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12 Co-Executor of the Estate of Michael J.

Jackson, Sony Music Entertainment, and

13 MJJ Productions, Inc.

14 **SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR**
15 **THE COUNTY OF LOS ANGELES**

16 VERA SEROVA, an individual, on behalf of
herself and all others similarly situated,

17 Plaintiff,

18 v.

19 SONY MUSIC ENTERTAINMENT, a
20 Delaware general partnership; JOHN
BRANCA, as Co-Executor of the Estate of
21 Michael J. Jackson; EDWARD JOSEPH
CASCIO, an individual; JAMES VICTOR
22 PORTE, an individual; MJJ
PRODUCTIONS, INC., a California
23 Corporation; ANGELIKSON
PRODUCTIONS LLC, a New York Jersey
24 Limited Liability Company; and DOES 1
through 50, inclusive,

25 Defendants.

Case No. BC 548468

Assigned to Hon. Ann I. Jones

**DEFENDANTS JOHN BRANCA, AS CO-
EXECUTOR OF THE ESTATE OF
MICHAEL J. JACKSON, SONY MUSIC
ENTERTAINMENT, AND MJJ
PRODUCTIONS, INC.'S NOTICE OF
APPEAL**

1 **NOTICE IS HEREBY GIVEN** that, pursuant to sections 425.16(i) and 904.1 of the
2 California Code of Civil Procedure and rule 8.100 of the California Rules of Court, defendants
3 John Branca, as Co-Executor of the Estate of Michael J. Jackson, Sony Music Entertainment, and
4 MJJ Productions, Inc. (collectively, the “Jackson Defendants”), hereby appeal from the
5 December 9, 2016 order (the “Order”) on the Jackson Defendants’ Special Motion to Strike
6 Plaintiff Vera Serova’s First Amended Complaint (the “Motion”) insofar as the Order denied the
7 Motion as to Plaintiff’s First Cause of Action for Violation of the Consumers Legal Remedies
8 Act and Second Cause of Action for Violation of the Unfair Competition Law as against the
9 Jackson Defendants. A copy of the Order is attached hereto as **Exhibit A**.

10 An order denying a special motion to strike is appealable. *See* Cal. Civ. Proc. Code §
11 425.16(i) (“An order granting or denying a special motion to strike shall be appealable under
12 Section 904.1.”); *id.* § 904.1 (“An appeal . . . may be taken from . . . an order granting or denying
13 a special motion to strike under Section 425.16.”).

14 The filing of this Notice of Appeal stays all proceedings in the trial court as to the subject
15 matter of the causes of action at issue in the Jackson Defendants’ Motion. Cal. Civ. Proc. Code §
16 916(a); *Varian Med. Sys., Inc. v. Delfino*, 35 Cal. 4th 180, 186 (2005) (an appeal from “the
17 denial of a special motion to strike automatically stays all further trial court proceedings on the
18 merits upon the causes of action affected by the motion”).

19
20 DATED: January 30, 2017

KATTEN MUCHIN ROSENMAN LLP

21
22 By: 

Zia F. Modabber

23 Attorneys for Defendants John Branca, as Co-
24 Executor of the Estate of Michael J. Jackson,
25 Sony Music Entertainment, and MJJ Productions,
26 Inc.
27
28

1 DATED: January 30, 2017

KINSELLA WEITZMAN ISER KUMP &
ALDISERT LLP

2
3 By: Howard Weitzman
4 Howard Weitzman
5 Attorneys for Defendants John Branca, as Co-
6 Executor of the Estate of Michael J. Jackson,
7 Sony Music Entertainment, and MJJ Productions,
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EXHIBIT A

FILED
Superior Court of California
County of Los Angeles

DEC 09 2016

SHERRI R. CARTER, EXECUTIVE OFFICER/CLERK
BY Benigno Del Barrio Deputy
BENIGNO DEL BARRIO

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES**

VERA SEROVA,

Plaintiff,

v.

SONY MUSIC ENTERTAINMENT, ET AL,

Defendant

Case No. BC548468

RULING ON SUBMITTED MATTER RE
MOTIONS TO STRIKE (ANTI-SLAPP)

Hearing Date: December 7, 2016

Assigned to: HON. ANN I. JONES
Department 308

This court, having received and reviewed the pleadings, as well as the authorities cited therein, and having heard oral argument, rules as follows:

The special motions to strike pursuant to CCP §425.16 are
GRANTED IN PART AND DENIED IN PART.

