

Case No. B280526

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION TWO

Vera Serova,
Plaintiff and Respondent,

v.

Sony Music Entertainment; John Branca, as Co-Executor of the
Estate of Michael J. Jackson; and MJJ Productions, Inc.
Defendants and Appellants.

Appeal from the Los Angeles Superior Court
Case No. BC 548468
Honorable Ann I. Jones

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I. INTRODUCTION AND SUMMARY OF ARGUMENT.

This case raises critical issues about protecting the First Amendment right to the distribution of art within the lawful boundaries of California's strict liability consumer protection statutes. Specifically, the issue on appeal is whether a consumer may hold Michael Jackson's estate, his production company, and his record company *strictly liable* for declaring, after reasonable investigation, that three songs on his first posthumous album were sung by Michael Jackson. The answer is no, because as described below even supposedly false speech requires a *mens rea* component for the speaker to be held liable where distribution of world-famous, First Amendment-protected art is implicated.¹

Plaintiff and respondent Vera Serova ("Serova") sued defendants and appellants John Branca, as Co-Executor of the Estate of Michael J. Jackson ("the Estate"), MJJ Productions, Inc., and Sony Music Entertainment ("Sony," and collectively with the Estate and MJJ Productions, Inc., "Appellants") under the Unfair Competition Law ("UCL") and Consumer Legal Remedies Act ("CLRA"). Serova brings her claims on behalf of a putative class of purchasers of the album alleging that Jackson did not sing lead vocals on three of the album's ten songs. Serova's claims are contrary to what Appellants could discern via

¹ (See, e.g., *Smith v. California* (1959) 361 U.S. 147, 152–154 [finding a strict liability ordinance that made it criminal to have an obscene book in a book store unconstitutional because it did not require the store owner to have any knowledge that the book contained obscene material].)

an investigation they undertook when the issue arose—recognizing the impossibility of any certainty because Jackson was not alive to answer the question definitively. The Estate also publicized its findings before the album was released, acknowledging that the public could and would make its own decision.

Nevertheless, Serova claims Appellants misleadingly marketed and advertised the album by titling it *Michael*, creating cover art that includes images of Michael Jackson, and stating on the back of the album cover that the recordings were “by” Michael Jackson.

In response to the Complaint, Appellants filed a special motion to strike the claims under California’s “anti-SLAPP” statute, section 425.16 of the Code of Civil Procedure. Under the two-step analysis required by the statute, the trial court correctly found that Appellants satisfied step one, in that all the claims arose out of the exercise of free speech in connection with an issue of public interest—namely, the first posthumously released material from one of the most famous songwriters and performers of all time.²

At step two—whether plaintiff can show she has a probability of success on the merits—Appellants argued that Serova has no probability of success on the merits for two

² Recent amendments to the anti-SLAPP statute confirm that even statements promoting musical works fall within the ambit of the statute’s protections. (Civ. Proc. Code, § 425.17, subd. (d).)

reasons. *First*, the UCL and CLRA apply only to commercial speech, and the statements on which Serova bases her claims are noncommercial speech (or at minimum are adjunct to or “inextricably intertwined” with noncommercial speech, warranting treatment as noncommercial speech). (See *White v. City of Sparks* (9th Cir. 2007) 500 F.3d 953, 957 [holding that artist’s paintings “do more than propose a commercial transaction and therefore are not commercial speech”].) *Second*, no reasonable consumer would be deceived by the statements Serova challenges, because they do not represent that Michael Jackson sang the lead vocals on the songs in question.

The trial court agreed that statements made on the Oprah Winfrey Show and public statements from an attorney for the Estate were noncommercial speech entitled to full First Amendment protection, and granted the motion as to those statements. However, it denied the motion as to: (1) the album’s title (“Michael”), cover art (images of Michael Jackson), and text on the back; and (2) a video announcing the release of the album, finding these to be commercial speech. Appellants respectfully submit that the trial court was wrong.

There is a three-part test for commercial speech: whether the speech (1) is a traditional advertisement; (2) references a product; and (3) is economically motivated. (*Bolger v. Youngs Drug Products Corp.* (1983) 463 U.S. 60, 66–67.) As to the title, *Michael*, it is not an advertisement. Nor are titles “references” to a product, which in this case is a compilation of musical recordings. Titles are part of the expressive work, and as such

cannot be considered commercial speech under this test. And even if one accepted the dubious proposition that selection of the title of an artistic work has an economic motive, that is insufficient to justify treating it as commercial speech. (*Joseph Burstyn, Inc. v. Wilson* (1952) 343 U.S. 495, 501.)

The same is true for the album cover's images of Michael Jackson. They are not advertisements and don't "reference the product"—rather, they are components of the album's artistic expression. Even a cursory look at the album demonstrates that the images and rest of the cover are wholly expressive. And while that expression, like the music itself, may be economically motivated, like the title it is in no way commercial speech.

The only arguably close call is the video, which could be considered to be in the form of an advertisement. But the supposedly actionable message of that video is that Michael Jackson performed the songs on *Michael*. That is a representation of what the album claims to be, and is, therefore, "inextricably intertwined" with or an "adjunct" to the expressive work. Accordingly, just like all facets of the album are noncommercial speech, saying that the songs are "Michael Jackson songs" imparts a particular meaning to the art by giving context to the songs' words and music. This is the key reason why music is fully protected speech, its ability to "communicat[e]." (*Ward v. Rock Against Racism* (1989) 491 U.S. 781, 790.)³

³ "[T]he animating principle behind pure-speech protection [is] safeguarding self-expression." (*Cressman v. Thompson* (10th

To be clear, Serova is not without a remedy. Even if the speech is noncommercial, fraud is a viable claim (assuming she can prove it), and one she has asserted against producers of the recordings at issue, defendants Edward Joseph Cascio, James Victor Porte, and Angelikson Productions, LLC (collectively, the “Angelikson Defendants”). That claim is not part of this appeal and will proceed irrespective of the outcome here. (CT 3:715–35; CT 3:612.) But because Serova’s novel theory of *strict liability* against appellants would necessarily chill distribution of the recordings, the portions of the trial court’s order denying Appellants’ anti-SLAPP motion should be reversed.

II. STATEMENT OF APPEALABILITY.

Appellants appeal the trial court’s December 9, 2017 order granting in part and denying in part their anti-SLAPP motion. (CT 4:888–910.) An order denying in part a motion brought under the anti-SLAPP statute is directly appealable. (Code Civ. Proc., § 425.16, subd. (i); Code Civ. Proc., § 904.1, subd. (a)(13); *Baral v. Schnitt* (2016) 1 Cal.5th 376, 394.) Appellant’s Notice of Appeal was timely filed on February 7, 2017. (CT 4:868–910.)

III. SUMMARY OF ALLEGATIONS AND PROCEDURAL HISTORY.

A. Serova’s Claims Against Appellants.

Serova’s claims arise from the release of an album called *Michael*, which Serova describes as “the first posthumous

Cir. 2015) 798 F.3d 938, 952–953.) Creating a strict liability rule for putting one’s name on art would significantly chill—and certainly not safeguard—the creation and dissemination of art.

compilation album of previously unreleased tracks by recording artist Michael Jackson[.]” released in the United States on December 14, 2010. (CT 1:116 [First Amended Complaint (“FAC”) ¶ 10].)

