe the falsehood:

[LAM] knew that Mr. Hoffman had never worn the designer clothes he was depicted as wearing, and that what they were showing was not even his body. Moreover, [LAM] admitted that it intended to create the false impression in the minds of the public "that

they were seeing Mr. Hoffman's body." Id.

[11] We have concluded that LAM is entitled to the full First Amendment protection accorded noncommercial speech. Because a public figure such as Hoffman can recover damages for noncommercial speech from a media organization such as LAM only by proving "actual malice," we now must determine whether the district court was correct in concluding that LAM acted with "reckless disregard for the truth" or a "high degree of awareness of probable falsity." Harte-Hanks Communications. Inc. v. Connaughton. 491 U.S. 657, 667, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989) (quotations omitted).

[12][13][14] We review the district court's finding of actual malice de novo. Eastwood v. Nat'l Enquirer, Inc., 123 F.3d 1249, 1252 (9th Cir.1997) ("First Amendment questions of constitutional fact compel us to conduct a de novo review. We ourselves must be convinced that the defendant acted with malice.") (quotations, alterations, and citation omitted); see Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 508 n. 27, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984). We give to "credibility determinations the special deference to which they are entitled," and then "determine whether the believed evidence establishes actual malice." Eastwood, 123 F.3d at 1252. We must "satisfy ourselves that plaintiff proved malice by clear and convincing evidence, which we have described as a heavy burden, far in excess of the preponderance sufficient for *1187 most civil litigation." Id. (citations and quotations omitted).

[15][16] We must first identify the purported false statement of fact in issue. Hoffman alleged, and the district court found, that the altered "Tootsie" photograph and the accompanying text were "false" because they created the impression that Hoffman himself posed for the altered photograph (that is, that Hoffman was wearing the Richard Tyler dress and the Ralph Lauren shoes which replaced the red sequined dress and the shoes Hoffman wore in the original photograph). To show actual malice, Hoffman must demonstrate by clear and convincing evidence that LAM intended to create the false impression in the minds of its readers that when they saw the altered "Tootsie" photograph they were seeing Hoffman's body. See id. It is not enough to show that LAM unknowingly misled readers into thinking Hoffman had actually posed for the altered photograph. Mere negligence is not enough to demonstrate actual malice. Dodds v. American Broad. Co., 145 F.3d 1053, 1063 (9th Cir.1998) (citing Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 510, 111 S.Ct. 2419, 115 L.Ed.2d 447 (1991)). "[S]ubjective or actual intent is required and ... 'there is no actual malice where journalists unknowingly mislead the public.' " <u>Id. at 1064</u> (quoting <u>Eastwood</u>, 123 F.3d at 1256). The evidence must clearly and convincingly demonstrate that LAM knew (or purposefully avoided knowing) that the photograph would mislead its readers into thinking that the body in the altered photograph was Hoffman's. See <u>Eastwood</u>, 123 F.3d at 1256.

The altered photograph retains Hoffman's head and the American flag background from the "Tootsie" still, but grafts onto it a body dressed in different clothing. The body is similar in appearance to Hoffman's in the original. On the page directly facing the altered "Tootsie" photograph the magazine printed small copies of all sixteen original, unaltered stills, including the original "Tootsie" photograph. By providing a point of comparison to the original, this next page made it clear that LAM had altered the film still. This direct comparison does not, however, alert the reader that Hoffman did not participate in the alteration.

[17] We must go beyond the altered photograph itself and examine the "totality of [LAM's] presentation," to determine whether it "would inform the average reader (or the average browser)" that the altered "Tootsie" photograph was not a photograph of Hoffman's body. See id. The article is featured on the magazine cover as "The Ultimate Fashion Show Starring Grace Kelly, Marilyn Monroe and Darth Vader." The table of contents describes the "Grand Illusions" article: "By using state-of-the-art digital magic, we clothed some of cinema's most enduring icons in fashions by the hottest designers." The accompanying full-page photo is of Humphrey Bogart and Ingrid Bergman as they appeared in "Casablanca," wearing current designer clothing, with a caption stating, "Digital composite by ZZYZX."

A few pages later, the "editor's note" describes the article:

The movie stills in our refashioned fashion spectacular, "Grand Illusions" (page 104) have appeared before-in fact, they're some of the most famous images in Hollywood history. But you've never seen them quite like this. Cary Grant, for example, is still ducking that pesky plane in North by Northwest, but now he is doing it as a runway model, wearing a suit from Moschino's spring collection.

We know purists will be upset, but who could resist the opportunity to produce a 1997 fashion show with mannequins who have such classic looks?

*1188 The Contributors page states: "'With computers,' says Elisabeth Cotter of ZZYZX, 'you can transform anything-even the past.' She proved it by using the latest in computer software to give old movie

stars makeovers for 'Grand Illusions,' "

The "Grand Illusions" article itself states on the title page, "With the help of digital magic and today's hottest designers, we present the ultimate Hollywood fashion show-starring Cary Grant, Marilyn Monroe, Rita Hayworth and the Creature from the Black Lagoon. Photographs by Alberto Tolot. Digital Composites by ZZYZX." Each photograph that follows identifies the actor whose "body" is clothed in designer clothing with a reference to the featured film. Representative captions read "Cary Grant is dashing in" (as he runs from the cropduster in "North by Northwest"), "Harold Lloyd looks timely in" (as he hangs from the clock in "Safety Last"), "Marilyn Monroe cools off in" (as she stands on the grate in "The Seven Year Itch"), "Jimmy Stewart likes to watch in" (as he looks at Grace Kelly in "Rear Window"), "Susan Sarandon takes on mankind in" (as she aims a gun in "Thelma and Louise"), and "Judy Garland hits the bricks in" (as she runs through a field in "The Wizard of Oz" with the Cowardly Lion, the Tin Man, and the Scarecrow, "who is stuffed into" a designer suit printed with bricks). Finally, the "Tootsie" photograph appears, with its caption "Dustin Hoffman isn't a drag in a buttercolored silk gown by Richard Tyler and Ralph Lauren heels," immediately followed by the page showing all the original stills. The only remaining reference to the article is the "shopping guide," which, almost twenty pages later, provides prices and the names of stores carrying some of the clothing featured in the photographs.

[18] We do not believe that the totality of LAM's presentation of the article and the "Tootsie" photograph provides clear and convincing evidence that the editors intended to suggest falsely to the ordinary reader that he or she was seeing Hoffman's body in the altered "Tootsie" photograph. All but one of the references to the article in the magazine make it clear that digital techniques were used to substitute current fashions for the clothes worn in the original stills. Although nowhere does the magazine state that models' bodies were digitally substituted for the actors' bodies, this would be abundantly clear given that the vast majority of the featured actors were deceased. While LAM never explicitly told its readers that the living actors did not pose for the altered photographs in the article, there is certainly no clear and convincing evidence in the magazine itself that LAM intended to suggest the opposite--that it convinced Hoffman (or, for that matter, John Travolta, Elizabeth Taylor, Susan Sarandon, and Geena Davis) to recreate poses from their past roles for this fashion article.

The district court stated that LAM "admitted that it

intended to create the false impression in the minds of the public 'that they were seeing Mr. Hoffman's body.'

" This is a quotation from a portion of the style editor's testimony, in which she explained that she wanted the male model whose body would appear in the altered "Tootsie" photograph to have Hoffman's body type. She later explained, however, that she did not intend to convey to readers that Hoffman had participated in some way in the article's preparation, and never thought that readers would believe Hoffman posed for the photograph in the new dress.

[19] We defer to the district court when it makes a credibility determination. See Eastwood, 123 F.3d at 1252. In this *1189 case, the district court made no express credibility finding, as it did not state that it believed this one statement and disbelieved the remainder of the editor's testimony. But even if the district court had determined that only this quoted portion of her testimony were worthy of belief, it does not constitute clear and convincing evidence that LAM intended to mislead its readers. This single statement, whose meaning is ambiguous in the context of other testimony, the text of the article, and the entire magazine, is not sufficient to strip the magazine of its First Amendment protection. See Newton v. Nat'l Broad. Co., 930 F.2d 662, 671 (9th Cir,1990) (as amended) (in evaluating claims of actual malice, "even when we accord credibility determinations the special deference to which they are entitled, we must nevertheless examine for ourselves the factual record in full") (quotations omitted). [FN3]

FN3. Hoffman also argues that the photograph created the false implication that he approved the use of his name and likeness in the altered photograph or that he was somehow associated with the designers. The district court did not address this claim in making its determination that LAM acted with actual malice. At any rate, Hoffman does not explain how the evidence or testimony shows that LAM subjectively intended that the reader believe Hoffman had endorsed the use of his name or likeness or the selection of the clothes, and we see no clear and convincing evidence of such intent.

We conclude that LAM is entitled to the full First Amendment protection awarded noncommercial speech. We also conclude that Hoffman did not show by clear and convincing evidence, which is "far in excess of the preponderance sufficient for most civil litigation," Eastwood, 123 F.3d at 1252, that LAM acted with

actual malice in publishing the altered "Tootsie" photograph. Because there is no clear and convincing evidence of actual malice, we must reverse the district court's judgment in Hoffman's favor and the court's award of attorney fees to Hoffman, and direct that judgment be entered for LAM. [FN4]

<u>FN4.</u> Because we conclude that the First Amendment protects LAM's use of the "Tootsie" photograph, we need not address LAM's argument that Hoffman's state law claims are preempted by the federal Copyright Act, 17 U.S.C. § 301.

REVERSED.

255 F.3d 1180, 59 U.S.P.Q.2d 1363, 29 Media L. Rep. 1993, 1 Cal. Daily Op. Serv. 5695, 2001 Daily Journal D.A.R. 6987

END OF DOCUMENT

EXHIBIT 3

68 F.3d 285 95 Cal. Daily Op. Serv. 7882, 95 Daily Journal D.A.R. 13,545 (Cite as: 68 F.3d 285)

C

United States Court of Appeals, Ninth Circuit.

Michael FREEMAN, Plaintiff-Appellant,

The TIME, INC., Magazine Company, et al., Defendants-Appellees.

Nos. 94-55089 and 94-55091.

Submitted July 13, 1995. [FN*]

<u>FN*</u> The panel unanimously finds this case appropriate for decision without oral argument. <u>Fed.R.App.P. 34(a)</u>; 9th Cir.R. 34-4(c).

Decided Aug. 21, 1995. Order and Opinion filed Oct. 6, 1995.

Plaintiff filed two action on various claims under California law related to allegedly fraudulent, deceptive and misleading sweepstakes promotional materials, and defendant publisher removed action. The United States District Court for the Central District of California, Terry J. Hatter, Jr., J., granted defendant's motions to dismiss, and plaintiff appealed. Actions were consolidated on appeal. The Court of Appeals, Tashima, District Judge, sitting by designation, held that: (1) "reasonable consumer" standard applied to claims under California's false advertising and unfair business practices statutes; (2) plaintiff failed to show that public was likely to be deceived by promotional materials; and (3) materials did not falsely represent that recipient had won contest.

Affirmed.

West Headnotes

[1] Federal Courts 776 170Bk776 Most Cited Cases

Dismissal of action on merits for failure to state claim is reviewed de novo. <u>Fed.Rules Civ.Proc.Rule</u> 12(b)(6), 28 U.S.C.A.

[2] Federal Civil Procedure 1773 170Ak1773 Most Cited Cases

Complaint should be dismissed for failure to state claim when it appears beyond doubt that plaintiff can prove no set of facts in support of claim which would entitle plaintiff to relief. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[3] Federal Courts 776 170Bk776 Most Cited Cases

Where there is no dispute or conflict in evidence, findings of trial court that advertisements are not in violation of applicable provisions of California Business and Professions Code amount to conclusions of law and are reviewed de novo. West's Ann.Cal.Bus. & Prof.Code §§ 17200, 17500.

[4] Consumer Protection 32 92Hk32 Most Cited Cases

[4] Consumer Protection 33 92Hk33 Most Cited Cases

California's statutory law of unfair competition authorizes actions for injunctive relief by certain state and local officers and persons acting for interests of themselves or the general public. West's Ann.Cal.Bus. & Prof.Code § 17200.

[5] Consumer Protection 57 92Hk7 Most Cited Cases

Any violation of false advertising law necessarily violates unfair competition law. West's Ann.Cal.Bus. & Prof.Code §§ 17200, 17500.

[6] Consumer Protection 38 92Hk38 Most Cited Cases

To state a claim under California's Unfair Business Practices Act, one need not plead and prove elements of tort; instead, one need only show that members of public are likely to be deceived. West's Ann.Cal.Bus. & Prof.Code § 17200.

[7] Consumer Protection 57 92Hk7 Most Cited Cases

"Reasonable consumer" standard, rather than "unwary consumer" standard, was appropriate for evaluating

claims under California's false advertising and unfair business practices statutes in action involving allegedly deceptive sweepstakes promotional materials; mailings were sent to millions of California residents, and there was no allegation that particularly vulnerable group was targeted. West's Ann.Cal.Bus. & Prof.Code §§ 17200, 17500.

[8] Consumer Protection 57 92Hk7 Most Cited Cases

Recipient of sweepstakes promotional material failed to show that public was likely to be deceived by those materials, in action under California false advertising and unfair business practices statutes; promotions expressly and repeatedly stated conditions which had to be met to win, qualifying language was not hidden or unreadably small, qualifying language appeared immediately next to representations it qualified and no reasonable reader could have ignore it, and any ambiguities in language was dispelled by promotion as a whole. West's Ann.Cal.Bus. & Prof.Code §§ 17200, 17500.

[9] Consumer Protection 57 92Hk7 Most Cited Cases

Provisions of California's false advertising law relating to certain contests was inapplicable in action involving sweepstakes promotional material, where subject sweepstakes did not involve any skill or require payment or purchase. West's Ann. Cal. Bus. & Prof. Code § 17539.1(a)(8).

[10] Consumer Protection 57 92Hk7 Most Cited Cases

Sweepstakes promotional materials did not falsely represent that recipient had won contest when read reasonably and in context, and therefore materials were not actionable under California's Consumer Legal Remedies Act. West's Ann.Cal.Civ.Code §§ 1770(n), 1780(a).

*286 Michael D. Freeman, Encino, CA, in pro per for plaintiff-appellant.

Robert C. Vanderet, O'Melveny & Myers, Los Angeles, CA, for defendants- appellees.

Appeals from the United States District Court for the Central District of California.

*287 Before: <u>FARRIS</u> and <u>O'SCANNLAIN</u>, Circuit Judges, and <u>TASHIMA</u>, District Judge. <u>[FN**]</u>

FN** Hon. A. Wallace Tashima, United States District Judge for the Central District of California, sitting by designation.

ORDER

The Memorandum disposition, filed August 21, 1995, is redesignated as an authored Opinion by Judge Tashima.

OPINION

TASHIMA, District Judge:

These are two consolidated appeals from the district court's dismissal of two separate actions alleging that sweepstakes promotional materials were fraudulent and misleading.

FACTS

Plaintiff-appellant Michael Freeman ("Freeman") received two separate mailers for the "Million Dollar Dream Sweepstakes," a promotion of defendant-appellee Time, Inc. ("Time"). [FN1] The mailers, personalized by computer, are similar in content and format--both contain statements in large type representing that Freeman won the sweepstakes, qualified by language in smaller type indicating that Freeman would win only if he returned a winning prize number. For example, the Sports Illustrated promotion states "If you return the grand prize winning number, we'll officially announce that MICHAEL FREEMAN HAS WON \$1,666,675.00 AND PAYMENT IS SCHEDULED TO BEGIN." It continues, "If you return the grand prize winning entry, we'll say \$1,666,675.00 WINNER MICHAEL FREEMAN OF ENCINO, CALIFORNIA IS OUR LARGEST MAJOR PRIZE WINNER!" The promotion provides, "We are now scheduled to begin payment of the third and largest prize--the \$1,666,675 listed next to the name MICHAEL FREEMAN! In fact, arrangements have already been made which make it possible to begin payment of the \$1,666,675 DIRECTLY to MICHAEL FREEMAN if one of your numbers is the grand prize winner." It concludes that "[i]f you return your entry with the Validation Seal attached and your entry includes the grand prize winning number, MICHAEL FREEMAN IS GUARANTEED TO BE PAID THE ENTIRE \$1,666,675.00!"

<u>FN1.</u> One promotion was from *Money* magazine and the other from *Sports Illustrated*, both of which are Time publications.

The mailer includes an "Official Entry Certificate" on which recipient could check a box marked "YES! [Send free gifts and magazine subscription] Also, enter me in the sweepstake and notify me if I'm a winner" or a box marked "NO! [Don't send gifts and subscription] But enter me in the sweepstakes." Separate return envelopes are enclosed for "yes" and "no" entries--printed outside both envelopes is the statement "enter me in the sweepstakes and notify me if I am a millionaire."

The "Million Dollar Dream Sweepstakes Official Rules" provide that random selection of the winner would take place by April 1, 1994 and indicate that "[c]hances of winning are dependent upon the number of entries distributed and received. Distribution of the sweepstakes is estimated not to exceed 900 million." The rules provide an address from which it was possible to obtain a list of major winners, available after August 1994.

Freeman filed a complaint in California Superior Court on April 12, 1993 regarding the Money magazine promotion, alleging six causes of action: (1) common law breach of contract; (2) common law fraud; (3) unfair and misleading business practices in violation of California's Unfair Business Practices Act ("UBPA") (Cal.Bus. & Prof.Code § 17200); (4) untrue and misleading advertising in violation of UBPA (Cal.Bus. & Prof.Code § 17500 et seq.); (5) failure to include an "odds of winning" statement in violation of Cal.Bus. & Prof.Code § 17537.1; and (6) unfair and deceptive practices under the California Consumer Legal Remedies Act (Cal.Civ.Code § 1770). On April 27, 1993, plaintiff filed an action alleging identical causes of action with respect to the Sports Illustrated promotion. Both actions seek monetary damages, restitution and disgorgement of profits, and injunctive relief. Time removed *288 these two actions to federal court on May 26, 1993 and June 4, 1993, respectively.

Shortly after removal, Time moved to dismiss both complaints pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief may be granted. Freeman conceded his fifth cause of action. The district court granted both motions on December 6, 1993 without discussion. [FN2] Plaintiff filed notices of appeal on January 3, 1994. [FN3] The parties stipulated request to consolidate the two actions was granted on March 23, 1994. The district court had jurisdiction under 28 U.S.C. §§ 1441(a) & (b) and 1332(a)(1). We have jurisdiction under 28 U.S.C. §

FN2. The district court's docketing sheet describes the order granting the motion to dismiss as "terminating case." "If it appears that the district court intended the dismissal to dispose of the action, [dismissal] may be considered final and appealable." Hoohuli v. Arivoshi, 741 F.2d 1169, 1171 n. 1 (9th Cir.1984).

FN3. Time contends that Freeman failed to perfect his appeals because his notices of appeal were signed by a lawyer who was not, at that time, counsel of record. Time's motion to dismiss the appeals on this ground was denied on May 31, 1994.

DISCUSSION

Freeman does not challenge the dismissal of his breach of contract and fraud claims. He argues only that the district court erred in dismissing his third, fourth and sixth causes of action for violations of the UBPA and the California Consumer Legal Remedies Act.

I. Standard of Review

[1][2][3] This court reviews de novo a district court's dismissal of an action on the merits for failure to state a claim. Everest & Jennings, Inc. v. American Motorists Ins. Co., 23 F.3d 226, 228 (9th Cir.1994). A complaint should be dismissed when "it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson. 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957). Where "[t]here is no dispute or conflict in the evidence.... the finding of the trial court that the advertisements are not in violation of the applicable provisions of the Business and Professions Code amounts to a conclusion of law." State Board of Funeral Directors & Embalmers v. Mortuary in Westminster Memorial Park, 271 Cal.App.2d 638, 642, 76 Cal.Rptr. 832 (1969). Questions of law are reviewed de novo. Vancouver Plywood Co. v. United States, 747 F.2d 547, 552 (9th Cir.1984).

II. Unfair Business Practices Act

[4] The UBPA defines unfair competition to include "unlawful, unfair or fraudulent business practice and unfair, deceptive, untrue or misleading advertising." Cal.Bus. & Prof.Code § 17200. "California's statutory law of unfair competition ... authorizes actions for injunctive relief ... by certain state and local officers

and persons acting for the interests of themselves or the general public." Mangini v. R.J. Revnolds Tobacco Co., 7 Cal.4th 1057, 1061, 31 Cal.Rptr.2d 358, 875 P.2d 73 (1994), cert. denied, 513 U.S. 1016, 115 S.Ct. 577, 130 L.Ed.2d 493 (1994). California law "also authorizes courts to make such orders as 'may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by such unfair competition.' " Bank of the West v. Superior Court, 2 Cal.4th 1254, 1267, 10 Cal.Rptr.2d 538, 833 P.2d 545 (1992) (quoting Bus. & Prof.Code § 17203). The California Legislature considered the goals of deterring future violations and foreclosing retention of ill-gotten gains "so important that it authorized courts to order restitution without individualized proof of deception, reliance, and injury if necessary to prevent the use or employment of an unfair practice." Id.

[5] The UBPA also contains a false advertising provision which prohibits dissemination of any statement concerning real or personal property for sale "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. Section 17535 authorizes injunctive relief and restitution for violations of the false advertising provision. *289 "Any violation of the false advertising law, moreover, necessarily violates the unfair competition law." Committee on Children's Television, Inc. v. General Foods Corp., 35 Cal.3d 197, 210, 197 Cal.Rptr. 783, 673 P.2d 660 (1983).

A. Likely to be Deceived

[6] "[T]o state a claim under the [UBPA] one need not plead and prove the elements of a tort. Instead, one need only show that 'members of the public are likely to be deceived.' "Bank of the West, 2 Cal.4th at 1267, 10 Cal.Rptr.2d 538, 833 P.2d 545 (quoting Chern v. Bank of America, 15 Cal.3d 866, 876, 127 Cal.Rptr.110, 544 P.2d 1310 (1976)). Freeman argues that to demonstrate that "members of the public are likely to be deceived" he need show only that some members of the public, such as the elderly, minors or the mentally disadvantaged, are likely to be deceived. Time argues that the court must consider whether "a person of ordinary intelligence" would be misled.

In a virtually identical case involving the same Time promotion, the district court rejected the plaintiff's proposed "unwary consumer" standard in favor of a "reasonable person" standard. <u>Haskell v. Time. Inc.</u>, 857 F.Supp. 1392, 1398 (E.D.Cal.1994) (dismissing claims for false or misleading advertising and unfair competition); see also State Board of Funeral

Directors, 271 Cal.App.2d at 642, 76 Cal.Rptr. 832 (applying standard of "what a person of ordinary intelligence" would conclude in false advertising case); Audio Fidelity, Inc. v. High Fidelity Recordings, Inc., 283 F.2d 551, 557 (9th Cir. 1960) (applying standard of "the eye of the ordinary purchaser" to the interpretation of unfair competition and misleading advertising under California law).

[7] An "ordinary person" standard is not inconsistent with the standard of <u>Bank of the West</u>—to determine whether members of the public are "likely to be deceived" the court must apply some standard. Plaintiff admits that "California courts have looked to interpretations of similar provisions in federal law under the Federal Trade Commission Act." AOB at 13. <u>Haskell</u> noted that "[s]ince 1982 the FTC has interpreted 'deception' in Section 5 of the Federal Trade Commission Act to require a showing of 'potential deception of consumers acting reasonably in the circumstances,' not just any consumers." <u>857 F.Supp. at 1399</u> (quoting <u>Southwest Sunsites, Inc. v. FTC, 785 F.2d 1431, 1436 (9th Cir.1986)</u>). <u>Haskell</u> further noted that

the reasonable person standard is well ensconced in the law in a variety of legal contexts in which a claim of deception is brought. It is the standard for false advertising and unfair competition under the Lanham Act, for securities fraud, for deceit and misrepresentation and for common law unfair competition. This list no doubt could be much expanded.

Id. at 1398 (citations omitted). "[B]y explicitly imposing a 'reasonable care' standard on advertisers, § 17500 implicitly adopts such a standard for consumers as well: unless particularly gullible consumers are targeted, a reasonable person may expect others to behave reasonably as well." Id. at 1399: Compare Committee on Children's Television, 35 Cal.3d 197, 197 Cal. Rptr. 783, 673 P.2d 660 (defendant's advertisements for sugar-filled cereals were targeted at children). In this case, the mailings were sent to millions of persons and there is no allegation that a particularly vulnerable group was targeted. "[I]n view of the allegations here, the false or misleading advertising and unfair business practices claim must be evaluated from the vantage of a reasonable consumer." Haskell, 857 F.Supp. at 1399.