BACKGROUND

This is a consumer class action filed by Plaintiff Vera Serova ("Plaintiff"), individually and on behalf of similarly situated persons who purchased the songs "Breaking News," "Monster," and/or "Keep Your Head Up" (collectively, "Songs") individually or as part of a compilation.

1 The operative First Amended Complaint ("FAC") alleges that the Songs, which appeared on the
2 posthumously released Michael Jackson ("Jackson") album *Michael*, were not authentic Jackson
3 recordings. [¶¶10, 13] *Michael* was released on December 14, 2010, approximately eighteen
4 months after Jackson's death. [¶ 10] The album contains ten tracks. [¶¶ 11, 27] Plaintiffs
5 allege that the Songs were performed by a singer other than Michael Jackson "under the
6 direction, and with the knowledge, cooperation, participation, and substantial assistance" of
7 Defendants Edward Joseph Cascio ("Cascio"), James Victor Porte ("Porte"), and Angelikson
8 Productions LLC ("Angelikson"), Cascio's production company. [¶¶7, 13]

9 The action is also brought against Defendants Sony Music Entertainment ("Sony"), John Branca
10 ("Branca"), as co-executor of the Estate of Michael J. Jackson ("Estate"), and MJJ Productions,
11 Inc. ("MJJ Productions"). Sony, the Estate, and MJJ Productions allegedly "remixed, edited,
12 produced, and otherwise finalized" the Songs. [¶19]

13 The FAC alleges the following causes of action:

- 14 (1) Violation of the Consumers Legal Remedies Act ("CLRA")
- 15 (2) Violation of the Unfair Competition Law ("UCL")
- 16 (3) Fraud

17
18 Before the Court are two special motions to strike pursuant to CCP §425.16—one filed by
19 Cascio, Porte, and Angelikson (collectively, "Angelikson Defendants") and another filed by Sony,
20 Branca, and MJJ Productions (collectively, "Jackson Defendants").

21 In ruling on the motions, the Court considered the parties' original briefs and recently filed
22 supplemental briefs.

23
24 THE PARTIES' 4/18/16 JOINT STIPULATION

25 The parties agreed that the Court shall address the special motions to strike in "one or more
26 phases." [¶1]

1 Solely for the purposes of deciding the first phase of the defendants' anti-SLAPP motions, the
2 court was directed to "assume the following":

3 (1) The November 11, 2010 statement alleged at FAC ¶22 was an e-mail from Howard
4 Weitzman, Esq., to Jeff Jampol for distribution to Jackson fans. As set forth in the
5 attachment to the stipulation, the e-mail was dated November 11, 2010 (shortly before
6 the release of the album *Michael*) and asserted that the co-executors of the Jackson
7 estate had conducted an investigation as to the authenticity of the vocals on the album.
8 Further, that investigation confirmed that the lead vocals were, in fact, performed by
9 Jackson. Given this objective evidence, Sony decided to release the album because they
10 believed, without reservation, that the lead vocal on all the tracks were "sung by Michael
11 Jackson."

12 (2) The photocopies of the front and back covers of the CD album entitled *Michael*, including
13 the enlargement of the statement on the album's back cover. The album's back cover
14 lists the titles of the songs contained therein, including the following statement: "This
15 album contains 9 previously unreleased vocal tracks performed by Michael Jackson.
16 These tracks were recently completed using music from the original vocal tracks and
17 music created by the credited producers."¹

18 (3) A You Tube video which was a commercial for a "brand new album" from Michael
19 Jackson. https://www.youtube.com/watch?v=CXWxAuHi_4

20 (4) A You Tube video showing a portion of the *Oprah Winfrey Show* where Edward Cascio
21 appeared as a guest on December 6, 2010.²
22 <https://www.youtube.com/watch?v=uzFR2aga5GE>

26 ¹ The Court grants the Jackson Defendants' Request for Judicial Notice as the album cover is a proposition that is not reasonably subject to
27 dispute and is capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. See Evidence
28 Code §452(h).

² The FAC alleges that the episode aired on 12/6/14. This appears to be a typographical error.

