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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

DEPARTMENT CCW 308 HON. ANN I. JONES, JUDGE

VERA SEROVA,)	
)	
PLAINTIFF,)	
)	SUPERIOR COURT
VS.)	CASE NO. BC548468
)	
SONY MUSIC ENTERTAINMENT, ET AL.,)	
)	
DEFENDANTS.)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

WEDNESDAY, DECEMBER 7, 2016

APPEARANCES:

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I N D E X

DECEMBER 7, 2016

ALPHABETICAL/CHRONOLOGICAL LIST OF WITNESSES

(NONE OFFERED.)

EXHIBITS

(NONE OFFERED.)

1 CASE NUMBER: BC548468
2 CASE NAME: SEROVA VS. SONY MUSIC
3 LOS ANGELES, CALIFORNIA WEDNESDAY, DECEMBER 7, 2016
4 DEPARTMENT CCW 308 HON. ANN I. JONES, JUDGE
5 REPORTER: ANITA B. ALDERSON, CSR NO. 11843
6 TIME: P.M. SESSION
7 APPEARANCES: (AS HERETOFORE NOTED.)
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9
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11

12 THE COURT: THANK YOU.

13 ON THE RECORD IN THE SEROVA VERSUS SONY
14 ENTERTAINMENT. I HAVE THE COURT REPORTER ORDER WHICH I'M
15 SIGNING RIGHT NOW. WELCOME.

16 COUNSEL PLEASE MAKE YOUR APPEARANCES.

17 MR. BOLLINGER: JEREMY BOLLINGER, MOSS BOLLINGER,
18 ON BEHALF OF PLAINTIFF, VERA SEROVA.

19 MR. MODABBER: ZIA MODABBER, KATTEN MUCHIN
20 ROSENMAN, FOR MJJ PRODUCTIONS, INC., JOHN BRANCA AS THE
21 CO-EXECUTOR OF THE MICHAEL JACKSON ESTATE AND SONY MUSIC.

22 MR. DEMKO: ANDY DEMKO ALSO KATTEN MUCHIN FOR
23 DEFENDANTS JOHN BRANCA AS CO-EXECUTOR OF THE ESTATE OF
24 MICHAEL JACKSON, SONY MUSIC, AND MJJ PRODUCTIONS, INC.

25 MR. HARDY: SEAN HARDY OF FREEDMAN & TAITELMAN FOR
26 DEFENDANTS ANGELIKSON PRODUCTIONS, CASCIO AND PORTE.

27 THE COURT: THANK YOU. PLEASE BE SEATED.

28 I RESISTED MY GENERAL PRACTICE OF ISSUING A

1 TENTATIVE. JUST SO YOU KNOW, FROM THIS SIDE OF THE WELL WE
2 HAVE THESE LONG DEBATES ABOUT WHETHER TENTATIVES ARE
3 HELPFUL OR NOT FOR US. I REMEMBER BEING ON THAT SIDE WHILE
4 THEY WERE EXTRAORDINARILY HELPFUL FOR THE LAWYERS, BUT THEY
5 SOMETIMES INTERFERE WITH MY ABILITY TO HAVE A REALLY CLEAR
6 SECOND OPPORTUNITY TO HAVE BOTH SIDES, ASIDE FROM THE
7 BRIEFS, PRESENT THEIR ARGUMENTS, PRESENT THEIR EVIDENCE IN
8 A WAY WHERE SOMEONE IS NOT ADOPTING A TENTATIVE OR
9 SUBMITTING ON THE TENTATIVE OR TRYING NOT TO DISABUSE THE
10 COURT OF WHAT THEY ALREADY WROTE.

11 FOR MY BENEFIT AND BECAUSE OF THE SINGULAR
12 IMPORTANCE OF THIS MOTION, I'M GOING TO GO AHEAD AND LET
13 YOU DO OLD-FASHIONED ARGUMENT THE OLD-FASHION WAY WITHOUT
14 THE BENEFIT OF A TENTATIVE.

15 I WILL BE TAKING THE MATTER UNDER SUBMISSION. HOPE
16 TO HAVE A RULING RELATIVELY QUICKLY AND THEN WE WILL
17 PROBABLY DO A TELEPHONIC STATUS CONFERENCE WITHIN A WEEK OR
18 TWO TO WHEN YOU THEN KNOW WHERE PEOPLE ARE IN TERMS OF WHAT
19 THEIR DECISIONS ARE AFTER SEEING THE COURT'S WRITTEN
20 DECISION.