Serova alleges her opinion that “Michael Jackson did not actually perform the lead vocals” on three of the album’s ten tracks (dubbed the “Cascio Tracks” because defendant Edward Joseph Cascio jointly produced and recorded the songs), and instead “the lead vocals on these songs were performed by another singer[.]” (CT 1:116 [FAC ¶ 13].) Serova does not allege that Jackson had nothing to do with the Cascio Tracks. She alleges only that he did not sing “lead vocals” on the Cascio Tracks. (CT 1:116–23 [FAC ¶¶ 13, 14, 18, 23, 29, 30, 32, 33].)

Serova admits that public “controversy has surrounded” the issue of whether Jackson sang the lead vocals on the Cascio Tracks. (CT 1:116 [FAC ¶¶ 11–13].) Indeed, she admits that in November 2010, Sony and the Estate both investigated the claim that Jackson had not performed the lead vocals on the Cascio Tracks, and publicly released the results of those investigations. (CT 1:13–14 [FAC ¶¶ 13–14, 21–22].)

Serova alleges that “Defendant Cascio and potentially Porte and Angelikson . . . represented to Defendants Sony and the Estate that Michael Jackson performed the lead vocals on” the Cascio Tracks, and “based on” that allegedly false representation, Appellants selected the songs “for inclusion on the album[.]” (CT 1:117 [FAC ¶¶ 14–17].) She also alleges Appellants made statements about the album that “expressly and

implicitly represented that the lead vocals on all of the tracks on the album were performed by Michael Jackson.” (CT 1:119 [FAC ¶ 27].) Despite being aware of the controversy, Serova purchased the album “between June 18 and 28, 2011” (CT 1:120 [FAC ¶ 30]), six months after its release.

Serova alleges that she “learned numerous facts suggesting Michael Jackson did not perform the lead vocals” on the Cascio Tracks. (CT 1:120 [FAC ¶ 32].) Specifically, she claims that “numerous people familiar with Michael Jackson’s voice” dispute that he sang the lead vocals on the Cascio Tracks. (CT 1:118 [FAC ¶ 20].) She also alleges that she hired an “independent audio expert” who “concluded that Michael Jackson very likely did not sing the lead vocals” on the Cascio Tracks. (CT 1:122 [FAC ¶ 33].)

Serova seeks to represent a class of people who purchased the album, or any of the Cascio Tracks individually, in California. (CT 1:123 [FAC ¶¶ 36–37].) The FAC brings two claims against Appellants, both on a class-wide basis:

First, she claims violations of the CLRA, section 1770, subdivision (a) of the Civil Code, based on allegations that Appellants deceived the putative class members into purchasing the album by representing that Jackson sang the lead vocals on all ten tracks, and therefore purchasers “have suffered damages and lost money in that they paid for goods that were not as represented.” (CT 1:125 [FAC ¶¶ 47–48].) Serova invokes five subsections of the CLRA, all of which concern misrepresenting

the characteristics or qualities of the album. (CT 1:125 [FAC ¶ 46, citing Civ. Code, § 1770, subd. (a)(1–3),(5), and (7)].)

Second, Serova claims violations of the UCL, section 17200 *et seq.* of the Business and Professions Code. She claims only violations of the “fraudulent” and “unlawful” prongs of the UCL (not the “unfair” prong). (CT 1:127 [FAC ¶¶ 54–55].) She claims Appellants’ alleged “misrepresentations” about whether Jackson sang the lead vocals on the Cascio Tracks were fraudulent in violation of the UCL, and “caused Plaintiff and class members to lose money by causing them to purchase goods they would not have otherwise purchased.” (CT 1:127 [FAC ¶ 56].) She claims the alleged misrepresentations were unlawful based on the claimed CLRA violation. (CT 1:127 [FAC ¶ 55].)

Serova also brings a fraud claim against the Angelikson Defendants, but not Appellants. The fraud claims are not at issue on this appeal.⁴

Serova’s prayer for relief seeks a permanent injunction prohibiting Appellants from “representing that Michael Jackson performed” the Cascio Tracks, attorneys’ fees and costs, punitive and other unspecified damages, and restitutionary disgorgement of “all money or property wrongfully obtained” from the putative class members. (CT 1:129.)

⁴ Prior to the trial court’s denial of Appellants’ anti-SLAPP motion, the Angelikson Defendants demurred to the fraud claim. (CT 4:715–35.) The trial court has not yet ruled upon that demurrer.

B. The Statements Alleged In The FAC.

Serova's claims against Appellants arise out of four specific statements she attributes to them:⁵

- **The Announcement Video.** On December 3, 2010, Serova alleges Appellants released a video (the "Announcement Video") announcing the release of the album described as "a brand new album from the greatest artist of all time." (CT 1:119 [FAC ¶ 24]; Lodged CD, Video No. 1 at 0min 23sec.)⁶ The video did not state Jackson performed the lead vocals on any or all of ten tracks. (Lodged CD, Video No. 1.) The video does not mention the Cascio tracks, identify any of the songs or how many songs are included on the album, or state how many of those tracks feature a vocal performance by Jackson, let alone a lead vocal performance by Jackson. (*Ibid.*)
- **The Album Cover.** The back cover of the album states: "This album contains 9 previously unreleased vocal

⁵ The FAC also brought UCL and CLRA claims against the Angelikson Defendants arising out of their December 6, 2010 appearance on the Oprah Winfrey Show. (CT 1:119 [FAC ¶¶ 25, 45–59].) The trial court granted the Angelikson Defendants' anti-SLAPP motion with respect to claims arising out of the Winfrey show appearance (CT 4:907–08), which ruling Serova did not appeal, so the Angelikson Defendants are not party to this appeal and the Oprah Winfrey segment is not relevant to it.

⁶ Serova lodged a true and correct copy of this video with the trial court, and the parties stipulated it was a true and correct copy thereof. (CT 2:269–70; 275.) At the request of the Court Clerk, Appellants have transmitted a copy of the disc to this Court.

tracks performed by Michael Jackson. These tracks were recently completed using music from the original vocal tracks and music created by the credited producers.” (CT 1:119 [FAC ¶ 27], 1:144–49; 4:894.)⁷ Serova’s allegations do not include the entire quote, only the first sentence, which refers to the “performed by Michael Jackson.” (CT 1:119 [FAC ¶ 27].) The second sentence makes clear that older recordings were combined with new music to create the final product. Serova also alleges the “the artwork on the album cover is composed primarily of images of Michael Jackson, and nothing on the album states or suggests that Michael Jackson did not perform the lead vocals for every track on the album.” (CT 1:119 [FAC ¶ 27].) She claims that these images of Michael, as well as the title of the album, “*Michael*,” are therefore misleading. (CT 1:119 [FAC ¶ 27].)

⁷ This statement refers to only nine out of the ten tracks on the album because one was previously released; this track is not one of the Cascio Tracks which form the subject of this lawsuit. (CT 1:116, 119 [FAC ¶¶ 13, 27].) Appellants requested that the trial court take judicial notice of a copy of the front and back cover of the compact disc version of the album, and they largely accord to Serova’s description in the FAC. (CT 1:144–49.) The trial court both entered the parties’ stipulated order to treat as authentic the documents included in Appellants’ request for judicial notice, and granted the request for judicial notice. (CT 2:275, CT 4:894.) The parties also stipulated that a video lodged with the trial court contained a true and correct copy of the Oprah Winfrey television show segment at issue in the FAC. (CT 3:604; see CT 3:602.)