[8] Freeman argues that his complaint adequately alleges that members of the public would be deceived, since it is likely that the reader will review the large print and ignore the qualifying language in small print. This argument is not persuasive. The promotions expressly and repeatedly state the conditions which must be met in order to win. None of the qualifying

language is hidden or unreadably small. The qualifying language appears immediately next to the representations it qualifies and no reasonable reader could ignore it. Any persons who thought that they had won the sweepstakes would be put on notice that this was not guaranteed simply by doing sufficient reading*290 to comply with the instructions for entering the sweepstakes.

Freeman further contends that the qualifying language in the promotion, even if read by the recipient, is ambiguous. He argues, for example, that the statement "If you return the grand prize winning number we'll officially announce that [you have won]" leaves room for the reader to draw an inference that he or she has the winning number. Such an inference is unreasonable in the context of the entire document. In dismissing the complaint against Time in Haskell. the court noted that such "statements, in context, are not misleading. It is clear from the exemplar that no reasonable addressee could believe that the mailing announced that the addressee was already the winner...." 857 F.Supp. at 1403. We agree. Any ambiguity that Freeman would read into any particular statement is dispelled by the promotion as a whole.

[9] Freeman argues that, although he did not plead it, his complaint states a claim for violation of provisions governing the operation of certain contests found in Cal.Bus. & Prof.Code § 17539.1(a)(8). This section prohibits "representing directly or by implication that the number of participants has been significantly limited, or that any particular person has been selected to win a prize unless such is the fact." This code section, however, clearly does not apply to the contest in question—the section is limited to a contest involving "skill or any combination of chance and skill and which is, or in whole or part may be, conditioned upon the payment of consideration." Cal. Bus. & Prof.Code § 17539.3(e). The entry here expressly notes that no payment or purchase is necessary to win.

Freeman failed to state a claim that the promotions violated the UBPA; therefore, the district court's dismissal of such claims is affirmed.

III. Consumers Legal Remedies Act

[10] California's Consumer Legal Remedies Act provides that "[a]ny consumer who suffers any damage as a result of the use or employment by any person of a method, act, or practice declared to be unlawful by Section 1770 may bring an action against such person" for actual damages, injunctive relief, restitution of property, punitive damages, and other relief that the court deems proper. Cal.Civ.Code § 1780(a).

Freeman claims that Time violated the prohibition on "[r]epresenting that a transaction confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law." Cal.Civ.Code § 1770(n). According to Freeman, the promotion falsely represents that the reader has won and thus been conferred certain rights. As discussed above, when read reasonably and in context, the promotion makes no such false representation. [FN4]

<u>FN4.</u> Moreover, it is doubtful that Freeman has "suffer[ed] any damage as a result of" the promotion. The only possible damage is a *de minimis* 29 cents for postage to mail in his entry.

Freeman's complaint does not state a claim under the California Consumer Legal Remedies Act and the district court's dismissal of this claim is also affirmed.

AFFIRMED.

68 F.3d 285, 95 Cal. Daily Op. Serv. 7882, 95 Daily Journal D.A.R. 13,545

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EXHIBIT 4

574 F.Supp. 107 (Cite as: 574 F.Supp. 107)

C

United States District Court, D. Massachusetts.

Joan M. MAVILIA, Individually and as Personal Representative of the Estate of Anthony Mavilia, Jr., Deceased, and as Representative of the Minors Alison Mavilia and Anthony Paul Mavilia, Plaintiffs,

STOEGER INDUSTRIES and Llama Gabilondo Y
Cia S.A., Defendants.

Civ. A. No. 82-1097-G.

Nov. 3, 1983.

Wrongful death action was brought by wife and two minor children of decedent, who was struck by bullet from automatic pistol manufactured and distributed by defendants. Defendants moved to dismiss for failure to state claim upon which relief could be granted. The District Court, Garrity, J., held that: (1) Massachusetts law of products liability being derived from implied warranty, and there being no separate strict products liability doctrine as such, claims in certain counts alleging strict liability for decedent's death would be dismissed, and (2) under Massachusetts law and particularly in light of numerous legislative refusals to ban ownership of handguns, indicating legislative determination that marketing of handguns is not unreasonably dangerous activity or socially unacceptable, .38-caliber automatic pistol was not inherently defective merely by reason that firing thereof resulted in death of wrongful death plaintiffs' decedent, an innocent by stander, and manufacturer and distributor of pistol could not be held liable under products liability theory.

Motion granted.

West Headnotes

[1] Products Liability 5 313Ak5 Most Cited Cases

Inasmuch as Massachusetts law on products liability derives from law of implied warranties, there being no separate doctrine of strict products liability as such, claims in wrongful death action based upon strict liability would be dismissed. M.G.L.A. c. 106, §§

2-314 to 2-318.

[2] Weapons \$\infty\$ 18(1) 406k18(1) Most Cited Cases

Under Massachusetts law and particularly in light of numerous legislative refusals to ban ownership of handguns, indicating legislative determination that marketing of handguns is not unreasonably dangerous activity or socially unacceptable, .38-caliber automatic pistol was not inherently defective merely by reason that firing thereof resulted in death of wrongful death plaintiffs' decedent, an innocent bystander, and manufacturer and distributor of pistol could not be held liable under products liability theory. M.G.L.A. c. 106, §§ 2-314 to 2-318; c. 140, § 122 et seq.; c. 269, § 12. *108 Windle Turley, John Howie, Dallas, Tex., Richard Bates Harris, Leominster, Mass., for plaintiffs.

Paul A. Kelley, Boston, Mass., for Llama Gabilondo Y Cia S.A.

Robert F. Charlton, Jr., Boston, Mass., for Stoeger Inds., Inc.

MEMORANDUM AND ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

GARRITY, District Judge.

This is a wrongful death action in which jurisdiction is based on diversity. On October 9, 1980, Anthony Mavilia, Jr. was killed when, as an innocent bystander, he was struck by a bullet from a .38 caliber Llama automatic pistol. Plaintiffs in this action are the decedent's wife and two minor children. They have brought this suit not against the individual who shot the decedent but rather against the manufacturer and designer of the gun, Llama Gabilondo Y Cia, S.A. (Llama) and a United States distributor of the gun, Stoeger Industries. Liability is premised on two novel theories: (1) defendants breached their warranties to the consumer, bystander and general public because the gun as designed and marketed was not fit for its intended or ordinary purposes; and (2) defendants should be strictly liable for the death because the gun as designed and marketed was inherently defective. Plaintiffs claim that the risk of injury and death that accompanies the pistol far outweighs its utility. In addition, say plaintiffs, defendants failed to employ reasonable safeguards in the marketing and distribution of the product.

The defendants have filed a motion to dismiss for failure to state a claim for relief pursuant to Fed.R.Civ.P. 12(b)(6). It is well established that a court should not dismiss a complaint under 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Melo-Tone Vending, Inc. v. United States, 1 Cir.1981, 666 F.2d 687, 688.

*109 After hearing oral argument and considering comprehensive legal memoranda, we hold that Massachusetts law on products liability does not encompass plaintiffs' theories. In light of the formidable Massachusetts legislative policy against banning handguns and the duty of this court, sitting in diversity, to interpret and apply state law as it is now, we decline to stretch the Massachusetts law on products liability to find manufacturers and sellers of .38 caliber handguns liable for injuries resulting from the use of the guns, and thus grant defendants' motion to dismiss.

I. Massachusetts law on products liability

[1] Massachusetts law on products liability derives from the law on implied warranties, as codified in the Uniform Commercial Code, Mass.G.L. c. 106, §§ 2-314--2-318. There is no separate doctrine of strict products liability as such, although amendments to the UCC have made Massachusetts warranty law virtually identical to the law of strict products liability in other jurisdictions. [FN1] Back v. Wickes, 375 Mass. 633, 378 N.B.2d 964 (1978); Note, Massachusetts Strict Products Liability Law: Alternate Route, Same Destination, 14 New England L.Rev. 237 (1978). Consequently plaintiffs' claims in counts VI and VII of their complaint alleging strict liability for the decedent's death are without merit. It remains to determine whether plaintiffs have stated a claim for relief under Massachusetts warranty law.

FN1. In particular, the legislature has abolished the privity requirement and has eliminated the right of suppliers to disclaim the implied warranty of fitness. See Mass.G.L. c. 106, §§ 2-318, 2-316A.

[2] Under Mass.G.L. c. 106, § 2-314, a supplier of goods warrants that the goods he supplies are "fit for the ordinary purposes for which such goods are used." Under § 2-315, if he has reason to know of any particular purpose for which the goods are required and that the buyer is relying on his skill to furnish suitable goods, he also warrants that the goods "shall be fit for such purpose."

The leading case interpreting these provisions is *Back* ν . *Wickes, supra*, which, like the instant case, was also a wrongful death suit involving a design defect. The deaths resulted from the explosion of decedents' mobile home when the vehicle struck a guardrail. Plaintiff claimed that the design of the gas tank was defective because the tank was not adequately shielded from collision. The case came before the Supreme Judicial Court to determine whether certain instructions to the jury were erroneous. In the course of its decision, the court explained the standards to apply in design defect cases. We quote at length from p. 642, <u>378 N.E.2d 964</u> of the court's opinion since we apply the same standards:

* * * One question for the jury ... [is] whether this propensity [of the mobile home to explode in accidents], resulting from conscious design choices of the manufacturer, rendered the product unreasonably dangerous to its users and therefore unfit for highway travel. The "fitness" of this motor home and all others of the same design is a question of degree depending largely, although not exclusively, on reasonable consumer expectations. * * * In evaluating the adequacy of a product's design, the jury should consider, among other factors, "the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design." In balancing all the pertinent factors, the jury [makes] a judgment as to the social acceptability of the design.

(citations omitted; emphasis added).

Plaintiffs contend that application of these standards resolves the issue in their favor; at trial, plaintiffs could offer evidence of the tremendous danger of the Llama pistol and the great likelihood that such danger would occur, so that a jury could find the .38 caliber Llama automatic *110 pistol socially unacceptable. This argument is supported by two recent law review articles: Turley, Manufacturers' and Suppliers' Liability to Handgun Victims, 10 Northern Ky.L.Rev. 41 (1983); Note, Manufacturers' Liability to Victims of Handgun Crime: A Common Law Approach. 51 Fordham L.Rev. 771 (1983). [FN2]

<u>FN2.</u> This note focuses primarily on liability for injuries caused by small revolvers sometimes called "Saturday Night Specials." This type of easily concealable gun may have special features which bring it within the doctrine of strict liability or breach of warranty; however, it is not the subject of the instant case, and we express no opinion regarding the application of Massachusetts products liability law to the manufacturing of the Saturday Night Special handgun.

Plaintiffs' argument, however, has been rejected by nearly every court that has considered the issue. See Richman v. Charter Arms Corp., E.D.La.1983, 571

F.Supp. 192; Bennet v. Cincinnati Checker Cab Co., Inc., D.Ky.1973, 353 F.Supp. 1206; DeRosa v. Remington Arms Co., E.D.N.Y.1981, 509 F.Supp. 762. Contra Steelman v. Garcia Gun Center, Inc., No. 82-17923, 11th Judicial Circuit of Fla., 1983, which denied defendant's motion to dismiss "in light of the record as presently constituted". [FN3]

FN3. Oliver Wendell Holmes, in his Collected Legal Papers, 131-132 (1952) explained his theory against holding the manufacturers and sellers of guns liable as follows:

If notice so determined is the general ground for liability, why is not a man who sells fire-arms answerable for assaults committed with pistols bought of him, since he must be taken to know the probability that, sooner or later, someone will buy a pistol of him for some unlawful end? ... The principle seems to be pretty well established ... that everyone has a right to rely upon his fellow-men acting lawfully, and, therefore, is not answerable for himself acting upon the assumption that they will do so, however improbable it may be. There may have been some nibbling at the edges of this rule ... but the rule hardly will be disputed. It applies in favor of wrongdoers as well as others.

In the most recent case to consider this issue, the district court for the Eastern District of Louisiana in the *Richman* case granted defendant's motion for summary judgment, finding as a matter of law that manufacturers are not strictly liable under Louisiana products liability law for marketing the "snub nose .38". [FN4] Louisiana law is slightly different from the law in Massachusetts, but the rationale for granting the motion applies equally here. In both states, the standard for establishing a design defect is to show that the product is unreasonably dangerous. To do this, a Louisiana plaintiff must show "either that no reasonable handgun manufacturer would market its product in the way defendant did knowing of the risks involved ... or that

the risks involved are greater than a reasonable buyer would expect." *Richman*, at 197. Massachusetts relies heavily on this latter test, as noted above. Regarding this test the district court of Louisiana remarked at p. 197.

FN4. The Court did not dismiss plaintiff's claim altogether. It denied defendant's motion for summary judgment on the issue of whether the marketing of guns is an ultrahazardous activity for which defendant should be held strictly liable. The issue of ultrahazardous activity has not been raised in the instant case, so we do not consider that issue. Examples of ultrahazardous activities in the Massachusetts case law are the use of dynamite for building roads and the manufacture of toxic drugs. See Clark-Aiken Co. v. Cromwell-Wright Co., Inc., 1975, 367 Mass. 70, 323 N.E.2d 876.

As to the "consumer expectation" theory, common sense requires the Court to find that the risks involved in marketing handguns for sale to the general public are not greater than reasonable consumers expect. Every reasonable consumer that purchases a handgun doubtless knows that the product can be used as a murder weapon. knowledge, however, in no way deters reasonable consumers from purchasing handguns. "consumer expectation" theory normally applies in cases where the defendant has failed to attach an however, it would be unreasonable to say that a death might have been averted had the [defendant] attached an adequate warning to each of its handguns explaining *111 how the product can be used and abused (citations omitted).

Similarly in our case, that death may result from careless handling of firearms is known by all Americans from an early age.

As for plaintiff's reliance on the "reasonable seller" theory, the Louisiana court found it equally misplaced, explaining as follows at p. 198:

*** The Louisiana legislature has neither enacted a statute banning the sale of handguns to the general public nor adopted a joint resolution to amend the Constitution to that effect. Given the prominence of the handgun issue in public debates, the only plausible explanation for the refusal to ban handgun sales to the general public, either by statute or by constitutional amendment, is that a majority of the legislators think such a ban would be undesirable as

a matter of public policy.

In other words, the court inferred, "a majority of the legislators does not think marketing handguns for sale to the general public is an 'unreasonably dangerous' activity."

This too holds true in Massachusetts. The legislature has on numerous occasions in the past ten years considered banning handguns and has consistently rejected the proposals. It has enacted comprehensive licensing provisions for suppliers and purchasers, Mass.G.L. c. 140, § 122 et seq., indicating its disinclination toward banning handguns. It has also enacted a provision banning a variety of different weapons and has recently amended this list, but has not seen fit to include handguns. Mass.G.L. c. 269, § 12. Thus the clear inference is that the majority of legislators in Massachusetts also do not feel that the marketing of handguns to the public is an unreasonably dangerous activity or socially unacceptable.

The duty of the district court is to apply the law of the state in which it is sitting. Harna v. Plumer, 1965, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8; Cantwell v. University of Massachusetts. 1 Cir. 1977, 551 F.2d 879. While there have been no Massachusetts cases on products liability for the marketing of handguns, we are confident that the Massachusetts court would accept the inference of social acceptability from the legislative action, and hold as a matter of law that at least with regard to the .38 caliber Llama automatic pistol, the gun is not inherently defective; manufacturers and sellers therefore do not breach their warranties of fitness in supplying them to members of the general public. [FN5] For the above reasons we grant defendants' motion to dismiss for failure to state a claim for relief.

FN5. Neither party has requested certification of the issue to the Supreme Judicial Court of Massachusetts pursuant to Rule 1:03 of the Rules of the Supreme Judicial Court of Massachusetts, and we do not feel that this is the type of issue to be certified to the Supreme Judicial Court under Rule 1:03.

574 F.Supp. 107

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EXHIBIT 5

110 S.Ct. 2695

111 L.Ed.2d 1, 58 USLW 4846, 60 Ed. Law Rep. 1061, 17 Media L. Rep. 2009

(Cite as: 497 U.S. 1, 110 S.Ct. 2695)

Supreme Court of the United States

Michael MILKOVICH, Sr., Petitioner, v. LORAIN JOURNAL CO. et al.

No. 89-645.

Argued April 24, 1990. Decided June 21, 1990.

Former high school wrestling coach brought defamation action against newspaper and reporter. The Court of Common Pleas, Lake County, entered directed verdict against coach, and coach appealed. The Court of Appeals, 65 Ohio App.2d 143, 416 N.E.2d.662. reversed and remanded. The Ohio Supreme Court dismissed the ensuing appeal. On remand, the Court of Common Pleas entered summary judgment for defendants, and coach appealed. The Court of Appeals affirmed. The Ohio Supreme Court, 15 Ohio St.3d 292, 473 N.E.2d 1191, reversed and remanded. On remand, the Court of Common Pleas entered summary judgment for defendants. Coach appealed. The Court of Appeals, 46 Ohio App.3d 20, 545 N.E.2d 1320, affirmed. The Ohio Supreme Court dismissed the ensuing appeal. After grant of certiorari, the Supreme Court, Chief Justice Rehnquist, held that: (1) separate constitutional privilege for "opinion" was not required in addition to established safeguards regarding defamation to ensure freedom of expression guaranteed by First Amendment, and (2) reasonable fact finder could conclude that statements in reporter's column implied assertion that high school coach perjured himself in judicial proceeding, and implication that coach committed perjury was sufficiently factual to be susceptible of being proved true or false and might permit defamation recovery.

Reversed and remanded.

Justice Brennan, filed dissenting opinion in which Justice Marshall joined.

West Headnotes

[1] Judgment 5707 228k707 Most Cited Cases High school coach who was not party to school superintendent's defamation suit was not bound in coach's own defamation suit that involved same newspaper column by court's statements in superintendent's suit that coach could not be considered other than public figure for purposes of controversy at issue, under Ohio law; coach was not party to proceedings involving superintendent.

[2] Federal Courts 511.1 170Bk511.1 Most Cited Cases (Formerly 170Bk511)

Ruling of Ohio Supreme Court that an allegedly defamed high school coach was not a public figure or public official for purposes of newspaper column continued to be law of the case on that issue, where Ohio Court of Appeals did not address public-private figure question on remand.

[3] Federal Courts 502 170Bk502 Most Cited Cases

Determination in defamation suit by school superintendent that newspaper column was constitutionally protected opinion would not be considered a determination on independent state constitutional grounds precluding federal review in separate defamation suit by school coach arising from same newspaper column on theory State Constitution was relied upon to recognize opinion privilege for defamation purposes; decision in superintendent's suit relied heavily on federal decisions interpreting scope of First Amendment protection accorded defamation defendants. U.S.C.A. Const.Amend. 1.

[4] Constitutional Law 90.1(5) 92k90.1(5) Most Cited Cases

Separate constitutional privilege for "opinion" was not required in addition to established safeguards against defamation liability to ensure freedom of expression guaranteed by First Amendment. <u>U.S.C.A.</u> Const.Amend. 1.

[5] Libel and Slander 51(5) 237k51(5) Most Cited Cases

Where statement of "opinion" on matter of public concern reasonably implies false and defamatory facts regarding public figures or officials, those individuals must show that such statements were made with knowledge of their false implications or with reckless disregard of truth in order to recover. <u>U.S.C.A.</u> <u>Const.Amend.</u> 1.

[6] Libel and Slander 48(1) 237k48(1) Most Cited Cases

Where statement of "opinion" on matter of public concern reasonably implies false and defamatory facts involving private figure, plaintiff must show that false implications were made with some level of fault to support recovery. U.S.C.A. Const. Amend. 1.

[7] Libel and Slander 112(1) 237k112(1) Most Cited Cases

Reasonable fact finder could conclude that statements in reporter's column implied assertion that high school coach perjured himself in judicial proceeding, and implication that coach committed perjury was sufficiently factual to be susceptible of being proved true or false and might permit defamation recovery by coach against reporter and newspaper. <u>U.S.C.A.</u> Const.Amend. 1.

**2696 Syllabus [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See <u>United States v. Detroit Lumber Co.</u>, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

*1 While petitioner Milkovich was a high school wrestling coach, his team was involved in an altercation at a match with another high school's team. Both he and School Superintendent Scott testified at an investigatory hearing before the Ohio High School Athletic Association (OHSAA), which placed the team on probation. They testified again during a suit by several parents, in which a county court overturned OHSAA's ruling. The day after the court's decision, respondent Lorain Journal Company's newspaper published a column authored by respondent Diadiun, which implied that Milkovich lied under oath in the judicial proceeding. Milkovich commenced a defamation action against respondents in the county court, alleging that the column accused him of committing the **2697 crime of perjury, damaged him in his occupation of teacher and coach, and constituted Ultimately, the trial court granted libel per se. summary judgment for respondents. The Ohio Court of Appeals affirmed, considering itself bound by the State Supreme Court's determination in Superintendent Scott's separate action against respondents that, as a matter of law, the article was constitutionally protected opinion.

Held:

- 1. The First Amendment does not require a separate "opinion" privilege limiting the application of state defamation laws. While the Amendment does limit such application, New York Times Co. v. Sullivan, 376 <u>U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686,</u> the breathing space that freedoms of expression require to survive is adequately secured by existing constitutional doctrine. *2 Foremost, where a media defendant is involved, a statement on matters of public concern must be provable as false before liability can be assessed, Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 106 S.Ct. 1558, 89 L.Ed.2d 783, thus ensuring full constitutional protection for a statement of opinion having no provably false factual connotation. Next, statements that cannot reasonably be interpreted as stating actual facts about an individual are protected, see, e.g., Greenbelt Cooperative Publishing Assn., Inc. v. Bresler, 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed.2d 6, thus assuring that public debate will not suffer for lack of "imaginative expression" or the "rhetorical hyperbole" which has traditionally added much to the discourse of this Nation. The reference to "opinion" in dictum in Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-340, 94 S.Ct. 2997, 3006-3007, 41 L.Ed.2d 789, was not intended to create a wholesale defamation exemption for "opinion." Read in context, the Gertz dictum is merely a reiteration of Justice Holmes' "marketplace of ideas" concept, see Abrams v. United States, 250 U.S. 616, 630, 40 S.Ct. 17, 22, 63 L.Ed. 1173. Simply couching a statement-- "Jones is a liar"--in terms of opinion--"In my opinion Jones is a liar"--does not dispel the factual implications contained in the statement. Pp. 2702-2707.
- 2. A reasonable factfinder could conclude that the statements in the Diadiun column imply an assertion that Milkovich perjured himself in a judicial proceeding. The article did not use the sort of loose, figurative, or hyperbolic language that would negate the impression that Diadiun was seriously maintaining Milkovich committed perjury. Nor does the article's general tenor negate this impression. In addition, the connotation that Milkovich committed perjury is sufficiently factual that it is susceptible of being proved true or false by comparing, inter alia, his testimony before the OHSAA board with his subsequent testimony before the trial court. Pp. 2707-2708.
- 3. This decision balances the First Amendment's vital guarantee of free and uninhibited discussion of public issues with the important social values that underlie

defamation law and society's pervasive and strong interest in preventing and redressing attacks upon reputation. Pp. 2707-2708.

46 Ohio App.3d 20, 545 N.E.2d 1320 (1989), reversed and remanded.

REHNQUIST, C.J., delivered the opinion of the Court, in which WHITE, BLACKMUN, STEVENS, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, post, p. 2708.

<u>Brent L. English</u> argued the cause for petitioner. With him on the brief was John D. Brown.

- *3 <u>Richard D. Panza</u> argued the cause for respondents. With him on the brief were William G. Wickens, <u>David Herzer</u>, Richard A. Naegle, P. Cameron DeVore, and <u>Marshall J. Nelson</u>. *
- * Briefs of amici curiae urging affirmance were filed for Dow Jones & Co. et al. by Robert D. Sack, Richard J. Tofel, Richard M. Schmidt, Jr., Devereux Chatillon, Douglas P. Jacobs, Barbara L. Wartelle, Harvey L. Lipton, Laura R. Handman, Slade R. Metcalf, Richard J. Ovelmen, Deborah R. Linfield, Jane E. Kirtley, and Bruce W. Sanford; and for the American Civil Liberties Union et al. by Henry R. Kaufman.

<u>Louis A. Colombo</u> and <u>David L. Marburger</u> filed a brief for the Ohio Newspaper Association et al. as amicus curiae.

Chief Justice <u>REHNQUIST</u> delivered the opinion of the Court.

Respondent J. Theodore Diadiun authored an article in an Ohio newspaper implying that petitioner Michael Milkovich, a local high school wrestling coach, lied under oath **2698 in a judicial proceeding about an incident involving petitioner and his team which occurred at a wrestling match. Petitioner sued Diadiun and the newspaper for libel, and the Ohio Court of Appeals affirmed a lower court entry of summary judgment against petitioner. This judgment was based in part on the grounds that the article constituted an "opinion" protected from the reach of state defamation law by the First Amendment to the United States Constitution. We hold that the First Amendment does not prohibit the application of Ohio's libel laws to the alleged defamations contained in the article.

