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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JANE DOE I, JANE DOE II, JOHN DOE I and JOHN DOE II, individually and on behalf of Wal-Mart Workers in Shenzhen, China, *et al.*, Plaintiffs, v. WAL-MART STORES, INC., Defendant.	Case No. CV 05-7307 GPS (MANx) **BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF WAL-MART'S MOTION TO DISMISS FIRST AMENDED COMPLAINT**

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF WAL-MART'S MOTION TO DISMISS FIRST AMENDED COMPLAINT

INTERESTS OF *AMICUS CURIAE*

The interests of the Washington Legal Foundation (WLF) are set forth more fully in the accompanying motion for leave to file this brief. WLF is a public interest law and policy center with supporters in all 50 states, including many in California. WLF regularly appears before federal and state courts to promote economic liberty, free enterprise, and a limited and accountable government.

In particular, WLF has devoted substantial resources over the years to promoting the free speech rights of the business community, appearing before numerous federal courts in cases raising First Amendment issues. *See, e.g., Nike v. Kasky*, 539 U.S. 654 (2003). WLF recently successfully challenged the constitutionality of Food and Drug Administration restrictions on speech by pharmaceutical manufacturers. *Washington Legal Found. v. Friedman,* 13 F. Supp. 2d 51 (D.D.C. 1998), *appeal dism'd,* 202 F.3d 331 (D.C. Cir. 2000).

WLF has also opposed litigation designed to create private rights of action under the Alien Tort Statute (ATS), 29 U.S.C. § 1350, because such litigation generally seeks (inappropriately, in WLF's view) to incorporate large swaths of customary international law into the domestic law of the United States. *See, e.g., Sosa v. Alvarez-Machain,* 542 U.S. 692 (2004). WLF is concerned that an overly expansive interpretation of the ATS would threaten to undermine American

foreign and domestic policy interests.

Although WLF supports Wal-Mart's Rule 12(b)(6) motion to dismiss in its entirety, this *amicus curiae* brief addresses UCL and ATS issues only.

STATEMENT OF THE CASE

Defendant Wal-Mart Stores, Inc. ("Wal-Mart") purchases (for re-sale to its retail customers) goods manufactured by suppliers located in numerous countries. Plaintiffs include individuals who are current or former employees of some of those suppliers, located in China, Bangladesh, Indonesia, Swaziland, and Nigeria. Four other plaintiffs (the "California Plaintiffs") are employed in California by retail competitors of Wal-Mart.

This brief focuses on claims raised by Plaintiffs under California's unfair competition law (UCL), Calif. Bus. & Prof. Code § 17200 *et seq.* (Counts VIII and IX of the First Amended Complaint (FAC)), and under the ATS (Count XI of the FAC). WLF does not believe that Plaintiffs have stated a cause of action under either statute.

Plaintiffs contends that Wal-Mart violates the UCL by the knowing use of suppliers who fail to adhere to minimum standards of labor and human rights, allegedly in violation of Wal-Mart's Code of Conduct; and by falsely telling California consumers that it enforces its Code of Conduct and ensures that the suppliers treat employees humanely. They allege that Wal-Mart has conveyed such information through its annual reports on supplier standards, through radio advertisements, and through its web sites. FAC ¶ 159. They contend that Wal-

Mart officials knew that these statements were false. FAC ¶ 160.

The California Plaintiffs contend that they were injured by Wal-Mart's actions because their employers were required to cut salaries in order to counter the competitive advantage obtained by Wal-Mart by: (1) failing to curtail abusive labor practices; and (2) falsely telling California consumers that Wal-Mart was working aggressively to end abusive labor practices by its suppliers. FAC ¶ 163. They seek injunctive relief, disgorgement of all profits derived from alleged UCL violations, and restitution. FAC ¶ 165.

Two foreign Plaintiffs, John Doe I and John Doe II, contend that the labor conditions at their factory in China violate customary international law and that they should be permitted to sue Wal-Mart in U.S. courts under the ATS to remedy those violations. FAC ¶¶ 172-177. They allege that the working conditions they face constitute forced labor because they are often forced to work without compensation and without being permitted to leave their places of employment. FAC ¶ 173. They allege that those working conditions violate a number of international law provisions outlawing forced labor and slavery. FAC ¶ 174.