21 I'M PULLING OUT MY NOTEPAD SO I CAN TAKE AMPLE
22 NOTES.

23 MOVING PARTY PLEASE PROCEED.

24 MR. MODABBER: OKAY. I WASN'T READY FOR THAT. LET
25 ME START BY POINTING OUT THE PRISM IN WHICH I THINK WE NEED
26 TO LOOK AT THIS.

27 WE ARE NOT TALKING ABOUT POTATO CHIPS, THE SALE OF
28 TENNIS SHOES OR ANY OTHER ROUTINE COMMERCIAL PRODUCT. WE

1 ARE TALKING ABOUT ARTISTIC EXPRESSION. AND WITHOUT
2 QUESTION ON BOTH SIDES OF THIS PODIUM OUT HERE, I THINK
3 THAT WE WOULD ALL AGREE THAT TRIGGERS FIRST AMENDMENT
4 CONCERNS THAT DO NOT EXIST IN A REGULAR COMMERCIAL
5 TRANSACTION. SO THAT IS THE FIRST POINT, WE ARE TALKING
6 ABOUT ART HERE.

7 THE NEXT THING I THINK IS IMPORTANT TO REMEMBER FOR
8 ALL OF US IS WE ARE ALSO NOT TALKING ABOUT A PLAINTIFF WHO
9 MAY NOT HAVE ANY REMEDY AT ALL. ALL WE ARE TALKING ABOUT
10 IS WHAT IS THE BURDEN FOR THAT PLAINTIFF. IS IT STRICT
11 LIABILITY BECAUSE THESE CONSUMER PROTECTION STATUTES APPLY,
12 OR IS IT NOT?

13 IS IT ESSENTIALLY A FRAUD CLAIM BECAUSE THE FIRST
14 AMENDMENT PROTECTS NONCOMMERCIAL SPEECH? THAT IS WHERE I
15 WOULD START.

16 I THINK IN THE COMMERCIAL SPEECH ANALYSIS I THINK
17 WE BEGAN WITH THE CASES THAT TALK ABOUT WHY DO WE MAKE THE
18 DISTINCTION BETWEEN COMMERCIAL AND NONCOMMERCIAL SPEECH.
19 FOR COMMERCIAL SPEECH, GENERALLY THE TREATISES TEACH US AND
20 THE LAW TEACHES US THAT THE SELLER OF THE PRODUCT IS IN A
21 POSITION TO KNOW WHAT IT IS THEY ARE SELLING.

22 IN THIS CASE, THAT IS NOT WHAT HAS GONE ON. WE
23 REPRESENT, AND THE COMPLAINT MAKES THIS CLEAR, THE
24 COMPLAINT ALLEGES SPECIFICALLY CASCIO, PORTE AND ANGELIKSON
25 FAILED TO DISCLOSE TO SONY OR THE ESTATE THAT MICHAEL
26 JACKSON DID NOT PROVIDE THE LEAD VOCALS.

27 AND IT CONTINUES, CASCIO, PORTE AND ANGELIKSON HAD
28 AN EXCLUSIVE KNOWLEDGE OF THE FACT THAT JACKSON DID NOT

1 PERFORM THE SONGS. WITH ALL DUE RESPECT TO MY
2 CO-DEFENDANTS, WE DO NOT SIT IN THE SAME SHOES THEY SIT IN.

3 WE ARE RECIPIENTS OF THE PRODUCT AND THE GOODS AND
4 ULTIMATELY SOLD THEM BASED ON ALL THE FACTS YOUR HONOR, I'M
5 SURE, IS FAMILIAR WITH BASED IN THE COMPLAINT.

6 WE DO NOT FALL IN THE GENERAL RUBRIC OF WHY WE
7 PROTECT COMMERCIAL SPEECH BECAUSE WE WERE IN A POSITION TO
8 KNOW, WE ARE NOT. MICHAEL JACKSON WAS DEAD. NOBODY OTHER
9 THAN THE DEFENDANTS WHO ARE IDENTIFIED, WHO ARE IN A ROOM,
10 ARE IN A POSITION TO PROVIDE THAT INFORMATION.