• **The Weitzman Email.** Before release of the album, on November 11, 2010, an attorney for the Estate (Howard Weitzman) issued a statement “addressing the questions that had arisen regarding” whether Jackson sang the lead vocals on the Cascio Tracks, and “reports of fan comments and concerns” (the “Weitzman Email”). (CT 1:118 [FAC ¶ 22]; CT 2:279–80.) The parties stipulated that the Weitzman Email was intended to be and was publicly distributed; it “was an email from Howard Weitzman Esq. for distribution to Michael Jackson fans.” (CT 2:275.)⁸ It states that Weitzman had been “asked by co-Executors [of the Estate] John Branca and John McClain to conduct an investigation regarding the authenticity of the lead vocals on the Cascio tracks.” (CT 2:279.) He notes that Appellant Sony also investigated the controversy, and identifies the many people who “concluded that Jackson performed the lead vocals on the tracks[.]” (CT 1:118 [FAC ¶ 22]; 2:279–80.)⁹ Weitzman states: “We take all fan comments very

⁸ On April 13, 2016, the parties stipulated that “[t]he November 11, 2010 statement alleged at FAC ¶ 22 was an email from Howard Weitzman Esq. to [fan] Jeff Jampol for distribution to Michael Jackson fans.” (CT 2:273–81.) The stipulation included a true and correct copy of the emailed statement, which itself makes clear that it was prepared for distribution to the public. (CT 2:278–81.)

⁹ These included six of Jackson’s former producers and engineers who “listened to raw a capella versions of the Cascio [T]racks[.]” other musicians who had worked with Jackson, and two professional forensic musicologists. (CT 1:118–19 [FAC ¶ 22].)

seriously, and as I'd stated above, there is nothing more important to the Estate than Michael's music, his legacy and his fans." Weitzman stated that despite the Estate's and Sony's conclusions, "ultimately, Michael's fans will be the judges of these songs, as they always are." (CT 2:280.)¹⁰

- **The Sony Statement.** The FAC also alleges that on November 5, 2010, Appellant Sony stated that: "We have complete confidence in the results of our extensive research as well as the accounts of those who were in the studio with Michael that the vocals on the new album are his own" (the "Sony Statement"). (CT 1:118 [FAC ¶ 21].)

Serova alleges she purchased *Michael* in June 2011, in supposed reliance upon the above-described statements, which she claims are "public representations" that Michael Jackson sang the lead vocals on all of the tracks on the album. (CT 1:120 [FAC ¶¶ 29, 30].) As discussed *infra*, only two of these four statements are pertinent here: the Album Cover and the Announcement Video.

¹⁰ Serova alleges that other people later claimed that some of those referenced in Weitzman's statement did not, in fact, believe Jackson sang the lead vocals on the Cascio Tracks—but she does not allege that any of the people mentioned in the Weitzman Email disclaimed their belief that Michael sang the lead vocals on the Cascio Tracks. (CT 1:119, 122 [FAC ¶¶ 23, 32].)

C. The Trial Court Grants In Part And Denies In Part Appellants' Anti-SLAPP Motion.

Appellants filed their anti-SLAPP motion on February 9, 2016. (CT 1:151–92.)¹¹ The trial court held a status conference on March 30, 2016, during which it worked with the parties to reach a stipulation on discovery and presentation of the issues to be decided on the motion. (See CT 2:248.)

On April 13, 2016, the parties filed the stipulation, which the trial court subsequently entered, providing that “the Court shall address the special motions to strike . . . in one or more phases.” (CT 2:274.) The parties stipulated and the trial court ordered that it would address certain potentially dispositive issues in its first phase of consideration, and that “other issues potentially raised by the [anti-SLAPP motion] . . . shall be reserved for one or more subsequent phases, if necessary.” (CT 2:275.) The final paragraph of the stipulated order states: “If a subsequent phase is necessary to decide the Motions, then the parties will meet and confer regarding whether discovery is necessary and will submit a joint statement” (CT 2:276.)

¹¹ Serova requested leave to take broad discovery in support of her opposition to the anti-SLAPP motion, which Appellants opposed. (CT 1:225–2:236.) Specifically, Serova asked for leave to notice *seventeen depositions*, including ten Jackson family members such as his elderly mother and teenage children; she sought to propound interrogatories asking for the home addresses of ten Jackson family members (including his children); and she requested Appellants produce scores of confidential business documents, including those disclosing the details of Sony’s distribution deals for the Estate unrelated to the album or the Cascio Tracks. (CT 1:230–2:235.)

Appellants also stipulated solely for purposes of the anti-SLAPP motion that Jackson did not sing the lead vocals on the Cascio Tracks. (CT 2:274.)

The first phase of the trial court's consideration of the anti-SLAPP motion was limited to whether Appellants had demonstrated that the conduct alleged in the FAC arose out of protected activity (the first step of the anti-SLAPP analysis) and if so, whether the challenged statements (i) are, or are inextricably intertwined with, noncommercial speech; and/or (ii) no reasonable consumer could be deceived by them. (CT 2:274.) Those questions, if resolved in Appellants' favor, would dispose of Serova's claims as a matter of law.

On December 9, 2016, the trial court issued the order from which this appeal was taken. The order granted Appellants' anti-SLAPP motion in part and denied it in part, and was titled: "RULING ON SUBMITTED MATTER RE MOTIONS TO STRIKE (ANTI-SLAPP)." (CT 4:884, 892–908.) After a sixteen-page analysis of the merits of the anti-SLAPP motion, the trial court granted it with respect to the Weitzman Email, but denied it with respect to the Album Cover and the Announcement Video. The trial court found that at step two, Serova had some chance of prevailing on her UCL and CLRA claims arising out of the Album Cover and Announcement Video, deeming them purely commercial speech (and therefore entitled to less First Amendment protection) that could potentially deceive a reasonable consumer. (CT 4:905–07.)

On January 30, 2017, Appellants timely appealed. (CT 3:390–412.) Serova did not appeal or cross-appeal the order granting the motion as to the Weitzman Email.

D. The Court Denies Serova’s Motion To Dismiss This Appeal.

On July 24, 2017, Serova moved to dismiss this appeal, arguing the trial court’s ruling was not an appealable order. Appellants opposed the motion. This Court denied Serova’s motion to dismiss on August 8, 2017, deferring the issue for this panel’s consideration.

E. The Two Statements At Issue In This Appeal.

As discussed, Serova alleged four supposed misrepresentations to support her UCL and CLRA claims: (1) the Album Cover, (2) the Announcement Video, (3) the Weitzman Email, and (4) the Sony Statement.¹² The trial court denied the anti-SLAPP motion with respect to only two of the statements: the Album Cover and the Announcement Video.

As a result of Serova’s failure to cross-appeal that ruling, the speech on the Album Cover and in the Announcement Video are the only ones at issue in this appeal. (See *Lima v. Vouis* (2009) 174 Cal.App.4th 242, 252 [“DHS did not cross-appeal from the order vacating the dismissal and is therefore prevented from challenging the validity of that order on appeal.”]; *Celia S. v. Hugo H.* (2016) 3 Cal.App.5th 655, 665 [“[t]o obtain affirmative

¹² In abiding by the parties’ stipulation that Serova did not base her claims on the Sony Statement, the trial court did not discuss it.

relief by way of appeal, respondents must themselves file a notice of appeal and become cross-appellants”], internal quotation marks and citation omitted.)

This appeal and this brief address whether Serova’s UCL and CLRA claims arising out of the Album Cover or the Announcement Video survive Appellants’ anti-SLAPP challenge.