On February 13, 2006, Wal-Mart filed a motion to dismiss the FAC pursuant to Fed.R.Civ.P. 12(b)(6). The motion alleges, *inter alia*, that Wal-Mart's statements regarding its overseas labor practices are fully protected by the First Amendment and thus not actionable under the UCL. Wal-Mart Br. 23-24, 28. The motion further alleges that Plaintiffs have failed to state a claim under

the ATS because they have failed to allege customary international law violations of the type recognized by *Sosa* as actionable under the ATS. *Id.* 29-34. WLF is filing this brief in order to support Wal-Mart's arguments regarding the First Amendment and the ATS.

SUMMARY OF ARGUMENT

Counts VIII and IX of the FAC fail to state claims upon which relief can be granted. Those counts raise claims under California's unfair competition law ("UCL"), Calif. Bus. & Prof. Code § 17200 *et seq.,* which prohibits unfair competition – including unlawful, unfair, and fraudulent business acts and unfair, deceptive, untrue, or misleading advertising. Plaintiffs concede that, among the unfair acts allegedly committed by Wal-Mart, only the allegedly false statements – statements that it enforces it Code of Conduct and ensures that its suppliers treat their employers humanely – occurred in California. Pltfs.' Opposition to Motion to Dismiss ("Opp. Br.") at 26. Accordingly, Counts VIII and IX rise or fall on whether those statements are actionable under the UCL.

Only limited remedies are available under the UCL. Damages cannot be recovered; rather, the UCL limits prevailing plaintiffs to injunctive relief and restitution. Although Plaintiffs claim to be seeking "restitution" from Wal-Mart, Opp. Br. 25 n.20, the "restitution" they seek is unavailable under the UCL. Restitution under the UCL is designed "to restore the status quo by returning to the plaintiff funds in which he or she has an ownership interest." *Korea Supply Co. v. Lockheed Martin Corp.,* 29 Cal. 4th 1134, 1149 (2003). Plaintiffs do not

allege that Wal-Mart possesses funds in which they have an ownership interest. Rather, they merely allege that they have been damaged by Wal-Mart's alleged misconduct and should be made whole. California courts have made clear that such claims are not actionable under the UCL.

Nor are Plaintiffs entitled to injunctive relief to prevent Wal-Mart from repeating its allegedly false statements, because the First Amendment protects against such prior restraints on speech on matters of public importance. The parties dispute whether Wal-Mart's statements regarding the overseas labor practices of its suppliers should be deemed commercial speech, a category of speech that – while entitled to significant First Amendment protection – is subject to government regulation designed to protect consumers engaging in commercial transactions. But what is not subject to dispute is that the overseas labor practices of large American corporations is an issue of *major public importance*. Because the First Amendment is designed to ensure that issues of major public importance are the subject of robust public debate, speech on such issues is entitled to *full* First Amendment protection, regardless whether the speech is properly classified as "commercial" or "noncommercial." Accordingly, Wal-Mart's statements regarding its overseas labor practices are entitled to full First Amendment protection, regardless whether (as Wal-Mart has convincingly argued) those statements should be deemed noncommercial.

This is not to say that speakers cannot be held accountable for damages caused by false statements on issues of major public importance; indeed they

can. In a libel action, for example, a speaker can be made to pay compensation for damages to the reputation of a individual – even if his statement concerns both a public figure and a matter of major public importance – if the statement is false and is uttered with knowledge of falsity or with reckless disregard for the truth. But while the First Amendment permits such after-the-fact award of damages for false speech in limited situations, it does not tolerate prior restraints on fully protected speech even when the plaintiff contends that the defendant will speak falsely unless prevented from doing so. By seeking an injunction against Wal-Mart's statements regarding its overseas labor practices, Plaintiffs are seeking just such an impermissible prior restraint.

Because Plaintiffs are not entitled to either restitution or injunctive relief – the only two types of relief available under the UCL – Counts VIII and IX of the FAC fail to state claims upon which relief can be granted. Even accepting as true all facts alleged by Plaintiffs in the FAC, they have failed to demonstrate that they are entitled to relief under the UCL.

Count XI of the FAC also fails to state a claim upon which relief can be granted. Count XI alleges that Wal-Mart's labor practices with regard to two of the Plaintiffs living in China, John Doe I and John Doe II, constituted violations of the law of nations and is actionable under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350. Count XI alleges that those labor practices violated international prohibitions against slavery and/or forced labor.