Further, by way of stipulation, the parties agreed that "[t]he first phase shall be limited to answering the questions: (1) whether Defendants have satisfied their burden on the first prong of the anti-SLAPP statute; and (2) if so:

- a. whether the various representations on which Plaintiff bases her [UCL and CLRA] claims constitute non-commercial speech and/or are inextricably intertwined with non-commercial speech, such that Plaintiff has failed to allege facts sufficient to constitute a cause of action under these statutes; and
- b. whether [specified] documents include any statements that a reasonable trier of fact could decide are sufficiently false or misleading to support a claim under the UCL or CLRA, assuming solely for purposes of this determination on the Motions that Michael Jackson did not sing the lead vocals on [the Songs]." [¶2]

They also agreed "[a]ll other issues potentially raised by the Motions, including, *inter alia*, Plaintiff's burden to establish a *prima facie* case (if applicable), whether Mr. Weitzman's November 11, 2010 public statement includes any false or misleading statements, and each Defendant's responsibility for the various representations on which Plaintiff bases her claims, shall be reserved for one or more subsequent phases, if necessary." [¶4]

DISCUSSION

The determination of whether an action is a SLAPP involves a two-step process. "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. 'A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in section 425.16, subdivision (e).' If the court finds that such a showing has been made, it must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim." See Navellier v. Sletten (2002) 29 Cal.4th 82, 88. "Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute-i.e., that arises from protected speech or petitioning *and* lacks even minimal merit-is a SLAPP, subject to being stricken under the statute." See Navellier, supra, 29 Cal.4th at 89 (italics in original).

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(1) FIRST PRONG OF THE ANTI-SLAPP ANALYSIS

"In the anti-SLAPP context, the critical point is whether the plaintiff's cause of action itself was *based on* an act in furtherance of the defendant's right of petition or free speech. 'A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in section 425.16, subdivision (e)....'" See City of Cotati v. Cashman (2002) 29 Cal.4th 69, 78 (italics in original). Those categories are: "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) 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, or (4) 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." See CCP §425.16(e).

Here, the Angelikson Defendants argue that the 1st cause of action for Violation of the CLRA and 2nd cause of action for Violation of the UCL implicate protected activity under subdivisions (e)(3) and (e)(4) of CCP §425.16. See Angelikson Defendants' Motion, §II. The Jackson Defendants make the same argument. See Jackson Defendants' Motion, §IV.

Plaintiff disagrees that the subject statements by Defendants are issues of public interest. Instead, Plaintiff describes them as "[c]ommercial speech about the properties of one's own product." See Opposition, 5:19-8:6 (citing to Nagel v. Twin Labs., Inc. (2003) 109 Cal.App.4th 39, Scott v. Metabolife Intern., Inc. (2004) 115 Cal.App.4th 404, Rezec v. Sony Pictures Entertainment, Inc. (2004) 116 Cal.App.4th 135, as modified (Feb. 26, 2004), and All One God Faith, Inc. v. Organic & Sustainable Industry Standards, Inc. (2010) 183 Cal.App.4th 1186); see also Supplemental Opposition, 1:11-2:1 (citing additionally to Consumer Justice Center v. Trimedica International, Inc. (2003) 107 Cal.App.4th 595).

1 As requested by counsel for the Sony defendants during oral argument, the court shall
2 consider this question individually for each of Plaintiff's claimed false assertions of
3 authenticity: (1) the Weitzman e-mail; (2) the album cover; (3) the YouTube commercial;
4 and (4) the *Oprah Winfrey Show* interview.

5
6 a. The Weitzman E-mail

7 Before *Michael* was released, the Songs became the subject of a public
8 controversy when several individuals close to Jackson publicly disputed that
9 Jackson had performed the lead vocals. [¶20]. Sony responded to these
10 questions by expressing complete confidence in the results of their
11 investigation and due diligence into the provenance of the Songs. [¶21]
12 Further, Attorney Howard Weitzman released a further statement on behalf of
13 the Jackson estate addressing the questions that had arisen regarding the
14 authenticity of the Songs. [¶22]

15 A review of the Weitzman e-mail clearly establishes that these statements were
16 made in a public forum about a matter of public interest. The nature of the
17 communication – in response to an inquiry from an on-line investigator – was
18 directed at the public at large and, more specifically, at the interested
19 community of Jackson fans. As such, it is a public forum. See Damon v. Ocean
20 Hills Journalism Club (2000) 85 Cal. App. 4th 468, 476. Further, the e-mail
21 responded to a matter of public concern, i.e., the authenticity of certain
22 recordings released posthumously and claimed to have been written and
23 recorded by a pop superstar. See Tamkin v. CBS Broadcasting, Inc. (2011)
24 193 Cal. App. 4th 142, 143 (2011) (an issue of public interest is any issue in
25 which the public is interested).