IV. STANDARD OF REVIEW.

California’s anti-SLAPP statute authorizes special motions to strike any “cause of action against a person arising from any act . . . in furtherance of the person’s right of . . . free speech under the United States Constitution or the California Constitution in connection with a public issue.” (Civ. Proc. Code, § 425.16, subd. (b)(1).) The statute was enacted “to expedite the early dismissal of these unmeritorious claims.” (*Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 21.) “To encourage ‘continued participation in matters of public significance’ and to ensure ‘that this participation should not be chilled through abuse of the judicial process,’ the Legislature expressly provided that the anti-SLAPP statute ‘shall be construed broadly.’” (*Id.* at p. 21, quoting Code Civ. Proc., § 425.16, subd. (a).)

Anti-SLAPP motions require a two-step analysis. (*Simpson Strong-Tie Co., Inc., supra*, 49 Cal.4th at p. 21.) *First*, the defendant must make a prima facie showing that the challenged cause of action arises from protected activity, i.e., that the acts of which the plaintiff complains were taken in furtherance of the

defendant's right of free speech in connection with a public issue. (*Ibid.*) Under the first step of the anti-SLAPP analysis, the Court determines whether the claims arise out of at least one of four types of protected activities. (Civ. Proc. Code, § 425.16, subd. (e).) "A defendant's burden on the first prong is not an onerous one." (*Okorie v. Los Angeles Unified School Dist.* (2017) 14 Cal.App.5th 574, 590.) *Second*, "[i]f a defendant meets this threshold showing," the burden shifts to the plaintiff and "the cause of action shall be stricken unless the plaintiff can establish 'a probability that the plaintiff will prevail on the claim.'" (*Simpson Strong-Tie Co., Inc., supra*, 49 Cal.4th at p. 21, quoting Code Civ. Proc., § 425.16, subd. (b)(1).)

A trial court's ruling on a special motion to strike is subject to *de novo* review on appeal. (*Thomas v. Quintero* (2005) 126 Cal.App.4th 635, 645; *Bernardo v. Planned Parenthood Federation of America* (2004) 115 Cal.App.4th 322, 357.) This Court applies its "independent judgment to determine whether [the] causes of action arose from acts . . . in furtherance of . . . [the] right of petition or free speech in connection with a public issue" and if so, "must then independently determine, from [a] review of the record as a whole," whether the plaintiff has "established a reasonable probability that [s]he would prevail on [her] claims." (*Thomas, supra*, 126 Cal.App.4th at p. 645.)

V. ARGUMENT.

At step one of the analysis, the trial court correctly ruled that the conduct on which Serova bases her claims against

Appellants falls under the anti-SLAPP statute's purview. The trial court denied the motion at step two of the analysis, based on two erroneous findings. *First*, the trial court incorrectly held that identifying Michael Jackson as the performer of all the songs on *Michael* was purely commercial speech. *Second*, the trial court erred in finding the challenged statements potentially misleading to a reasonable consumer.

A. Step One: Serova's Claims Arise Out Of Speech Protected Under The First Amendment.

The trial court properly found in Appellants' favor on step one. (CT 4:896–901.)

Serova argued below that these statements were not in furtherance of protected activity because they were commercial speech under the statute. (CT 1:289–307; 4:785–787.) Specifically, in 2004, the California Legislature enacted Code of Civil Procedure section 425.17, which exempts actions “brought against a person primarily engaged in the business of selling or leasing goods or services” based on “representations of fact” about the speaker's products made for the purpose of promoting or securing sales. (Civ. Proc. Code, § 425.17, subd. (c).) However, this commercial speech exemption *specifically does not apply* to “[a]ny action . . . based upon the creation, dissemination, exhibition, advertisement, or other similar promotion of any . . . *musical* . . . work.” (Civ. Proc. Code, § 425.17, subd. (d), italics added.) As such, the trial court properly recognized that this provision is essentially dispositive of step one of the anti-SLAPP analysis. (CT 4:900.)

Even putting aside the exception to the commercial speech exemption, Serova's lawsuit is a SLAPP. Under the traditional first prong of the anti-SLAPP analysis, the Court determines whether the claims arise out of at least one of four types of protected activities. (Civ. Proc. Code, § 425.16, subd. (e).) Serova's claims fall easily into two, namely (1) "any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest" (Civ. Proc. Code, § 425.16, subd. (e)(3)); and (2) "any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest" (Civ. Proc. Code, § 425.16, subd. (e)(4)). (See, e.g., *Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 476 [holding homeowners' association newsletter is "public forum" because it is a vehicle for discussing public issues and distributed to a large and interested community]; *Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, 1347 ["The public's fascination with Brando and widespread public interest in his personal life made Brando's decisions concerning the distribution of his assets a public issue or an issue of public interest."]; *Stutzman v. Armstrong* (E.D. Cal., Sept. 10, 2013, No. 2:13-CV-00116-MCE) 2013 WL 4853333, at p. 7 [finding cyclist Lance Armstrong's statements concerning whether he used performance enhancing drugs, including in promotional materials for books he had written, met the public interest test].)

B. Step Two: Serova Cannot Establish A Probability Of Prevailing On The Merits Of Her Claims.

As this action falls within the anti-SLAPP statute at step one of the analysis, the burden shifts to Serova to establish a probability that she will prevail on the merits. (Civ. Proc. Code, § 425.16, subd. (b)(1).) To meet this burden, Serova must demonstrate that the FAC is both “legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment[.]” (*Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 26, internal quotations and citation omitted.)

Serova’s claims against Appellants are not legally sufficient for two reasons. *First*, the UCL and CLRA apply only to commercial speech, and the speech Serova attributes to Appellants is noncommercial, protected speech (or at the very least, sufficiently adjunct to or inextricably intertwined with protected speech so as to be protected as well). *Second*, the Album Cover and Announcement Video were not false or misleading as a matter of law.

1. The Album Cover And Announcement Video Comprise Non-Commercial Speech And Thus Fall Outside The Purview Of The UCL And CLRA.

“California’s consumer protection laws, like the unfair competition law, govern only commercial speech. [Citations.] Noncommercial speech is beyond their reach.” (*Rezec v. Sony Pictures Entertainment, Inc.* (2004) 116 Cal.App.4th 135, 140, as modified (Feb. 26, 2004); *New.Net, Inc. v. Lavasoft* (C.D.Cal.

2004) 356 F.Supp.2d 1090, 1110 [“Lawsuits premised on section 17200 are subject to being stricken because they are barred by the First Amendment where the speech complained of is not commercial speech.”]; see also *Ting v. AT&T* (9th Cir. 2003) 319 F.3d 1126, 1148 [CLRA applies only to a “limited set” of commercial transactions]; Civ. Code, § 1770, subd. (a).¹³

The U.S. Supreme Court has defined “commercial speech” as speech that “does no more than propose a commercial transaction.” (*Bolger, supra*, 463 U.S. at 66, internal quotations omitted.) “If speech is not ‘purely commercial’—***that is, if it does more than propose a commercial transaction***—then it is entitled to full First Amendment protection.” (*Stewart v. Rolling Stone LLC* (2010) 181 Cal.App.4th 664, 685, as modified on denial of reh’g (Feb. 24, 2010), quotation marks and citation omitted, and italics added.)