Tellingly, Plaintiffs do not allege that Wal-Mart, or anyone else allegedly

responsible for the working conditions faced by John Doe I or John Doe II, was a state actor. The Supreme Court and the Ninth Circuit have made clear that the ATS provides federal court jurisdiction over only a limited set of violations of the law of nations, and that any such alleged violations are never or rarely actionable when engaged in (as here) by purely private actors. The Ninth Circuit has categorically held that conduct by private actors is not actionable under the ATS. *Trajano v. Marcos (In re: Estate of Ferdinand E. Marcos Human Rights Litigation)*, 978 F.2d 493, 501-02 (9th Cir. 1992), *cert. denied*, 508 U.S. 972 (1993). Even those courts of appeals that have recognized causes of action under the ATS against private actors have done so in very limited contexts; for example, they have declined to recognize causes of action against private actors even for such reprehensible conduct as torture and summary execution. WLF is unaware of any court that has recognized an ATS cause of action against private actors in circumstances even remotely similarly to those alleged in Count XI.

In defense of Count XI, Plaintiffs cite the Supreme Court's recent decision in *Sosa v. Alvarez-Machain,* 542 U.S. 692 (2004). In fact, *Sosa* is fatal to their case. *Sosa* held that the ATS is purely a jurisdictional statute and does not make actionable alleged violations of international law; and that while federal courts do possess limited authority to recognize a "modest" number of federal common law rights of action based on alleged violations of the law of nations, the courts should exercise "great caution" in "adapting the law of nations to private rights." *Sosa*, 542 U.S. at 728. The Court *unanimously* rejected a contention that alle-

gations of state-sponsored kidnaping and arbitrary detention stated a federal common law claim actionable under the ATS.[1] Given that the allegations made in *Sosa* were not actionable, it is difficult to comprehend how the allegations made by John Doe I and John Doe II could be deemed actionable. At most, they allege that they were subjected to oppressive working conditions (forced overtime, pay below minimum wage, and denial of full overtime pay) and that they were "effectively prevented" from leaving their jobs during the first three months of employment because their wages were withheld during that period. FAC ¶¶ 7, 8, 51. Plaintiffs rather fancifully characterize such working conditions as "slavery" and "forced labor." Given *Sosa*'s unanimous rejection of an ATS cause of action based on far more serious allegations of state-sponsored *physical* coercion, John Doe I's and John Doe II's allegations that they were subjected to severe *economic* coercion by private parties cannot rise to the level of an actionable violation of the law of nations. Indeed, even if Plaintiffs really had alleged conduct amounting to "slavery" and "forced labor," they would still not meet the exacting standards established by *Sosa.*

There is an additional, independent reason for finding that Count XI fails to state a cause of action upon which relief can be granted. Plaintiffs do not allege that Wal-Mart engaged directly in the "forced labor" practices of which they complain. Rather, they assert that Wal-Mart, for a variety of reasons,

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[1] The defendant was a private Mexican citizen working at the behest of the American government. The defendant kidnaped a doctor in Guadalajara and detained him until the doctor was turned over to American authorities at the U.S.-Mexican border.

should be held responsible for the labor practices of its suppliers. But the great weight of ATS case law holds that one cannot be held liable under the ATS for aiding and abetting others' alleged violations of the law of nations. Most of the cases cited by Petitioners as supporting their claim that aiding-and-abetting allegations are actionable under the ATS, Opp. Br. 31 & n. 24, do not so hold. In particular, no Ninth Circuit decision so holds.

ARGUMENT

I. PLAINTIFFS' § 17200 CLAIMS FAIL TO STATE CLAIMS UPON WHICH RELIEF CAN BE GRANTED

A. The Only Possible Relief Plaintiffs Could Obtain Under § 17200 Is Injunctive Relief

The UCL bans unfair business practices and authorizes injunctive and restitutionary relief against "any person who engages in . . . unfair competition." Bus. & Prof. Code § 17203. Both sides agree that the UCL focuses on conduct occurring within the State of California. Opp. Br. 26-27; Wal-Mart Br. 22; *Norwest Mortgage, Inc. v. Superior Court*, 72 Cal. App. 4th 214, 222-23 (1999).

The California actions on which Plaintiffs base their UCL claim are the statements made by Wal-Mart regarding its adherence to the Code of Conduct:

> The *key* is that Wal-Mart misled California's consumers into believing that its low prices were legitimately obtained through adherence to Wal-Mart's Code. [FAC] ¶¶ 157-162. To hold Wal-Mart liable for its false statements, both groups [*i.e.,* both the foreign Plaintiffs and the California Plaintiffs] need only show a connection between their damages and the misleading statements. Plaintiffs need not show causation in the strict sense necessary for a tort action.