This lawsuit is before us for the third time in an

odyssey of litigation spanning nearly 15 years. [FN1] Petitioner Milkovich, now retired, was the wrestling coach at Maple Heights High *4 School in Maple Heights, Ohio. In 1974, his team was involved in an altercation at a home wrestling match with a team from Mentor High School. Several people were injured. In response to the incident, the Ohio High School Athletic Association (OHSAA) held a hearing at which Milkovich and H. Don Scott, the Superintendent of Maple Heights Public Schools, testified. Following the hearing, OHSAA placed the Maple Heights team on probation for a year and declared the team ineligible for the 1975 state tournament. OHSAA also censured Milkovich for his actions during the altercation. Thereafter, several parents and wrestlers sued OHSAA in the Court of Common Pleas of Franklin County, Ohio, seeking a restraining order against OHSAA's ruling on the grounds that they had been denied due process in the OHSAA proceeding. Both Milkovich and Scott testified in that proceeding. The court overturned OHSAA's probation and ineligibility orders on due process grounds.

FN1. The Court has previously denied certiorari twice in this litigation on various judgments rendered by the Ohio courts. See Lorain Journal Co. v. Milkovich, 474 U.S. 953, 106 S.Ct. 322, 88 L.Ed.2d 305 (1985); Lorain Journal Co. v. Milkovich, 449 U.S. 966, 101 S.Ct. 380, 66 L.Ed.2d 232 (1980).

The day after the court rendered its decision, respondent Diadiun's column appeared in the News-Herald, a newspaper which circulates in Lake County, Ohio, and is owned by respondent Lorain Journal Co. The column bore the heading "Maple beat the law with the 'big lie,' "beneath which appeared Diadiun's photograph and the words "TD Says." The carryover page headline announced "... Diadiun says Maple told a lie." The column contained the following passages:

- "'... [A] lesson was learned (or relearned) yesterday by the student body of Maple Heights High School, and by anyone who attended the Maple-Mentor wrestling meet of last Feb. 8.
- " 'A lesson which, sadly, in view of the events of the past year, is well they learned early.
- "It is simply this: If you get in a jam, lie your way
- *5 " If you're successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up, regardless of what really happened.
- " 'The teachers responsible were mainly head Maple

wrestling coach, Mike Milkovich, and former superintendent of schools H. Donald Scott.

" 'Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth.

" But they got away with it.

" 'Is that the kind of lesson we want our young people learning from their high school administrators and coaches?

" 'I think not.' " <u>Milkovich v. News-Herald</u>, 46 Ohio App.3d 20, 21, 545 N.E.2d 1320, 1321-1322 (1989). [FN2]

<u>FN2.</u> In its entirety, the article reads as follows:

"Yesterday in the Franklin County Common Pleas Court, judge Paul Martin overturned an Ohio High School Athletic Assn. decision to suspend the Maple Heights wrestling team from this year's state tournament.

"It's not final yet--the judge granted Maple only a temporary injunction against the ruling--but unless the judge acts much more quickly than he did in this decision (he has been deliberating since a Nov. 8 hearing) the temporary injunction will allow Maple to compete in the tournament and make any further discussion meaningless.

"But there is something much more important involved here than whether Maple was denied due process by the OHSAA, the basis of the temporary injunction. "When a person takes on a job in a school, whether it be as a teacher, coach, administrator or even maintenance worker, it is well to remember that his primary job is that of educator.

"There is scarcely a person concerned with school who doesn't leave his mark in some way on the young people who pass his way-many are the lessons taken away from school by students which weren't learned from a lesson plan or out of a book. They come from personal experiences with and observations of their superiors and peers, from watching actions and reactions.

"Such a lesson was learned (or relearned) yesterday by the student body of Maple Heights High School, and by anyone who attended the Maple-Mentor wrestling meet of last Feb. 8.

"A lesson which, sadly, in view of the events

of the past year, is well they learned early.
"It is simply this: If you get in a jam, lie your way out.

"If you're successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up, regardless of what really happened. "The teachers responsible were mainly head Maple wrestling coach, Mike Milkovich, and former superintendent of schools H. Donald Scott

"Last winter they were faced with a difficult situation. Milkovich's ranting from the side of the mat and egging the crowd on against the meet official and the opposing team backfired during a meet with Greater Cleveland Conference rival Metor [sic], and resulted in first the Maple Heights team, then many of the partisan crowd attacking the Mentor squad in a brawl which sent four Mentor wrestlers to the hospital.

"Naturally, when Mentor protested to the governing body of high school sports, the OHSAA, the two men were called on the carpet to account for the incident.

"But they declined to walk into the hearing and face up to their responsibilities, as one would hope a coach of Milkovich's accomplishments and reputation would do, and one would certainly expect from a man with the responsible poisition [sic] of superintendent of schools.

"Instead they chose to come to the hearing and misrepresent the things that happened to the OHSAA Board of Control, attempting not only to convince the board of their own innocence, but, incredibly, shift the blame of the affair to Mentor.

"I was among the 2,000-plus witnesses of the meet at which the trouble broke out, and I also attended the hearing before the OHSAA, so I was in a unique position of being the only non-involved party to observe both the meet itself and the Milkovich-Scott version presented to the board.

"Any resemblance between the two occurrances [sic] is purely coincidental." To anyone who was at the meet, it need only be said that the Maple coach's wild gestures during the events leading up to the brawl were passed off by the two as 'shrugs,' and that Milkovich claimed he was 'Powerless to control the crowd' before the melee.

"Fortunately, it seemed at the time, the Milkovich-Scott version of the incident presented to the board of control had enough contradictions and obvious untruths so that the six board members were able to see through it. "Probably as much in distasteful reaction to the chicanery of the two officials as in displeasure over the actual incident, the board then voted to suspend Maplefrom this year's tournament and to put Maple Heights, and both Milkovich and his son, Mike Jr. (the Maple Jaycee coach), on two-year probation. "But unfortunately, by the time the hearing before Judge Martin rolled around, Milkovich and Scott apparently had their version of the incident polished and reconstructed, and the judge apparently believed them.

"I can say that some of the stories told to the judge sounded pretty darned unfamiliar,' said Dr. Harold Meyer, commissioner of the OHSAA, who attended the hearing. 'It certainly sounded different from what they told us.'

"Nevertheless, the judge bought their story, and ruled in their favor.

"Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth.

"But they got away with it.

"Is that the kind of lesson we want our young people learning from their high school administrators and coaches?

"I think not." App. to Pet. for Cert. A138--A139.

**2699 *6 Petitioner commenced a defamation action against respondents in the Court of Common Pleas of Lake County, Ohio, alleging that the headline of Diadiun's article and the *7 nine passages quoted above "accused plaintiff of committing the crime of perjury, an indictable offense in the State of Ohio, and damaged plaintiff directly in his life-time occupation **2700 of coach and teacher, and constituted libel per se." App. The action proceeded to trial, and the court granted a directed verdict to respondents on the ground that the evidence failed to establish the article was published with "actual malice" as required by New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). See App. 21-22. The Ohio Court of Appeals for the Eleventh Appellate District reversed and remanded, holding that there was sufficient evidence of actual malice to go to the jury. See Milkovich v. Lorain Journal, 65 Ohio App.2d 143, 416 N.E.2d 662 (1979). The Ohio *8 Supreme Court dismissed the ensuing appeal for want of a substantial constitutional question, and this Court denied certiorari.

449 U.S. 966, 101 S.Ct. 380, 66 L.Ed.2d 232 (1980).

On remand, relying in part on our decision in Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), the trial court granted summary judgment to respondents on the grounds that the article was an opinion protected from a libel action by "constitutional law," App. 55, and alternatively, as a public figure, petitioner had failed to make out a prima facie case of actual malice. Id., at 55-59. The Ohio Court of Appeals affirmed both determinations. Id., at 62-70. On appeal, the Supreme Court of Ohio reversed and remanded. The court first decided that petitioner was neither a public figure nor a public official under the relevant decisions of this Court. See Milkovich v. News-Herald, 15 Ohio St.3d 292, 294-299, 473 N.E.2d 1191, 1193-1196 (1984). The court then found that "the statements in issue are factual assertions as a matter of law, and are not constitutionally protected as the opinions of the writer.... The plain import of the author's assertions is that Milkovich, inter alia, committed the crime of perjury in a court of law." Id., at 298-299, 473 N.E.2d, at 1196-1197. This Court again denied certiorari. 474 U.S. 953, 106 S.Ct. 322, 88 L.Ed.2d 305 (1985).

Meanwhile, Superintendent Scott had been pursuing a separate defamation action through the Ohio courts. Two years after its *Milkovich* decision, in considering Scott's appeal, the Ohio Supreme Court reversed its position on Diadiun's article, concluding that the column was "constitutionally protected opinion." *Scott v. News-Herald*, 25 Ohio St.3d 243, 254, 496 N.E.2d 699, 709 (1986). Consequently, the court upheld a lower court's grant of summary judgment against Scott.

The Scott court decided that the proper analysis for determining whether utterances are fact or opinion was set forth in the decision of the United States Court of Appeals for the District of Columbia Circuit in Ollman v. Evans, 242 U.S.App.D.C. 301, 750 F.2d 970 (1984), cert. denied, *9471 U.S. 1127, 105 S.Ct. 2662, 86 L.Ed.2d 278 (1985). See Scott, 25 Ohio St.3d, at 250, 496 N.E.2d, at 706. Under that analysis, four factors are considered to ascertain whether, under the "totality of circumstances," a statement is fact or opinion. These factors are: (1) "the specific language used"; (2) "whether the statement is verifiable"; (3) "the general context of the statement"; and (4) "the broader context in which the statement appeared." Ibid. The court found that application of the first two factors to the column militated in favor of deeming the challenged passages actionable assertions of fact. Id., at 250-252, 496 N.E.2d, at 706-707. That potential outcome was trumped, however, by the court's consideration of the third and fourth factors. With respect to the third factor, the general context, the court explained that "the large caption 'TD Says' ... would indicate to even the most gullible reader that the article was, in fact, opinion." <u>Id.</u> at 252, 496 N.E.2d, at 707. [FN3] As for the fourth factor, the "broader context," the court reasoned that because the **2701 article appeared on a sports page--"a traditional haven for cajoling, invective, and hyperbole"--the article would probably be construed as opinion. <u>Id.</u> at 253-254, 496 N.E.2d, at 708. [FN4]

FN3. The court continued:

"This position is borne out by the second headline on the continuation of the article which states: '... Diadiun says Maple told a lie.' ... The issue, in context, was not the statement that there was a legal hearing and Milkovich and Scott lied. Rather, based upon Diadiun's having witnessed the original altercation and OHSAA hearing, it was his view that any position represented by Milkovich and Scott less than a full admission of culpability was, in his view, a lie.... A review of the context of the statements in question demonstrates that Diadiun is not making an attempt to be impartial and no secret is made of his bias.... While Diadiun's mind is certainly made up, the average reader viewing the words in their internal context would be hard pressed to accept Diadiun's statements as an impartial reporting of perjury." Scott, 25 Ohio St.3d, at 252-253, 496 N.E.2d, at 707-708 (emphasis in original).

<u>FN4.</u> Specifically, the court reasoned as follows:

"It is important to recognize that Diadiun's article appeared on the sports page—a traditional haven for cajoling, invective, and hyperbole.... In this broader context we doubt that a reader would assign the same weight to Diadiun's statement as if it had appeared under the byline 'Law Correspondent' on page one of the newspaper.... On balance ... a reader would not expect a sports writer on the sports page to be particularly knowledgeable about procedural due process and perjury. It is our belief that 'legal conclusions' in such a context would probably be construed as the writer's opinion." Scott. Id., at 253-254, 496 N.E.2d, at 708.

*10 [1][2][3] Subsequently, considering itself bound

by the Ohio Supreme Court's decision in <u>Scott.</u> the Ohio Court of Appeals in the instant proceedings affirmed a trial court's grant of summary judgment in favor of respondents, concluding that "it has been decided, as a matter of law, that the article in question was constitutionally protected opinion." <u>46 Ohio App.3d.</u> at 23, 545 N.E.2d, at 1324. The Supreme Court of Ohio dismissed petitioner's ensuing appeal for want of a substantial constitutional question. App. 119. We granted certiorari, <u>493 U.S. 1055, 110 S.Ct. 863, 107 L.Ed.2d 947 (1990)</u>, to consider the important questions raised by the Ohio courts' recognition of a constitutionally required "opinion" exception to the application of its defamation laws. We now reverse. [FN5]

FN5. Preliminarily, respondents contend that our review of the "opinion" question in this case is precluded by the Ohio Supreme Court's decision in Scott v. News-Herald, 25 Ohio St.3d 243, 496 N.E.2d 699 (1986). respondents claim that the determination by the Ohio Supreme Court in Milkovich v. News-Herald, 15 Ohio St.3d 292, 298, 473 N.E.2d 1191, 1196 (1984), that petitioner is not a public official or figure was overruled in Scott. Thus, since petitioner has failed to establish actual malice, his action is precluded under New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), and Curtis Publishing Co. v. Butts, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 This contention is meritless. Respondents rely on the following statements made by the Ohio Supreme Court in its discussion of Scott's status as a public official: " To say that Milkovich nevertheless was not a public figure for purposes of discussion about the controversy is simply nonsense,' ' 25 Ohio St.3d, at 247, 496 N.E.2d, at 704 (quoting Milkovich v. Lorain Journal Co., 474 U.S. 953, 964, 106 S.Ct. 322, 330, 88 L.Ed.2d 305 (1985) (BRENNAN, J., dissenting from denial of certiorari)), and "we overrule Milkovich in its restrictive view of public officials and hold a public school superintendent is a public official for purposes of defamation law." 25 Ohio St.3d, at 248. 496 N.B.2d, at 704. However, it is clear from the context in which these statements were made that the court was simply supporting its determination that Scott was a public official, and that as relates to petitioner Milkovich, these statements were pure dicta. But more importantly, petitioner Milkovich was not a

party to the proceedings in Scott and thus would not be bound by anything in that ruling under Ohio law. See Hainbuchner v. Miner, 31 Ohio St.3d 133, 137, 509 N.E.2d 424, 427 (1987) ("It is universally recognized that a former judgment, in order to be res judicata in a subsequent action, must have been rendered in an action in which the parties to the subsequent action were adverse parties") (quotation omitted). Since the Ohio Court of Appeals did not address the public- private figure question on remand from the Ohio Supreme Court in Milkovich (because it decided against petitioner on the basis of the opinion ruling in Scott), the ruling of the Ohio Supreme Court in Milkovich presumably continues to be law of the case on that issue. See Hawley v. Ritley, 35 Ohio St.3d 157, 160, 519 N.E.2d 390, 393 (1988) ("[T]he decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels"). Nor is there any merit to respondents' contention that the Court of Appeals below alternatively decided there was no negligence in this case even if petitioner were regarded as a private figure, and thus the action is precluded by our decision in Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997. 41 L.Ed.2d 789 (1974). Although the appellate court noted that "the instant cause does not present any material issue of fact as to negligence or 'actual malice,' " Milkovich v. News-Herald, 46 Ohio App.3d 20, 24, 545 N.E.2d 1320, 1325 (1989), this statement was immediately explained by the court's following statement that the Scott ruling on the opinion issue had accorded respondents absolute immunity from liability. See 46 Ohio App.3d, at 24, 545 N.E.2d, at 1325. The court never made an evidentiary determination on the issue of respondents' negligence.

Next, respondents concede that the <u>Scott</u> court relied on the United States Constitution as well as the Ohio Constitution in its recognition of an opinion privilege, Brief for Respondents 18, but argue that certain statements made by the court evidenced an intent to independently rest the decision on state-law grounds, see <u>25</u> <u>Ohio St.3d. at 244, 496 N.E.2d, at 701</u> ("We find the article to be an opinion, protected by <u>Section 11, Article I of the Ohio Constitution</u> ..."); <u>id.</u>, at 245, 496 N.E.2d, at 702 ("These ideals are not only an integral part of First Amendment freedoms under the federal

Constitution but are independently reinforced in Section 11, Article I of the Ohio Constitution ..."), thereby precluding federal review under Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983). We similarly reject this contention. In the Milkovich proceedings below, the Court of Appeals relied completely on Scott in concluding that Diadiun's article was privileged opinion. See 46 Ohio App.3d, at 23-25, 545 N.E.2d, at 1324-1325. Scott relied heavily on federal decisions interpreting the scope of First Amendment protection accorded defamation defendants, see, e.g., 25 Ohio St.3d, at 244, 496 N.E.2d. at 701 ("The federal Constitution has been construed to protect published opinions ever since the United States Supreme Court's opinion in Gertz v. Robert Welch, Inc. ..."), and concluded that "[b]ased upon the totality of circumstances it is our view that Diadiun's article was constitutionally protected opinion both with respect to the federal Constitution and under our state Constitution." Id., at 254, 496 N.E.2d, at 709. Thus, the Scott decision was at least "interwoven with the federal law," and was not clear on its face as to the court's intent to rely on independent state grounds, yet failed to make a "plain statement ... that the federal cases ... [did] not themselves compel the result that the court ... reached." Long. supra, 463 U.S., at 1040-1041, 103 S.Ct., at 3476. Under Long, then, federal review is not barred in this case. We note that the Ohio Supreme Court remains free, of course, to address all of the foregoing issues on remand.

**2702 *11 Since the latter half of the 16th century, the common law has afforded a cause of action for damage to a person's reputation by the publication of false and defamatory statements. See L. Eldredge, Law of Defamation 5 (1978).

*12 In Shakespeare's Othello, Iago says to Othello:

"Good name in man and woman, dear my lord,

Is the immediate jewel of their souls.

Who steals my purse steals trash;

'Tis something, nothing;

'Twas mine, 'tis his, and has been slave to thousands;

But he that filches from me my good name

Robs me of that which not enriches him,

And makes me poor indeed." Act III, scene 3.

Defamation law developed not only as a means of allowing an individual to vindicate his good name, but also for the purpose of obtaining redress for harm caused by such statements. Eldredge, supra, at 5. As the common law developed in this country, apart from the issue of damages, one usually needed only allege an unprivileged publication of false and defamatory matter to state a cause of action for defamation. See, e.g., Restatement of Torts § 558 (1938); *13Gertz v. Robert Welch, Inc., 418 U.S., at 370, 94 S.Ct., at 3022 (WHITE, J., dissenting) ("Under typical state defamation law, the defamed private citizen had to prove only a false publication that would subject him to hatred, contempt, or ridicule"). The common law generally did not place any additional restrictions on the type of statement that could be actionable. Indeed, defamatory communications were deemed actionable regardless of whether they were deemed to be statements of fact or opinion. See, e.g., Restatement of Torts, supra, §§ 565-567. As noted in the 1977 Restatement (Second) of Torts § 566, Comment a:

"Under the law of defamation, an expression of opinion could be defamatory if the **2703 expression was sufficiently derogatory of another as to cause harm to his reputation, so as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.... The expression of opinion was also actionable in a suit for defamation, despite the normal requirement that the communication be false as well as defamatory.... This position was maintained even though the truth or falsity of an opinion—as distinguished from a statement of fact—is not a matter that can be objectively determined and truth is a complete defense to a suit for defamation."

However, due to concerns that unduly burdensome defamation laws could stifle valuable public debate, the privilege of "fair comment" was incorporated into the common law as an affirmative defense to an action for defamation. "The principle of 'fair comment' afford[ed] legal immunity for the honest expression of opinion on matters of legitimate public interest when based upon a true or privileged statement of fact." 1 F. Harper & F. James, Law of Torts § 5.28, p. 456 (1956) (footnote omitted). As this statement implies, comment was generally privileged when it concerned a matter of public concern, was upon true or privileged facts, represented the actual opinion of the speaker, and was not made *14 solely for the purpose of causing harm. See Restatement of Torts, supra, § 606. "According to the majority rule, the privilege of fair comment applied only to an expression of opinion and not to a false statement of fact, whether it was expressly stated or implied from an expression of opinion." Restatement (Second) of Torts, supra, § 566, Comment a. Thus under the common law, the privilege of "fair comment" was the device employed to strike the appropriate balance between the need for vigorous public discourse

and the need to redress injury to citizens wrought by invidious or irresponsible speech.

In 1964, we decided in New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686, that the First Amendment to the United States Constitution placed limits on the application of the state law of defamation. There the Court recognized the need for "a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not." Id., at 279-280, 84 S.Ct., at 726. This rule was prompted by a concern that, with respect to the criticism of public officials in their conduct of governmental affairs, a state-law " 'rule compelling the critic of official conduct to guarantee the truth of all his factual assertions' would deter protected speech." Gertz v. Robert Welch. Inc., supra. 418 U.S., at 334, 94 S.Ct., at 3004 (quoting New York Times, supra, 376 U.S., at 279, 84 S.Ct., at 725).

Three years later, in Curtis Publishing Co. v. Butts, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967), a majority of the Court determined "that the New York Times test should apply to criticism of 'public figures' as well as 'public officials.' The Court extended the constitutional privilege announced in that case to protect defamatory criticism of nonpublic persons 'who are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." " Gertz. supra, 418 U.S., at 336-337, 94 S.Ct., at 3005 *15 quoting Butts, supra, at 164, 87 S.Ct., at 1996 (Warren, C.J., concurring in result)). As Chief Justice Warren noted in concurrence, "[o]ur citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of 'public officials.' " Butts, supra, at 164, 87 S.Ct., at 1996. The Court has also determined that both for public officials and public figures, a showing of New York Times malice is subject to a clear and convincing standard **2704 of proof. Gertz, supra. 418 U.S., at 342, 94 S.Ct., at 3008.

The next step in this constitutional evolution was the Court's consideration of a private individual's defamation actions involving statements of public concern. Although the issue was initially in doubt, see Rosenbloom v. Metromedia, Inc., 403 U.S. 29.91 S.Ct. 1811, 29 L.Ed.2d 296 (1971), the Court ultimately concluded that the New York Times malice standard was inappropriate for a private person attempting to prove

he was defamed on matters of public interest. <u>Gertz v.</u> <u>Robert Welch, Inc., supra.</u> As we explained:

"Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy.

"[More important,] public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them. No such assumption is justified with respect to a private individual." <u>Id. 418 U.S., at 344-345, 94</u> S.Ct., at 3009 (footnote omitted).

Nonetheless, the Court believed that certain significant constitutional protections were warranted in this area. First, we held that the States could not impose liability without requiring some showing of fault. See id., at 347-348, 94 S.Ct., at 3010-3011 ("This approach ... recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury *16 to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation"). Second, we held that the States could not permit recovery of presumed or punitive damages on less than a showing of New York Times malice. See 418 U.S., at 350, 94 S.Ct., at 3012 ("Like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship ...").

Still later, in Philadelphia Newspapers. Inc. v. Hepps, 475 U.S. 767, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986), we held that "the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern." Id., at 777, 106 S.Ct., at 1564. In other words, the Court fashioned "a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages." Id., at 776, 106 S.Ct., at 1563. Although recognizing that "requiring the plaintiff to show falsity will insulate from liability some speech that is false, but unprovably so," the Court believed that this result was justified on the grounds that "placement by state law of the burden of proving truth upon media defendants who publish speech of public concern deters such speech because of the fear that liability will unjustifiably result." Id., at 777-778, 106 S.Ct., at 1564.

We have also recognized constitutional limits on the type of speech which may be the subject of state defamation actions. In <u>Greenbelt Cooperative Publishing Assn., Inc. v. Bresler, 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed.2d 6 (1970)</u>, a real estate developer had

engaged in negotiations with a local city council for a zoning variance on certain of his land, while simultaneously negotiating with the city on other land the city wished to purchase from him. A local newspaper published certain articles stating that some people had characterized the developer's negotiating position as "blackmail," and the developer sued for libel. Rejecting a contention that liability could be premised on the notion that the word "blackmail" implied the developer had committed the actual crime of blackmail, we held that "the imposition of *17 liability on such a basis was constitutionally impermissible--that as a matter of constitutional law, the word 'blackmail' in these circumstances was not slander when spoken, and not libel when reported in the Greenbelt News Review." Id., at 13, 90 S.Ct., at 1541. **2705 Noting that the published reports "were accurate and full," the Court reasoned that "even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [the developer's] negotiating position extremely unreasonable." Id., at 13-14, 90 S.Ct., at 1541-1542. See also Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50, 108 S.Ct. 876, 879, 99 L.Ed.2d 41 (1988) (First Amendment precluded recovery under state emotional distress action for ad parody which "could not reasonably have been interpreted as stating actual facts about the public figure involved"); Letter Carriers v. Austin. 418 U.S. 264. 284-286, 94 S.Ct. 2770, 2781-2782, 41 L.Ed.2d 745 (1974) (use of the word "traitor" in literary definition of a union "scab" not basis for a defamation action under federal labor law since used "in a loose, figurative sense" and was "merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members").