The analysis of whether speech is commercial is guided by three factors: whether the speech (1) is a traditional advertisement; (2) references a product; and (3) was economically motivated. (*Bolger, supra*, 463 U.S. at pp. 66–67.) These three factors are not dispositive. (*Ibid.*; see also *Dex Media West, Inc. v.*

¹³ “This interpretation avoids constitutional overbreadth, since the First Amendment fully protects non-commercial speech. (See, e.g., *O’Connor v. Super. Ct.* (1986) 177 Cal.App.3d 1013, 1019–1020 [observing that the “broad sweep” of the UCL would likely render it “fatally defective” and “constitutionally impermissible” if applied to noncommercial speech].) Indeed, Serova has never argued that a UCL or CLRA claims based on non-commercial speech could be viable.

City of Seattle (9th Cir. 2012) 696 F.3d 952, 958.) The California Supreme Court has subsequently described the three factors as “the speaker, the intended audience, and the content of the message.” (*Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 960.)

Where commercial and noncommercial speech are inextricably intertwined, meaning the commercial speech cannot logically be separated from the noncommercial speech, all of it is deemed noncommercial and is fully protected. (*Riley v. Nat. Federation of the Blind of N.C., Inc.* (1988) 487 U.S. 781, 796; *Dex Media West, Inc., supra*, 696 F.3d at p. 958.) This doctrine also applies to commercial advertisements for noncommercial speech.¹⁴ In other words, speech that is adjunct or incidental to noncommercial speech, such as an advertisement accurately reflecting the content of a film or magazine article, is itself noncommercial speech. (*Cher v. Forum Internat., Ltd.* (9th Cir. 1982) 692 F.2d 634, 639 [First Amendment protections extend to advertising that “is merely an adjunct” of protected speech], citing *Guglielmi v. Spelling-Goldberg Productions* (1979) 25 Cal.3d 860, 873 [“Having established that any interest in financial gain in producing the film did not affect the constitutional stature of respondents’ undertaking, it is of no moment that the advertisement may have increased the

¹⁴ The *Bolger* Court recognized in finding that advertising for “an activity itself protected by the First Amendment” may constitute noncommercial speech. (*Bolger, supra*, 463 U.S. at p. 67, fn. 14, citing *Murdock v. Pennsylvania* (1943) 319 U.S. 105, 111.)

profitability of the film.”]; see also *Polydoros v. Twentieth Century Fox Film Corp.* (1997) 67 Cal.App.4th 318, 325 [holding defendants’ film “endeavor is constitutionally protected. This right was not diminished when [defendants] advertised then sold their work as mass public entertainment”].)¹⁵

Under these standards, those statements, namely, the Album Cover and the Announcement Video are not actionable under the UCL and CLRA, because those statutes cannot be invoked to impose liability for speech protected as noncommercial under the First Amendment.

a. The Album Cover Is Not Commercial Speech, Or Is Protected As Inextricably Intertwined With Protected Non-Commercial Speech.

Serova bases her UCL and CLRA claims on several aspects of the Album Cover, namely the title, the inclusion of photographs of Michael Jackson, and the statement on the back cover identifying nine of the ten songs as “vocal tracks performed by Michael Jackson.” (CT 1:119 [FAC ¶ 27].) These statements do far more than propose a commercial transaction; they are part

¹⁵ Indeed, musical works and other artistic expression are among the most fully protected forms of speech under the First Amendment. (*Stewart, supra*, 181 Cal.App.4th at p. 682 (First Amendment protections “extend to all forms of expression, including . . . music, films . . . and entertainment, whether or not sold for a profit”); *Berger v. City of Seattle* (9th Cir. 2009) 569 F.3d 1029, 1055 [distinguishing commercial speech from “artistic and political speech”]; *Polydoros, supra*, 67 Cal.App.4th at p. 324 [“Popular entertainment is entitled to the same constitutional protection as the exposition of political ideas[.]”].)

and parcel of the artistic expression, because they attribute it to its author and performer. (See *White, supra*, 500 F.3d at p. 957 [holding that artist’s paintings “do more than propose a commercial transaction and therefore are not commercial speech”].) The title is unquestionably part of the expressive work. (See, e.g., *Bery v. New York* (2d Cir. 1996) 97 F.3d 689, 695 [“written and visual expression do not always allow for neat separation: words may form part of a work of art, and images may convey messages and stories”].) The pictures of Michael Jackson on the cover of the album are part of it as well. (*Ibid.* [“Visual artwork is as much an embodiment of the artist’s expression as is a written text, and the two cannot always be readily distinguished.”].)

The attribution of Michael Jackson as the performer of the Cascio Tracks is not commercial speech because it is informational in nature, and more importantly, it imparts meaning to the songs because it is a message from the artist.¹⁶

¹⁶ “The personality of the artist is revealed in the art.” (Eberle, Edward J., 11 Univ. of Penn. Journal of Law and Social Change 1, 19 (2007) [noting the justifications for treating art as fully protected under the First Amendment]; accord *National Endowment for the Arts v. Finley*, (1998) 524 U.S. 569, 602–603 [art is fully protected due to its “simply . . . expressive character, which falls within a spectrum of protected ‘speech’ extending outward from the core of overtly political declarations.”]; *Cressman, supra*, 798 F.3d at p. 952 [“Arnold Schönberg’s atonal compositions, Lewis Carroll’s nonsense verse, and Jackson Pollock’s abstract paintings—regardless of their meaning, or lack thereof—are ‘unquestionably shielded’ as expressions of the creators’ perceptions and ideas.”]; *Ward v. Rock Against Racism*

(*Kronemyer v. Internet Movie Data Base, Inc.* (2007) 150 Cal.App.4th 941, 948 [speech that is “informational rather than directed at sales” is not commercial speech], *Bery, supra*, 97 F.3d at p. 695 [“One cannot look at Winslow Homer’s paintings on the Civil War without seeing, in his depictions of the boredom and hardship of the individual soldier, expressions of anti-war sentiments, the idea that war is not heroic.”].) Indeed, the attributions on the album cover are part of the core, protected speech of the album; the controversy about whether Michael sang the lead vocals on the Cascio Tracks was not centered on whether someone else should be paid for sales of those tracks, but instead, based on whether or not they should be included in the canon of his work, as, in the Estate’s words, “there is nothing more important to the Estate than Michael’s music, his legacy and his fans.” (CT 2:280.)¹⁷

But even if parts of the Album Cover could be considered commercial speech, those parts are inextricably intertwined with the noncommercial, expressive elements of the album. Advertisements using “photographs of actors” in a film used to promote that film are sufficiently “adjunct” to the protected work

(1989) 491 U.S. 781, 790 [“Music, as a form of expression and communication, is protected under the First Amendment.”].)

¹⁷ Serova herself recognizes that her claims are not based on the commercial nature of the speech; she posted on a web forum in 2013 about this lawsuit: “The point would not be to win, or get money, the point is basically to get to the discovery phase and see the evidence [*sic*].” A few months later, she posted: “Michael’s legacy is above all to me, and it deserves the fight.”

(i.e., the film) that the advertisements are themselves protected speech. (*Rezec, supra*, 116 Cal.App.4th at p. 142 [“just as the films are noncommercial speech, so is an advertisement reflecting their content”].) Put simply, it is hard to imagine what could be more clearly intertwined with an album than its cover.