Opp. Br. 26-27 (emphasis added).

But regardless whether Plaintiffs have adequately demonstrated that they were injured by Wal-Mart's statements,[2] Plaintiffs' UCL claims can survive a Rule 12(b)(6) motion to dismiss only if they can demonstrate that they are entitled to some relief under the statute. As Plaintiffs recognize, they are not entitled to recover damages in a UCL suit; rather, they are limited to claims for restitution and injunctive relief.

California case law makes clear that the monetary recovery sought by Plaintiffs is not the type of equitable "restitution" available to UCL litigants. A UCL order for "restitution" is one "compelling a UCL defendant to return money obtained through an unfair business practice to those persons in interest from whom the property was taken, that is, to persons who had an ownership interest in the property or those claiming through that person." *Kraus v. Trinity Mgmt. Servs., Inc.*, 23 Cal.4th 116, 126-27 (2000). Plaintiffs' asserted right to "restitution," Opp. Br. 25 n.20, plainly does not meet that standard. Plaintiffs allege that they were injured by Wal-Mart's false statements because: (1) those false statements allowed Wal-Mart to continue to sell goods in California at the low sales prices facilitated by its use of forced labor; and (2) those low sales prices hurt the California Plaintiffs by requiring their employers to reduce wages in order to meet the competition. In seeking a monetary recovery from Wal-

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[2] As a result of 2004 amendments to the UCL, a UCL action may be brought only by designated public officials and by those who can demonstrate that they were injured by the unfair business practice complained of. *See* Bus. & Prof. Code §§ 17203, 17204, 17535.

Mart for such injuries, Plaintiffs quite obviously are not seeking to recover funds taken from them by Wal-Mart. Plaintiffs do not assert that any funds flowed from them to Wal-Mart; rather, they simply seek to hold Wal-Mart responsible for damages allegedly incurred as a result Wal-Mart's allegedly unfair competition. UCL restitution is designed to "restore the status quo by returning to the plaintiff funds in which he or she has an ownership interest," *Korea Supply Co. v. Lockheed Martin Corp.,* 29 Cal. 4th 1134, 1149 (2003), not to compensate plaintiffs for their damages.[3]

Because Plaintiffs do not contend that Wal-Mart holds money or property that rightfully belongs to them, the only relief that is even arguably available to them under the UCL is injunctive relief.

B. The First Amendment Bars Injunctive Relief Against Speech on Issues of Public Importance

Any effort by Plaintiffs to obtain an injunction against statements by Wal-Mart regarding its overseas labor practices runs afoul of the First Amendment. Any such injunction would amount to a prior restraint, and "Prior restraints on speech are the most serious and least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 559 (1976).

The absolute prohibition against prior restraints is subject to limitation

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[3] The UCL restitution remedy also permits one to seek recovery of specific "money or property in which he or she has a vested interest," even if the money or property was never previously in one's hands. *Korea Supply,* 29 Cal. 4th at 1150. But plaintiffs do not argue, nor could they, that they have any vested interest in the profits they seek to disgorge from Wal-Mart.

only in "exceptional cases." *Near v. Minnesota,* 283 U.S. 697, 716 (1931). None of the exceptions cited in *Near* – the publication of sailing dates of transports or the number and location of troops; incitement to acts of violence and the overthrow by force of orderly government – are even remotely similar to Wal-Mart's speech regarding its labor practices. Nor does the speech fall into any of the categories that are deemed unprotected by the First Amendment. *See, e.g., Chaplinski v. New Hampshire,* 315 U.S. 568 (1942) (fighting words); *Miller v. California,* 413 U.S. 15 (1973) (obscenity).

Nor is a prior restraint justified by allegations that a defendant has spoken falsely in the past. *Near* rejected just such an argument in connection with Minnesota's efforts to suppress as a public nuisance a newspaper alleged to have published "malicious, scandalous, and defamatory material." The Court held that one does not forfeit First Amendment rights by compiling a history of abusing those rights: a speaker "does not lose his right by exercising it." *Near,* 283 U.S. at 720. Any such abuses may be addressed only *after* they have occurred:

> [A] free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are intolerable.

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558-59 (1995).[4]

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[4] The First Amendment also bars any injunction that would compel Wal-Mart to speak against its will, such as an injunction requiring Wal-Mart to pay for advertisements "correcting" alleged errors in its prior statements. *See, e.g., Wooley v. Maynard,* 430 U.S. 705 (1977).