The Court has also determined that "in cases raising First Amendment issues ... an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.' "Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 499, 104 S.Ct. 1949. 1958, 80 L.Ed. 2d 502 (1984) (quoting New York Times. 376 U.S., at 284-286, 84 S.Ct., at 728-729). "The question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law." Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 685, 109 S.Ct. 2678, 2694, 105 L.Ed. 2d 562 (1989).

[4] Respondents would have us recognize, in addition to the established safeguards discussed above, still another First-Amendment-based protection for defamatory statements which are categorized as

"opinion" as opposed to "fact." For *18 this proposition they rely principally on the following dictum from our opinion in *Gertz:*

"Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact." 418 U.S., at 339-340, 94 S.Ct., at 3007 (footnote omitted).

Judge Friendly appropriately observed that this passage "has become the opening salvo in all arguments for protection from defamation actions on the ground of opinion, even though the case did not remotely concern the question." Cianci v. New Times Publishing Co., 639 F.2d 54, 61 (CA2 1980). Read in context, though, the fair meaning of the passage is to equate the word "opinion" in the second sentence with the word "idea" in the first sentence. Under this view, the language was merely a reiteration of Justice Holmes' classic "marketplace of ideas" concept. See Abrams v. United States, 250 U.S. 616, 630, 40 S.Ct. 17, 22, 63 L.Ed. 1173 (1919) (dissenting opinion) ("[T]he ultimate good desired is better reached by free trade in ideas -... the best test of truth is the power of the thought to get itself accepted in the competition of the market").

Thus, we do not think this passage from <u>Gertz</u> was intended to create a wholesale defamation exemption for anything that might be labeled "opinion." See <u>Cianci, supra</u>, at 62, n. 10 (The "marketplace of ideas" origin of this passage "points strongly to the view that the 'opinions' held to be constitutionally protected were the sort of thing that could be corrected by discussion"). Not only would such an interpretation be contrary to the tenor and context of the passage, but it would also ignore the fact that expressions of "opinion" may often imply an assertion of objective fact.

If a speaker says, "In my opinion John Jones is a liar," he implies a knowledge of **2706 facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts *19 upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, "In my opinion Jones is a liar," can cause as much damage to reputation as the statement, "Jones is a liar." As Judge Friendly aptly stated: "[It] would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words I think.' "See Cianci, supra, at 64. It is worthy of note that at common law,

even the privilege of fair comment did not extend to "a false statement of fact, whether it was expressly stated or implied from an expression of opinion." Restatement (Second) of Torts, § 566, Comment a (1977).

Apart from their reliance on the Gertz dictum, respondents do not really contend that a statement such as, "In my opinion John Jones is a liar," should be protected by a separate privilege for "opinion" under the First Amendment. But they do contend that in every defamation case the First Amendment mandates an inquiry into whether a statement is "opinion" or "fact," and that only the latter statements may be actionable. They propose that a number of factors developed by the lower courts (in what we hold was a mistaken reliance on the Gertz dictum) be considered in deciding which is which. But we think the "breathing space' "which " '[f]reedoms of expression require in order to survive,' "Hepps, 475 U.S., at 772, 106 S.Ct., at 1561 (quoting New York Times, supra, 376 U.S., at 272, 84 S.Ct., at 721), is adequately secured by existing constitutional doctrine without the creation of an artificial dichotomy between "opinion" and fact.

Foremost, we think <u>Hepps</u> stands for the proposition that a statement on matters of public concern must be provable as false before there can be liability under state defamation law, at least in situations, like the present, where a media defendant *20 is involved. [FN6] Thus, unlike the statement, "In my opinion Mayor Jones is a liar," the statement, "In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin," would not be actionable. <u>Hepps</u> ensures that a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection. [FN7]

FN6. In <u>Hepps</u> the Court reserved judgment on cases involving nonmedia defendants, see 475 U.S., at 779, n. 4, 106 S.Ct., at 1565, n. 4, and accordingly we do the same. Prior to <u>Hepps</u>, of course, where public-official or public-figure plaintiffs were involved, the <u>New York Times</u> rule already required a showing of falsity before liability could result. 475 U.S., at 775, 106 S.Ct., at 1563.

<u>FN7.</u> We note that the issue of falsity relates to the *defamatory* facts implied by a statement. For instance, the statement, "I think Jones lied," may be provable as false on two levels. First, that the speaker really did not think Jones had lied but said it anyway, and second

that Jones really had not lied. It is, of course, the second level of falsity which would ordinarily serve as the basis for a defamation action, though falsity at the first level may serve to establish malice where that is required for recovery.

Next, the <u>Bresler-Letter Carriers-Falwell</u> line of cases provides protection for statements that cannot "reasonably [be] interpreted as stating actual facts" about an individual. <u>Falwell</u>, 485 U.S., at 50, 108 S.Ct., at 879. This provides assurance that public debate will not suffer for lack of "imaginative expression" or the "rhetorical hyperbole" which has traditionally added much to the discourse of our Nation. See <u>id.</u>, at 53-55, 108 S.Ct., at 880-882.

[5][6] The New York Times-Butts-Gertz culpability requirements further ensure that debate on public issues remains "uninhibited, robust, and wide-open." New York Times, 376 U.S., at 270, 84 S.Ct., at 720. Thus, where a statement of "opinion" on a matter **2707 of public concern reasonably implies false and defamatory facts regarding public figures or officials, those individuals must show that such statements were made with knowledge of their false implications or with reckless disregard of their truth. Similarly, where such a statement involves a private figure on a matter of public concern, a plaintiff must show that the false connotations were made with some level of fault *21 as required by Gertz. [FN8] Finally, the enhanced appellate review required by Bose Corp. provides assurance that the foregoing determinations will be made in a manner so as not to "constitute a forbidden intrusion of the field of free expression." Bose Corp., 466 U.S., at 499, 104 S.Ct., at 1959 (quotation omitted).

<u>FN8.</u> Of course, the limitations on presumed or punitive damages established by <u>New York Times</u> and <u>Gertz</u> also apply to the type of statements at issue here.

[7] We are not persuaded that, in addition to these protections, an additional separate constitutional privilege for "opinion" is required to ensure the freedom of expression guaranteed by the First Amendment. The dispositive question in the present case then becomes whether a reasonable factfinder could conclude that the statements in the Diadiun column imply an assertion that petitioner Milkovich perjured himself in a judicial proceeding. We think this question must be answered in the affirmative. As the

Ohio Supreme Court itself observed: "[T]he clear impact in some nine sentences and a caption is that [Milkovich] 'lied at the hearing after ... having given his solemn oath to tell the truth.' " Scott. 25 Ohio St.3d, at 251, 496 N.E.2d, at 707. This is not the sort of loose, figurative, or hyperbolic language which would negate the impression that the writer was seriously maintaining that petitioner committed the crime of perjury. Nor does the general tenor of the article negate this impression.

We also think the connotation that petitioner committed perjury is sufficiently factual to be susceptible of being proved true or false. determination whether petitioner lied in this instance can be made on a core of objective evidence by comparing, inter alia, petitioner's testimony before the OHSAA board with his subsequent testimony before the trial court. As the Scott court noted regarding the plaintiff in that case: "[W]hether or not H. Don Scott did indeed perjure himself is certainly verifiable by a perjury action with evidence adduced from the transcripts and witnesses present at *22 the hearing. Unlike a subjective assertion the averred defamatory language is an articulation of an objectively verifiable event." Id., at 252, 496 N.B.2d, at 707. So too with petitioner Milkovich. [FN9]

> FN9. In their brief, amici Dow Jones et al. urge us to view the disputed statements "[a]gainst the background of a high profile controversy in a small community," and says that "[t]hey related to a matter of pressing public concern in a small town." Brief for Dow Jones et al. as Amici Curiae 27. We do not have the same certainty as do amici that people in a "small town" view statements such as these differently from people in a large city. Be that as it may, however, amici err in their factual assumption. Maple Heights is located in Cuyahoga County, Ohio, and in the 1980 census had a population of 29,735. Mentor is located in Lake County, Ohio, and in the 1980 census had a population of 42,065. Lake County adjoins Cuyahoga County on the east, and in the 1980 census had a population of 212,801. Both Maple Heights and Mentor are included in the Cleveland standard consolidated statistical area, which in 1980 had a population of 2,834,062. The high schools of both Mentor and Maple Heights played in the Greater Cleveland Conference.

The numerous decisions discussed above establishing

First Amendment protection for defendants in defamation actions surely demonstrate the Court's recognition of the Amendment's vital guarantee of free and uninhibited discussion of public issues. But there is also another side to the equation; we have regularly acknowledged the "important social values which underlie the law of defamation," and recognized that "[s]ociety has a pervasive and strong interest in preventing and redressing attacks upon reputation."

**2708Rosenblatt v. Baer, 383 U.S. 75. 86, 86 S.Ct. 669. 676, 15 L.Ed.2d 597 (1966). Justice Stewart in that case put it with his customary clarity:

"The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.

* * *

"The destruction that defamatory falsehood can bring is, to be sure, often beyond the capacity of the law to redeem. *23 Yet, imperfect though it is, an action for damages is the only hope for vindication or redress the law gives to a man whose reputation has been falsely dishonored." Id., at 92-93, 86 S.Ct., at 679-680 (concurring opinion).

We believe our decision in the present case holds the balance true. The judgment of the Ohio Court of Appeals is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Reversed.

Justice BRENNAN, with whom Justice MARSHALL joins, dissenting.

Since this Court first hinted that the First Amendment provides some manner of protection for statements of opinion, [FN1] notwithstanding any common-law protection, courts and commentators have struggled with the contours of this protection and its relationship to other doctrines within our First Amendment jurisprudence. Today, for the first time, the Court addresses this question directly and, to my mind, does so cogently and almost entirely correctly. I agree with the Court that under our line of cases culminating in Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 777, 106 S.Ct. 1558, 1564, 89 L.Ed.2d 783 (1986), only defamatory statements that are capable of being proved false are subject to liability under state libel law. See ante, at 2704. [FN2] I also agree with the Court that the "statement" *24 that the plaintiff must prove false under <u>Hepps</u> is not invariably the literal phrase published but rather what a reasonable reader would have understood the author to have said. See <u>ante</u>, at 2704-2705 (discussing <u>Greenbelt Cooperative Publishing Assn., Inc. v. Bresler, 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed.2d 6 (1970); <u>Letter Carriers v. Austin, 418 U.S. 264, 94 S.Ct. 2770, 41 L.Ed.2d 745 (1974); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988)).</u></u>

FN1. See, e.g., New York Times Co. v. Sullivan, 376 U.S. 254, 292, n. 30, 84 S.Ct. 710, 732, n. 30, 11 L.Ed.2d 686 (1964) ("Since the Fourteenth Amendment requires recognition of the conditional privilege for honest misstatements of fact, it follows that a defense of fair comment must be afforded for honest expression of opinion based upon privileged, as well as true, statements of fact"); Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-340, 94 S.Ct. 2997, 3006-3007, 41 L.Ed.2d 789 (1974) ("Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas").

FN2. The defendant in the Hepps case was a major daily newspaper and, as the majority notes, see ante, at 2704, the Court declined to decide whether the rule it applied to the newspaper would also apply to a nonmedia defendant. See 475 U.S., at 779, n. 4, 106 S.Ct., at 1565, n. 4. I continue to believe that "such a distinction is 'irreconcilable with the fundamental First Amendment principle that "[t]he inherent worth of ... speech in terms of its capacity for informing the public does not depend upon the identity of the source, whether corporation, association, union, or individual." ¹" <u>Id., at 780, 106 S.Ct., at 1565</u> (BRENNAN, J., concurring) (citations omitted).

In other words, while the Court today dispels any misimpression that there is a so-called opinion privilege wholly in addition to the protections we have already found to be guaranteed by the First Amendment, it determines that a protection for statements of pure opinion is dictated by existing First Amendment doctrine. As the Court explains, "full constitutional protection" extends to any statement relating to matters

of public concern "that cannot 'reasonably [be] interpreted as stating actual facts' about an individual.' **2709 Ante, at 2706. Among the circumstances to be scrutinized by a court in ascertaining whether a statement purports to state or imply "actual facts about an individual," as shown by the Court's analysis of the statements at issue here, see ante, at 2707 and n. 9, are the same indicia that lower courts have been relying on for the past decade or so to distinguish between statements of fact and statements of opinion: the type of language used, the meaning of the statement in context, whether the statement is verifiable, and the broader social circumstances in which the statement was made. See, e.g., Potomac Valve & Fitting Inc. v. Crawford Fitting Co., 829 F.2d 1280 (CA4 1987); Janklow v. Newsweek. Inc., 788 F.2d 1300 (CA8 1986); Ollman v. Evans, 242 U.S.App.D.C. 301, 750 F.2d 970 (1984), cert. denied, 471 U.S. 1127, 105 S.Ct. 2662, 86 L.Ed.2d 278 (1985).

*25 With all of the above, I am essentially in agreement. I part company with the Court at the point where it applies these general rules to the statements at issue in this case because I find that the challenged statements cannot reasonably be interpreted as either stating or implying defamatory facts about petitioner. Under the rule articulated in the majority opinion, therefore, the statements are due "full constitutional protection." I respectfully dissent.

1

As the majority recognizes, the kind of language used and the context in which it is used may signal readers that an author is not purporting to state or imply actual, known facts. In such cases, this Court has rejected claims to the contrary and found that liability may not attach "as a matter of constitutional law." Ante, at 2704. See, e.g., Bresler, supra (metaphor); Letter Carriers, supra (hyperbole); Falwell, supra (parody). In Bresler, for example, we found that Bresler could not recover for being accused of "blackmail" because the readers of the article would have understood the author to mean only that Bresler was manipulative and extremely unreasonable. See ante, at 2704. In Letter Carriers, we found that plaintiffs could not recover for being accused of being "traitor[s]" because the newsletter's readers would have understood that the author meant that plaintiffs' accurately reported actions were reprehensible and destructive to the social fabric, not that plaintiffs committed treason. See ante, at 2705.

Statements of belief or opinion are like hyperbole, as the majority agrees, in that they are not understood as actual assertions of fact about an individual, but they may be actionable if they *imply* the existence of false and defamatory facts. See ante, at 2706. The majority provides some general guidance for identifying when statements of opinion imply assertions of fact. But it is a matter worthy of further attention *26 in order "to confine the perimeters of [an] unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited." Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 505, 104 S.Ct. 1949, 1962, 80 L.Ed.2d 502 (1984). Although statements of opinion may imply an assertion of a false and defamatory fact, they do not invariably do so. Distinguishing which statements do imply an assertion of a false and defamatory fact requires the same solicitous and thorough evaluation that this Court has engaged in when determining whether particular exaggerated or satirical statements could reasonably be understood to have asserted such facts. See Bresler, supra: Letter Carriers, supra; Falwell, supra. As Justice Holmes observed long ago: "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." Towne v. Eisner, 245 U.S. 418, 425, 38 S.Ct. 158, 159, 62 L.Ed. 372 (1918).

For instance, the statement that "Jones is a liar," or the example given by the majority, "In my opinion John Jones is a liar"--standing **2710 alone-- can reasonably be interpreted as implying that there are facts known to the speaker to cause him to form such an opinion. See ante, at 2706. But a different result must obtain if the speaker's comments had instead been as follows: "Jones' brother once lied to me; Jones just told me he was 25; I've never met Jones before and I don't actually know how old he is or anything else about him, but he looks 16; I think Jones lied about his age just now." In the latter case, there are at least six statements, two of which may arguably be actionable. The first such statement is factual and defamatory and may support a defamation action by Jones' brother. The second statement, however, that "I think Jones lied about his age just now," can be reasonably interpreted in context only as a statement that the speaker infers, from the facts stated, that Jones told a particular lie. It is clear to the listener that the speaker does *27 not actually know whether Jones lied and does not have any other reasons for thinking he did. [FN3] Thus, the only fact implied by the second statement is that the speaker drew this inference. If the inference is sincere or nondefamatory, the speaker is not liable for damages. [FN4]

FN3. The Restatement (Second) of Torts § 566, Comment c (1977), makes a similar observation. It explains that a statement that

"I think C must be an alcoholic" is potentially libelous because a jury might find that it implies the speaker knew undisclosed facts to justify the statement. In contrast, it finds that the following statement could not be found to imply any defamatory facts: "A writes to B about his neighbor C: 'He moved in six months ago. He works downtown, and I have seen him during that time only twice, in his backyard around 5:30 seated in a deck chair with a portable radio listening to a news broadcast, and with a drink in his hand. I think he must be an alcoholic.'"

Yet even though clear disclosure of a comment's factual predicate precludes a finding that the comment implies other defamatory facts, this does not signify that a statement, preceded by only a partial factual predicate or none at all, necessarily implies other facts. The operative question remains whether reasonable readers would have actually interpreted the statement as implying defamatory facts. See ante, at 2706, n. 7; see generally Note, 13 Wm. Mitchell L.Rev. 545 (1987); Comment, 74 Calif.L.Rev. 1001 (1986); Zimmerman, Curbing the High Price of Loose Talk, 18 U.C.D.L.Rev. 359 (1985).

FN4. See ante, at 2706, n. 7 (noting that under Philadelphia Newspapers. Inc. v. Hepps, 475 U.S. 767, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986), "the issue of falsity relates to the defamatory facts implied by a statement" (emphasis changed)). Hepps mandates protection for speech that does not actually state or imply false and defamatory factsindependently of the Bresler-Letter Carriers-Falwell line of cases. Implicit in the constitutional rule that a plaintiff must prove a statement false to recover damages is a requirement to determine first what statement was actually made. The proof that <u>Hepps</u> requires from the plaintiff hinges on what the statement can reasonably be interpreted to mean. For instance, if Riley tells his friends that Smith cheats at cards and Smith then proves that he did not rob a convenience store, Smith cannot recover damages for libel on that basis because he has proved the wrong assertion false. Likewise, in the example in text, Jones cannot recover for defamation for the statement "I think Jones lied about his age just now" by producing proof that he did not lie about his age because, like Smith, he would have proved the wrong assertion false. The assertion Jones must prove false is that the speaker had, in fact, drawn the inference that Jones lied.

*28 II

The majority does not rest its decision today on any finding that the statements at issue explicitly state a false and defamatory fact. Nor could it. Diadiun's assumption that Milkovich must have lied at the court hearing is patently conjecture. [FN5] The majority finds Diadiun's statements actionable, however, because it concludes that these statements imply a factual assertion that Milkovich perjured himself at the judicial proceeding.**2711 I disagree. Diadiun not only reveals the facts upon which he is relying but he makes it clear at which point he runs out of facts and is simply guessing. Read in context, the statements cannot reasonably be interpreted as implying such an assertion as fact. See ante, at 2698-2699, n. 2 (reproducing the column).

FN5. Conjecture, when recognizable as such, alerts the audience that the statement is one of belief, not fact. The audience understands that the speaker is merely putting forward a hypothesis. Although the hypothesis involves a factual question, it is understood as the author's "best guess." Of course, if the speculative conclusion is preceded by stated factual premises, and one or more of them is false and defamatory, an action for libel may lie as to them. But the speculative conclusion itself is actionable only if it implies the existence of another false and defamatory fact.

Diadiun begins the column by noting that, on the day before, a Court of Common Pleas had overturned the decision by the Ohio High School Athletic Association (OHSAA) to suspend the Maple Heights wrestling team from that year's state tournament. He adds that the reversal was based on due process grounds. Diadiun emphasizes to the audience that he was present at the wrestling meet where the brawl that led to the team's suspension took place and that he was present at the hearing before the OHSAA. He attributes the brawl to Maple Heights coach Milkovich's wild gestures, ranting and egging the crowd on against the competing team from Mentor. He then describes Milkovich's testimony before the OHSAA, characterizing it as deliberate misrepresentation "*29 attempting not only to convince the board of [his] own innocence, but, incredibly, shift the blame of the affair to Mentor." Ante, at 2699, n. 2.

Diadiun then quotes statements allegedly made by Milkovich to the commissioners to the effect that his wrestlers had not been involved in the fight and his gestures had been mere shrugs.

At that point in the article, the author openly begins to Diadiun says that it "seemed " that Milkovich's and another official's story contained enough contradictions and obvious untruths that the OHSAA board was able to see through it and that "[p]robably " the OHSAA's suspension of the Maple Heights team reflected displeasure as much at the testimony as at the melee. Ante, at 2699, n. 2 (emphasis added). Then Diadiun guesses that by the time of the court hearing, the two officials "apparently had their version of the incident polished and reconstructed, and the judge apparently believed them." Ibid. (emphasis added). For the first time, the column quotes a third party's version of events. The source, an OHSAA commissioner, is described--in evident contrast to Diadiun-as having attended the proceeding. column does not quote any testimony from the court proceeding, nor does it describe what Milkovich said in There is only a vague statement from the OHSAA commissioner that the testimony "sounded pretty darned unfamiliar." [FN6] For the first time, Diadiun fails *30 to claim any firsthand knowledge, after stressing that he had personally attended both the meet and the OHSAA hearing. After noting again that the judge ruled in Milkovich's and Maple Heights' favor, Diadiun proclaims: "Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth." Ibid.

> FN6. The commissioner is quoted as having said: " I can say that some of the stories told to the judge sounded pretty darned unfamiliar.... It certainly sounded different from what they told us.' " Ante, at 2699, n. 2. This quotation might also be regarded as a stated factual premise on which Diadiun's speculation is based. However, Milkovich did not complain of the quotation in his pleadings. In any event, it is unlikely that it would be found defamatory. Diadiun had already characterized the testimony of the two officials before the OHSAA as "obvious untruths." Thus, the commissioner's alleged assertion that the testimony in court was different is quite nebulous. It might indicate that the officials told the truth in court, in contrast to the version given to the commissioners, or that the officials discussed

entirely different issues, rather than that they told a new lie.

No reasonable reader could understand Diadiun to be impliedly asserting--as fact--that Milkovich had perjured himself. Nor could such a reader infer that Diadiun had further information about Milkovich's court testimony on which his belief was based. It is plain from the column that Diadiun did not attend the court hearing. Diadiun also clearly had no detailed second hand information about what Milkovich had said in court. Instead, **2712 what suffices for "detail" and "color" are quotations from the OHSAA hearing--old news compared to the court decision which prompted the column--and a vague quotation from an OHSAA commissioner. Readers could see that Diadiun was focused on the court's reversal of the OHSAA's decision and was angrily supposing what must have led to it. [FN7]

> FN7. Both state and federal courts have found that audiences can recognize conjecture that neither states nor implies any assertions of fact, just as they can recognize hyperbole. For example, in Potomac Valve & Fitting, Inc. v. Crawford Fitting Co., 829 F.2d 1280, 1290 (CA4 1987), the court found that a disparaging statement about a product test in an industry newsletter, set forth following a list of seven observations about the test's methodology, "readily appears to be nothing more than the author's personal inference from the test results. The premises are explicit, and the reader is by no means required to share [the author's] conclusion." For the same reason, the court in Dunlap v. Wayne, 105 Wash.2d 529, 540, 716 P.2d 842, 849 (1986), concluded: "Arguments for actionability disappear when the audience members know the facts underlying an assertion and can judge the truthfulness of the allegedly defamatory statement themselves." See also National Assn. of Government Employees. Inc. v. Central Broadcasting Corp., 379 Mass. 220, 226, 396 N.E.2d 996, 1000 (1979) (finding that, as listeners were told the facts upon which a radio talk show host based her conclusion, they "could make up their own minds and generate their own opinions or ideas which might or might not accord with [the host's]"). The common-law doctrine of fair comment was also premised on such an observation. Where the reader knew or was told the factual foundation for a comment and

could therefore independently judge whether the comment was reasonable, a defendant's unreasonable comment was held to defame " 'himself rather than the subject of his remarks.' Hill, Defamation and Privacy Under the First Amendment, 76 Colum.L.Rev. 1205, 1229 (1976) (quoting Popham v. Pickburn, 158 Eng.Rep. 730, 733 (Ex.1862) (Wilde, B.)). "As Thomas Jefferson observed in his first Inaugural Address ... error of opinion need not and ought not be corrected by the courts 'where reason is left free to combat it.' Potomac, supra, at 1288-1289, quoting Thomas Jefferson's first Inaugural Address (The Complete Jefferson 385 (S. Padoyer ed. 1943)).