11 THE OTHER THING WE ARE NOT TALKING ABOUT AND WHY
12 COMMERCIAL SPEECH GETS LESS PROTECTION IS WHAT IS THE HARM
13 HERE. THE HARM HERE IS NOT JUST THE LOSS OF MONEY. IT IS
14 THE LOSS TO THE MARKET OF THE ARTISTIC IMPRESSION BEING
15 AVAILABLE TO IT. THAT IS ANOTHER PARAMOUNT CONCERN OF THE
16 FIRST AMENDMENT THAT EXISTS IN THIS CASE THAT DOES NOT
17 EXIST WHEN WE ARE TALKING ABOUT TENNIS SHOES OR LOCKS OR
18 SOME OTHER ROUTINE COMMERCIAL PRODUCT.

19 AND LASTLY THE DAMAGES HERE ARE NOT DAMAGES, SIMPLY
20 FINANCIAL DAMAGES. IT IS AGAIN THE CHILLING OR ARTISTIC
21 IMPRESSION WE'RE TALKING ABOUT.

22 WITH THAT AS THE CONTEXT, THE ANALYSIS UNDER THE
23 U.S. SUPREME COURT IN BOLGER IS PRETTY STRAIGHTFORWARD.
24 ARE WE TALKING ABOUT ADVERTISEMENTS HERE OR NOT. I WILL
25 START AND GO THROUGH ALL OF THEM IN DETAIL.

26 I WOULD ASK YOUR HONOR THAT WHEN A RULING IS
27 FASHIONED THAT WE BE SPECIFIC ABOUT WHETHER OR NOT
28 SOMETHING IS COMMERCIAL OR NONCOMMERCIAL SPEECH WITH

1 RESPECT TO EACH OF THE ELEMENTS HERE.

2 SO I'LL START -- LET'S START WITH THE STATEMENT BY
3 MR. WEITZMAN THAT IS ATTACHED AS AN EXHIBIT. MR. WEITZMAN
4 AFTER TALKING ABOUT WHAT WAS DONE AND WHAT WAS NOT DONE, AT
5 THE END OF HIS STATEMENTS HE SAYS, HE RECOGNIZED THE
6 QUESTION, ALTHOUGH THERE STILL SEEM TO BE CONCERNS HE
7 WRITES QUOTE "ULTIMATELY MICHAEL JACKSON'S FANS WILL BE THE
8 JUDGES OF THESE SONGS AS THEY ALWAYS ARE."

9 SO HE RECITES AND RESPONDS TO PUBLIC -- AGAIN, FROM
10 THE ALLEGATIONS IN THE COMPLAINT, WE KNOW THIS IS A
11 RESPONSE TO A PUBLIC STATEMENT ABOUT WHETHER OR NOT THESE
12 ARE MICHAEL JACKSON'S VOCALS. AND A PUBLIC STATEMENT IS
13 ISSUED IN RESPONSE THAT SAYS THIS IS WHAT WE'VE DONE. WE
14 BELIEVE IT'S MICHAEL JACKSON, BUT ULTIMATELY IT'S UP TO YOU
15 AND THE RECORD IS GOING TO COME OUT, AND YOU WILL BE ABLE
16 TO MAKE THE DECISION AND THAT WAS BEFORE THE RECORD
17 CAME OUT.

18 THERE IS NO CREDIBLE WAY TO FIND THIS IS AN
19 ADVERTISEMENT WHICH MEANS IT DOESN'T MEET THE FIRST OF THE
20 BOLGER ELEMENTS. YES IT REFERS TO THE PRODUCT, BUT YOU
21 DON'T EVEN GET PAST THE FIRST TEST. I DON'T THINK ANYBODY
22 WITH A STRAIGHT FACE CAN SAY THIS IS AN ADVERTISEMENT.

23 I WANT TO TURN TO THE CD ITSELF. THERE IS A LOT OF
24 TALK IT SAYS "MICHAEL" ON THE COVER. AND IT'S GOT PICTURES
25 OF MICHAEL JACKSON ON THE COVER THAT IS ALL TRUE. BUT
26 THOSE PICTURES ARE ARTISTIC IMPRESSION IN AND OF
27 THEMSELVES. AND THE TITLE OF THE ALBUM IS ARTISTIC
28 EXPRESSION IN AND OF ITSELF. YOU CANNOT STRIP THOSE OUT

1 AND STILL HAVE THE SAME ARTISTIC EXPRESSION IN ITS SAME
2 FORM. YOU CANNOT DO IT. THEY ALL ARE PART OF ONE AND THE
3 SAME.

