IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

PHYSICIANS COMMITTEE FOR RESPONSIBLE MEDICINE and CATHERINE HOLMES, for herself and as a representative for others similarly situated, *Plaintiffs,* v. GENERAL MILLS, INC.; DANNON CO., INC.; McNEIL-PPC, INC.; INTERNATIONAL DAIRY FOODS ASSOCIATION; DAIRY MANAGEMENT, INC.; NATIONAL DAIRY COUNCIL; and LIFEWAY FOODS, INC., *Defendants.*	)	Civil Action Nos. 1:05CV958 1:05CV960 (LMB/BRP)

BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS' MOTIONS TO DISMISS

The Washington Legal Foundation (WLF) files this brief in support of the Defendants' motions to dismiss Civil Action Nos. 1:05CV958 and 1:05CV960. The two cases were originally filed as a single action for injunctive relief in the Circuit Court for the City of Alexandria, Virginia. Two groups of Defendants then filed removal petitions; a motion to consolidate the cases (as well as a third case, No. 1:05CV959) is pending before the Court.

WLF supports each of the arguments raised by Defendants in support of their motions to dismiss.[1] WLF's brief focuses on only one of those arguments: the cases should be

[1] In particular, WLF wholeheartedly agrees with Defendants that, in light of PCRM's pending FTC and FDA petitions, the Court should dismiss this action pursuant to the doctrine of primary jurisdiction.

dismissed because neither of the Virginia statutes upon which Plaintiffs rely authorizes private parties to seek injunctive relief, the sole type of relief requested by Plaintiffs. WLF's brief also argues that the Virginia statutes should be interpreted as precluding injunctive relief in this case because a contrary interpretation would raise serious First Amendment concerns.

STATEMENT OF THE CASE

In their suit for injunctive relief, Plaintiffs take issue with advertisements run by Defendants that promote consumption of dairy products. According to Plaintiffs, the advertising campaign is designed "to convince Virginia consumers specifically, and Americans generally, that increased consumption of dairy products will lead to weight loss." Bill of Complaint ("Compl.") ¶ 1.

The Plaintiffs include one group and one individual. The group is Physicians Committee for Responsible Medicine (PCRM), which describes itself as a charitable organization with more than 100,000 members (including 4,700 in Virginia) that "advocates for preventive medicine through good nutrition, among other mission activities." Compl. ¶ 2. PCRM does not claim to have suffered any injuries as a result of the challenged advertising, but it claims that some unnamed members have been injured. The individual Plaintiff is Catherine Holmes, a Virginia resident and a member of PCRM. Ms. Holmes claims that she saw some of the advertising, "relied upon it by going on the diet and increasing her consumption of dairy products, and gained, rather than lost, weight." *Id.* ¶ 3.

The Complaint recognizes that Defendants have cited scientific studies in support of their weight-loss claims. Plaintiffs acknowledge, for example, that Defendants rely on the findings of Michael Zemel, Ph.D., a researcher at the University of Tennessee. Compl. ¶¶ 15-

16, 34-36. Plaintiffs also acknowledge that Defendants rely on studies that have demonstrated conclusively an association between the use of dairy products and a healthier body weight. *Id.* ¶ 40. They further acknowledge that in support of the weight-loss claim, a dairy industry web site lists 35 other scientific studies. *Id.* ¶ 42.

The Complaint nonetheless contends that those three categories of studies do not adequately support the weight-loss claims. Plaintiffs contend that the Zemel studies cannot reasonably be relied upon, because they are scientifically flawed, they are contradicted by findings from other studies, and Dr. Zemel's objectivity is compromised -- both because he has received funding from the dairy industry and because he holds a method patent for using dairy products as a means of treating/preventing obesity and thus has a financial interest in promoting such use. *Id.* ¶¶ 15-16, 34-36. While acknowledging that the studies showing an "association" between "the [increased] use of dairy products or calcium supplements and a healthier body weight" are not "completely without merit," the Complaint states that they are of "limited" value because no causal relationship necessarily exists. *Id.* ¶ 40. The Complaint speculates that the "healthier body weight" finding could be due to an overall tendency of dairy product users to be more "health-conscious than non-milk drinkers." *Id.* The Complaint further alleges that the dairy industry has "distorted the results and significance" of the 35 studies listed on the dairy industry web site. *Id.* ¶ 42.