*31 Even the insinuation that Milkovich had repeated, in court, a more plausible version of the misrepresentations he had made at the OHSAA hearing is preceded by the cautionary term "apparently"--an unmistakable sign that Diadiun did not know what Milkovich had actually said in court. "[C]autionary language or interrogatories of this type put the reader on notice that what is being read is opinion and thus weaken any inference that the author possesses knowledge of damaging, undisclosed facts.... In a word, when the reasonable reader encounters cautionary language, he tends to 'discount that which follows.' " Ollman v. Evans, 242 U.S.App.D.C., at 314, 750 F.2d, at 983, quoting Burns v. McGraw-Hill Broadcasting Co., 659 P.2d 1351, 1360 (Colo.1983). See also B. Sanford, Libel and Privacy: The Prevention and Defense of Litigation 145 (1987) (explaining that many courts have found that words like "apparent" reveal "that the assertion is qualified or speculative and is not to be understood as a declaration of fact"); Information Control Corp. v. Genesis One Computer Corp., 611 F.2d 781, 784 (CA9 1980) (explaining that a statement phrased in language of apparency "is less likely to be understood as a statement of *32 fact rather than as a statement of opinion"); Gregory v. McDonnell Douglas Corp., 17 Cal.3d 596, 603, 131 Cal.Rptr. 641, 644, 552 P.2d 425, 429 (1976) (finding a letter "cautiously phrased in terms of apparency" did not imply factual assertions); Stewart v. Chicago Title Ins. Co., 151 III.App.3d 888, 894, 104 III.Dec. 865, 868, 503 N.E.2d 580, 583 (1987) (finding a letter "couched in language of opinion rather than firsthand knowledge" did not imply factual assertions). Thus, it is evident from what Diadiun actually wrote that he had no unstated reasons for concluding that Milkovich perjured himself.

Furthermore, the tone and format of the piece notify readers to expect speculation and personal judgment. The tone is pointed, exaggerated, and heavily laden with emotional rhetoric and moral outrage. Diadiun never says, for instance, that Milkovich committed perjury. He says that "[a]nyone who **2713 attended the meet ... knows in his heart" that Milkovich lied--obvious hyperbole as Diadiun does not purport to have researched what everyone who attended the meet knows in his heart.

The format of the piece is a signed editorial column with a photograph of the columnist and the logo "TD Even the headline on the page where the column is continued -- "Diadiun says Maple told a lie," ante, at 2698-- reminds readers that they are reading one man's commentary. While signed columns may certainly include statements of fact, they are also the "well recognized home of opinion and comment." Mr. Chow of New York v. Ste. Jour Azur S.A., 759 F.2d 219. 227 (CA2 1985). Certain formats--editorials, reviews, political cartoons, letters to the editor--signal the reader to anticipate a departure from what is actually known by the author as fact. See Ollman v. Evans, supra, at 317. 750 F.2d. at 986 ("The reasonable reader who peruses [a] column on the editorial or Op-Ed page is fully aware that the statements found there are not 'hard' news like those printed on the front page or elsewhere in the news sections of the newspaper"); R. Smolla, Law of Defamation § 6.12(4), n. 252 (1990) (collecting *33 cases); Zimmerman, Curbing the High Price of Loose Talk, 18 U.C.D.L.Rev. 359, 442 (1985) (stressing the need to take into account "the cultural common sense of the ordinary listener or reader"). [FN8]

> FN8. The readers of Diadiun's column would also have been alerted to regard any implicit claim of impartiality by Diadiun with skepticism because Diadiun's newspaper is published in the county in which Mentor High School--home to the team that was allegedly mauled at the wrestling meet- is located. Where readers know that an author represents one side in a controversy, they are properly warned to expect that the opinions expressed may rest on passion rather than factual foundation. See, e.g., Potomac Valve & Fitting Inc. v. Crawford Fitting Co., 829 F.2d, at 1290 (explaining that the contents of a company's newsletter would be understood as reflecting the professional interests of the company rather than as "a dispassionate and impartial assessment" of a test of a competitor's product); Information Control Corp. v. Genesis One Computer Corp., 611 F.2d 781, 784 (CA9 1980) (recognizing that statements in the early weeks of litigation by

one side about the other were likely to include unsubstantiated charges, but that these "are highly unlikely to be understood by their audience as statements of fact").

Ш

Although I agree with the majority that statements must be scrutinized for implicit factual assertions, the majority's scrutiny in this case does not "hol [d] the balance true," ante, at 2708, between protection of individual reputation and freedom of speech. The statements complained of neither state nor imply a false assertion of fact, and, under the rule the Court reconfirms today, they should be found not libel "'as a matter of constitutional law.' "Ante, at 2704, quoting Bresler, 398 U.S., at 13, 90 S.Ct., at 1541. Readers of Diadiun's column are signaled repeatedly that the author does not actually know what Milkovich said at the court hearing and that the author is surmising, from factual premises made explicit in the column, that Milkovich must have lied in court. [FN9]

FN9. Milkovich does not challenge the accuracy of any of Diadiun's stated premises. Nor does he complain or proffer proof that Diadiun had not, in fact, concluded from the stated premises that Milkovich must have lied in court. There is, therefore, no call to consider under what circumstances an insincere speculation would constitute a false and defamatory statement under Philadelphia Newspapers, Inc. v. Hepps. 475 U.S. 767, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986). However, I would think that documentary or eyewitness testimony that the speaker did not believe his own professed opinion would be required before a court would be permitted to decide that there was sufficient evidence to find that the statement was false and submit the question to a jury. Without such objective evidence, a jury's judgment might be too influenced by its view of what was said. As we have long recognized, a jury "is unlikely to be neutral with respect to the content of speech and holds a real danger of becoming an instrument for the suppression of those 'vehement, caustic, and sometimes unpleasantly sharp attacks,' ... which must be protected if the guarantees of the First and Fourteenth Amendments are to prevail." Monitor Patriot Co. v. Rov. 401 U.S. 265, 277, 91 S.Ct. 621, 628, 28 L.Ed.2d 35 (1971) (quoting New York Times, 376 U.S., at 270, 84 S.Ct., at 720). See also Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 510-511, and n. 29, 104 S.Ct. 1949. 1964-1965, and n. 29, 80 L.Ed.2d 502 (1984) (discussing the risks of submitting various questions to juries where freedom of speech is at stake); Gertz, 418 U.S., at 349, 94 S.Ct., at 3011 (expressing concern about juries punishing unpopular opinion rather than compensating individuals for injuries sustained by the publication of a false fact); Smolla, Law of Defamation §§ Zimmerman, 18 6.05(3)(a)-(c) (1990); U.C.D.L.Rev., at 430.

**2714 *34 Like the "imaginative expression" and the "rhetorical hyperbole" which the Court finds have "traditionally added much to the discourse of our Nation," ante, at 2706, conjecture is intrinsic to "the free flow of ideas and opinions on matters of public interest and concern" that is at "the heart of the First Amendment." Falwell, 485 U.S., at 50, 108 S.Ct., at The public and press regularly examine the activities of those who affect our lives. "One of the perogatives of American citizenship is the right to criticize men and measures." Id., at 51, 108 S.Ct., at 879 (quoting Baumgartner v. United States, 322 U.S. 665, 673-674, 64 S.Ct. 1240, 1244-1245, 88 L.Ed. 1525 (1944)). But often only some of the facts are known, and solely through insistent prodding-through conjecture as well as research-- can important public questions be subjected to the "uninhibited, robust, and wide-open" debate to which this country is profoundly committed. New York Times Co. v. Sullivan, 376 U.S. 254, 270, 84 S.Ct. 710, 720, 11 L.Ed.2d 686 (1964).

Did NASA officials ignore sound warnings that the Challenger Space Shuttle would explode? Cuban-American *35 leaders arrange for John Fitzgerald Kennedy's assassination? Was Kurt Waldheim a Nazi officer? Such questions are matters of public concern long before all the facts are unearthed, if they ever are. Conjecture is a means of fueling a national discourse on such questions and stimulating public pressure for answers from those who know more. " 'The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system." Id., at 269, 84 S.Ct., at 720 (quoting Stromberg v. California, 283 U.S. 359, 369, 51 S.Ct. 532, 535, 75 L.Ed. 1117 (1931)).

What may be more disturbing to some about Diadiun's conjecture than, say, an editorial in 1960 speculating that Francis Gary Powers was in fact a spy, despite the Government's initial assurances that he was not, is the naivete of Diadiun's conclusion. The basis of the court decision that is the subject of Diadiun's column was that Maple Heights had been denied its right to due process by the OHSAA. Diadiun, as it happens, not only knew this but included it in his column. But to anyone who knows what "due process" means, it does not follow that the court must have believed some lie about what happened at the wrestling meet, because what happened at the meet would not have been germane to the questions at issue. There may have been testimony about what happened, and that testimony may have been perjured, but to anyone who understands the patois of the legal profession there is no reason to assume--from the court's decision--that such testimony must have been given.

Diadiun, therefore, is guilty. He is guilty of jumping to conclusions, of benightedly assuming that court decisions are always based on the merits, and of looking foolish to lawyers. He is not, however, liable for defamation. Ignorance, without more, has never served to defeat freedom of speech. "The constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are *36 offered.' "New York Times, supra, at 271, 84 S.Ct., at 721 (quoting NAACP v. Button, 371 U.S. 415, 445, 83 S.Ct. 328, 344, 9 L.Ed.2d 405 (1963)).

I appreciate this Court's concern with redressing injuries to an individual's reputation. But as long as it is clear to the reader that he is being offered conjecture and not solid information, the danger to reputation is **2715 one we have chosen to tolerate in pursuit of " 'individual liberty [and] the common quest for truth and the vitality of society as a whole." Falwell, supra, 485 U.S., at 50-51, 108 S.Ct., at 879 (quoting Bose Corp., 466 U.S., at 503-504, 104 S.Ct., at 1960-1961). Readers are as capable of independently evaluating the merits of such speculative conclusions as they are of evaluating the merits of pure opprobrium. Punishing such conjecture protects reputation only at the cost of expunging a genuinely useful mechanism for public debate. "In a society which takes seriously the principle that government rests upon the consent of the governed, freedom of the press must be the most cherished tenet." Edwards v. National Audubon Society. Inc., 556 F.2d 113, 115 (CA2), cert. denied sub nom. Edwards v. New York Times Co., 434 U.S. 1002, 98 S.Ct. 647, 54 L.Ed.2d 498 (1977).

It is, therefore, imperative that we take the most particular care where freedom of speech is at risk, not

only in articulating the rules mandated by the First Amendment, but also in applying them. "Whatever is added to the field of libel is taken from the field of free debate.' "New York Times, supra. at 272, 84 S.Ct., at 721 (quoting Sweeney v. Patterson, 76 U.S.App.D.C. 23, 24, 128 F.2d 457, 458, cert. denied, 317 U.S. 678, 63 S.Ct. 160, 87 L.Ed. 544 (1942)). Because I would affirm the Ohio Court of Appeals' grant of summary judgment to respondents, albeit on somewhat different reasoning, I respectfully dissent.

110 S.Ct. 2695, 497 U.S. 1, 111 L.Ed.2d 1, 58 USLW 4846, 60 Ed. Law Rep. 1061, 17 Media L. Rep. 2009

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EXHIBIT 6

933 F.Supp. 903 65 USLW 2062

(Cite as: 933 F.Supp. 903)

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United States District Court, N.D. California.

Russell Allen NORDYKE and Sallie Ann Nordyke, dba Trade Shows, Plaintiffs,

COUNTY OF SANTA CLARA, et al., Defendants.

No. C-96-20367-JW.

July 8, 1996.

Gun show entrants filed motion for preliminary injunction against ban on act of selling guns at county fairground on basis that ban violated their right to free speech. The District Court, Ware, J., held that entrants demonstrated likelihood of success on merits.

Motion granted.

West Headnotes

[1] Injunction 5 138.1 212k138.1 Most Cited Cases

To obtain preliminary injunction, moving party must show combination of probable success on merits and possibility of irreparable injury or that serious questions are raised and balance of hardships tips sharply in its favor.

[2] Civil Rights 399 78k399 Most Cited Cases

Gun show entrants established likelihood that they would prevail on merits of their challenge to county ban on act of selling guns as part of gun shows at county fairgrounds, on basis that ban violated their rights to free speech, and so were entitled to preliminary injunction against enforcement of ban, ban addressed commercial speech, county failed to present any evidence that ban on sales of guns at fairground would protect health, safety, and welfare of citizens, and ban did not restrict gun sales at other locations in county. U.S.C.A. Const.Amend. 1.

[3] Constitutional Law 50.2 92k90.2 Most Cited Cases Selling of guns is not pure conduct, but involves speech, and so is subject to First Amendment protection of speech, since selling of gun requires exchange of verbal communication. <u>U.S.C.A. Const.Amend. 1</u>.

[4] Constitutional Law 90.2 92k90.2 Most Cited Cases

For government regulation to restrict commercial speech that concerns lawful activity and is not misleading, asserted governmental interest must be substantial, regulation must directly advance interest, and regulation must not be more extensive than is necessary to serve that interest. <u>U.S.C.A.</u> Const.Amend. 1.

*904 Edward P. Davis, Jr., O'Donnell Rice Davis Alexander & Granneman, The Genesis Law Group LLP, San Jose, CA, Russell S. Bogue, Joseph T. Wargo, Holland & Knight, Atlanta, GA, for plaintiffs.

Linda Deacon, Santa Clara County Counsel's Office, San Jose, CA, Susan Roeder, Thelen Marrin Johnson & Bridges, San Jose, CA, for defendant Santa Clara County.

ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

WARE, District Judge.

I. INTRODUCTION

This case involves one of the most controversial issues of our day: the right to bear arms and the authority of the government to control the exercise of that right. Based upon concern for public health and safety, the County of Santa Clara imposed a restriction against gun shows at the County Fairgrounds. The restriction was later clarified to allow shows, but only prohibits sales of guns at the shows. The Plaintiffs seek a preliminary injunction against the enforcement of the restriction on the ground that it is unconstitutional.

The Court recognizes the threat to community health and safety caused by proliferation of firearms, too many of which end up in the hands of people who use them irresponsibly. Nevertheless, the Court finds unconstitutional the restriction on gun show sales at the County Fairgrounds. As set forth below, the Court enjoins the County from enforcing the restriction while this action is pending.

II. BACKGROUND

The Santa Clara County Fairgrounds is owned and operated by Santa Clara County and is funded by County taxpayers. The Fairgrounds is the center for a variety of organizations and activities, including the County Fair, religious meetings and services, cultural events, political speeches and various celebrations of all kinds. Since 1993, Plaintiffs have appeared at the Fairgrounds and conducted gun shows without incident on 20 occasions.

On January 23, 1996, during a public meeting of the Santa Clara County Board of Supervisors, the Board passed an addendum to the County's lease for the County Fairgrounds. The addendum precludes the Santa Clara County Fairgrounds Management Corp. Inc. ("FMC") from leasing fairground space to vendors for the purpose of holding "gun shows". On April 16, 1996, the County confirmed in a letter to FMC that the addendum was limited to the "sale of guns" and did not prohibit a vendor from conducting a "gun show" as long as no guns were sold during the show on fairground property. (See Exhibit N to Plaintiffs' Complaint). The letter states in relevant part:

It is the intention of the Board only to prohibit any person from selling, offering for sale, supplying, delivering, or giving possession or control of firearms or ammunition to any other person at a gun show at the fairgrounds. This prohibition applies to any act initiating any of the foregoing transactions with the intent of completing them at a later date.

*905 It is not the intention of the Board to prohibit the exchange of information or ideas about guns, gun safety, or the display of guns for historical or educational purposes.

Apparently in response to Plaintiffs' concerns and challenge to the addendum, a second public meeting was held by the Board on June 25, 1996. Plaintiffs' counsel addressed the Board, as did numerous members of the public, to voice concern over the passage of the addendum. Some county residents contend, as Plaintiffs do, that the addendum is unconstitutional and exceeds the Board's authority, while other residents applaud the Board's efforts for the attempt to control the rising incidences of violence associated with guns in this County.

Following the hearing on June 25, the Board affirmed its earlier conclusions and decided to ban the sale of guns at the Fairgrounds. The Board clarified that the addendum bans only the sale of guns and does not prohibit any vendor from conducting a gun show at the Fairgrounds.

Plaintiffs Russell and Sallie Nordyke, dba Trade Shows', ("Plaintiffs") filed this lawsuit and moved for entry of a preliminary injunction in the above- entitled action. Plaintiffs were present in Court and were represented by attorney Joseph D. Wargo of the law firm of Holland & Knight. Mr. Wargo was admitted to the Court pro hac vice. Defendants County of Santa Clara, Santa Clara County Fairgrounds Management Corp., Inc., and the individual members of the Santa Clara County Board of Supervisors ("Defendants") were represented by the County Counsel's Office and attorney Paul A. Bruno of the law firm of Thelen, Marrin, Johnson & Bridges.

Based upon such addendum, Plaintiffs contend that Defendants have forbidden Plaintiffs access to a public forum—the Santa Clara County Fairgrounds—and have infringed upon Plaintiffs' Constitutional rights to free speech. Plaintiffs argue that Defendants' addendum cannot withstand judicial scrutiny and that Defendants must be enjoined from seeking to enforce the addendum.

Defendants contend that the addendum does not regulate speech but regulates only non-protected conduct. Defendants invite Plaintiffs to host a gun show on the premises of the Fairgrounds-Plaintiffs are simply forbidden from selling guns at the Fairgrounds. Plaintiffs are free to make whatever verbal or written comments they wish about guns at the Fairgrounds; they simply must sell the guns at a different location. Defendants point out that there are over 136 locations throughout Santa Clara County which sell guns. The gun show may display guns; permit speakers to voice their opinions about guns; pass out literature regarding guns, etc. Defendants contend that there are no regulations or prohibitions on speech regarding guns.

Defendants alternatively contend that, even assuming that the Court finds that the addendum prohibits a form of protected speech, that the addendum is constitutionally permissible because it places proper restrictions on purely commercial speech. Therefore, Defendants argue that Plaintiffs' motion for entry of a preliminary injunction must be denied.

III. LEGAL STANDARDS

[1] In the Ninth Circuit, in order to obtain a preliminary injunction, the moving party must show a combination of probable success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in its favor. Atari Games Corp. v. Nintendo of America. Inc.. 897 F.2d 1572, 1575 (Fed.Cir.1990); Vision Sports, Inc. v. Melville Corp., 888 F.2d 609, 612 (9th

Cir.1989).

IV. DISCUSSION A. Speech vs. Conduct

[2][3] Plaintiffs move for entry of an injunction in this matter to prohibit Defendants from enforcing the new addendum to the County Fairgrounds lease on the bases that such addendum violates their First Amendment and Equal Protection rights as guaranteed in the United States Constitution. Pursuant to the Constitution, Plaintiffs *906 contend that their speech is protected and that Defendants cannot impose unlawful restrictions on such speech. Defendants argue that Plaintiffs are banned solely from the act of selling guns (i.e., conduct) and that, therefore, the addendum does not address constitutionally protected speech. Even assuming that the Court construes Plaintiffs' actions as involving protected speech, Defendants contend that the addendum is constitutionally permissible.

The first issue that the Court must address is whether the type of expression at issue herein constitutes speech or conduct. Although the evidence shows that Plaintiffs have been permitted to sell guns at their shows at the County Fairgrounds in the past, such evidence also shows that far more than simply a gun sale occurs at such shows. For instance, the shows also permit a forum for the exchange and debate of ideas regarding guns and gun control and offer an opportunity for candidates for political office to express their views on these important social issues. Plaintiffs contend that all of these actions which occur at their gun shows are constitutionally protected forms of speech.

Defendants do not dispute the fact that Plaintiffs' guns shows may offer benefits to the community. In fact, Defendants encourage the exchange of ideas and the offering of a forum at which political candidates may speak. Defendants point out that such activities are not banned by the addendum at issue herein. According to Defendants, the addendum only prohibits the sale of guns and does not restrict or prohibit the free exchange of ideas regarding such guns. The addendum simply requires that Plaintiffs sell their guns at a location other than the County Fairgrounds. According to Defendants' analysis, the addendum does not even address speech and seeks to regulate only a narrow aspect of Plaintiffs' conduct.

The Court cannot agree with Defendants' analysis regarding the addendum's attempt to regulate only conduct, however, since it is undisputed that some type of speech is necessarily involved in the sale of any gun. A gun may not be sold in silence, without any exchange of verbal communication whatsoever.

Therefore, the Court rejects the argument that the selling of guns constitutes pure conduct and does not involve any type of speech.

B. Commercial Speech Analysis

Having determined that some speech is necessarily involved in the sale of guns, the Court must next determine the type of speech involved in such transactions. The Supreme Court has determined that where speech "does no more than propose a commercial transaction" it is classified as "commercial speech" and is afforded some constitutional protection. Pittsburgh Press Co. v. Human Relations Comm., 413 U.S. 376. 93 S.Ct. 2553, 37 L.Ed.2d 669 (1973). In this action, Plaintiffs contend that more than simply a commercial transaction is involved in the gun sales at its shows. Plaintiffs argue that since many ideas, suggestions and political literature is exchanged in conjunction with the sale of guns at its shows, pure speech and commercial speech are "inextricably intertwined" and that, therefore, the entire category of speech attendant with a gun sale must be classified as noncommercial. A similar argument was raised by the defense in the case of Bd. of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989).

In <u>Fox</u>, the State University of New York passed a regulation banning private commercial enterprises from conducting business on the state campus. American Future Systems, Inc. ("AFS") is a company which sells various housewares to college students. AFS sells its wares through "tupperware parties", which consist of a prospective buyer who acts as a host or hostess and who gathers other prospective buyers together to listen to a demonstration about the product and to make purchases. The host or hostess then receives a gift for his or her organizational efforts.

AFS conducted a demonstration in a student's dormitory located on the state's campus and was arrested for violation of the state's regulation. AFS and the students involved file an action against the University for a violation of their First Amendment rights. The students claimed that they had the constitutional right to conduct "tupperware parties" in their dorm rooms if they so *907 desired since such "speech" was constitutionally protected. The Supreme Court found that the speech was protected, but only under the rubric of commercial speech.

The Court held that the fact that educational elements such as home economics was included in AFS' sales presentations did not convert such speech to noncommercial speech. The Court reiterated that "communications can constitute commercial speech

notwithstanding the fact that they contain discussions of important public issues.... We have made clear that advertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech." Fox, supra at page 475, 109 S.Ct. at page 3032.

[4] The Fox Court then noted the analysis to be applied when analyzing the lawfulness of restrictions placed on commercial speech. As set forth in Central Hudson Gas & Electric Corp. V. Public Service Comm'n of New York, 447 U.S. 557, 566, 100 S.Ct. 2343, 2351, 65 L.Ed.2d 341 (1980), such speech must concern lawful activity and must not be misleading. If the speech at issue fulfills these requirements, then the court must determine whether the asserted governmental interest is substantial. If there is a substantial governmental interest, then the court must determine whether the regulation directly advances the governmental interest asserted and whether it is not more extensive than is necessary to serve that interest. Id.

The Court finds that the <u>Fox</u> holding is instructive in this case. The simple fact that the gun sales which occur at Plaintiffs' shows may involve types of speech which are afforded constitutional protection does not mean that the actual sale of guns is afforded constitutional protection. As in <u>Fox</u>, the Court finds that the speech which occurs at Plaintiffs' gun show sales constitutes commercial speech.

Since the Court finds that the addendum at issue which bans the sale of guns at Plaintiffs' gun shows involves a prohibition on commercial speech, it must now determine the constitutional analysis to be applied to test the validity of the addendum. As the Court pointed out in *Rubin v. Coors Brewing Co.*, 514 U.S. 476, -----, 115 S.Ct. 1585, 1587-88, 131 L.Ed.2d 532 (1995), the mere fact that messages propose commercial transactions does not dictate the constitutional analysis that should apply to decisions to suppress them.

In this instance, the addendum does not seek to regulate "pure" speech but addresses only speech which occurs as an adjunct to the sale of a gun. As such, the Court finds that it is appropriate to apply the analysis enunciated by the Supreme Court in <u>Central Hudson</u> which discusses the standard for constitutionally permissible regulations regarding commercial speech.

To summarize, the <u>Central Hudson</u> analysis requires that the Court determine whether the speech is truthful and is not misleading. If the speech is truthful and does not mislead, then the Court must determine if a substantial governmental interest exists regarding the

necessity for the regulation. If such an interest exists, then the Court determines whether the regulation directly advances the governmental interest and whether the regulation is not more extensive than necessary to achieve the interest. The Court now applies this analysis to the evidence submitted in this case.