Plaintiffs contend that Wal-Mart's statements should be deemed "commercial speech,"[5] a category of speech generally deemed entitled to a somewhat lesser degree of First Amendment protection than is noncommercial speech. Wal-Mart convincingly argues that its statements should, in fact, be deemed to be noncommercial speech. But regardless which is the proper categorization, Wal-Mart's statements are entitled to *full* First Amendment protection against prior restraints because they focus on an issue of *major public importance*: the overseas labor practices of large American corporations. As the Supreme Court warned in criticizing prior restraints, "The damage [to free speech] can be particularly great when the prior restraint falls upon the communication of *news and commentary on current events*." *Nebraska Press Ass'n,* 427 U.S. at 559 (emphasis added).

Plaintiffs contend that this Court is bound by the California Supreme Court's determination, in *Kasky v. Nike, Inc.,* 27 Cal.4th 939 (2002), that the First Amendment provides no protection to commercial speech, even commercial speech on issues of public importance, if a UCL plaintiff demonstrates that the speech is false or misleading. Opp. Br. 27 ("*Kasky* remains the controlling law in California."). As more fully explained below, *Kasky* was wrongly decided. Moreover, this Court takes its guidance on First Amendment issues from the U.S. Supreme Court, not the California Supreme Court.

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[5] Commercial speech is defined as "speech that does no more than propose a commercial transaction." *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001).

The U.S. Supreme Court has explained that government is granted greater leeway in regulating speech directly related to commercial transactions because of its interest in "preservation of a fair bargaining process," an interest that often cannot be vindicated without some regulation of speech. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996) (plurality). Direct government regulation may be the only mechanism to ensure that consumers receive accurate information about the products and services they wish to purchase. It is thus "the State's interest in regulating the underlying transaction" that "give[s] it a concomitant interest in the underlying expression itself," *Edenfield v. Fane,* 507 U.S. 761, 767 (1993), and the power to "deal effectively with false, deceptive, or misleading sales techniques." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 69 (1983). A State's interest in sanctioning false commercial speech undoubtedly is at its highest when the speech directly concerns the characteristics of a commercial speaker's product or service (*e.g.,* price, efficacy, quality, value, or safety).

But a State's interest in regulating the speech of an entity that offers products for sale to the public diminishes as that speech becomes further removed from the underlying sales transactions. Speech of the type engaged in by Wal-Mart and alleged by Plaintiffs to have been false – discussion of its overseas labor practices – may lead consumers to feel more warmly about a company and ultimately more likely to purchase one of the company's product, but it is highly unlikely that a consumer would rely on such statements as his

primary basis for buying a specific product. The unlikelihood of such reliance suggests that States' interests in regulating the speech are significantly diminished.

Moreover, as noted above, society's First Amendment interest in promoting uninhibited speech on an issue increases when, as here, the issue is one acknowledged to be of significant public interest.[6] For example, when those seeking to disseminate information have been challenged by those asserting a privacy interest in nondissemination, the Court has consistently resolved such disputes by reference to whether the information involved a matter of public interest. *See, e.g., Smith v. Daily Mail Publishing Co.,* 443 U.S. 97, 103 (1979) (publication of juvenile court proceedings; "if a newspaper obtains truthful information about *a matter of public significance*, then state officials may not constitutionally punish publication of the information, absent a need . . . of the highest order.") (emphasis added); *New York Times Co. v. United States,* 403 U.S. 713 (1971) (*per curiam*) (publication of Pentagon Papers over objections of federal government justified in part by fact that papers included information of great public concern). Most recently, in *Bartnicki v. Vopper,* 532 U.S. 514

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[6] There is no reason to conclude that Wal-Mart's speech regarding overseas labor practices is any less valuable than the views of its opponents. Wal-Mart's status as a corporation is immaterial, for "[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its sources, whether corporation, association, union, or individual." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978). Nor is it relevant that an entity may choose to speak out on issues of public importance because it believes that doing so ultimately will redound to its economic benefit; indeed, "[s]ome of our most valued forms of fully protected speech are uttered for a profit." *Bd. of Trustees v. Fox,* 492 U.S. 469, 482 (1989).

(2001), the Court held that the First Amendment prevented individuals whose illegally intercepted telephone conversations had been broadcast on a radio station from suing the radio station, in large measure because the conversations involved "information of public concern." 532 U.S. at 534. Similarly, the First Amendment right of government employees to speak freely (without fear of discipline by their employers) hinges largely on the public importance of the issues addressed. *See Pickering v. Bd. of Education,* 391 U.S. 563, 566 (1968).