Although the Complaint asserts that Defendants' weight-loss claims are false, it does not include any explicit statement that Defendants made those claims with knowledge of their falsity. The closest the Complaint comes to making such an allegation is as follows:

The dairy industry is . . . highly sophisticated in the science of nutrition **and** in selling

> its products to consumers. The dairy industry defendants in this case are well aware of the available scientific information about dairy intake and weight. As a result, they also know that the average consumer is likely to **gain**, not **lose**, weight, by adding dairy products, especially high-fat dairy products, to their diet.

Id. ¶ 45 (emphasis in original). In other words, the allegation is that the Defendants could not have believed what they were saying because they were too smart to have been duped by Dr. Zemel. To the extent that Paragraph 45 can be viewed as a vaguely worded knowledge-of-falsity claim, the Complaint does not allege *any* specific conduct by Defendants that would tend to support such a claim.

Plaintiff Holmes – although a member of PCRM, a group with a long history of hostility to the dairy industry – alleges that she believed the industry's weight-loss claims and, in reliance on those claims, altered her diet by significantly increasing her consumption of dairy products. *Id.* ¶ 30. She alleges that her reliance resulted in injury: she lost money and gained weight. *Id.* ¶ 31.

The Complaint alleges two causes of action. First, the Complaint alleges that Defendants violated the Virginia Consumer Protection Act of 1977, Va. Code Ann. § 59.1-196 *et seq.* (the "VCPA"), which prohibits a supplier of goods or services from, *inter alia*, "Misrepresenting that goods or services have certain quantities, characteristics, ingredients, uses, or benefits." Va. Code Ann. § 59.1-200(A)(5). Compl. ¶¶ 57-67. Second, the Complaint alleges that Defendants violated Virginia's False Advertising Statute, Va. Code Ann. § 18.2-216 (the "FAS"), which makes it a Class 1 misdemeanor for anyone to disseminate an advertisement containing an "untrue, deceptive or misleading" statement of fact with an intent to sell merchandise or to increase consumption thereof. Although the Complaint

alleges that Ms. Holmes and unspecified "members" of PCRM suffered damages as a result of the VCPA and FAS violations, it does not seek recovery of damages. Rather, it seeks only "equitable relief": an injunction against further advertisements that claim that increased consumption of dairy products can lead to weight loss, and a "mandatory injunction" requiring Defendants to undertake a "corrective market campaign" that includes advertisements stating that consumption of dairy products will *not* lead to weight loss. *Id.*, Prayer for Relief A and B.

SUMMARY OF ARGUMENT

Neither the FAS nor the VCPA authorizes a private litigant to seek an injunction, or any other sort of equitable relief, as a remedy for violation of the statute. Because those are the only two statutes invoked by Plaintiffs, and because Plaintiffs seek injunctive relief as their *sole* remedy, their Bill of Complaint must be dismissed. Both statutes authorize *government officials* to seek injunctive relief, but both the language and structure of the statutes make clear that that authority does not extend to private litigants. Indeed, WLF is unaware of any Virginia court, whether state or federal, that has interpreted either the FAS or the VCPA as authorizing injunctive relief for private litigants.

Even if the Court concludes that the issue is unclear, it should apply the doctrine of constitutional doubt and dismiss the lawsuit. Any interpretation of the FAS or VCPA that permitted individuals to serve as private attorneys general, authorized to sue for injunctions against others' speech on issues of public importance, would raise serious First Amendment concerns. The mere threat of such suits would have a significant chilling effect on such speech. Any such law would be subject to strict First Amendment scrutiny, regardless

whether the censored speech on issues of public importance arose in a commercial context. The doctrine of constitutional doubt counsels that when a statute can plausibly be interpreted in a manner that avoids such constitutional difficulties, a reviewing court should adopt that interpretation. Because an interpretation of the FAS and VCPA that avoids placing censorship powers into the hands of private attorneys general (and thus avoids First Amendment difficulties) is eminently plausible, WLF respectfully submits that the Court should adopt that interpretation here and dismiss the Bill of Complaint.

ARGUMENT

I. INJUNCTIVE RELIEF IS UNAVAILABLE TO PRIVATE PLAINTIFFS UNDER EITHER THE FAS OR THE VCPA

Both the FAS and the VCPA provide for private rights of action to enforce those statutes. Neither of the provisions authorizing private rights of action contemplates injunctive relief for the plaintiffs. Because Plaintiffs make clear that injunctive relief is the *only* form of relief they seek, the Bill of Complaint should be dismissed.