1. Lawful/Misleading Activity

The evidence submitted to the Court with respect to Plaintiffs' motion for entry of a preliminary injunction shows that the speech involved in the sale of guns at Plaintiffs' shows involves lawful activity. As noted, Plaintiffs have conducted shows in the past at the Fairgrounds without incident. Nor has there been evidence presented to the Court which indicates that the speech involved in the sale of guns is in any way misleading. Presumably, no complaints have been filed against Plaintiffs as a result of their prior sales of guns at the Fairgrounds. Having found that the speech attendant to the sale of guns is lawful and is not misleading, the Court must next analyze whether the asserted governmental interest is substantial in this instance.

2. Substantial Government Interest

Plaintiffs contend that the County has no interest, much less a substantial interest, in *908 prohibiting the sale of firearms on the Fairgrounds. Plaintiffs base their contention on the allegation that the County considered no objective evidence that there is a "substantial governmental interest" at stake herein in passing the addendum at issue. Plaintiffs argue that the County Board members simply superimposed their own personal viewpoints regarding gun sales and the "image" of the County which they wish to project and concluded that there is a substantial governmental interest in banning gun sales at the Fairgrounds.

Defendants counter that it is not necessary for the Board to base its decision to ban gun sales at the Fairgrounds on empirical data but may rest its decision on rational speculation and the County's perceived health, safety and welfare of its citizens. Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico, 478 U.S. 328, 341, 106 S.Ct. 2968, 2976-77. 92 L.Ed.2d 266 (1986); National Paint & Coatings v. City of Chicago, 45 F.3d 1124, 1127 (7th Cir.1995). Prior to its passage of the addendum, the Board heard the testimony of Dina Dickinson, the Executive Director of Public Health, and Dick de la Rosa, Mayor Hammer's Gang Policy Manager, regarding the fact that the proliferation of guns has created an alarming public health and fiscal crisis for the County of Santa Clara.

In response to Defendants' arguments, Plaintiffs point out that four Supreme Court Justices recently criticized the <u>Posadas</u> conclusion regarding a governmental body's discretion to suppress truthful, nonmisleading information for paternalistic purposes. <u>See, 44 Liquormart, Inc. v. Rhode Island, 517U.S. 484, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996).</u> Therefore, Plaintiffs contend that the Court should disregard the <u>Posadas</u> holding in this case.

The <u>44 Liquormart</u> case struck down the state of Rhode Island's attempt to ban accurate information regarding retail prices of alcoholic beverages. Four Justices in <u>Liquormart</u> criticized the <u>Posadas</u> holding for the proposition that the price advertising ban should be permitted because it targets commercial speech which pertains to a "vice" activity. The Supreme Court refused to recognize a "vice" exception to the commercial speech doctrine. See, <u>Rubin v. Coors Brewing Co.</u>, 514 U.S. 476, ---, 115 S.Ct. 1585, 1589, 131 L.Ed.2d 532 (1995).

The Liquormart Court did not overrule the holding in Posadas and the Court finds that it may rely on the Posadas holding for the proposition that the County may act in the absence of empirical evidence when it rationally perceives a threat to the health, welfare and benefit of its citizens. However, there has been no evidence presented to the Court which shows that the Board acted in response to a perceived threat to the County's health or welfare when it passed the ban on gun sales at the Fairgrounds. Absolutely no evidence was presented to the Board which suggested any need to curtail gun sales at that location. There have been no problems associated with Plaintiffs' gun shows, or any gun shows, held at the Fairgrounds. There is no evidence of any unlawful activity occurring at such shows. In fact, if a gun is purchased a such a show, it does not actually exchange hands until the requisite waiting period has expired, some fifteen or more days after the show.

Although the Board was presented with some testimony regarding the fact that the sale of guns creates a health and financial crisis for the County, such testimony was not in any way directed to the sale of guns at the Fairgrounds. There is absolutely no evidence in the record as to why the Board chose to target the Fairgrounds as a place to ban gun sales and yet allows such guns to be sold down the street.

For the reasons stated above, the Court finds that the County has not articulated a substantial government interest in banning gun sales at the County Fairgrounds. Therefore, the addendum is unconstitutional and cannot be enforced until the conclusion of this action.

3. Advancement/Extensiveness

Even assuming that the County had articulated a substantial governmental interest in banning gun sales at the Fairgrounds, the Court would have to consider whether the ban directly advances the governmental interest asserted and whether such ban is not *909 more extensive than necessary to serve that interest. Central Hudson, supra at 566, 100 S.Ct. at 2351. In order to evaluate whether the ban on gun sales at the Fairgrounds directly advances the County's interest in protecting the safety and welfare of its citizens, the Court must determine whether the ban provides effective or direct support for the government's interest. Id.

In this case, there is no evidence that the ban on gun sales at the Fairgrounds would curtail the possession of firearms on the County's premises. In addition, as noted above, the ban is not narrowly tailored to achieve the ends desired since the guns are not even exchanged at the Fairgrounds but at a much later date. By banning gun sales only at the Fairgrounds, the Board achieves nothing in the way of curtailing the overall possession of guns in the County.

As noted above, the ban does not restrict gun sales in any of the over 100 distributorships throughout the County. The County simply wishes to portray a "weapons-free" image at its Fairgrounds, however, such an image is not created by banning gun sales since the sales do not permit any exchange of the guns on the property owned by the County. Even with the ban, prospective buyers can examine the merchandise and discuss the prospective sale with Plaintiffs at the Fairgrounds during the operation of Plaintiffs' shows. Therefore, the Court does not find that the addendum directly advances the governmental interest asserted and finds that it is more extensive than necessary to achieve such interest.

V. CONCLUSION

For the reasons stated above, the Court GRANTS Plaintiffs' motion for entry of a preliminary injunction. The Court finds that the addendum to the County Fairgrounds lease provision which bans gun sales on the premises of the County Fairgrounds is not constitutionally permissible and violates Plaintiffs' constitutional rights. Plaintiffs are free to conduct their gun shows at the Fairgrounds and may sell guns at such shows. Based on the reasons set forth in this Order, the Court finds that Plaintiffs are likely to succeed on the merits of their constitutional challenge to the addendum at trial and that the balance of hardships tip sharply in

their favor. Therefore, the claim for injunctive relief is granted. Defendants may not enforce the addendum pending the outcome of this litigation. The parties are ordered to file briefs on or before July 22, 1996 addressing why this preliminary injunction should not be made permanent.

933 F.Supp. 903, 65 USLW 2062

END OF DOCUMENT

EXHIBIT 7

108 S.Ct. 2667 101 L.Ed.2d 669, 56 USLW 4869 (Cite as: **487** U.S. **781**, **108** S.Ct. **2667**)

P

Supreme Court of the United States

Randolph RILEY, etc., et al., Appellants,

NATIONAL FEDERATION OF THE BLIND OF NORTH CAROLINA, INC., et al.

No. 87-328.

Argued March 23, 1988. Decided June 29, 1988.

Charitable organizations, professional charitable solicitors and others filed action challenging constitutionality of North Carolina law regarding solicitation of funds for charitable purposes. United States District Court for the Eastern District of North Carolina, 635 F.Supp. 256, W. Earl Britt, Chief Judge, found licensing and disclosure provisions unconstitutional, and the state appealed. The Court of Appeals for the Fourth Circuit, 817 F.2d 102, affirmed, and the state appealed. The Supreme Court, Justice Brennan, held that: (1) statute regulating solicitation of charitable contributions is subject to review under strict scrutiny standard; (2) state's definition of reasonable fee, using percentages, was not narrowly tailored to state's interest in preventing fraud; (3) requirement that professional fund raisers disclose a potential donor's percentage of charitable contributions collected during previous year which were actually turned over to charity was unduly burdensome and unconstitutional; and (4) licensing requirement for professional fund raisers was unconstitutional.

Affirmed.

Justice Scalia filed an opinion concurring in part and concurring in judgment.

Justice Stevens filed an opinion concurring in part and dissenting in part.

Chief Justice Rehnquist filed a dissenting opinion in which Justice O'Connor joined.

West Headnotes

[1] Constitutional Law 590.1(1.1) 92k90.1(1.1) Most Cited Cases The solicitation of charitable contributions is protected speech, and thus using percentages to decide the legality of a fund raiser's fee is not narrowly tailored to the state's interest in preventing fraud. <u>U.S.C.A.</u> Const.Amend. 1; N.C.G.S. § 131C-1 et seq.

[2] Constitutional Law 50.1(1.1) 92k90.1(1.1) Most Cited Cases

A state's three-tiered, percentage-based definition of "unreasonable" nature of fees paid to professional fund raisers under statute regulating charitable solicitation practices was subject to strict scrutiny under the First Amendment. <u>U.S.C.A. Const.Amend. 1</u>; <u>N.C.G.S. § 131C-1</u> et seq.

Under the First Amendment, it is presumed that speakers, not the government, know best what they want to say and how to say it. <u>U.S.C.A. Const.Amend.</u> 1.

[4] Charities ← 41.5 75k41.5 Most Cited Cases (Formerly 75k411/2)

[4] Constitutional Law \$\infty\$ 90.1(1.1) 92k90.1(1.1) Most Cited Cases

State's regulation of charitable solicitation practices by professional fund raisers, which defined reasonableness of fees using percentages of receipts collected, was not narrowly tailored to achieve state's valid interest in protecting charities; a charity might choose a particular type of fund-raising drive or a particular solicitor expecting to receive a large sum as measured by total dollars, rather than percentage of dollars remitted, or might choose to engage in the advocacy or dissemination of information during solicitation or to seek the introduction of the charity's officers to the philanthropic community during a special event. N.C.G.S. § 131C-1 et seq.; U.S.C.A. Const.Amend. 1.

[5] Constitutional Law 50.1(1.1) 92k90.1(1.1) Most Cited Cases

The state's interest in protecting charities and the public from fraud is a sufficiently substantial interest to justify a narrowly tailored regulation of speech. <u>U.S.C.A.</u> Const.Amend. 1.

[6] Charities 41.5 75k41.5 Most Cited Cases (Formerly 75k411/2)

[6] Constitutional Law 590.1(1.1) 92k90.1(1.1) Most Cited Cases

Statute regulating solicitation for charities by professional fund raisers, which defined an unreasonable and excessive fee according to percentage of total revenues collected, was not narrowly tailored to promoting state's interest in protecting public and charities from fraud under provision requiring fund raiser to rebut prima facie showing of unreasonableness. N.C.G.S. § 131C-1 et seq.; U.S.C.A. Const.Amend. 1.

[7] Charities € 41.5 75k41.5 Most Cited Cases (Formerly 75k411/2)

[7] Constitutional Law 90.1(1.1) 92k90.1(1.1) Most Cited Cases

Actregulating solicitation of charitable contributions by professional solicitors unconstitutionally chilled speech by failing to adequately define how reasonableness of fund raiser's fee was to be determined, thus requiring fund raising to bear cost of litigation and risk of mistaken adverse finding on reasonableness of fund raising fees. <u>U.S.C.A. Const.Amend. 1</u>; N.C.G.S. § 131C-16.

[8] Constitutional Law 90(1) 92k90(1) Most Cited Cases

Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech. U.S.C.A. Const.Amend. 1.

[9] Constitutional Law 90.1(1.1) 92k90.1(1.1) Most Cited Cases

Requirement that, before an appeal for funds, professional fund raisers disclose to potential donors the percentage of charitable contributions collected during previous 12 months that were actually turned over to charity, was subject to the test for fully protected expression, not the more deferential commercial speech principles, as the commercial portions of the speech were inextricably intertwined with the protected portions. N.C.G.S. §§ 131C-1 et seq., 131C-3(5a); U.S.C.A. Const.Amend. 1.

[10] Constitutional Law 90(1) 92k90(1) Most Cited Cases The difference between compelled speech and compelled silence is without constitutional significance in the context of protected speech, as the First Amendment guarantees "freedom of speech," a term necessarily compromising the decision of both what to say and what not to say. <u>U.S.C.A. Const. Amend. 1</u>.

[11] Charities ← 41.5 75k41.5 Most Cited Cases (Formerly 75k411/2)

[11] Constitutional Law 50.1(1.1) 92k90.1(1.1) Most Cited Cases

Statutory requirement that professional fund raisers disclose to potential donors the percentage of charitable contributions collected during the previous year actually turned over to charity was not narrowly tailored to state's interests in informing donors how money contributed was spent; state incorrectly presumed charity derived no benefit from funds collected but not turned over to it, unchallenged portion of disclosure law required professional fund raisers to disclose their professional status to potential donor, and compelled disclosure would almost certainly hamper legitimate efforts of professional fund raisers to raise money for charities they represented. N.C.G.S. §§ 131C-1 et seq., 131C-3(5a); U.S.C.A. Const.Amend. 1.

[12] Charities ← 41.5 75k41.5 Most Cited Cases (Formerly 75k411/2)

[12] Constitutional Law 90.1(4) 92k90.1(4) Most Cited Cases

Charitable solicitation statute's licensing requirement that professional fund raisers await a determination regarding their license application before engaging in solicitation, while volunteer fund raisers or those employed by the charity could solicit immediately upon submitting an application, unconstitutionally permitted unlimited delay in issuing licenses to professional fund raisers. N.C.G.S. §§ 131C-1 et seq., 131C-3(5a); U.S.C.A. Const.Amend. 1.

[13] Charities ← 41.5 75k41.5 Most Cited Cases (Formerly 75k411/2)

[13] Constitutional Law € 90.1(4) 92k90.1(4) Most Cited Cases

Fact that state had a history of issuing licenses for professional fund raisers quickly did not constitute a practice effectively constraining licensor's discretion under provision requiring professional fund raisers to await determination regarding their license application before engaging in solicitation, while volunteer fund raisers or those employed by the charity could solicit immediately upon submitting an application, preventing licensing provision from being declared unconstitutional, since state's prior history related to a time prior to amendment of the act when professional fund raisers were permitted to solicit as soon as their applications were filed. N.C.G.S. §§ 131C-1 et seq., 131C-3(5a); U.S.C.A. Const.Amend. 1.

**2669 Syllabus [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See <u>United States v. Detroit Lumber Co.</u>, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

*781 The North Carolina Charitable Solicitations Act defines the prima facie "reasonable fee" that a professional fundraiser may charge according to a three-tiered schedule. A fee up to 20% of receipts collected is deemed reasonable. A fee between 20% and 35% is deemed unreasonable upon a showing that the solicitation at issue did not involve the "dissemination of information, discussion, or advocacy relating to public issues as directed by the [charitable organization] which is to benefit from the solicitation." A fee exceeding 35% is presumed unreasonable, but the fundraiser may rebut the presumption by showing that the fee was necessary either because the solicitation involved the dissemination of information or advocacy on public issues directed by the charity, or because otherwise the charity's ability to raise money or communicate would be significantly diminished. The Act also provides that a professional fundraiser must disclose to potential donors the average percentage of gross receipts actually turned over to charities by the fundraiser for all charitable solicitations conducted in the State within the previous 12 months. Finally, the Act provides that professional fundraisers may not solicit without an approved license, whereas volunteer fundraisers may solicit immediately upon submitting a license application. Appellees, a coalition of professional fundraisers, charitable organizations, and potential donors, brought suit against appellantgovernment officials charged with the enforcement of the Act (hereinafter collectively referred to as North Carolina or the State), seeking injunctive and declaratory relief. The District Court ruled that the challenged provisions on their face unconstitutionally infringed upon freedom of speech and enjoined their enforcement. The Court of Appeals affirmed.

Held:

1. North Carolina's three-tiered definition of "reasonable fees" unconstitutionally infringes upon freedom of speech. The solicitation of charitable contributions is protected speech, and using percentages to decide the legality of the fundraiser's fee is not narrowly tailored to the State's *782 interest in preventing fraud. Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 100 S.Ct. 826, 63 L.Ed.2d 73; Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947, 104 S.Ct. 2839, 81 L.Ed.2d 786. North Carolina cannot meaningfully distinguish its statute from those previously held invalid on the ground that it has a motivating interest, not present in the prior cases, to ensure that the maximum amount of funds reach the charity, or to guarantee that the fee charged charities is not unreasonable. This provision is not merely an economic regulation, with no First Amendment implication, to be tested only for rationality; instead, the regulation must be considered as one burdening speech. The State's asserted justification that charities' speech must be regulated for their own benefit is unsound. The First Amendment mandates the presumption that speakers, not the government, know best both what they want to say and how to say it. Also unavailing is the State's contention that the Act's flexibility more narrowly tailors it to the State's asserted interests than the laws invalidated in the prior cases. The State's asserted additional interests are both constitutionally invalid and insufficiently related **2670 to a percentage- based test. And while a State's interest in protecting charities and the public from fraud is a sufficiently substantial interest to justify a narrowly tailored regulation, the North Carolina statute, even with its flexibility, is not sufficiently tailored to such interest. Pp. 2672-2676.

2. North Carolina's requirement that professional fundraisers disclose to potential donors, before an appeal for funds, the percentage of charitable contributions collected during the previous 12 months that were actually turned over to charity is unconstitutional. This provision of the Act is a content- based regulation because mandating speech that a speaker would not otherwise make necessarily alters the speech's content. Even assuming that the mandated speech, in the abstract, is merely "commercial," it does not retain its commercial character when it is inextricably intertwined with the otherwise fully protected speech involved in charitable solicitations, and thus the mandated speech is subject to the test for fully protected expression, not the more deferential commercial speech principles. Nor is a deferential test to be applied on the theory that the First Amendment interest in compelled speech is different than the interest in compelled silence. The difference is without constitutional significance, for the First Amendment guarantees "freedom of speech," a term necessarily comprising the decision of both what to say and what not to say. Moreover, for First Amendment purposes, a distinction cannot be drawn between compelled statements of opinion and, as here, compelled statements of "fact," since either form of compulsion burdens protected speech. Thus, North Carolina's content-based regulation is subject to exacting First Amendment scrutiny. The State's interest in informing donors how the money they contribute is spent to *783 dispel the alleged misperception that the money they give to professional fundraisers goes in greater-than-actual proportion to benefit charity, is not sufficiently weighty, and the means chosen to accomplish it are unduly burdensome and not narrowly tailored. Pp. 2676-2680.

3. North Carolina's licensing requirement for professional fundraisers is unconstitutional. speaker's rights are not lost merely because compensation is received, and the State's asserted power to license professional fundraisers carries with it (unless properly constrained) the power directly and substantially to affect the speech they utter. Consequently, the statute is subject to First Amendment scrutiny. Generally, speakers need not obtain a license to speak. Even assuming that the State's interest in regulating those who solicit money justifies requiring fundraisers to obtain a license before soliciting, such a regulation must provide that the licensor will, within a specified brief period, either issue a license or go to court. That requirement is not met here, for the North Carolina Act permits a delay without limit. Nor can the State assert that its history of issuing licenses quickly constitutes a practice effectively constraining the licensor's discretion, since such history relates to a time (prior to amendment of the Act) when professional fundraisers were permitted to solicit as soon as their applications were filed. Pp. 2680-2681.

817 F.2d 102 (CA 4 1987), affirmed.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, and KENNEDY, JJ., joined, in Parts I, II, and III, of which STEVENS, J., joined, and in all but n. 11 of which SCALIA, J., joined. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, post, p. —. STEVENS, J., filed an opinion concurring in part and dissenting in part, post, p. —. REHNQUIST, C.J., filed a dissenting opinion, in which O'CONNOR, J., joined, post, p. —.

Lacy H. Thornburg, Attorney General of North

Carolina, argued the cause for appellants. With him on the briefs were Jean A. Benoy, Senior Deputy Attorney General, and Charles M. Hensey, Special Deputy Attorney General.

Errol Copilevitz argued the cause for appellees. With him on the brief was John P. Jennings, Jr.*

* Briefs of amici curiae urging reversal were filed for the State of Indiana et al. by Linley E. Pearson, Attorney General of Indiana, David A. Miller, Christine M. Page, and David M. Sommers, Deputy Attorneys General, and Charlie Brown, Attorney General of West Virginia; and for the State of Maine et al. by James E. Tierney, Attorney General of Maine, and Stephen L. Wessler, Assistant Attorney General, Joseph J. Lieberman, Attorney General of Connecticut, and David E. Ormstedt, Assistant Attorney General.

Briefs of amici curiae urging affirmance were filed for the Alabama Sheriffs' Association et al. by Eric J. Magnuson; for the California Council of the Blind by Barry A. Fisher and David Grosz; and for the Independent Sector et al. by Thomas R. Asher and Adam Yarmolinsky.

*784 **2671 Justice BRENNAN delivered the opinion of the Court.

The North Carolina Charitable Solicitations Act governs the solicitation of charitable contributions by professional fundraisers. As relevant here, it defines the prima facie "reasonable fee" that a professional fundraiser may charge as a percentage of the gross revenues solicited; requires professional fundraisers to disclose to potential donors the gross percentage of revenues retained in prior charitable solicitations; and requires professional fundraisers to obtain a license before engaging in solicitation. The United States Court of Appeals for the Fourth Circuit held that these aspects of the Act unconstitutionally infringed upon freedom of speech. We affirm.

Ι

Responding to a study showing that in the previous five years the State's largest professional fundraisers had retained as fees and costs well over 50% of the gross revenues collected in charitable solicitation drives, North Carolina amended its Charitable Solicitations Act in 1985. As amended, the Act prohibits professional fundraisers from retaining an "unreasonable" or "excessive" fee, [FN1] a term defined by a three-tiered schedule. [FN2] A fee up to 20% of the gross *785

receipts collected is deemed reasonable. If the fee retained is between 20% and 35%, the Act deems it unreasonable upon a showing that the solicitation at issue did not involve the "dissemination of information, discussion, or advocacy relating to public issues as directed by the [charitable organization] which is to benefit from the solicitation." Finally, a fee exceeding 35% is presumed unreasonable, but the fundraiser may rebut the presumption by showing that the amount of the fee was necessary either (1) because the solicitation involved the dissemination of information or advocacy on public issues directed by the charity, or (2) because otherwise the charity's ability to raise money or communicate **2672 would be significantly *786 diminished. As the State describes the Act, even where a prima facie showing of unreasonableness has been rebutted, the factfinder must still make an ultimate determination, on a case-by-case basis, as to whether the fee was reasonable--a showing that the solicitation involved the advocacy or dissemination of information does not alone establish that the total fee was reasonable. See Brief for Appellants 10-11; Reply Brief for Appellants 2-3.

<u>FN1.</u> "Fee" for purposes of the statute includes the costs and expenses of solicitation. N.C.Gen.Stat. § 131C-3(5a) (1986).

FN2. North Carolina Gen.Stat. § 131C-17.2 (1986) provides:

"(a) No professional fund-raising counsel or professional solicitor who contracts to raise funds for a person established for a charitable purpose may charge such person established for a charitable purpose an excessive and unreasonable fund-raising fee for raising such funds

"(b) For purposes of this section a fund-raising fee of twenty percent (20%) or less of the gross receipts of all solicitations on behalf of a particular person established for a particular charitable purpose is deemed to be reasonable and nonexcessive. "(c) For purposes of this section a fund-raising fee greater than twenty percent (20%) but less than thirty-five percent (35%) of the gross receipts of all solicitations on behalf of a particular person established for a charitable purpose is excessive and unreasonable if the party challenging the fund-raising fee also proves that the solicitation does not involve the dissemination of information, discussion, or advocacy relating to public issues as directed by the person established for a charitable purpose

which is to benefit from the solicitation.

"(d) For purposes of this section only, a fund-raising fee of thirty-five percent (35%) or more of the gross receipts of all solicitations on behalf of a particular person established for a charitable purpose may be excessive and unreasonable without further evidence of any fact by the party challenging the fund-raising fee. The professional fund-raising counsel or professional solicitor may successfully defend the fund-raising fee by proving that the level of the fee charged was necessary:

- "(1) Because of the dissemination of information, discussion, or advocacy relating to public issues as directed by the person established for a charitable purpose which is to benefit from the solicitation, or
- "(2) Because otherwise ability of the person established for a charitable purpose which is to benefit from the solicitations to raise money or communicate its ideas, opinions, and positions to the public would be significantly diminished.
- "(e) Where the fund-raising fee charged by a professional fund-raising counsel or a professional solicitor is determined to be excessive and unreasonable, the fact finder making that determination shall then determine a reasonable fee under the circumstances..."

The Act also provides that, prior to any appeal for funds, a professional fundraiser must disclose to potential donors: (1) his or her name; (2) the name of the professional solicitor or professional fundraising counsel by whom he or she is employed and the name and address of his or her employer; and (3) the average percentage of gross receipts actually turned over to charities by the fundraiser for all charitable solicitations conducted in North Carolina within the previous 12 months. [FN3] Only the third disclosure requirement is challenged here.

<u>FN3.</u> North Carolina Gen.Stat. § 131C-16.1 (1986) states:

"During any solicitation and before requesting or appealing either directly or indirectly for any charitable contribution a professional solicitor shall disclose to the person solicited: "(1) His name; and,

"(2) The name of the professional solicitor or professional fund-raising counsel by whom he is employed and the address of his employer; and

"(3) The average of the percentage of gross receipts actually paid to the persons established for a charitable purpose by the professional fund-raising counsel or professional solicitor conducting the solicitation for all charitable sales promotions conducted in this State by that professional fund-raising counsel or professional solicitor for the past 12 months, or for all completed charitable sales promotions where the professional fund-raising counsel or professional solicitor has been soliciting funds for less than 12 months."