In *Thornhill v. Thompson,* 310 U.S. 88 (1940), the Supreme Court rejected a very similar effort to enjoin the speech of an entity that wished to speak out on an issue of public importance. The case involved labor picketing that sought "to advise customers and prospective customers" regarding labor conditions "and thereby to induce such customers" to change their purchase decisions. *Thornhill*, 310 U.S. at 99. Despite Alabama's claim that information being conveyed by picketers was false, the Court overturned an injunction against picketing because the First Amendment bars States from "impair[ing] the effective exercise of the right to discuss freely industrial relations which are *matters of public concern*." *Id.* (emphasis added). The Court reasoned, "Free discussion concerning the conditions in industry and the causes of labor disputes [is] indispensable to the effective and intelligent uses of the process of popular government to shape the destiny of modern industrial society." *Id.* at 103. Similarly, free discussion concerning the overseas labor practices of large companies such as Wal-Mart is in jeopardy if California is permitted to issue injunctions against companies

wishing to discuss such issues.

It will not do to suggest, as did the California Supreme Court in *Kasky*, that companies have nothing to fear so long as they ensure that their speech on matters of public interest is truthful. As the Supreme Court has repeatedly recognized, laws permitting broad sanctions against speech inevitably tend to "chill" even truthful speech, for "[p]unishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). Thus, "speech on matters of public concern needs 'breathing space' – potentially incorporating certain false or misleading speech – in order to survive." *Nike, Inc. v. Kasky*, 539 U.S. 654, 676 (2003) (Breyer, J., dissenting from dismissal of writ of certiorari). The appropriate response by those who believe that Wal-Mart's speech has been false is to engage in counter-speech of their own, not to attempt to silence Wal-Mart.

The Court need not now decide the circumstances under which a defendant can be made to pay damages for false speech on matters of public importance – because damages are not a permissible remedy in a UCL action. For purposes of this motion, it is sufficient to hold that injunctions against speech on matters of public interest (as opposed to speech related to the terms of a proposed commercial transaction) are impermissible under the First Amendment, even when spoken by an entity that offers products for sale to the public. Because injunctive relief is unavailable to Plaintiffs, Counts VIII and IX

fail to state claims upon which relief can be granted.

II. PLAINTIFFS FAIL TO STATE A CLAIM FOR WHICH RELIEF CAN BE GRANTED UNDER THE ALIEN TORT STATUTE

The Alien Tort Statute (ATS), 28 U.S.C. § 1350, grants the federal courts jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." The Supreme Court recently confirmed that the ATS is solely a jurisdictional statute, rejecting the plaintiff's claim (and prior Ninth Circuit rulings) that the ATS provides a cause of action for violations of international law. *Sosa,* 542 U.S. at 713. *Sosa* held that when Congress adopted the ATS in 1789, it contemplated that the statute granted jurisdiction over only three very limited causes of action recognized by federal common law: suits alleging violation of safe conducts, infringement of the rights of ambassadors, and piracy. *Id.* at 715, 720, 724.

Sosa also held open the possibility that there may exist additional federal common law rights of action over which courts may exercise ATS jurisdiction, but it held that federal courts should exercise "great caution" in recognizing any such rights. *Id.* at 728. Among the reasons given by the Court for such caution: (1) the modern-day acceptance of Oliver Wendell Holmes's view that the common law does not have an independent, transcendental existence (the 18th-century view) but rather only comes into being when created by a judge; (2) the Supreme Court's rejection (in *Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938)), of the view that there exists any federal "general" common law; (3) a decision to create a private cause of action is one better left to legislative judgment; (4) crea-

tion of ATS causes of action can have significant collateral consequences on U.S. foreign relations, a subject normally left to the discretion of the elected branches of government; and (5) the federal courts "have no congressional mandate to seek out and define new and debatable violations of the law of nations." *Id.* at 725-28. While not confirming the existence of *any* additional federal common law causes of action under the ATS, *Sosa* established the following minimum prerequisite: "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was adopted" – *i.e.*, violation of safe conducts, infringement of the rights of ambassadors, and piracy. *Id.* at 732.[7]

Applying the standards set forth in *Sosa*, one can only conclude that Count XI of the FAC (which alleges a violation of the ATS) fails to state a claim upon which relief can be granted. Count XI contends that labor practices endured by John Doe I and John Doe II in their Chinese factory violate international prohibitions against slavery and/or forced labor. The factual allegations supporting that contention come nowhere near meeting the exacting *Sosa* standards for recognition of a new federal common law claim.