A. The FAS

Virginia's False Advertising Statute (the "FAS") is a criminal statute that makes it a Class 1 misdemeanor for anyone to, among other things, disseminate an advertisement containing an "untrue, deceptive or misleading" statement of fact with an intent to sell merchandise or to increase consumption thereof. Va. Code Ann. § 18.2-216.

Separate statutes address enforcement of the FAS by government officials on the one hand, and by private citizens on the other hand. Va. Code Ann. § 59.1-68.2 authorizes the Attorney General to "bring an action in the name of the Commonwealth to enjoin any

violation" of the FAS. Similarly, Va. Code Ann. § 59.1-68.4 grants such enforcement authority not only to the Attorney General but also to "the attorney for any city or county." Section 59.1-68.4 (which is entitled, "Suits by attorneys for the Commonwealth and city and county attorneys") explicitly provides that the court having jurisdiction "may enjoin such violations notwithstanding the existence of an adequate remedy at law" and notwithstanding the absence of evidence regarding damages.

In sharp contrast, the statutes authorizing private actions under the FAS make no provision whatsoever for injunctive relief. Moreover, they spell out with precision the relief to which an injured private litigant is entitled: "Any person who suffers loss as the result of a violation of [the FAS] . . . shall be entitled to bring an individual action to recover damages, or $100, whichever is greater. . . . [I]n addition to the damages recovered by the aggrieved party, such person may be awarded reasonable attorney's fees." Va. Code Ann. §§ 59.1-68.3 & 59.1-68.5. There is only one reasonable conclusion to be drawn from the juxtaposition of the enforcement provisions in this manner: in contrast to the Attorney General and attorneys for a city or county, private litigants are *not* authorized to seek or obtain injunctions against future violations of the FAS. Moreover, the language of §§ 59.1-68.3 & 59.1-68.5 is explicit that violations of the FAS do not give rise to an all-encompassing right of action by injured private individuals; rather, their entitlement is explicitly limited to "an individual action *to recover damages*, or $100, whichever is greater." By definition, "an individual action to recover damages" does not include an action for injunctive relief.

Furthermore, authorizing private individuals to sue for prospective relief, such as an injunction, would be inconsistent with the provision that limits private suits to those who have

"suffer[ed] loss" as a result of an FAS violation. Once private plaintiffs have been made whole by an award of damages, there is little likelihood that they will suffer future loss – because even if the defendant continues to disseminate false advertising, there is little likelihood that they will be deceived by the advertising yet again. To grant an injunction under those circumstances to a private litigant would constitute the award of prospective relief to someone with little prospect of suffering future injury, contrary to the rationale of the provision that limits private actions to those who have "suffer[ed] loss." To the extent that injunctive relief is necessary to protect the public at large, §§ 59.1-68.2 & 59.1-68.4 authorize *public officials* to seek whatever injunctions are necessary.[2]

Finally, WLF notes that the Virginia Supreme Court, in the only case in which it has discussed private suits under the FAS, indicated its understanding that the private right of action created by § 58.1-68.3 is an action for damages only. *Henry v. R.K. Chevrolet, Inc.,* 254 S.E.2d 66, 67 (Va. 1979) ("The violation of [the FAS] is not only a criminal offense punishable as a misdemeanor, but it subjects the defendant to an action for damages by any person who suffers a loss as a result of such violation.").

B. The VCPA

The structure of the FAS and the VCPA are quite similar; for many of the same

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[2] The title of § 59.1-68.4 ("Suits by attorneys for the Commonwealth and city and county attorneys") puts to rest any argument that that statute authorizes courts to issue injunctions in *any and all* suits brought to enforce the FAS, including suits by private litigants. The statute authorizes courts to "enjoin" violations of the FAS "notwithstanding the existence of an adequate remedy at law," but that grant of jurisdiction can only be understood as applying to the specific statutory provision within which it appears, a statute that applies (as indicated by its title) only to suits by public officials.

reasons as outlined above, the VCPA cannot reasonably be interpreted as authorizing private litigants to seek injunctive relief.

The Virginia Consumer Protection Act of 1977 (the "VCPA") prohibits a supplier of goods or services from engaging in a wide variety of conduct, including, "Misrepresenting that goods or services have certain quantities, characteristics, ingredients, uses, or benefits." Va. Code Ann. § 59.1-200(A)(5). Like the FAS, the VCPA has dual-track enforcement provisions -- one track for suits by public officials to enjoin violations of the VCPA (Va. Code Ann. § 59.1-203) and one track for private individuals who have suffered a loss and seek to recover damages (Va. Code Ann. § 59.1-204). The language of §§ 59.1-203 and 59.1-204 and their dual-track structure are inconsistent with Plaintiffs' assertion that they are entitled to seek injunctive relief under the VCPA.