26 b. The *Oprah Winfrey Show* Interview

1 As a result of the same controversy regarding the provenance of the Songs on
2 the *Michael* album, defendant Cascio was asked to and did appear with others
3 on the *Oprah Winfrey Show*. During that interview, Cascio responded to the
4 controversy by stating that Jackson had performed the lead vocals on the
5 Songs.

6 As with the Weitzman e-mail, the statements made during the interview were
7 directed at the public at large and the intended audience were Jackson's fans.
8 Further, this interview was intended to and did address a matter of public
9 concern – whether these vocals were, in fact, performed by Jackson.

10 Plaintiffs' contention as to both the e-mail and the interview is that these are
11 simply commercials or promotional statements regarding a product. Likening
12 these statements to a label listing ingredients or a commercial promoting a
13 product, plaintiffs contend that these two statements are not protected under
14 section 425.16.

15 The court is not persuaded that either the e-mail or the interview can be so
16 characterized. The cases upon which plaintiffs rely are distinguishable.

17
18 Nagel involved a list of ingredients. The Court of Appeal narrowly concluded
19 that "a list of product ingredients on labels and a Web site is at the other end of
20 the spectrum [of First Amendment protection] and is not protected speech
21 under section 425.16." See Nagel, *supra*, 109 Cal.App.4th at 47. In rejecting
22 the argument that the list of ingredients was speech "in connection with a public
23 issue," the Court of Appeal gave two reasons. It explained that: (1) the phrase
24 "in connection with a public issue" modifies earlier language referring to acts in
25 furtherance of the constitutional right of free speech and cannot be read in
26 isolation; and (2) the list of ingredients was not participation in the public
27 dialogue on weight management. *Id.* at 47-48.
28

1 Scott arose out of a manufacturer's advertising of the safety and efficacy of its
2 product (a dietary supplement called Metabolife 365). See Scott, supra, 115
3 Cal.App.4th at 423. According to the Court of Appeal, such advertising, which
4 was merely "for the profit-generating purpose of selling that product to the
5 consuming public," did not concern an issue of public interest. *Id.*

6 As for the e-mail and the interview, these statements were clearly part of a
7 larger public dialogue regarding the authenticity of the Songs. Again, while
8 both the e-mail and the interview discussed the Songs, the principal purpose
9 of these communications was to respond to a matter of public interest, not
10 simply to sell a product to the consuming product.

11 c. The Album Cover and the YouTube Commercial

12 By contrast, the album cover – its title and cover art and the statement of
13 attribution on the back of the CD cover -- and YouTube commercial advertising
14 a new album by the best pop artist of all time did not result or evolve as part of
15 any controversy regarding the authenticity of the Songs. Rather, the title of the
16 album *Michael*, the picture of Michael Jackson on its cover, the statements on
17 the backside of the CD cover, and the commercial advertising a "brand new
18 album" by Michael Jackson were communicated as identifiers of the product
19 "for the profit-generating purpose of selling that product to the consuming
20 public."

21 It is well established that commercial speech that does nothing but promote a
22 commercial product or service is not speech protected under the anti-SLAPP
23 statute. CCP §425.17(c). The CD cover and YouTube commercial did not
24 speak to the controversy surrounding the performance nor did it address or
25 refute these allegations. The cover and commercial were created by persons
26 primarily engaged in the business of identifying the artist responsible for the
27 Songs and for selling the album and was based on representations of fact about
28

1 the product made for the purpose of promoting or securing sales. CCP §425.17
2 (c).