To begin with, Plaintiffs do not allege that Wal-Mart is a state actor or acts

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[7] Other prerequisites established by *Sosa* include that the alien plaintiff must have adequately exhausted judicial remedies in his/her domestic legal system, and that the proposed cause of action must not interfere with efforts by the political branches to conduct foreign policy. *Id.* at 733 n.21.

under color of law. The Ninth Circuit has categorically held that conduct by private actors is not actionable under the ATS. *Trajano*, 978 F.2d at 501-02 ("Only individuals who have acted under official authority or under color of such authority may violate international law.").[8] Accordingly, Ninth Circuit precedent requires the dismissal of Plaintiffs' ATS claim.

The great majority of federal courts that have addressed the issue agree with the Ninth Circuit's view. *See, e.g., Aldano v. Del Monte Fresh Produce N.A., Inc.,* 416 F.3d 1242, 1247 (11th Cir. 2005) (torture by private actors not actionable under ATS); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791-95 (D.C. Cir. 1984) (Edwards, J., concurring) (same); *Corrie v. Caterpillar, Inc.,* 403 F. Supp. 2d 1019, 1026 (W.D. Wash. 2005) (citing *Trajano*); *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 25-26 (D.D.C. 2005) (ATS liability encompasses only state actors, not private individuals or those acting under color of law). Only the Second Circuit has permitted ATS suits to proceed against private individuals. Moreover, even the Second Circuit has recognized that ATS liability is far more limited when private actors are involved:

> This Court held in *Kadic* that certain forms of conduct by private individuals may violate the law of nations even when the individual does not act under color of law. *See Kadic* [*v. Karadzic*], 70 F.3d [232,] 239 [(2d Cir. 1995), *cert. denied,* 518 U.S. 1005 (1996)]. . . . We held in *Kadic* that war crimes and acts of genocide are actionable under the [ATS] without regard

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[8] While declining to take a definitive position on whether common-law causes of action under the ATS are limited to suits against state actors or those acting under color of state law, *Sosa* recognized that international law proscriptions are less well defined with respect to the actions of private citizens than with respect to the actions of state actors. *Id.* at 732 n.20.

> to state action, but that "torture and summary execution – when not perpetrated in the course of genocide or war crimes – are proscribed by international law only when committed by state officials or under color of law." 70 F.3d at 243.

Bigio v. Coca-Cola Co., 239 F.3d 440, 447-48 (2d Cir. 2000). The court suggested that private conduct actionable under the ATS was limited to piracy, slave *trade*, attacks on or hijacking of aircraft, genocide, war crimes, and "perhaps" certain forms of terrorism. *Id.* at 448. No mention is made of the acts alleged by Plaintiffs: slavery and forced labor. Thus, Count XI cannot survive even under the Second Circuit's more lenient standard.

Moreover, a comparison of the allegations here to the allegations raised in *Sosa* well demonstrates the inadequacy of Plaintiffs' ATS claims. In *Sosa*, the defendant (Sosa) was a private Mexican citizen working at the behest of the American government. Sosa kidnaped a doctor in Guadalajara and detained him until the doctor was turned over to American authorities at the U.S.-Mexico border. Even though Sosa's conduct was not authorized by American law and violated the law of Mexico (where the kidnaping and detention took place), the Court held that it "violate[d] no norm of customary international law *so well defined* as to support the creation of a federal remedy." *Sosa,* 542 U.S. at 738 (emphasis added). In contrast, Wal-Mart and its suppliers are never alleged to have physically detained Plaintiffs; at most, they are alleged to have subjected John Does I and II to oppressive working conditions (forced overtime, pay below minimum wage, and denial of full overtime pay) and to have "effectively prevented" John Does I and II from leaving their jobs during their first three months

of employment because their wages were withheld during that period. FAC ¶¶ 7, 8, 51. Given *Sosa*'s unanimous rejection of an ATS cause of action based on far more serious allegations of state-sponsored *physical* coercion, John Doe I's and John Doe II's allegations that they were subjected to severe *economic* coercion by private parties cannot rise to the level of an actionable violation of the law of nations. Plaintiffs point to a number of international documents that include condemnations of slavery and forced labor. But *Sosa* requires, as an absolute minimum prerequisite for recognition of a common law cause of action under the ATS, that the alleged conduct violate a specific, "well defined" and universally recognized international norm. Given Plaintiffs' inability, in any of the documents they cite, to point to language that specifically condemns the types of economic coercion they allege here as a violation of a universal norm, Count XI does not come close to meeting the *Sosa* standard. Nor have Plaintiffs attempted to demonstrate, assuming that *state-sponsored* forced labor were actionable under the ATS, that the federal courts should also recognize an ATS cause of action for acts of "forced labor" committed by private actors.