Section 59.1-203, entitled "Restraining prohibited acts," makes clear that the individuals authorized to seek to restrain prohibited acts are "the Attorney General, any attorney for the Commonwealth, or the attorney for any city, county, or town." § 59.1-203(A). When such government officials seek to enjoin a VCPA violation, "the circuit court having jurisdiction may enjoin *such violations* notwithstanding the existence of an adequate remedy at law" and without regard to whether "damages [are] proved." *Id.* (emphasis added). The circuit court's powers "to restrain and prevent violations" extend both to "temporary" and "permanent" injunctions. § 59.1-203(C). There is no mention whatsoever of private litigants in this, the only section of the VCPA that addresses injunctions against violations of the VCPA.

Suits by private litigants are discussed in a separate section of the VCPA, § 59.1-204

(entitled, "Individual action for damages or penalty"). That section provides, "Any person who suffers loss as the result of violation of this chapter shall be entitled to initiate an action to recover actual damages, or $500, whichever is greater" (§ 59.1-204(A)), and "also may be awarded reasonable attorneys' fees and court costs." § 59.1-204(B). Just as with the FAS, there is only one reasonable conclusion to be drawn from the juxtaposition of the enforcement provisions in this manner: in contrast to the Attorney General, attorneys for the Commonwealth, and an attorney for a city/county/town, private litigants are *not* authorized to seek or obtain injunctions against future violations of the VCPA. Moreover, the language of § 59.1-204(A) makes explicit that violations of the VCPA do not give rise to an all-encompassing right of action by injured private individuals; rather, their entitlement is limited to "an action to recover actual damages, or $500, whichever is greater." By definition, the creation of "an action to recover actual damages" does not include an action for injunctive relief.[3]

No state or federal court in Virginia has so much as suggested that private litigants are entitled to seek injunctive relief under the VCPA, and several courts have strongly indicated that they are not so entitled. For example, in *Disharoon v. Wintergreen Development, Inc.,* 1991 U.S. Dist. LEXIS 15703 (W.D. Va. 1991), the plaintiffs filed suit under the VCPA after becoming dissatisfied with real property they purchased from the defendant. But instead of seeking to recover damages at law, the plaintiffs sought equitable relief: rescission of the

[3] Also, for the same reasons explained above in connection with the FAS, authorizing private individuals to sue for injunctive relief is inconsistent with the statutory provision that limits private suits to those who have "suffer[ed] loss" as a result of a VCPA violation.

purchase contract. The trial court held that rescission was not a remedy authorized by the VCPA. The court said that the *only* remedy available to the plaintiff in a VCPA action is the remedy explicitly set forth in § 59.1-204:

> The court cannot accept the proposition that rescission, under any circumstances, is a proper remedy under § 59.1-204. The language of that provision is crystal clear – a prevailing party may recover "actual damages or $100, whichever is greater."

Disharoon, 1991 U.S. Dist. LEXIS 15703, at *3. *Disharoon*'s logic dictates that injunctive relief, because it is not specified in § 59.1-204, is not available to private litigants.

H.D. Oliver Funeral Apartments, Inc. v. Dignity Funeral Services, Inc., 964 F. Supp. 1033 (E.D. Va. 1997), is similar. In that case, a funeral home sought an injunction against the advertising of one of its competitors, claiming that the advertising was false and violated the VCPA. The court dismissed the action, finding that the VCPA authorizes private suits only when the individual injured by advertising is a *consumer*, not a competitor. *H.D. Oliver*, 964 F. Supp. at 1039. But the court also provided an alternative basis for its dismissal: the plaintiff was not entitled to an injunction against his competitor's advertisements because "there [is not] any provision in the VCPA authorizing [the plaintiff] to seek an injunction against [the defendant] from publishing the advertisement." *Id.*[4]

In their Bill of Complaint, Plaintiffs cite § 59.1-203(C) ("The circuit courts are authorized to issue temporary or permanent injunctions to restrain and prevent violations of"

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[4] The court rejected the plaintiff's complaint that denial of an injunction under the VCPA would leave him without any means of obtaining relief. The court said that the plaintiff was free to sue under § 59.1-68.3, which "gives any person who suffers a loss as a result of a violation of [the FAS] a cause of action *for damages* similar to damages recoverable under the VCPA." *Id.* (emphasis added).