3 There is, however, an express statutory exception that applies even though the
4 commercial speech exemption applies. An anti-SLAPP motion can be used to
5 strike lawsuits against a person or entity based on the “creation, advertisement,
6 or other promotion of musical work.” CCP §425.17(d)(2). Clearly, the CD
7 cover, statements regarding the contents of the album, and a commercial
8 advertising its release fall within the scope of artistic works statutory exception
9 as they are all statements regarding the creation of an artistic work.

10 Accordingly, anti-SLAPP motions remain available to the defendants as the
11 producers and distributors of a musical work, such as the Songs in *Michael*.

12 The exception of CCP §425.17(d)(2), however, does not eliminate the need on
13 the part of the defendants to show significant public interest in the conduct at
14 the heart of the plaintiffs’ complaint. Accordingly, while the SLAPP motion
15 remains available, defendants must still show that the conduct here was “in
16 furtherance of the exercise of the constitutional right to petition or the
17 constitutional right of free speech in connection with a public issue or an issue
18 of public interest.

19 The cover art, the title of the album, the statements on the back of the album
20 cover, and the YouTube Commercial describe the properties of the product
21 contained within the cover. Like the label in *Nagel*, the cover and commercial
22 were intended to advise the customer regarding the nature of the product inside
23 the container and not to participate in a public dialogue. See also *All One God*
24 *Faith*, *supra*, 183 Cal.App.4th at 1191. The Court of Appeal stated that “[i]n
25 th[at] case, the use of the ‘OASIS Organic’ seal on member products is not
26 activity directed to public discussion of organic standards in general, but is only
27 speech about the contents and quality of the product.” *Id.* at 1209; *Consumer*
28 *Justice Center*, *supra*, 107 Cal.App.4th at 601 (the Court of Appeal

1 distinguished between speech about herbal supplements in general and
2 commercial speech about the properties of a product.)

3 Nor does the cover art, the title or the description of the source of certain
4 soundtracks as being Michael Jackson merge with or re-publish the musical
5 expressions contained within the album. Compare, e.g., Bolger v. Young Drug
6 Products Corp., 463 U.S. 60, 67-68 n.14 (1983) (speech likely to be expressive
7 where the pamphlet advertises an activity itself protected by the First
8 Amendment). Here, the lyrics are not reproduced and no aspect of the
9 protected portions of the recordings are re-iterated or repeated as part of the
10 advertising.

11 Rather, the only possible basis upon which a claim of protection could be based
12 is the contention that the statements made on the cover and the video
13 describing the album as being Michael Jackson are a matter of public interest
14 solely because of the fame that the artist achieved. See No Doubt v. Activision
15 Publishing Inc. (2011) 192 Cal. App. 4th 1018, 1027. In No Doubt, the use of
16 the likeness of a well-known band in a video game was a matter of public
17 interest because "there is a public interest which attaches to people who, by
18 their accomplishments, mode of living, professional standing or calling, create
19 a legitimate and widespread attention to their activities...." Similarly, in this
20 case, calling an album *Michael*, with cover art resembling the artist, a claim of
21 attribution on the back cover, and a commercial promising a new album from
22 Michael Jackson would meet the first requirement of the anti-SLAPP statute.
23 Michael Jackson's professional standing and accomplishments created
24 legitimate and widespread attention to the release of a new album.

25 For these reasons, the court concludes that the e-mail, *Oprah* interview, title,
26 cover art and disclosures on the cover of the *Michael* CD and the YouTube
27 commercial promoting the album arise from protected activity.

28 (2) SECOND PRONG OF THE ANTI-SLAPP ANALYSIS

1 As the Court has found that the defendants have shown that the challenged causes of
2 action arises from protected activity, "it must then determine whether the plaintiff has
3 demonstrated a probability of prevailing on the claim." See Navellier, supra, 29 Cal.4th
4 at 88. "In order to establish a probability of prevailing on the claim, a plaintiff responding
5 to an anti-SLAPP motion must *state*[] and substantiate[] a legally sufficient claim. Put
6 another way, the plaintiff must demonstrate that the *complaint is both legally sufficient*
7 and supported by a sufficient prima facie showing of facts to sustain a favorable judgment
8 if the evidence submitted by the plaintiff is credited." See Premier Medical Management
9 Systems, Inc. v. California Ins. Guarantee Assn. (2006) 136 Cal.App.4th 464, 476 (italics
10 in original) (internal quotation marks omitted).