4 THEY ALSO ARE NOT ADVERTISEMENTS. UNDER STUTZMAN
5 WE HAD ALMOST IDENTICAL FACTS. YOU HAVE LANCE ARMSTRONG'S
6 BOOK CALLING IT A WORK OF NONFICTION AND ALLEGATION THAT
7 THERE WERE MATERIAL FALSE STATEMENTS WITHIN THE BOOK AND ON
8 THE COVER. AND ON THE COVER THAT HE WAS A SEVEN TIME TOUR
9 DE FRANCE WINNER. IT'S NONFICTION. HE DIDN'T TAKE DRUGS
10 ALL OF THAT ON THE COVER.

11 THE COURT'S RECOGNIZE THAT AND THIS IS CONSISTENT
12 WITH THE EXCEPTION TO THE EXEMPTION TO THE ANTI-SLAPP
13 STATUTE PRONG ONE. WHEN WE ARE TALKING ABOUT WORKS OF
14 ARTISTIC EXPRESSION AND HEARING A WORK OF MUSICAL
15 EXPRESSION, THE ADVERTISING AND PROMOTION OF THAT
16 EXPRESSION IS ALSO PROTECTED BECAUSE THE COURTS RECOGNIZE
17 IN ORDER TO GET IT OUT IN THE MARKET PLACE IS A NATURAL
18 CONSEQUENCE TO THAT A NEED ARISES TO ACTUALLY PROMOTE IT
19 AND SELL IT, AND WE WANT TO ENCOURAGE THAT.

20 SO THE ALBUM, THE ARTISTIC WORK, IT'S AN ARTFUL
21 COVER. I'M SURE YOUR HONOR HAS HAD A CHANCE TO LOOK AT IT,
22 HOPEFULLY. THIS IS NOT A SKETCH LIKE SOMEBODY'S PENCIL OR
23 PHOTOGRAPH EVEN; IT'S ART. AND THE TITLE OF IT IS ARTISTIC
24 WORK, AGAIN, IT IS ART.

25 SO NONE OF THESE ELEMENTS MEET OR NONE OF THESE
26 STATEMENTS MEET THE FIRST PRONG OF THE COMMERCIAL TEST
27 SPEECH UNDER BOLGER. EVEN IF THEY DO, ALL OF THEM ARE
28 INEXORABLY INTERTWINED EVEN IF YOU HAVE A COMBINATION,

1 OKAY, THERE IS SOME ADVERTISING COMPONENT TO THE YOUTUBE
2 VIDEO OR ALBUM BY SPLASHING MICHAEL'S NAME, SURE, MICHAEL
3 IS POPULAR SO YOU WOULD ATTRACT PEOPLE TO BUY IT.

4 YOU CAN'T SEPARATE OUT THE IDENTITY OF THE AUTHOR
5 OF THE ART FROM THE ART ITSELF WITHOUT CHANGING THE ART AND
6 THAT IS CRITICAL. BECAUSE IN ALL OF THE CASES WHERE YOU
7 FIND THERE IS NOTHING THAT IS INEXORABLY INTERTWINED, WHAT
8 YOU WILL SEE IS AT A TUPPERWARE PARTY WHEN YOU ARE SELLING
9 TUPPERWARE, YOU DON'T HAVE TO TALK ABOUT THE PUBLIC ISSUE
10 OF MANAGING THE FINANCES OF YOUR HOME.

11 IN THE NIKE CASE YOU DON'T HAVE TO TALK ABOUT, I
12 FORGET WHAT THE OTHER ISSUE WAS IN THE NIKE CASE, BUT THERE
13 WERE TWO THINGS THEY TRIED TO INTERJECT TO BE ABLE TO MAKE
14 THE CASE AND SAY, HEY, WE ARE TALKING ABOUT THIS IMPORTANT
15 THING. YOU WERE NOT REQUIRED, I THINK THE PHRASE IS THERE
16 IS NO LAW OF MAN OR NATURE THAT REQUIRED YOU TO TALK ABOUT
17 THESE THINGS TOGETHER.

18 THERE IS EVERY LAW OF NATURE THAT TELLS YOU CAN'T
19 TALK ABOUT A MICHAEL JACKSON WORK OF ART WITHOUT CALLING IT
20 A MICHAEL JACKSON WORK OF ART AND IDENTIFYING THE SINGER.
21 WITH THAT I WILL SIT DOWN AND ASK FOR PERMISSION TO RESPOND
22 TO ANYTHING ELSE.