Accordingly, on facts nearly identical to those at issue here, a California district court in the case of *Stutzman v. Armstrong* found that statements on the cover of a book and related promotional materials describing the book’s contents and its authors were fully protected, noncommercial speech, because they were inextricably intertwined with protected expression within the books. (*Stutzman, supra*, 2013 WL 4853333, at pp. 17–19.) In *Stutzman*, the plaintiffs brought putative class UCL and CLRA claims against cyclist Lance Armstrong and the publishers of his books, alleging they had misrepresented the books as works of nonfiction. According to the plaintiffs, the defendants had misrepresented the books because they contained false statements concerning Armstrong’s supposed (non)use of performance enhancing drugs. (*Id.* at p. 1.) The plaintiffs based their claims on, among other things, statements on the flyleaves, covers, and jackets of the books, and those made to the media. (*Id.* at p. 17.)

Analyzing the *Bolger* factors, the district court concluded the statements were “inextricably bound to the noncommercial contents of the books” and therefore fully protected under the First Amendment. (*Stutzman, supra*, 2013 WL 4853333, at p. 18.) Specifically, the Court found it impossible to separate the

descriptions of “the contents of the [b]ooks, the [b]ooks’ classification . . . [and a description of one of its] authors, Lance Armstrong,” from the fully protected contents of the books themselves. (*Ibid.*) Indeed, to be sold (and thereby perpetuate the publishing industry), the district court found that there had to be some leeway to describe the work and its author without transforming that expression into commercial speech. (See *ibid.*) The Ninth Circuit has similarly held that the business of producing artistic works is intertwined with the process of producing the artistic work and therefore afforded full First Amendment protection as noncommercial speech, whether it be selling paintings (*White, supra*, 500 F.3d at p. 956), or running tattoo parlors (*Anderson v. City of Hermosa Beach* (9th Cir. 2010) 621 F.3d 1051, 1063).

Here it is equally impossible to separate the identification of the author/performer (Jackson) from the musical work (the *Michael* album). Just as in *Stutzman*, *White* and *Anderson*, “the economic reality in this age of technology is that [music] companies and authors must promote the [music] in order to sell [it], if . . . [music is] to continue to be sold.” (*Stutzman, supra*, 2013 WL 4853333, at p. 18.) For, as a practical matter, it would be impossible to distribute an album without identifying the performer. And the songs would have less meaning as a form of Michael Jackson’s self-expression if the songs were not attributed fully to him.

In sum, even if the Album Cover statements identifying Jackson as the performer were to be deemed commercial speech

(which they are not), they are inextricably intertwined with the album's noncommercial contents (i.e., the musical expression). The Album Cover's statements are therefore treated as noncommercial speech under the First Amendment, and are not actionable under the UCL or CLRA.

b. The Announcement Video Is Not Commercial Speech, Or Is Protected As Inextricably Intertwined With Protected Non-Commercial Speech.

The focus of the anti-SLAPP analysis must be on the challenged speech itself, not the broader context in which that speech was made. For instance, *Rezec* involved an anti-SLAPP challenge to claims arising out of a movie trailer stating that a fictitious film critic had favorably reviewed the film. (See *Rezec*, *supra*, 116 Cal.App.4th at pp. 137–138.) In analyzing whether the defendant's speech was commercial, this Court did not analyze the entire movie trailer, but instead zeroed in on the allegedly false statement upon which the claims were based. (*Id.* at p. 142.) The *Rezec* Court noted that had the statement at issue been mere descriptions of the protected work, "such as . . . photographs of actors in the films, [defendant] Sony would have a point because, just as the films are noncommercial speech, so is an advertisement reflecting their content." (*Ibid.*) That is exactly what the challenged portion of the Announcement Video does here; *Michael* is an album "from" Michael Jackson, regardless of whether he sang the lead vocals on 7, 8, 9, or all 10 of its tracks. Moreover, unlike in *Rezec*, there is no allegation

here that Appellants knew the statement was false when made (or ever). (See *id.* at p. 137.)

Rather than commercial speech making verifiable assertions about the album's quality, the Announcement Video truthfully describes the album as a whole as "from" Michael Jackson, and makes no assertion whatsoever about the irresolvable controversy surrounding the performer of all lead vocals on the Cascio Tracks. It is thus protected, noncommercial speech. (See *Bernardo, supra*, 115 Cal.App.4th at p. 348.)

This is confirmed when looking at the justifications for regulating commercial speech. A key indicia of commercial speech is that it is "easily verifiable" by the speaker. (*Kasky, supra*, 27 Cal.4th at p. 955; see also *Bernardo, supra*, 115 Cal.App.4th at p. 348 [advertisement not commercial speech where it does not involve "readily verifiable factual assertions" but instead matters of "genuine . . . debate"]; *Keimer v. Buena Vista Books, Inc.* (1999) 75 Cal.App.4th 1220, 1224 [advertisements were commercial speech where defendant misrepresented the "verifiable fact" "that the investment club's actual average rate of return from 1984 to 1994 was 9.1 percent as opposed to the advertised 23.4 percent"].) The Announcement Video lacks that fundamental quality, because the only person who could verify whether Jackson sang the lead vocals on the Cascio Tracks, Jackson himself, is deceased. The representation Serova challenges—the supposed implication that Michael sang the lead vocals on the Cascio Tracks—is impossible to verify, and forms the subject of genuine public debate about which people

hold different opinions. The Announcement Video's statement that Michael is an album "from" Michael Jackson thus lacks a hallmark of commercial speech, verifiability by Appellants in this case. (Cf. *Kasky, supra*, 27 Cal.4th at p. 348 [holding Nike's advertising statements were commercial speech because "Nike was in a position to readily verify the truth of any factual assertions it made"].)

2. Alternatively, Serova Has No Probability of Success on the Merits Because The Statements In The Press And The Video Did Not Contain Any False Or Misleading Statements About Whether Jackson Performed The Vocals On The Cascio Tracks.

Serova's UCL and CLRA claims also fail as a matter of law because the Album Cover and Announcement Video would not have deceived any reasonable consumer into thinking that Jackson sang the lead vocals on the Cascio Tracks, for one simple reason: none of them stated or implied that he did.

a. Standards Applicable To UCL And CLRA Claims.

To allege a viable UCL claim under the "fraudulent" prong, the plaintiff "is required to 'show that members of the public are likely to be deceived[,]'" and "an unlawful practice is established if the conduct is 'forbidden by law.'" (*Bernardo, supra*, 115 Cal.App.4th at pp. 352, 355, italics, quotation marks and

citations omitted.)¹⁸ The evaluation must be from the standpoint of a reasonable consumer. (*Hill v. Roll Internat. Corp.* (2011) 195 Cal.App.4th 1295, 1304 [“The reasonable consumer test used in the UCL. . . requires a plaintiff to show potential deception of consumers acting reasonably in the circumstances—not just any consumers”].) “[T]he reasonable consumer standard is also established for the CLRA[.]” (*Ibid.*)

Courts routinely determine that UCL and CLRA claims fail as a matter of law at the pleading stage on the grounds that the alleged representations are not misleading. (See, e.g., *Bardin v. Daimlerchrysler Corp.* (2006) 136 Cal.App.4th 1255, 1276; *Rubenstein v. The Gap, Inc.* (2017) 14 Cal.App.5th 870, 877 [“courts can and do sustain demurrers on UCL claims when the facts alleged fail as a matter of law to show . . . a likelihood” of deception]; *Hill, supra*, 195 Cal.App.4th at p. 1305; *Bernardo, supra*, 115 Cal.App.4th at p. 355; *Anthony v. Buena Vista Home Entertainment Inc.* (C.D. Cal., Sept. 28, 2016, No. 215CV09593SVWJPR) 2016 WL 6836950, at p. 9.)

b. The Album Cover Would Not Mislead A Reasonable Consumer.