the VCPA) in support of their assertion that they are entitled to seek injunctive relief. Compl. ¶ 67. That citation totally ignores the structure of the VCPA and the fact that the quoted language appears within the section of the VCPA that addresses suits by government officials to enjoin violations of the VCPA (§ 59.1-203), not the section that addresses suits by private individuals (§ 59.1-204). Section 59.1-203(C) merely clarifies that the circuit courts' authorization to issue injunctions extends both to temporary *and* to permanent injunctions; nothing in its language so much as suggests that it was intended to expand the remedial options available to private litigants. Section 59.1-203 grants broad powers to circuit courts; but the exercise of that power is unwarranted in cases in which a private litigant seeks relief to which (s)he clearly is not entitled under the statute authorizing private suits.[5]

In sum, the structures of the FAS and the VCPA, the statutory language, and the case law all support a finding that neither statute authorizes an award of injunctive relief to a private litigant. In the absence of such authorization, Plaintiffs' Bill of Complaint must be dismissed.

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[5] Section 59.1-203(D) provides further support for the argument that, regardless of the breadth of the court's power to issue injunctions, the only parties entitled to seek and obtain injunctive relief under the VCPA are those government officials listed in § 59.1-203(A). Section 59.1-203(D) recognizes that the Commissioner of Virginia's Department of Agriculture and Consumer Services may have significant interest in investigating possible violations of the VCPA. But that section makes clear that the Commissioner nonetheless lacks independent authority to seek injunctive relief. Rather, if the Commissioner seeks initiation of enforcement action, he must approach one of the government officials listed in § 59.1-203(A) and "request" that official "to bring an action to enjoin such violations." § 59.1-203(D). Given the General Assembly's unwillingness to authorize the Commissioner on his own to initiate actions to enjoin VCPA violations even when the violations fall within his purview, it is unlikely that the General Assembly nonetheless intended to grant private individuals the right to seek broad injunctions against prospective VCPA violations.

II. THE DOCTRINE OF CONSTITUTIONAL DOUBT IS APPLICABLE AND COUNSELS A FINDING THAT NEITHER THE FAS NOR THE VCPA AUTHORIZES AN AWARD OF INJUNCTIVE RELIEF TO PRIVATE LITIGANTS

Even if the Court concludes that the availability of injunctive relief is unclear, it should nonetheless grant the motion to dismiss based on the doctrine of constitutional doubt. Any interpretation of the FAS or VCPA that permitted individuals to serve as private attorneys general, authorized to sue for injunctions against others' speech on issues of public importance, would raise serious First Amendment concerns.

The "constitutional doubt" doctrine is a "cardinal principle of statutory interpretation." *Zadvydas v. Davis,* 533 U.S. 678, 689 (2001). That doctrine provides that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided," a court's "duty is to adopt the latter." *Jones v. United States*, 526 U.S. 227, 239 (1999).

Any statute that imposes significant restraints on free speech raises serious constitutional concerns. That is true regardless whether the speech at issue is commercial in nature (*i.e.,* it proposes a commercial transaction); in general, although commercial speech has been extended somewhat less protection than expressions that are noncommercial in nature, that level of protection certainly has not been insubstantial. *See, e.g., Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 562-63 (1980). But regardless whether speech is deemed commercial, the Supreme Court has made clear that speech is entitled to a greater level of constitutional protection when, as here. it involves matters of public interest. First Amendment protection of speech on matters of public interest extends even to speech that

is false. In *New York Times v. Sullivan,* 376 U.S. 254 (1964), the Court held that the First Amendment prohibited imposition of damages in a libel suit filed in response to false information negligently included in a newspaper advertisement, in large measure because the plaintiff's status as a public figure made the case of public interest. The Court arrived at that conclusion after reviewing numerous cases that all relied on the "profound national commitment to the principle that debate *on public issues* should be uninhibited, robust, and wide open." *Id.* at 270. The Court was concerned that imposing liability on speakers for uttering false statements on matters of public interest threatened to chill even truthful speech on such matters. *Id.*

There can be little doubt that the health issues raised by Defendants' advertisements are matters of significant public interest. Public health is significantly endangered by the prevalence of overweight and obese individuals within the nation's population. Accordingly, information about the weight-reducing potential of a food category (dairy products) regularly consumed by the vast majority of Americans is of great public interest. In light of that significant public interest, any interpretation of the FAS and the VCPA that threatens to chill discussion of the issue raises serious constitutional concerns.