11 As indicated above, the parties' Joint Stipulation agreed that, in connection with the
12 second prong, only the following questions will be answered:³

- 13 • whether the various representations on which Plaintiff bases her [UCL and
14 CLRA] claims constitute non-commercial speech and/or are inextricably
15 intertwined with non-commercial speech, such that Plaintiff has failed to
16 allege facts sufficient to constitute a cause of action under these statutes;
17 and
- 18 • whether [specified] documents include any statements that a reasonable
19 trier of fact could decide are sufficiently false or misleading to support a
20 claim under the UCL or CLRA, assuming solely for purposes of this
21 determination on the Motions that Michael Jackson did not sing the lead
22 vocals on [the Songs].

23
24 a. Do the challenged statements constitute non-commercial speech and/or are
25 inextricably intertwined with non-commercial speech?
26

27
28 ³ See Joint Stipulation, ¶2.

1 In Kasky v. Nike, Inc. (2002) 27 Cal.4th 939, as modified (May 22, 2002), the plaintiff
2 brought claims under Business & Professions Code §§17200 and 17500, alleging that
3 Nike, "in response to public criticism, and to induce consumers to continue to buy its
4 products, made false statements of fact about its labor practices and about working
5 conditions in factories that make its products." See Kasky, *supra*, 27 Cal.4th at 945.
6 The issue was "whether [Nike's] false statements are commercial or noncommercial
7 speech for purposes of constitutional free speech analysis under the state and federal
8 Constitutions." Id. at 946. The California Supreme Court explained that "[r]esolution
9 of th[at] issue is important because commercial speech receives a lesser degree of
10 constitutional protection than many other forms of expression, and because
11 governments may entirely prohibit commercial speech that is false or misleading." Id.

12 According to the high court, "*when a court must decide whether particular speech may*
13 *be subjected to laws aimed at preventing false advertising or other forms of*
14 *commercial deception, categorizing a particular statement as commercial or*
15 *noncommercial speech requires consideration of three elements: the speaker, the*
16 *intended audience, and the content of the message.*" Id. at 960 (italics in original).
17 Applying that test, it concluded that Nike's statements constituted commercial speech
18 because: (1) the speakers (Nike and its officers and directors) were commercial
19 speakers in that they made and sold athletic gear; (2) the statements were addressed
20 directly to (or intended to reach or influence) actual and potential purchasers of Nike
21 products; and (3) the statements regarding labor policies and practices and working
22 conditions in factories where Nike products were made were factual representations
23 of a commercial nature. Id. at 963.

24 Applying the Kasky test, Plaintiff here contends that all of the challenged statements
25 are commercial speech. See Opposition, §§5.A to 5.D. As such, plaintiffs assert,
26 these statements may be subjected to laws aimed at preventing false advertising or
27 other forms of commercial deception.

28 Again, disaggregating the analysis, the court considers each of the alleged forms of
speech separately.

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2 i. Weitzman e-mail

3 As for the Weitzman e-mail, there is little doubt that this is not commercial
4 speech. The audience for that communication was members of the public
5 who doubted or questioned the authenticity of the vocal performance on the
6 Songs. It was not motivated for the purpose of selling or promoting the
7 good; it was directed at stemming a controversy regarding the veracity of
8 the claims surrounding the release of the album. The contents of the
9 communication reported the results of an investigation into the source of the
10 vocals on the Songs. It was not a statement of fact as to how *Michael* was
11 made. As it was not directed at a commercial audience and not intended to
12 be a representation of fact of a commercial nature, it cannot fairly be
13 characterized as commercial speech.

14 ii. The *Oprah* interview

15 Nor can the *Oprah* interview be properly characterized under Kasky as
16 commercial speech. The statements contained in the interview did not
17 propose a commercial transaction. Nor can it be fairly concluded that the
18 remarks made by Cascio during the interview were advertising. The
19 statements regarding the performance on the album were mere seconds of
20 a 17 minute interview into the secret relationship that Michael Jackson had
21 with the entire Cascio family. It was not intended to, nor could it be
22 considered to, "propose a commercial transaction." See Rezec, *supra*, 116
23 Cal. App. 4th at 141. Moreover, as discussed above, even this statement
24 was given in response to an inquiry posed by Oprah Winfrey regarding the
25 larger public controversy surrounding the authenticity of the vocal tracks on
26 the Songs. These statements were directed to and intended to address a
27 public controversy; they did not advertise or reference a product to further
28 the speaker's economic motive. See Kasky, *supra*, at 945-47.