The Album Cover does not include any statements about who sang the lead vocals on the Cascio Tracks, and thus is not misleading as a matter of law. (See *Bardin, supra*, 136 Cal.App.4th at p. 1276 [sustaining demurrer to CLRA claim

¹⁸ Serova does not allege any claim against Appellants based on the “unfair” prong of the UCL. (CT 1:127 [FAC ¶¶ 54–55].)

because the “complaint did not allege a single affirmative representation” by the defendant that could have deceived consumers, nor alleged facts showing the defendant was bound to disclose any facts that were not represented].) The Album Cover’s imagery of Michael Jackson, its title (*Michael*) and its statement that the album contained nine previously unreleased tracks “by” Michael Jackson do not state or reasonably imply that he sang the lead vocals on all ten tracks. Indeed, Serova does not allege that Jackson had nothing whatsoever to do with the Cascio Tracks. She *only* alleges that he did not sing the “lead vocals” on those songs. (CT 1:116–22 [FAC ¶¶ 13, 14, 18, 23, 29, 30, 32, 33].) No reasonable consumer would be misled by the Album Cover into thinking he did.¹⁹ (See *Anthony, supra*, 2016 WL 6836950, at p. 9 [finding as a matter of law that defendant studios’ advertisements and film packaging stating a film was “captioned” or “subtitled” would not deceive a reasonable consumer into thinking every word of the film, including lyrics of background music, was subtitled].)

c. The Announcement Video Would Not Mislead A Reasonable Consumer.

Similarly, Serova cannot base viable UCL or CLRA claims on the Announcement Video, because it contains no false or misleading content. The only statement in the video concerned the album as a whole, dubbing it: “a brand new album from the

¹⁹ Appellants stipulated *only* for purposes of this motion that Jackson did not sing the lead vocals on the Cascio Tracks. (CT 2:274.)

greatest artist of all time.” (See CT 1:119 [FAC ¶ 24]; Lodged CD, Video 1 at 0min 23sec.) The video does not state that Jackson sang lead vocals on the Cascio Tracks. Nor does it state how many tracks the album contains, or how many of those tracks feature a vocal performance by Jackson, let alone a lead vocal performance. The video featured imagery of Michael Jackson, and conveyed only that *Michael* was a new album “from” Michael Jackson. This was true. Indeed, countless artists, including Jackson, the Beatles and Nirvana, have released musical albums under their own name featuring performances by guest vocalists and musicians, or “covers” of songs written by other artists.²⁰

The trial court relied upon *Colgan v. Leatherman Tool Group Co.* (2006) 135 Cal.App.4th 663, 682–683, in finding that to the extent other artists performed on the album, “reasonable consumers would expect . . . attribution.” (CT 4:907.) That case is not on all fours with the instant matter. In *Colgan*, the plaintiffs raised consumer protection claims against a tool manufacturer that sold products containing parts manufactured abroad with a label stating: “Made in U.S.A.” (*Colgan, supra*, 135 Cal.App.4th at p. 672.) The defendant there conceded that critical components of its tools were manufactured abroad, and thus the statement “Made in U.S.A.” was, at least in part, false; it

²⁰ The album title “Nirvana: Unplugged” presumably would be a misleading title actionable under the UCL and CLRA, under Serova’s standard because it features songs written and performed by the band the Meat Puppets.

even changed its labeling after the lawsuit was filed to state: “Made in U.S.A. of U.S. and foreign components.” (See *id.* at pp. 673–674, 680.) Here, Serova does not allege that Michael Jackson had nothing to do with the Cascio Tracks, merely that he did not sing their *lead* vocals. (See generally CT 1:114–31.) Thus, the statement that the album as a whole is “from” Michael Jackson is thus not partially false in the same manner as the “Made in U.S.A” label at issue in *Colgan*. (See *Parent v. Millercoors LLC* (S.D.Cal., Oct. 26, 2015, No. 3:15-CV-1204-GPC-WVG) 2015 WL 6455752, at p. 9 [granting motion to dismiss UCL and CLRA claims, and distinguishing *Colgan* because the phrase at issue, “artfully crafted,” was not objectively, partially false in the manner as the “Made in U.S.A.” label at issue in *Colgan*].) Moreover, the case is inapposite because the component parts of a tool are not analogous to the component parts of a song; the parts are separable in a way a song’s components are not, and a song, unlike a tool, is an expressive work protected by the First Amendment, as discussed *supra*.

In sum, to the extent Serova’s UCL and CLRA claims are based on the Announcement Video, they fail as a matter of law because the video’s statement that the album is “from” Michael Jackson would not mislead a reasonable consumer into thinking Michael Jackson sang the lead vocals on all ten tracks.

C. Serova Is Not Without a Remedy; She Can And Did Bring A Fraud Claim.

While consumers cannot rely on the strict liability of the UCL and CLRA to challenge noncommercial representations,

they are not without a remedy: fraud is an exception to the First Amendment. (See *Martinez v. Metabolife Intern., Inc.* (2003) 113 Cal.App.4th 181, 191 [denying anti-SLAPP motion with respect to allegations of knowingly fraudulent labeling, because the defendant “cites no authority holding that a manufacturer . . . engages in activity protected by the First Amendment when it produces a product *it knows* does not meet its warranted characteristics”], italics added.) Indeed, the cases on which Serova relies allege fraudulent conduct, which Serova alleged *only* against the Angelikson Defendants. (See, e.g., *Kasky, supra*, 27 Cal.4th at p. 949 [plaintiff alleged “actual fraud”]; *Colgan, supra*, 135 Cal.App.4th at pp. 673–674 [manufacturer knew parts of tools labeled “Made in U.S.A.” were manufactured abroad]; *Keimer, supra*, 75 Cal.App.4th at p. 1224 [claims based on defendant’s knowing misrepresentation of the “verifiable fact was that the investment club’s actual average rate of return from 1984 to 1994 was 9.1 percent as opposed to the advertised 23.4 percent”]; *Rezec, supra*, 116 Cal.App.4th at p. 137 [employee of defendant knowingly included statement from fictitious film critic in movie trailer].)

The trial court expressed a concern that if Appellants were to prevail, “forgery is without redress[.]” (RT 643:8–10; see also RT 642:1–645:9.) But the trial court was wrong. Of course there is redress, and the form of that redress is a fraud claim. This appeal does not touch upon whether a defendant may be liable for fraud based on knowingly misleading advertisements for a work of art. The issue here is whether a defendant may be

strictly liable under the UCL and CLRA for distributing a work of art with an attribution to the artist, ***with no allegation of any knowledge of falsity of that attribution.***

Serova can and did allege scienter and bring a fraud claim against the Angelikson Defendants. (CT 1:128–29 [FAC ¶¶ 61–63].) However, she could not and did not do so against Appellants, because there is no basis to do so. Indeed she alleges that the Angelikson Defendants, who actually were in a position to know, withheld the truth from Appellants. (CT 1:117 [FAC ¶ 18].) Serova will have her day in court regardless of the outcome of this appeal. But Appellants’ constitutional right of free speech requires that she do so by claiming fraud against those she alleges knowingly misled consumers. She should not be permitted to invoke strict liability legal principles against innocent purveyors of protected, expressive speech.²¹ (See *Garrison v. State of La.* (1964) 379 U.S. 64, 75 [“The use of calculated falsehood, however, would put a different cast on the constitutional question. ***Although honest utterance, even if***

²¹ Serova may not amend her complaint to add a fraud claim against Appellants. (See *Mobile Medical Services for Physicians and Advanced Practice Nurses, Inc. v. Rajaram* (2015) 241 Cal.App.4th 164, 171 [holding that once it has been “determined [that] the speech at issue is constitutionally protected, it may not grant leave to amend to omit facts to take the claim out of the protection of section 425.16.”].) In any event, she alleges that the Angelikson Defendants tricked Appellants into thinking Jackson sang the Cascio Tracks, which admits Appellants did not have the requisite level of scienter to support a fraud claim. (CT 1:117 [FAC ¶ 18].)

inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity.”], italics added.)