Those concerns are particularly serious in light of the circumstances of this case. Those circumstances include: (1) the Bill of Complaint includes nothing more than vague and conclusory allegations regarding whether Defendants *knowingly* made false statements and indeed admits that there are scientific studies supporting Defendants' position (albeit Plaintiffs contend that those studies are flawed); (2) threatened injunctions can have a particularly severe chilling effect on truthful speech when, as here, lawsuits are filed despite the existence of a

substantial body of evidence supporting the speaker's claims; (3) the injunctive relief proposed by Plaintiffs would impose significant prior restraints on Defendants' speech, despite the absence of any indication that Ms. Holmes, PCRM, or any members of PCRM would suffer any injury-in-fact if Defendants were not enjoined from continuing their advertisements; (4) the proposed injunctive relief raises the prospect that Defendants would be compelled to pay for "corrective" advertising against their will, such as advertisements alleging that increased dairy consumption results in weight *gain*; and (5) in contrast to government attorneys who generally establish false-advertising enforcement priorities based on the potential economic impact of the advertising at issue, this suit appears to be driven largely by PCRM's ideological objections to consumption of dairy products.

The Supreme Court last year agreed to hear *Nike, Inc. v. Kasky*, a case that raised important issues regarding the proper level of constitutional protections to be afforded commercial speech that discusses matters of significant public importance. The Court ultimately did not address those issues, dismissing the case on procedural grounds. *Nike, Inc. v. Kasky,* 539 U.S. 654 (2003). Justice Breyer's separate opinion (dissenting from dismissal of the case) nonetheless provided a detailed discussion of the First Amendment concerns raised by consumer protection laws that allow individual citizens to serve as private attorneys general who challenge commercial speech concerning matters of significant public interest.[6] Justice

[6] The *Nike* case involved a challenge, filed pursuant to California's consumer protection statute, to statements made by Nike regarding labor conditions at its overseas production facilities – an issue of significant public interest. The plaintiff, an individual with a long history of anti-Nike animus, alleged that Nike's labor conditions were worse than its statements had indicated.

Breyer (joined by Justice O'Connor) said that California's unfair competition law raised grave First Amendment concerns because of its tendency to chill speech on matters of public interest. Justice Breyer explained:

> The delegation of state authority to private individuals authorizes a purely ideological plaintiff, convinced that his opponent is not telling the truth, to bring into the courtroom the kind of battle better waged in other forums. Where that political battle is hard fought, such plaintiffs potentially constitute a large and hostile crowd freely able to bring prosecutions designed to vindicate their beliefs, and to do so unencumbered by the legal and practical checks that tend to keep the energies of public enforcement agencies focused on more purely economic harm. . . . That threat means a commercial speaker must take particular care -- considerably more care than the speaker's noncommercial opponents -- when speaking on public matters. A large organization's unqualified claim about the adequacy of working conditions, for example, could lead to liability, should a court conclude after hearing the evidence that enough exceptions exist to warrant qualification -- even if those exceptions were unknown (but perhaps should have been known) to the speaker. Uncertainty about how a court will view these, or other, statements, can easily chill a speaker's efforts to engage in public debate -- particularly where a "false advertising" law, like California's law, imposes liability based on negligence or without fault.

Nike, 539 U.S. at 680 (Breyer, J., dissenting).[7]

Plaintiffs' proposed interpretation of the FAS and the VCPA raise similar constitutional concerns. That interpretation would place draconian enforcement powers into the hands of individual citizens who are far less likely than public officials to establish enforcement priorities based on the extent of economic harm cause by allegedly false advertising. Under that regime, it is very likely that commercial speakers will forgo significant amounts of speech on issues of major public importance, rather than face potentially debilitating lawsuits under the FAS and the VCPA.

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[7] No member of the Court took issue with Justice Breyer's First Amendment analysis. The Court dismissed the case based solely on procedural grounds.

Accordingly, the doctrine of constitutional doubt is applicable. Defendants' interpretation of the FAS and the VCPA (that private citizens are not permitted to seek injunctive relief under those statutes) is, at the very least, a plausible interpretation. Under those circumstances, the Court should adopt that interpretation in order to avoid the constitutional pitfalls that Plaintiffs' contrary interpretation entails.

CONCLUSION

Amicus curiae Washington Legal Foundation respectfully requests that the Court grant Defendants' motion to dismiss the Bill of Complaint for failure to state a cause of action.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of September, 2005, copies of the foregoing *amicus curiae* brief of Washington Legal Foundation were deposited in the U.S. Mail, First-Class postage prepaid, addressed as follows:

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