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iii. Cover (title, picture and statements) and YouTube Commercial

A harder question, however, is presented by the remaining two statements – the CD cover – its title, cover art, and statements of origin and the YouTube advertisement. In each of these instances, the speech is clearly advertising. The title and cover art promote and advertise the source of the album as Michael Jackson. The YouTube Video is nothing more than a commercial announcing the release of *Michael*. The commercial speaker (Sony) has designed a cover and titled the album as a way of making factual statements to an intended commercial audience of record buyers representing the origin of the product.

As Plaintiff also persuasively argues, the commercial speech is not “adjunct or incidental to” or inextricably intertwined” with the non-commercial content of the Songs. As explained in Riley v. Nat’l Fed’n of the Blind of N.C., Inc. (1988) 487 U.S. 781, 796, this narrow exception applies when commercial speech “is inextricably intertwined with otherwise fully protected speech.” Where the component parts of a single speech are inextricably intertwined, the courts cannot parcel out the speech, applying one test to one phrase and another test to another. *Id.*

There is nothing inextricable about Defendants’ commercial statements about Michael Jackson being the lead vocalist of the Songs and the non-commercial, protected content of those tracks. The decision by the producers of the album to call the tracks *Michael*, to use a picture of Michael Jackson as cover art, to assert that “[t]his album contains 9 previously unreleased vocal tracks performed by Michael Jackson,” and to release a commercial advertising a new album from the greatest pop artist of all time are not components of the songs themselves. There is nothing inextricable about the presentation of these tracks and the commercial decision to name the album and design cover art and attribute the work to Michael Jackson. Nothing in this case prevented Defendants from giving the album a different

1 title and look or from electing not to attest to the authenticity of the
2 recordings on the cover or in a commercial.

3 Nor is the *Michael* cover and commercial fairly likened to the yellow pages
4 directories at issue in Dex Media W., Inc. v. City of Seattle (9th Cir. 2012)
5 696 F.3d 952, 962-65. In that case, the paid advertisements in the yellow
6 pages were found to be inextricably intertwined with the telephone listings
7 and community information that was non-commercial. Given the economic
8 reality that the ads paid for the publication of the public information, these
9 two elements could not be fairly parsed.

10 In this instance, however, Defendants' statements naming Jackson as the
11 performer of the Songs are not economically mandated in order to release
12 the Songs as part of a collection of recordings. A fair characterization of the
13 questionable provenance of the voices on those Songs would not have
14 effectively stopped the expressive activity altogether.

15 Moreover, the "adjunct or incidental to" exceptions do not apply to false
16 advertising. See Charles v. City of Los Angeles (9th Cir. 2012) 697 F.3d
17 1146, 1156 ("Doctrines extending noncommercial status from a protected
18 work to advertising for that work are justified only to the extent necessary to
19 safeguard the ability to truthfully promote protected speech."). As the
20 defendants have stipulated to the fact (for purposes of this motion only) that
21 Michael Jackson did not sing the lead vocals on the Songs, the false nature
22 of these statements further adds to the need to provide them nothing more
23 than the protection ordinarily afforded commercial speech.

- 24 b. Do Michael's cover and the video ad contain statements that a reasonable trier of fact
25 could decide are sufficiently false or misleading?
26
27
28

1 The Court agrees with Plaintiff that, assuming Jackson did not perform the lead vocals
2 on the Songs,⁴ the front and back covers of *Michael* and the video ad were likely to
3 deceive a reasonable consumer.

4 *Michael's* front cover features art with images of Jackson and describes the album as
5 "The Much Anticipated Album of Newly Completed Recordings." The back cover
6 states: "This album contains 9⁵ previously unreleased vocal tracks performed by
7 Michael Jackson." Further, for songs that feature other artists (i.e., Akon, 50 Cent,
8 and Lenny Kravitz), those artists are expressly credited on the album, and to the extent
9 that someone other than Jackson performed the lead vocals, a reasonable consumer
10 would expect a similar attribution.