Finally, professional fundraisers may not solicit without an approved license. [FN4] In contrast, volunteer fundraisers *787 may solicit immediately upon submitting a license application. N.C.Gen.Stat. § 131C-4 (1986). A licensing provision had been in effect prior to the 1985 amendments, but the prior law allowed both professional and volunteer fundraisers to solicit as soon as a license application was submitted.

<u>FN4.</u> North Carolina Gen.Stat. § 131C-6 (1986) provides:

"Any person who acts as a professional fund-raising counsel or professional solicitor shall apply for and obtain anannual license from the Department [of Human Resources], and shall not act as a professional fund-raising counsel or professional solicitor until after obtaining such license."

A coalition of professional fundraisers, charitable organizations, and potential charitable donors brought suit against various government officials charged with the enforcement of the Act (hereinafter collectively referred to as North Carolina or the State), seeking injunctive and declaratory relief. The District Court for the Eastern District of North Carolina ruled on summary judgment that the foregoing aspects of the Act on their face unconstitutionally infringed upon freedom of speech (it also found the Act constitutional in other respects not before us now), and enjoined enforcement of the unconstitutional provisions. 635 F.Supp. 256 (1986). The Court of Appeals for the Fourth Circuit affirmed in a per curiam opinion. 817 F.2d 102 (judgment order), and we noted probable jurisdiction, 484 U.S. 911, 108 S.Ct. 256, 98 L.Ed.2d 214 (1987).

П

We turn first to the "reasonable fee" provision. In

deciding this issue, we do not write on a blank slate; the Court has heretofore twice considered laws regulating the financial aspects of charitable We first examined such a law in solicitations. Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980). There we invalidated a local ordinance requiring charitable solicitors to use, for charitable purposes (defined to exclude funds used toward administrative expenses and the costs of conducting the solicitation), 75% of the funds solicited. **2673 We began our analysis by categorizing the type of speech at issue. The village argued that charitable solicitation is akin to a business proposition, and therefore constitutes merely commercial speech. We rejected *788 that approach and squarely held, on the basis of considerable precedent, that charitable solicitations "involve a variety of speech interests ... that are within the protection of the First Amendment," and therefore have not been dealt with as "purely commercial speech." *Id.*, at 632, 100 S.Ct., at 834. Applying standard First Amendment analysis, we determined that the ordinance was not narrowly tailored to achieve the village's principal asserted interest: the prevention of fraud. We concluded that some charities, especially those formed primarily to advocate, collect, or disseminate information, would of necessity need to expend more than 25% of the funds collected on administration or fundraising expenses. Id., at 635-637, 100 S.Ct., at 835-836. Yet such an eventuality would not render a solicitation by these charities fraudulent. In short, the prevention of fraud was only "peripherally promoted by the 75- percent requirement and could be sufficiently served by measures less destructive of First Amendment interests." Id., at 636-637, 100 S.Ct., at 835-836. We also observed that the village was free to enforce its already existing fraud laws and to require charities to file financial disclosure reports. Id., at 637-638, and nn. 11-12, 100 S.Ct., at 836-837, and nn. 11-12.

We revisited the charitable solicitation field four years later in Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947, 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984), a case closer to the present one in that the statute directly regulated contracts between charities and professional fundraisers. Specifically, the statute in question forbade such contracts if, after allowing for a deduction of many of the costs associated with the solicitation, the fundraiser retained more than 25% of the money collected. Although the Secretary was empowered to waive this limitation where it would effectively prevent the charitable organization from raising contributions, we held the law unconstitutional under the force of Schaumburg. We rejected the State's argument that restraints on the relationship between the charity and the fundraiser were mere

"economic regulations" free of First Amendment implication. Rather, we viewed the law as "a direct restriction on the amount of *789 money a charity can spend on fundraising activity," and therefore "a direct restriction on protected First Amendment activity." 467 U.S., at 967, and n. 16, 104 S.Ct., at 2852-2853, and n. 16. Consequently, we subjected the State's statute to exacting First Amendment scrutiny. Again, the State asserted the prevention of fraud as its principal interest, and again we held that the use of a percentage-based test was not narrowly tailored to achieve that goal. In fact, we found that if the statute actually prevented fraud in some cases it would be "little more than fortuitous." An "equally likely" result would be that the law would "restrict First Amendment activity that results in high costs but is itself a part of the charity's goal or that is simply attributable to the fact that the charity's cause proves to be unpopular." 966-967, 104 S.Ct., at 2852.

[1] As in Schaumburg and Munson, we are unpersuaded by the State's argument here that its three-tiered, percentage-based definition of "unreasonable" passes constitutional muster. Our prior cases teach that the solicitation of charitable contributions is protected speech, and that using percentages to decide the legality of the fundraiser's fee is not narrowly tailored to the State's interest in preventing fraud. [FN5] That much established, unless the **2674 State can meaningfully distinguish its statute from those discussed in our precedents, its statute must fall. The State offers two distinctions. First, it asserts a motivating interest not expressed in Schaumburg or Munson: ensuring that the maximum amount of funds reach the charity or, somewhat relatedly, to guarantee that the fee charged charities is not "unreasonable." *790 Second, the State contends that the Act's flexibility more narrowly tailors it to the State's asserted interests than the laws considered in our prior cases. We find both arguments unavailing.

FN5. The dissent suggests that the State's regulation is merely economic, having only an indirect effect on protected speech. However, as we demonstrate, the burden here is hardly incidental to speech. Far from the completely incidental impact of, for example, a minimum wage law, a statute regulating how a speaker may speak directly affects that speech. See Meyer v. Grant. 486 U.S. 414, 421-423, and n. 5, 108 S.Ct. 1886, ---, and n. 5, 100 L.Ed.2d 425 (1988). Here, the desired and intended effect of the statute is to encourage some forms of solicitation and discourage others.

The State's additional interest in regulating the fairness of the fee may rest on either of two premises (or both):
(1) that charitable organizations are economically unable to negotiate fair or reasonable contracts without governmental assistance; or (2) that charities are incapable of deciding for themselves the most effective way to exercise their First Amendment rights. Accordingly, the State claims the power to establish a single transcendent criterion by which it can bind the charities' speaking decisions. We reject both premises.

[2] The first premise, notwithstanding the State's almost talismanic reliance on the mere assertion of it, amounts to little more than a variation of the argument rejected in Schaumburg and Munson that this provision is simply an economic regulation with no First Amendment implication, and therefore must be tested only for rationality. We again reject that argument; this regulation burdens speech, and must be considered accordingly. There is no reason to believe that charities have been thwarted in their attempts to speak or that they consider the contracts in which they enter to be anything less than equitable. [FN6] Even if such a showing could be made, the State's solution stands in sharp conflict with the First Amendment's command that government regulation of speech must be measured in minimums, not maximums.

FN6. North Carolina was apparently surprised to learn of the charities' opposition to its law, and at oral argument could only surmise that the charities had been misinformed regarding the pro-charity nature of the statute. Tr. of Oral Arg. 20-21. Nonetheless, every charity that has stated a position before us in this case (and there are almost 60 of them other than appellees) supports the judgment below.

[3] The State's remaining justification—the paternalistic premise that charities' speech must be regulated for their own benefit—is equally unsound. The First Amendment mandates *791 that we presume that speakers, not the government, know best both what they want to say and how to say it. See <u>Tashijan v. Republican Party of Connecticut</u>, 479 U.S. 208, 224, 107 S.Ct. 544, 554, 93 L.Ed.2d 514 (1987) (criticizing State's asserted interest in protecting "the Republican party from undertaking a course of conduct destructive of its own interests," and reiterating that government "imay not interfere [with expressions of First Amendment freedoms] on the ground that [it] view[s] a particular expression as unwise or irrational!")

(quoting Democratic Party of United States v. Wisconsin ex rel. La Follette, 450 U.S. 107, 124, 101 S.Ct. 1010, 1020, 67 L.Ed.2d 82 (1981)); cf. First National Bank of Boston v. Bellotti, 435 U.S. 765, 791-792, and n. 31, 98 S.Ct. 1407, 1424, and n. 31, 55 L.Ed.2d 707 (1978) (criticizing State's paternalistic interest in protecting the political process by restricting speech by corporations); Linmark Associates, Inc. v. Willingboro, 431 U.S. 85, 97, 97 S.Ct. 1614, 1620, 52 L.Ed.2d 155 (1977) (criticizing, in the commercial speech context, the State's paternalistic interest in maintaining the quality of neighborhoods by restricting speech to residents). "The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the **2675 press, speech, and religion." Thomas v. Collins, 323 U.S. 516, 545, 65 S.Ct. 315, 329,89 L.Ed. 430 (1945) (Jackson, J., concurring). To this end, the government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government. We perceive no reason to engraft an exception to this settled rule for charities.

[4] The foregoing discussion demonstrates that the State's additional interest cannot justify the regulation. But, alternatively, there are several legitimate reasons why a charity might reject the State's overarching measure of a fundraising drive's legitimacy-the percentage of gross receipts remitted to the charity. For example, a charity might choose a particular type of fundraising drive, or a particular solicitor, expecting to receive a large sum as measured by total dollars *792 rather than the percentage of dollars remitted. Or, a solicitation may be designed to sacrifice short-term gains in order to achieve long-term, collateral, or noncash benefits. To illustrate, a charity may choose to engage in the advocacy or dissemination of information during a solicitation, or may seek the introduction of the charity's officers to the philanthropic community during a special event (e.g., an awards dinner). Consequently, even if the State had a valid interest in protecting charities from their own naivete or economic weakness, the Act would not be narrowly tailored to achieve it.

The second distinguishing feature the State offers is the flexibility it has built into its Act. The State describes the second of its three-tiered definition of "unreasonable" and "excessive" as imposing no presumption one way or the other as to the reasonableness of the fee, although unreasonableness may be demonstrated by a showing that the solicitation does not involve the advocacy or dissemination of information on the charity's behalf and at the charity's

direction. The State points out that even the third tier's presumption of unreasonableness may be rebutted.

[5] It is important to clarify, though, what we mean by "reasonableness" at this juncture. As we have just demonstrated, supra, at 2674-2675, the State's generalized interest in unilaterally imposing its notions of fairness on the fundraising contract is both constitutionally invalid and insufficiently related to a percentage-based test. Consequently, what remains is the more particularized interest in guaranteeing that the fundraiser's fee be "reasonable" in the sense that it not be fraudulent. The interest in protecting charities (and the public) from fraud is, of course, a sufficiently substantial interest to justify a narrowly tailored regulation. The question, then, is whether the added flexibility of this regulation is sufficient to tailor the law to this remaining interest. We conclude that it is not.

*793 Despite our clear holding in *Munson* that there is no nexus between the percentage of funds retained by the fundraiser and the likelihood that the solicitation is fraudulent, the State defines, prima facie, an "unreasonable" and "excessive" fee according to the percentage of total revenues collected. Indeed, the State's test is even more attenuated than the one held invalid in *Munson*, which at least excluded costs and expenses of solicitation from the fee definition. 467 U.S., at 950, n. 2. 104 S.Ct., at 2843, n. 2. Permitting rebuttal cannot supply the missing nexus between the percentages and the State's interest. [FN7]

<u>FN7.</u> Even if percentages are not completely irrelevant to the question of fraud, their relationship to the question is at best tenuous, as *Schaumburg* and *Munson* demonstrate.

[6] But this statute suffers from a more fundamental Even if we agreed that some form of a percentage-based measure could be used, in part, to test for fraud, we could not agree to a measure that requires the speaker to prove "reasonableness" case by case based upon **2676 what is at best a loose inference that the fee might be too high. Under the Act, once a prima facie showing of unreasonableness is made, the fundraiser must rebut the showing. Proof that the solicitation involved the advocacy or dissemination of information is not alone sufficient; it is merely a factor that is added to the calculus submitted to the factfinder, who may still decide that the costs incurred or the fundraiser's profit were excessive. Similarly, the Act is impermissibly insensitive to the realities faced by small or unpopular charities, which must often pay more than 35% of the gross receipts collected to the fundraiser due to the difficulty of attracting donors. See <u>Munson</u>, 467 U.S., at 967, 104 S.Ct., at 2852. Again, the burden is placed on the fundraiser in such cases to rebut the presumption of unreasonableness.

[7] According to the State, we need not worry over this burden, as standards for determining "[r]easonable fundraising fees will be judicially defined over the years." Reply Brief for Appellants 6. Speakers, however, cannot be made to *794 wait for "years" before being able to speak with a measure of security. In the interim, fundraisers will be faced with the knowledge that every campaign incurring fees in excess of 35%, and many campaigns with fees between 20% and 35%, will subject them to potential litigation over the "reasonableness" of the fee. And, of course, in every such case the fundraiser must bear the costs of litigation and the risk of a mistaken adverse finding by the factfinder, even if the fundraiser and the charity believe that the fee was in fact fair. This scheme must necessarily chill speech in direct contravention of the First Amendment's dictates. See Munson, supra, at 969. 104 S.Ct., at 2853: New York Times Co. v. Sullivan, 376 U.S. 254, 279, 84 S.Ct. 710, 725, 11 L.Ed.2d 686 (1964). [FN8]

> FN8. The dissent is correct that the statute requires that expenses incurred in the dissemination of information be considered legitimate by the fact-finder. But that does not address the primary defect here: that fraud is presumed by a surrogate and imprecise formula. Nor does it suffice to argue, as does the dissent, that the statute is valid because the fund-raiser, not the charity, is the object of the regulation. Fining the fund-raiser based upon its speech for the charity has an obvious and direct relation to the charity's speech. See Munson, 467 U.S., at 967, and n. 16, 104 S.Ct., at 2853, and n. 16. Moreover, the fundraiser has an independent First Amendment interest in the speech, even though payment is received. See, e.g., New York Times Co. v. Sullivan, 376 U.S., at 265-266, 84 S.Ct., at 718.

This chill and uncertainty might well drive professional fundraisers out of North Carolina, or at least encourage them to cease engaging in certain types of fundraising (such as solicitations combined with the advocacy and dissemination of information) or representing certain charities (primarily small or unpopular ones), all of which will ultimately "reduc[e] the quantity of expression." <u>Buckley v. Valeo</u>, 424 U.S. 1, 19, 39, 96

S.Ct. 612. 635, 644, 46 L.Ed.2d 659 (1976). Whether one views this as a restriction of the charities' ability to speak, *Munson. supra.* at 967, 104 S.Ct., at 2852, and n. 16, or a restriction of the professional fundraisers' ability to speak, *Munson. supra.* at 955, n. 6, 104 S.Ct., at 2846, n. 6, the restriction is undoubtedly one on speech, and cannot be countenanced here.

*795 In striking down this portion of the Act, we do not suggest that States must sit idly by and allow their citizens to be defrauded. North Carolina has an antifraud law, and we presume that law enforcement officers are ready and able to enforce it. Further North Carolina may constitutionally require fundraisers to disclose certain financial information to the State, as it has since 1981. *Munson. supra.* at 967, n. 16, 104 S.Ct., at 2852, n. 16. If this is not the most efficient means of preventing fraud, we reaffirm simply and emphatically that the First Amendment does not permit the State to sacrifice speech for efficiency. Schaumburg. 444 U.S., at 639, 100 S.Ct., at 837; Schneider v. State, 308 U.S. 147, 164, 60 S.Ct. 146, 152, 84 L.Ed. 155 (1939).

**2677 III

[8] We turn next to the requirement that professional fundraisers disclose to potential donors, before an appeal for funds, the percentage of charitable contributions collected during the previous 12 months that were actually turned over to charity. Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech. We therefore consider the Act as a content-based regulation of speech. See <u>Miami Herald Publishing Co. v. Tornillo</u>, 418 U.S. 241, 256, 94 S.Ct. 2831, 2839, 41 L.Ed.2d 730 (1974) (statute compelling newspaper to print an editorial reply "exacts a penalty on the basis of the content of a newspaper").

The State argues that even if charitable solicitations generally are fully protected, this portion of the Act regulates only commercial speech because it relates only to the professional fundraiser's profit from the solicited contribution. Therefore, the State asks us toapply our more deferential commercial speech principles here. See generally Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council. Inc., 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976).

[9] It is not clear that a professional's speech is necessarily commercial whenever it relates to that person's financial motivation for speaking. Cf. *796Bigelow v. Virginia, 421 U.S. 809, 826, 95 S.Ct. 2222, 2235, 44 L.Ed.2d 600 (1975) (state labels cannot be dispositive of degree of First Amendment

protection). But even assuming, without deciding, that such speech in the abstract is indeed merely "commercial," we do not believe that the speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech. Our lodestars in deciding what level of scrutiny to apply to a compelled statement must be the nature of the speech taken as a whole and the effect of the compelled statement thereon. This is the teaching of Schaumburg and Munson, in which we refused to separate the component parts of charitable solicitations from the fully protected whole. Regulation of a solicitation "must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech ..., and for the reality that without solicitation the flow of such information and advocacy would likely cease." Schaumburg, supra, 444 U.S., at 632, 100 S.Ct., at 834, quoted in Munson, 467 U.S., at 959-960, 104 S.Ct., at 2848. See also Meyer v. Grant, 486 U.S. 414, 422, n. 5, 108 S.Ct. 1886. ---, n. 5, 100 L.Ed.2d 425 (1988); Thomas v. Collins, 323 U.S., at 540-541. Thus, where, as here, the component parts of a single speech are inextricably intertwined, we cannot parcel out the speech, applying one test to one phrase and another test to another phrase. Such an endeavor would be both artificial and impractical. Therefore, we apply our test for fully protected expression. [FN9]

FN9. Of course, the dissent's analogy to the securities field entirely misses the point. Purely commercial speech is more susceptible to compelled disclosure requirements. See Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio. 471 U.S. 626, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985).

[10] North Carolina asserts that, even so, the First Amendment interest in compelled speech is different than the interest in compelled silence; the State accordingly asks that we apply a deferential test to this part of the Act. There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment *797 guarantees "freedom of speech," a term necessarily comprising the decision of both what to say and what not to say.

The constitutional equivalence of compelled speech and compelled silence in the context of fully protected expression was established in *Miami Herald Publishing Co. v. Tornillo, supra.* There, the Court **2678 considered a Florida statute requiring newspapers to

give equal reply space to those they editorially criticize. We unanimously held the law unconstitutional as content regulation of the press, expressly noting the identity between the Florida law and a direct prohibition of speech. "The Florida statute operates as a command in the same sense as a statute or regulation forbidding appellant to publish a specified matter. Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers." Id., 418 U.S., at 256, 94 S.Ct., at 2839. That rule did not rely on the fact that Florida restrained the press, and has been applied to cases involving expression generally. For example, in Wooley v. Maynard, 430 U.S. 705, 714, 97 S.Ct. 1428, 1435, 51 L.Ed.2d 752 (1977), we held that a person could not be compelled to display the slogan "Live Free or Die." In reaching our conclusion, we relied on the principle that "[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind,' " as illustrated in Tornillo. 430 U.S., at 714, 97 S.Ct., at 1435 (quoting West Virginia Board of Education v. Barnette, 319 U.S. 624. 637, 63 S.Ct. 1178, 1185, 87 L.Ed. 1628 (1943)). See also Pacific Gas & Electric Co. v. Public Utilities Comm'n of California. 475 U.S. 1, 9-11, 106 S.Ct. 903. 908-909, 89 L.Ed.2d 1 (1986) (plurality opinion of Powell, J.) (characterizing Tornillo in terms of freedom of speech); Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 559, 105 S.Ct. 2218, 2230, 85 L.Ed.2d 588 (1985); Abood v. Detroit Board of Education, 431 U.S. 209, 234-235, 97 S.Ct. 1782, 1799, 52 L.Ed.2d 261 (1977); West Virginia Board of Education v. Barnette, supra.

These cases cannot be distinguished simply because they involved compelled statements of opinion while here we deal with compelled statements of "fact": either form of compulsion *798 burdens protected speech. Thus, we would not immunize a law requiring a speaker favoring a particular government project to state at the outset of every address the average cost overruns in similar projects, or a law requiring a speaker favoring an incumbent candidate to state during every solicitation that candidate's recent travel budget. Although the foregoing factual information might be relevant to the listener, and, in the latter case, could encourage or discourage the listener from making a political donation, a law compelling its disclosure would clearly and substantially burden the protected speech.

[11] We believe, therefore, that North Carolina's content-based regulation is subject to exacting First Amendment scrutiny. The State asserts as its interest the importance of informing donors how the money

they contribute is spent in order to dispel the alleged misperception that the money they give to professional fundraisers goes in greater-than-actual proportion to benefit charity. To achieve this goal, the State has adopted a prophylactic rule of compelled speech, applicable to all professional solicitations. We conclude that this interest is not as weighty as the State asserts, and that the means chosen to accomplish it are unduly burdensome and not narrowly tailored.

Although we do not wish to denigrate the State's interest in full disclosure, the danger the State posits is not as great as might initially appear. First, the State presumes that the charity derives no benefit from funds collected but not turned over to it. Yet this is not necessarily so. For example, as we have already discussed in greater detail, where the solicitation is combined with the advocacy and dissemination of information, the charity reaps a substantial benefit from the act of solicitation itself. See Munson, supra, 467 U.S., at 963, 104 S.Ct., at 2850; Schaumburg, 444 U.S., at 635, 100 S.Ct., at 835. Thus, a significant portion of the fundraiser's "fee" may well go toward achieving the charity's objectives even though it is not remitted to **2679 the *799 charity in cash. [FN10] Second, an unchallenged portion of the disclosure law requires professional fundraisers to disclose their professional status to potential donors, thereby giving notice that at least a portion of the money contributed will be retained. [FN11] Donors are also undoubtedly aware that solicitations incur costs, to which part of their donation might apply. And, of course, a donor is free to inquire how much of the contribution will be turned over to the charity. Under another North Carolina statute, also unchallenged, fundraisers must disclose this information upon request. N.C.Gen.Stat. § 131C-16 (1986). Even were that not so, if the solicitor refuses to give the requested information, the potential donor may (and probably would) refuse to donate.

<u>FN10</u>. In addition, the net "fee" itself benefits the charity in the same way that an attorney's fee benefits the charity, or the purchase of any other professional service benefits the charity. That the fundraiser's fee does not first pass through the charity's hands is of small import.

FN11. The Act, as written, requires the fundraiser to disclose his or her employer's name and address. Arguably, this may not clearly convey to the donor that the solicitor is employed by a for-profit organization, for example, where the employer's name is

"Charitable Fundraisers of America." However, nothing in this opinion should be taken to suggest that the State may not require a fundraiser to disclose unambiguously his or her professional status. On the contrary, such a narrowly tailored requirement would withstand First Amendment scrutiny.

Moreover, the compelled disclosure will almost certainly hamper the legitimate efforts of professional fundraisers to raise money for the charities they First, this provision necessarily represent. discriminates against small or unpopular charities, which must usually rely on professional fundraisers. Campaigns with high costs and expenses carried out by professional fundraisers must make unfavorable disclosures, with the predictable result that such solicitations will prove unsuccessful. Yet the identical solicitation with its high costs and expenses, if carried out by the employees of a charity or volunteers, results in no compelled disclosure, and therefore greater success. Second, in the context of a *800 verbal solicitation, if the potential donor is unhappy with the disclosed percentage, the fundraiser will not likely be given a chance to explain the figure; the disclosure will be the last words spoken as the donor closes the door or hangs up the phone. [FN12] Again, the predictable result is that professional fundraisers will be encouraged to quit the State or refrain from engaging in solicitations that result in an unfavorable disclosure.

> FN12. The figure chosen by the State for disclosure is curious. First, it concerns unrelated past solicitations without regard for whether they are similar to the solicitation occurring at the time of disclosure. Thus, the high percentage of retained fees for past dinner-dance fundraisers must be disclosed to potential contributors during a less expensive door-to-door solicitation. Second, the figure does not separate out the costs and expenses of prior solicitations, such as printing, even though these expenses must also be borne by charities not subject to the disclosure requirement (i.e., those engaging in employee or volunteer staffed campaigns). The use of the "gross" percentage is even more curious in light of the fact that most contracts between the solicitor and the charity provide for a fee based on the percentage of "net" funds collected (i.e., the gross funds collected less costs), making this more relevant figure far easier to come by. Brief for Appellants 15.