Moreover, many of the documents which Plaintiffs cite are not legitimate evidence of American acceptance of an alleged international norm – and obviously, a norm cannot be said to meet *Sosa*'s "universal" acceptance requirement if it is not accepted by the U.S. For example, Plaintiffs rely on the International Covenant on Civil and Political Rights (ICCPR), which includes a very general prohibition against forced labor. Opp. Br. 29. But *Sosa* explicitly

rejected efforts to cite the ICCPR in support of an ATS claim because the U.S. ratified it "on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts." *Sosa,* 542 U.S. at 735. Plaintiffs' reliance on ILO (International Labor Organization) Convention Nos. 29 and 105 and the American Convention on Human Rights, Opp. Br. 29, is similarly misplaced. ILO Convention No. 105 is not self-executing, and (as Prof. Leary concedes in her Declaration, ¶¶ 14 & 15) ILO Convention No. 29 and the American Convention have never even been ratified by the U.S.

Count XI also fails to state a cause of action upon which relief can be granted because it seeks to impose liability on Wal-Mart for "aiding and abetting" others' alleged violations of federal common law. Plaintiffs do not allege that Wal-Mart engaged directly in the "forced labor" practices of which they complain. Rather, they assert that Wal-Mart, for a variety of reasons, should be held responsible for the labor practices of its suppliers. But the great weight of ATS case law holds that one cannot be held liable under the ATS for aiding and abetting others' alleged misconduct.

Plaintiffs cite a "long line of cases" which they claim "recogniz[e] aiding and abetting liability under the ATS." Opp. Br. 30-31. To the contrary, virtually none of the cited cases so hold. *Hilao v. Estate of Marcos*, 103 F.3d 767, 776 (9th Cir. 1996), held that Ferdinand Marcos, as President of the Philippines, could be held responsible for torture, summary execution, and "disappearances" under a "command responsibility" theory (*i.e.*, responsibility for the actions of

military subordinates under his direct supervision). But *Hilao* includes no discussion of "aiding and abetting" liability. Another Ninth Circuit panel decision cited by Plaintiffs, *Doe v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), is no longer a valid precedent: the decision was vacated when the Ninth Circuit granted rehearing *en banc* in the case. 395 F.3d 978 (9th Cir. 2003). The two Fifth Circuit decisions on which Plaintiffs rely – *Aldano* and *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1157 (11th Cir. 2005) – are similarly silent on "aiding and abetting" liability under the ATS; *Cabello* focuses solely on ATS co-conspirator liability and "aiding and abetting" liability under a separate statute. The two cited Second Circuit decisions also say nothing about ATS "aiding and abetting" liability.

The great weight of ATS case law holds that one cannot be held liable under federal common law for aiding and abetting others' alleged violations of the law of nations. There is simply "no norm of customary international law so well defined as to support the creation of a federal remedy" for aiding and abetting such violations. *Sosa*, 542 U.S. at 738.

Two particularly well-reasoned post-*Sosa* decisions have so held. *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 24 (D.D.C. 2005); *In re South African Apartheid Litigation*, 346 F. Supp. 2d 538, 550 (S.D.N.Y. 2004). In finding that federal common law does not recognize a cause of action for aiding and abetting violations of the law of nations, *South African* cited a recent Supreme Court holding that "where Congress has not explicitly provided for aider and abettor

liability in civil causes of action, it should not be inferred." *Id*. (citing *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 181-82 (1994)).

CONCLUSION

Amicus curiae Washington Legal Foundation respectfully requests that the Court grant Defendants' motion to dismiss Counts VIII, IX, and XI for failure to state a claim upon which relief can be granted.

Respectfully submitted,

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I hereby certify that on this 4th day of May, 2006, copies of the foregoing *amicus curiae* brief of the Washington Legal Foundation were deposited in the U.S. Mail, postage pre-paid, addressed as follows:

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