11 As for the video ad, it describes *Michael* as "a brand new album from the greatest
12 artist of all time." Coupled with the images of Jackson, a reasonable consumer would
13 understand that Jackson is the referenced "artist." As Plaintiff also correctly argues,
14 the fact that Jackson performed at least seven of the ten tracks on *Michael* is of no
15 consequence. See Colgan v. Leatherman Tool Group, Inc. (2006) 135 Cal.App.4th
16 663, 682-683 (finding that a reasonable consumer would likely be deceived by "Made
17 in U.S.A." representations on products that were partly manufactured abroad).

18 (3) CONCLUSION

19 For all of the above reasons, the special motions to strike pursuant to CCP §425.16 are
20 GRANTED IN PART AND DENIED IN PART.
21

22 Defendants have satisfied their burden on the first prong of the anti-SLAPP statute.
23

24 As for the second prong, to the extent that Plaintiff alleges violations of the UCL and CLRA
25 based on the Weitzman e-mail and the Oprah Winfrey interview, the special motion to
26

27 ⁴ This assumption is part of the parties' Joint Stipulation. See Joint Stipulation, ¶2.b.

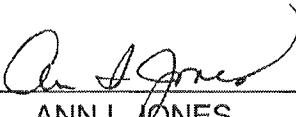
28 ⁵ Although there are 10 tracks on *Michael*, one of the tracks ("The Way You Love Me") was previously released in 2004. See FAC, ¶27.

1 strike is GRANTED. As these non-commercial statements are not actionable under these
2 statutory schemes, Plaintiff cannot state a *prima facie* case.

3 To the extent that Plaintiff alleges violations of the UCL and CLRA based on the album
4 title, its cover art, and the statement on the back of the cover and the YouTube
5 commercial promoting the album, plaintiffs have met their burden (based on the
6 stipulation) of presenting a *prima facie* case sufficient to satisfy their burden on the second
7 prong of the anti-SLAPP statute. As these purely commercial and not-inextricably
8 intertwined false statements are likely to deceive a reasonable consumer, the special
9 motion to strike the UCL and CLRA causes of action based on this conduct is DENIED.

10 IT IS SO ORDERED:

11
12 DATED: December 9, 2016
13

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16 _____
17 ANN I. JONES
18 Judge of the Superior Court
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PROOF OF SERVICE

I declare that I am over the age of eighteen (18) and not a party to this action. My business address is 2029 Century Park East, Suite 2600, Los Angeles, California 90067.

January 30, 2017, I served the following documents: **DEFENDANTS JOHN BRANCA, AS CO-EXECUTOR OF THE ESTATE OF MICHAEL J. JACKSON, SONY MUSIC ENTERTAINMENT, AND MJJ PRODUCTIONS, INC.'S NOTICE OF APPEAL** on the interested parties in this action by placing a true and correct copy of each document thereof, enclosed in a sealed envelope, addressed as follows:

Ari E. Moss, ari@mossbollinger.com Jeremy F. Bollinger, jeremy@mossbollinger.com Moss Bollinger LLP 15300 Ventura Blvd., Suite 207 Sherman Oaks, CA 91403 Fax: (310) 861-0389	<i>Attorneys for Plaintiff Vera Serova</i>
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Bryan J. Freedman, bfreedman@fllp.com Jordan Susman, jsusman@fllp.com Sean M. Hardy, smhardy@fllp.com FREEDMAN AND TAITELMAN, LLP 1901 Avenue of the Stars, Suite 500 Los Angeles, CA 90067 Fax: (310) 201-0045	<i>Attorneys for Defendants Edward Joseph Cascio, James Victor Porte, and Angelikson Productions LLC</i>

(X) (BY NOTICE OF ELECTRONIC FILING THROUGH CASE ANYWHERE).

I electronically served a true and correct copy of the document on counsel of record listed to receive transmissions through CaseAnywhere.

(X) (BY U.S. MAIL) I am "readily familiar" with the firm's practice of collecting and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on the same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date

1 of deposit for mailing in affidavit.

2 I declare under penalty of perjury under the laws of the State of California that the above
3 is true and correct.

4 Executed on January 30, 2017, at Los Angeles, California.

5 Adelle Shafer
6 Adelle Shafer