D. The Trial Court’s Attempts To “Shape” Appellants’ Protected Speech, And Overly Narrow Definition Of What It Is To “Chill” Speech, Support Reversal.

At oral argument on the anti-SLAPP motion, Serova’s counsel and the trial court went so far as to suggest how Appellants might have designed the Album Cover and related statements differently. (See, e.g., RT 633:2–3 [The Court: “‘Maybe Michael’ would have been a much better title.”]; RT 632:26–27 [Serova’s counsel suggesting the title: “‘Maybe It’s Michael, Maybe It’s Not, But It’s A Record And Here Have A Listen.”].) The trial court’s ruling included similar reasoning, finding: “A fair characterization of the questionable provenance of the voices on [the Cascio Tracks] would not have effectively stopped the expressive activity altogether.” (CT 4:906.) These musings underscore why the ruling must be reversed. (See *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 340 [“a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship”].)

“The term ‘chill,’ in the context of the right of free speech underlying the anti-SLAPP . . . statute, refers not to a direct interference with ongoing speech by injunctive or similar relief but to *the inhibiting effect on speakers of the threat posed*

by possible lawsuits.” (*Vogel v. Felice* (2005) 127 Cal.App.4th 1006, 1016, italics added.) This “inhibiting effect” is unconstitutional not only when the speech is chilled “altogether,” as the trial court held (CT 4:906), but also when fear of litigation threatens to **shape** artistic expression: “[t]he creative process must be unfettered, especially because it can often take strange turns, as many bizarre and potentially offensive ideas are suggested, tried, and, in the end, either discarded or used . . . We must not permit juries to dissect the creative process in order to determine what was necessary to achieve the final product and what was not, and to impose liability . . . for that portion deemed unnecessary.” (*Brodeur v. Atlas Entertainment, Inc.* (2016) 248 Cal.App.4th 665, 675, citation and internal quotation marks omitted; *Anthony, supra*, 2016 WL 6836950, at p. 7 [affirming grant of anti-SLAPP motion to strike consumer claims arising out of statements about film closed-captioning, because “the decision regarding what content to caption, is a component of the moviemaking process, as the Studios must decide what level of captioning would provide the best experience for consumers using the caption and subtitle features”].) To demand perfect certainty about the nature of a deceased performer’s contribution to an expressive work, or detailed descriptions of any uncertainty in that regard on the work’s advertisements and packaging, would result in posthumous music never being released, gives too short shrift to Appellants’ free speech rights. (See *FilmOn.com v. DoubleVerify, Inc.* (2017) 13 Cal.App.5th 707, 714 [affirming order granting anti-SLAPP motion with respect to “essentially

true” statements]; *Smith, supra*, 361 U.S. at p. 153 [“If the contents of bookshops and periodical stands were restricted to material of which their proprietors had made an inspection, they might be depleted indeed.”].)

E. The Ruling Is Appealable.

Serova will likely seek to revive her motion to dismiss this appeal, arguing that the trial court’s order was interlocutory and not appealable. This argument does not withstand scrutiny.

Most critically, there is nothing left to litigate after the trial court’s order and this appeal. If Appellants were to succeed in this appeal, the case would be over as to Appellants (though not as to the Angelikson Defendants, as the fraud claim will proceed). The plain text of the order confirms that it is final and appealable. It is titled: “RULING ON SUBMITTED MATTER RE MOTIONS TO STRIKE (ANTI-SLAPP).” (CT 4:892.) Its first and last pages state that the anti-SLAPP motion is “GRANTED IN PART AND DENIED IN PART,” a phrase the ruling reiterates after proceeding through a sixteen-page analysis. (CT 4:892, 907.)

The parties’ stipulation regarding the adjudication of the anti-SLAPP motion also supports the notion that the trial court’s order was final. It expressly contemplated that the trial court could rule on the anti-SLAPP motion without discovery (CT 2:276), which is exactly what it did. The stipulation, which the trial court adopted in its order verbatim, provides that “the Court shall address the special motions to strike . . . in *one or more* phases.” (CT 2:274, italics added.) To that end, the parties

stipulated and the trial court ordered that certain issues would be addressed first, and “other issues *potentially* raised by the [Anti-SLAPP] Motions . . . shall be reserved for *one or more* subsequent phases, *if necessary*.” (CT 2:275, italics added.) Driving home the fact that the parties and the trial court contemplated a full resolution of the merits of the anti-SLAPP motion without any discovery being taken and without any “second phase” of proceedings before the trial court, the stipulation and order provides: “*If* a subsequent phase is necessary to decide the Motions, *then* the parties will meet and confer regarding *whether discovery is necessary*” (CT 2:276, italics added.)

Moreover, this Court’s prior ruling makes clear that the trial court not only did but *was ordered* to issue a final ruling on the anti-SLAPP motion. Indeed, on October 16, 2016, this Court unambiguously ordered the trial court to “rule upon” the anti-SLAPP motion. That is exactly what the trial court did. It is no more complicated than that.

F. On Remand, The Trial Court Should Award Appellants Their Attorneys’ Fees.

Should this Court reverse the portions of the ruling partially denying the Anti-SLAPP motion, Appellants are entitled to their attorneys’ fees. (Code Civ. Proc., § 425.16, subd. (c).) Appellants are entitled to their fees and costs incurred in preparing the anti-SLAPP motion itself, the fees on the writ proceedings and the instant appeal, as well as fees-on-fees. (*Christian Research Inst. v. Alnor* (2008) 165 Cal.App.4th 1315,

1320 [“Appellate challenges concerning the motion to strike are also subject to an award of fees and costs, which are determined by the trial court after the appeal is resolved.”]; *569 E. Cty. Boulevard LLC v. Backcountry Against the Dump, Inc.* (2016) 6 Cal.App.5th 426, 433 [“An award of attorney fees to a prevailing defendant on an anti-SLAPP motion properly includes attorney fees incurred to litigate the special motion to strike (the merits fees) plus the fees incurred in connection with litigating the fee award itself (the fees on fees).”].)

VI. CONCLUSION.

For the foregoing reasons, Appellants respectfully request that the Court reverse the portions of the trial court’s order that denied the anti-SLAPP motion, and remand the matter to the trial court with instructions to enter an order striking all of the claims against Appellants from the FAC, and awarding Appellants their attorneys’ fees in an amount to be determined by subsequent noticed motion.

Dated: April 11, 2018

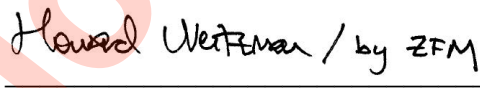
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WORD COUNT CERTIFICATION

The undersigned counsel for Appellants certifies pursuant to rule 8.204(c)(1) of the California Rules of Court that the word count for this document using Microsoft Word is 10,316 words, including footnotes but excluding the tables and this certificate, and certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Los Angeles, California, on April 11, 2018.

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