In contrast to the prophylactic, imprecise, and unduly burdensome rule the State has adopted to reduce its alleged donor misperception, more benign and narrowly tailored options are available. For example, as a general rule, the State may itself publish the detailed financial disclosure forms it requires professional fundraisers to file. This procedure would communicate the desired information to the public without burdening a speaker with unwanted speech during the course of a solicitation. Alternatively, the State may vigorously enforce its antifraud laws to prohibit professional fundraisers from obtaining money on false pretenses or by making false statements. These more narrowly tailored rules are in keeping with the First Amendment directive that government not dictate the **2680 content of speech absent compelling necessity, and then, only by means precisely tailored. *801 iE.g., Consolidated Edison Co. v. Public Service Comm'n of New York, 447 U.S. 530, 537-538, 100 S.Ct. 2326, 2333, 65 L.Ed.2d 319 (1980). "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." NAACP v. Button, 371 U.S. 415, 438, 83 S.Ct. 328, 340, 9 L, Ed. 2d 405 (1963) (citations omitted).

TV

Finally, we address the licensing requirement. This provision requires professional fundraisers to await a determination regarding their license application before engaging in solicitation, while volunteer fundraisers, or those employed by the charity, may solicit immediately upon submitting an application.

Given our previous discussion and precedent, it will not do simply to ignore the First Amendment interest of professional fundraisers in speaking. It is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak. E.g., New York Times Co. v. Sullivan. 376 U.S., at 265-266, 84 S.Ct., at 718. And the State's asserted power to license professional fundraisers carries with it (unless properly constrained) the power directly and substantially to affect the speech they utter. Consequently, the statute is subject to First Amendment scrutiny. See Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 755-756. 108 S.Ct. 2138, ---, 100 L.Ed.2d 771 (1988) (when a State enacts a statute requiring periodic licensing of speakers, at least when the law is directly aimed at speech, it is subject to First Amendment scrutiny to ensure that the licensor's discretion is suitably confined). [FN13]

FN13. Even were we to focus only on the charities' First Amendment interest here, we still could not adopt the dissent's reasoning, for its logic in that regard necessarily depends on the premise that professional fundraisers are interchangeable from the charities' vantage. There is no reason to believe that is so. Fundraisers may become associated with particular clients or causes. Regulating these fundraisers with the heavy hand that unbridled discretion allows affects the speech of the clients or causes with which they are associated. Nor are we persuaded by the dissent's assertion that this statute merely licenses a profession, and therefore is subject only to rationality review. Although Justice Jackson did express his view that solicitors could be licensed, a proposition not before us, he never intimated that the licensure was devoid of all First Amendment implication. Thomas v. Collins, 323 U.S. 516, 544-545, 65 S.Ct. 315, 329, 89 L.Ed. 430 (1945) (Jackson, J., concurring).

*802 [12][13] Generally, speakers need not obtain a license to speak. However, that rule is not absolute. For example, States may impose valid time, place, or manner restrictions. See Cox v. New Hampshire, 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049 (1941). North Carolina seeks to come within the exception by alleging a heightened interest in regulating those who solicit money. Even assuming that the State's interest does justify requiring fundraisers to obtain a license before soliciting, such a regulation must provide that the licensor "will, within a specified brief period, either issue a license or go to court." Freedman v. Maryland. 380 U.S. 51, 59, 85 S.Ct. 734, 739, 13 L.Ed.2d 649 That requirement is not met here, for the <u>(1965)</u>. Charitable Solicitations Act (as amended) permits a delay without limit. The statute on its face does not purport to require when a determination must be made, nor is there an administrative regulation or interpretation doing so. The State argues, though, that its history of issuing licenses quickly constitutes a practice effectively constraining the licensor's discretion. See Poulos v. New Hampshire, 345 U.S. 395, 73 S.Ct. 760, 97 L.Ed. 1105 (1953). We cannot agree. The history to which the State refers relates to the period before the 1985 amendments, at which time professional fundraisers were permitted to solicit as soon as their applications were filed. **2681 Then, delay permitted the speaker's speech; now, delay compels the speaker's silence. Under these circumstances, the licensing provision cannot stand. [FN14]

FN14. In addition, appellees assert that the Secretary of State has unbridled discretion to grant or deny a license, and that the differential treatment of professional and nonprofessional fundraisers denies them equal protection of the laws. In light of our conclusion that the licensing provision is unconstitutional on other grounds, we do not reach these questions.

*803 V

We hold that the North Carolina Charitable Solicitations Act is unconstitutional in the three respects before us. Accordingly, the judgment of the Court of Appeals is

Affirmed.

Justice SCALIA, concurring in part and concurring in judgment.

We have held the solicitation of money by charities to be fully protected as the dissemination of ideas. See ante, at 2672-2673; Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947, 959-961, 104 S.Ct. 2839, 2848-2849, 81 L.Ed.2d 786 (1984); Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 628-632, 100 S.Ct. 826, 831-833, 63 L.Ed.2d 73 (1980). It is axiomatic that, although fraudulent misrepresentation of facts can be regulated, cf. New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710. 11 L.Ed.2d 686 (1964), the dissemination of ideas cannot be regulated to prevent it from being unfair or unreasonable, see, e.g., Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 51, 54, 57, 108 S.Ct. 876, ----, ----, 99 L.Ed.2d 41 (1988); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 256-258, 94 S.Ct. 2831, 2839-2840, 41 L.Ed.2d 730 (1974); Organization for a Better Austin v. Keefe, 402 U.S. 415, 419, 91 S.Ct. 1575, 1578, 29 L.Ed.2d 1 (1971); <u>Kingsley</u> International Pictures Corp. v. Regents of University of New York, 360 U.S. 684, 688-689, 79 S.Ct. 1362, 1365, 3 L.Ed.2d 1512 (1959); Baumgartner v. United States, 322 U.S. 665, 673-674, 64 S.Ct. 1240, 1244- 1245, 88 L.Ed. 1525 (1944). Because the opinion of the Court, except for footnote 11, is consistent with this principle, I join all of the opinion with that exception.

As to the last two sentences of that footnote, which depart from the case at hand to make a pronouncement upon a situation that is not before us, I do not see how requiring the professional solicitor to disclose his professional status is narrowly tailored to prevent fraud. Where core First Amendment speech is at issue, the State can assess liability for specific instances of deliberate deception, but it cannot impose a prophylactic rule requiring disclosure even where misleading statements are not made. Cf. Landmark Communications. Inc. v. Virginia, 435 U.S. 829, 843-844, 98 S.Ct. 1535, 1543- 1544, 56 L.Ed.2d 1 (1978). *804 Since donors are assuredly aware that a portion of their donations may go to solicitation costs and other administrative expenses--whether the solicitor is a professional, an in-house employee, or even a volunteer-it is not misleading in the great mass of cases for a professional solicitor to request donations "for" a specific charity without announcing his professional status. Compensatory employment is, I would judge, the natural order of things, and one would expect volunteer solicitors to announce that status as a selling point.

The dictum in footnote 11 represents a departure from our traditional understanding, embodied in the First Amendment, that where the dissemination of ideas is concerned, it is safer to assume that the people are smart enough to get the information they need than to assume that the government is wise or impartial enough to make the judgment for them.

Justice STEVENS, concurring in part and dissenting in part.

Although I join Parts I, II, and III of the Court's opinion, I agree with THE CHIEF JUSTICE that the licensing provisions in **2682 the North Carolina statute do not impose a significant burden on the charities' ability to speak and that there is no evidence suggesting that the State will be dilatory in the processing of license applications. Thus, I respectfully dissent from Part IV of the Court's opinion.

Chief Justice REHNQUIST, with whom Justice O'CONNOR joins, dissenting.

Ι

In 1980 this Court held invalid an ordinance enacted by a suburb of Chicago regulating the percentage of the gross amount of money raised by charitable solicitors which might be used for the cost of conducting the solicitation. Schaumburg v. Citizens for a Better Environment. 444 U.S. 620, 100 S.Ct. 826, 63 L.Ed.2d 73. In an effort to comply with that decision, Maryland

enacted a statute forbidding charities to contract with professional fundraisers in such a way as would allow the fundraisers to *805 retain more than 25% of the money collected. Even though an administrative official was empowered to waive this requirement when its imposition would effectively prevent the charitable organization from raising money, the Court nonetheless invalidated the statute. Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947. 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984). Following the decision in Munson, North Carolina revised its Charitable Solicitations Act to contain the provisions described in the opinion of the Court today. The Court now invalidates the North Carolina provisions as well.

The Court's opinion in Schaumburg relied on the seminal cases of Lovell v. Griffin, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949 (1938), Schneider v. State, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939), and Martin v. Struthers, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313 (1943), as establishing the right of charitable solicitors under the First Amendment to be free from burdensome governmental regulation. It is interesting to compare the activities of the three "solicitors" in those cases with the activities of professional fundraisers in cases like the present one. In Lovell, for example, appellant was convicted for distributing a religious pamphlet and a magazine called the "Golden Age" without a permit. 303 U.S., at 450, 58 S.Ct., at 668. In Schneider, the evidence showed that one of the petitioners was a "Jehovah's Witness" who canvassed house-to-house seeking to leave behind some literature and to obtain contributions to defray the cost of printing additional literature for others. 308 U.S., at 158, 60 S.Ct., at 149. In Martin, the appellant was also a Jehovah's Witness, who went door- to-door distributing to residents of homes leaflets advertising a religious meeting. 319 U.S., at 142, 63 S.Ct., at 862.

These activities are a far cry indeed from the activities of professional solicitors such as those involved in Munson and the present case. In Munson, the plaintiff, an Indiana corporation, was "a professional for-profit fundraiser in the business of promoting fundraising events and giving advice to customers on how those events should be conducted. Its Maryland customers include[d] various chapters of the Fraternal *806 Order of Police." 467 U.S., at 950, 104 S.Ct., at 2843. The professional fundraisers in the present case presumably operate in the same manner. Yet the Court obdurately refuses to allow the various States which have legislated in this area to distinguish between the sort of incidental fundraising involved in Lovell, Schneider, and Martin on the one hand, and the entirely commercial activities of people whose job is, simply put, figuring out how to raise money for charities.

The Court has recognized that the commercial aspects of newsgathering and publishing are different from the editorial function, and has upheld regulation of the former against claims based on the First Amendment. A newsgathering organization is subject to the provisions of the National Labor Relations Act, Associated Press v. NLRB. 301 U.S. 103, 57 S.Ct. 650, 81 L.Ed. 953 (1937); a newspaper is subject **2683 to the antitrust laws, Indiana Farmer's Guide Publishing Co. v. Prairie Farmer Publishing Co., 293 U.S. 268, 55 S.Ct. 182, 79 L.Ed. 356 (1934), as well as the provisions of the Fair Labor Standards Act, Smith v. Evening News Assn., 371 U.S. 195, 83 S.Ct. 267, 9 L.Ed.2d 246 (1962). It seems to me that the vaguely defined activity of "charitable solicitation," when pursued by professional fundraisers such as are involved in this case, deserves no more favorable treatment.

П

But even accepting that Schaumburg and Munson were rightly decided, I cannot join in the extension of their principles to the North Carolina statute involved here. This Act provides, at its heart, only that no professional fundraiser may charge a charity "an excessive and unreasonable fundraising fee." N.C.Gen.Stat. § 131C-17.2(a) (1986). Unlike the statute at issue in Schaumburg, which directly prevented charities from soliciting donations unless they could show that 75% of the proceeds were used for charitable purposes, 444 U.S., at 624, 100 S.Ct., at 829, the fee provisions of this Act put no direct burden on the charities themselves. And, unlike the Maryland statute in Munson, the fee provisions are designed *807 to allow the professional fundraiser whose fees are challenged to introduce evidence that the fees were in fact reasonable under the circumstances. In my view, the distinctions between the statute in this case and those in Munson and Schaumburg are crucial to the proper First Amendment analysis of the Act, for they make this Act both less burdensome on the protected speech activities of charitable organizations and more carefully tailored to the interests that the State is trying to serve by regulating fundraising fees.

First, as to the nature of the burden on protected speech: The Court today concludes flatly that "this regulation burdens speech, and must be considered accordingly." Ante, at 2674. As far as I know, this Court has never held that an economic regulation with some impact on protected speech, no matter how small or indirect, must be subjected to strict scrutiny under the First Amendment. The only burden on speech identified in the Court's opinion is that professional fundraisers may be "chill[ed]" by the risk that if they

charge more than 20% of the gross they may be required to show that the fee they charged was reasonable. The Court speculates that this "chill" will "drive professional fundraisers out of North Carolina" or induce them to cease certain types of fundraising. Ante, at 2676-2677. Of course, it is undeniable that a price control regulation-which is what these fee provisions are, in essence--will have some impact on the supply of the services whose prices are being regulated. See Munson, supra, 467 U.S., at 979, 104 S.Ct., at 2858-2859 (REHNQUIST, J., dissenting). But to say that professional fundraisers will be driven from the State is the rankest speculation; they may be a far doughtier breed than the Court realizes. I am unwilling to say, on this extremely bare record, that a statute prohibiting a professional fundraiser from charging fees that are "unreasonable and excessive" will have the sort of impact on the availability of fundraising services that the Court hypothesizes. The plaintiffs in this case had an opportunity to put in evidence in the District Court to this effect, but did not do so; we should not *808 substitute our guesswork as to the economic consequences of the regulation for a conclusion that ought to be deduced from evidence.

I believe that on this record the minimal burden on speech resulting from the statute can be characterized as remote or incidental, and that therefore there is no reason to apply "heightened scrutiny" to the regulation of fees charged by the professional fundraisers. The fee provisions of the Act are rationally related to the State's legitimate interests in preventing fraud on potential donors and protecting against **2684 overcharging of charities by professional fundraisers.

Even if heightened scrutiny should apply, the fee provisions in the North Carolina statute in my view still survive. This Court has never indicated that the State's interest in preventing fraud would not be sufficient to support a narrowly tailored regulation of fees. See Schaumburg. 444 U.S., at 636-637, 100 S.Ct., at 835-836; Munson, 467 U.S., at 961, 104 S.Ct., at 2849.

Here, the State asserts the additional interest of "promot [ing] the efficient transmission of the public's money to the charity through the medium of the for-profit, professional fundraiser," Reply Brief for Appellants 3, or as I put it in *Munson*, protecting the "expectations of the donor who thinks that his money will be used to benefit the charitable purpose in the name of which the money was solicited," 467 U.S., at 980, n. 2, 104 S.Ct., at 2859, n. 2, [FN1]

<u>FN1.</u> I find it hard to understand the Court's complaint that the statute's attempts to encourage charity and charitable contributions

and to maximize the funds that flow to charities are based on "the paternalistic premise that charities' speech must be regulated for their own benefit," ante, at 2674. All economic regulation of this sort is "paternalistic" in the sense that it prevents parties who wish to contract with one another from entering into a contract on precisely the terms that they would choose. But ever since West Coast Hotel Co. v. Parrish, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703 (1937), finally overruled Lochner v. New York. 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905), and Adkins v. Children's Hospital, 261 U.S. 525, 43 S.Ct. 394, 67 L.Ed. 785 (1923), "paternalism" has been a perfectly acceptable motive for legislative regulation of this sort. Olsen v. Nebraska ex rel. Western Reference & Bond Assn., Inc., 313 U.S. 236, 246, 61 S.Ct. 862, 865, 85 L.Ed. 1305 (1941).

*809 In determining whether the North Carolina statute narrowly serves these interests, it is important to note that the statute does not impose a blanket prohibition upon fees that exceed a certain proportion of gross receipts, as did the statute in Munson. [FN2] The basic judgment for the trier-of-fact under the fee provisions is whether the fee is "reasonable." This determination is made not only in light of the percentages, but also in light of such factors as whether the solicitation "involve[s] the dissemination of information, discussion, or advocacy relating to public issues as directed by the [charity] which is to benefit from the solicitation," §§ 131C-17.2(c), (d)(1), and whether the ability of the charity to "raise money or communicate its ideas, opinions, and positions to the public would be significantly diminished" by the charging of a lower fee, § 131C-17.2(d)(2).

FN2. Neither Schaumburg nor Munson holds that the "percentage of gross receipts" figure is irrelevant to the question whether a particular fee is unreasonable or fraudulent. See Munson, 467 U.S., at 961, 966, and n. 14, 104 S.Ct., at 2849, 2852, and n. 14. The problem with the figure was that, standing alone, it was "simply too imprecise an instrument to accomplish" the end of preventing fraud. Id., at 961, 104 S.Ct., at 2849.

The inclusion of these factors in the "reasonableness" determination of the factfinder protects against the vices

of the fixed-percentage scheme struck down in Munson. The limited waiver of the 25% limitation in Munson was found unacceptable because the statute gave the State "no discretion to determine that reasons other than financial necessity warrant a waiver." 467 U.S., at 963, 104 S.Ct., at 2850. This meant that organizations whose high solicitation costs were a result of the dissemination of information would not be able to obtain waivers and would thus be prevented by the 25% limitation from hiring professional fundraisers. Id., at 963-964, 104 S.Ct., at 2850. No such problem exists here: the statute mandates that First Amendment considerations such as the desire to disseminate information and the ability of the charity to get its message across be taken into account by the factfinder in determining *810 reasonableness. Thus, unlike the statute in Munson, it cannot be said that the reasonableness limitation is overbroad, as the North Carolina statute is designed and carefully tailored to avoid any restrictions on "First Amendment activity that results in high costs but **2685 is itself a part of the charity's goal or that is simply attributable to the fact that the charity's cause proves to be unpopular," Munson, supra, at 967, 104 S.Ct., at 2852. In my view, the fee provisions of the statute thus satisfy the constitutional requirement that it be narrowly tailored to serve the State's compelling interests. I would reverse the judgment of the Court of Appeals on this issue.

Ш

The next part of the statute to be considered is the requirement of the Act that the fundraiser disclose to the potential donor "the percentage of charitable contributions collected during the previous 12 months that were actually turned over to charity," ante, at 2676. [FN3] The asserted purpose of this provision is to "better inform the donating public as to where its money will go" in order to assist the potential donor in making the decision whether to donate. Brief for Appellants 17. The Court concludes, after a lengthy discussion of the constitutionality of "compelled statements," that strict scrutiny *811 should be applied and that the statute does not survive that scrutiny. I disagree.

<u>FN3.</u> In the words of the statute, the fundraiser must disclose

"[t]he average of the percentage of gross receipts actually paid to [charities] by the professional fund-raising counsel or professional solicitor conducting the solicitation for all charitable sales promotions conducted in this State by that [fundraiser] for the past 12 months, or for all completed

charitable sales promotions where the [fundraiser] has been soliciting funds for less than 12 months." N.C.Gen.Stat. § 131C-16.1(3) (1986).

The statute also contains several other disclosure provisions that are not at issue in this appeal, including a requirement that the professional fundraiser disclose his name, his employer, and his employer's address to potential donors, §§ 131C-16.1(1)-(2), and a requirement that any person subject to licensure under the Act disclose upon request "his percentage of fund-raising expenses and the purpose of the organization," N.C.Gen.Stat. § 131C-16 (1986).

This statute requires only that the professional solicitor disclose certain relevant and verifiable facts to the potential donor. Although the disclosure must occur at some point in the context of the solicitation (which can be either oral or written), it is directly analogous to mandatory disclosure requirements that exist in other contexts, such as securities transactions. In my view, the required disclosure of true facts in the course of what is at least in part a "commercial" transaction--the solicitation of money by a professional fundraiser-does not necessarily create such a burden on core protected speech as to require that strict scrutiny be applied. Indeed, it seems to me that even in cases where the solicitation involves dissemination of a "message" by the charity (through the fundraiser), the disclosure required by the statute at issue here will have little, if any, effect on the message itself, though it may have an effect on the potential donor's desire to contribute financially to the cause.

Of course, the percentage of previous collections turned over to charities is only a very rough surrogate for the percentage of collections which will be turned over by the fundraiser in the particular drive in question. The State's position would be stronger if either in the legislative history or in the testimony in the District Court there was some showing that the percentage charged by any particular fundraiser does not vary greatly from one drive to another. Nonetheless, because the statute is aimed at the commercial aspect of the solicitation, and because the State's interests in enacting the disclosure requirements are sufficiently strong, I cannot conclude that the First Amendment prevents the State from imposing the type of disclosure requirement involved here, at least in the absence of a showing that the effect of the disclosure is to dramatically limit contributions or impede a charity's ability to disseminate ideas or information. But, again, we have nothing but speculation to guide *812 us here,

since neither party offered any evidence as to how this provision would operate when **2686 the statute went into effect. On this state of the record, and considering the rule that "[w]hen a statute is assailed as unconstitutional we are bound to assume the existence of any state of facts which would sustain the statute in whole or in part," Alabama Federation of Labor v. McAdorv, 325 U.S. 450, 465, 65 S.Ct. 1384, 1391, 89 L.Ed. 1725 (1945), I would uphold this provision.

IV

The final issue raised here is the validity of the licensing provisions contained in the North Carolina statute. It is beyond dispute that the statute differentiates between professional fundraisers and volunteer or in-house fundraisers; the former may not engage in solicitation until their license application is accepted, while the latter may. But this fact alone does not impose an impermissible burden on protected speech, nor does it require that the licensing provisions be subjected to strict scrutiny.

For one thing, the requirement that a professional fundraiser apply for and receive a license before being allowed to solicit donations does not put any burden on the charities' ability to speak. Even if the charity is one that typically relies on professional fundraisers, the effect of the statute is to require only that the fundraiser the charity hires is a fundraiser who has been licensed by the State. While this effect may limit to some degree the charity's ability to hire whomever it chooses as its professional fundraiser, it will still be able to choose from other, licensed professionals and obtain their assistance in soliciting donations. [FN4] To the extent, *813 then, that the licensing provisions have a burden on speech, it is one that truly can be said to be incidental. [FN5] In addition, it is a burden that is countenanced in other circumstances without any suggestion that some type of heightened scrutiny should apply. For example, bar admission requirements may have some incidental effect on First Amendment protected activity by restricting a petitioner's right to hire whomever he pleases to serve as his attorney, but we have never suggested that state regulation of admission to the bar should generally be subject to strict scrutiny. In my view, then, requiring a professional fundraiser to wait until its license is approved before engaging in solicitation does not create a sufficiently significant burden on speech by charities that it should be reviewed under any more exacting standard than that which is typically applied to state occupational licensing requirements.

FN4. There is absolutely no basis in the record

to conclude that the licensing and registration requirements of the Act are so onerous that they would drive professional fundraisers out of the State to such an extent that there would be none left for a charity to hire. If there were such evidence, then I would certainly agree that the licensing provisions did have the effect of restricting speech by charities, at least for those charities who rely heavily on professional fundraising.

FN5. Indeed, the record also indicates that even if the charity decides to wait until the licensing proceedings are complete in order to hire a specific fundraiser, the charity will not have long to wait. See App. 58-62. The speed with which licensing proceedings have been handled by the State in the past belies appellees' claim that the waiting period for professional fundraisers has a chilling effect on the charities' right to speak.

Nor do I think that heightened scrutiny should apply because the statute allegedly has some effect on speech by the professional fundraisers themselves. It simply is not true that in this case the fundraisers are prevented from engaging in any protected speech on their own behalf by the State's licensing requirements; the requirements only restrict their ability to engage in the profession of "solicitation" without a license. We do not view bar admission requirements as invalid because they restrict a prospective lawyer's "right" to be hired as an advocate by a client. So in this case we should not subject to strict scrutiny the State's attempt to license a business—professional fundraising—some of whose members might reasonably be **2687 thought to pose a risk of fraudulent activity. As Justice Jackson put it:

*814 "The modern state owes and attempts to

*814 "The modern state owes and attempts to perform a duty to protect the public from those who seek for one purpose or another to obtain its money. When one does so through the practice of a calling, the state may have an interest in shielding the public against the untrustworthy, the incompetent, or the irresponsible, or against unauthorized representation of agency. A usual method of performing this function is through a licensing system." Thomas v. Collins, 323 U.S. 516, 545, 65 S.Ct. 315, 329, 89 L.Ed. 430 (1945) (concurring opinion).

In this case, the North Carolina statute's requirement that professional solicitors wait for a license before engaging in any solicitation is rationally related to the State's interest in protecting the public and the charities themselves. The State could reasonably have

concluded that professional solicitors pose a greater risk of fraud, see, e.g., App. 60, making it more important that the State have an opportunity to review their license applications before they are allowed to engage in solicitation. Presumably, there is less of a risk that a charity will be defrauded or cheated by volunteer fundraisers and fundraisers who are themselves employed by the charity, as these individuals are more likely to be known to the charity. See New Orleans v. Dukes, 427 U.S. 297. 96 S.Ct. 2513. 49 L.Ed.2d 511 (1976). I would, accordingly, uphold the licensing provisions of the statute notwithstanding its different treatment of volunteers and professionals.

108 S.Ct. 2667, 487 U.S. 781, 101 L.Ed.2d 669, 56 USLW 4869

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