23 THE COURT: THANK YOU. SO HAVING BEEN THROWN UNDER
24 THE BUS.

25 MR. HARDY: YOUR HONOR, I WOULDN'T SUBMIT THAT I'VE
26 BEEN THROWN UNDER THE BUS, BUT --

27 THE COURT: I THINK WHAT HE'S SAYING IS WE WERE AS
28 DUPED AS THE PLAINTIFFS. WE WANT TO COME OVER TO JOIN THE

1 CLASS. WE'RE SONY AND WE DIDN'T KNOW YOU GUYS WERE
2 RECORDING STUFF IN A BASEMENT THAT WASN'T RECORDED BY
3 MICHAEL. YOU TOLD US IT WAS MICHAEL. WE BELIEVED IT WAS
4 MICHAEL. AND IF THERE IS A BAD GUY HERE WHO WAS ENGAGING
5 IN FALSE COMMERCIAL SPEECH, IT'S NOT US, SO THAT IS CALLED
6 GETTING THROWN UNDER THE BUS.

7 MR. HARDY: YOUR HONOR, WE ARE NOT FINGER POINTING
8 AT THIS STAGE. AGAIN, UNDER THE ANTI-SLAPP ANALYSIS THAT
9 COUNSEL FOR SONY WENT THROUGH, THE SPEECH ATTRIBUTED TO THE
10 ANGELIKSON DEFENDANTS CONSIST SOLELY OF A SINGLE STATEMENT
11 MADE BY A DEFENDANT CASCIO, NOT ANGELIKSON PRODUCTIONS AND
12 NOT DEFENDANT PORTE ON THE OPRAH WINFREY SHOW.

13 AND I DON'T THINK THERE IS ANY DISPUTE HERE, YOUR
14 HONOR, THAT THE OPRAH WINFREY APPEARANCE IN TOTAL CONCERNED
15 A MATTER OF PUBLIC CONCERN, A MATTER OF PUBLIC INTEREST.

16 IT WAS NOT A SHOW DESIGNED TO PROMOTE THE UPCOMING
17 ALBUM. RATHER IT WAS A SHOW DETAILING THE LAST DAYS OF
18 MICHAEL JACKSON AND ONE OF THE MOST WELL KNOWN FIGURES IN
19 THE WORLD, AND MR. CASCIO AND HIS FAMILY'S INTERACTIONS
20 WITH JACKSON.

21 THE SPECIFIC COMMENT WHICH HAS BEEN CITED IN THE
22 COMPLAINT CAME IN RESPONSE TO ONE OF OPRAH WINFREY'S
23 QUESTIONS REGARDING THE CONTROVERSY SURROUNDING THE
24 SO-CALLED CASCIO TRACKS AND THE STATEMENTS IS ITS ENTIRETY.
25 "I CAN TELL YOU IT IS MICHAEL'S VOICE. HE RECORDED IT
26 RIGHT THERE IN MY BASEMENT. IT WAS A HOME STUDIO, AND WE
27 WORKED. I WAS THERE PUSHING THE BUTTONS. HE WAS THERE
28 DIRECTING THAT IS MICHAEL JACKSON."

1 NOW CASCIO WASN'T THERE TO PUSH A PARTICULAR
2 PRODUCT OR SELL OR THERE AS A DISGUISED COMMERCIAL FOR THE
3 UPCOMING ALBUM, RATHER HE WAS SIMPLY RESPONDING TO A SERIES
4 OF QUESTIONS FROM OPRAH WINFREY CONCERNING VARIOUS ISSUES
5 CONCERNING THE LAST DAYS OF MICHAEL JACKSON.

6 THIS WAS CONSISTENT WITH THE LINE OF QUESTIONING
7 THAT TOOK PLACE OVER THE ENTIRE COURSE OF THE SHOW
8 REGARDING HOW THE CASCIOS MET MR. JACKSON, MR. JACKSON'S
9 SLEEP HABITS, HIS CLOTHING CHOICES, THE BASEMENT WHERE HE
10 RECORDED WITH CASCIO AND OTHER ISSUES CONCERNING HIS LIFE
11 IN GENERAL.

12 NOW, AGAIN, GOING DOWN THROUGH THE ANTI-SLAPP
13 ANALYSIS, YOUR HONOR, IN TERMS OF THE FIRST PRONG OF THE
14 ANTI-SLAPP EXCEPTION TO THE ANTI-SLAPP STATUTE THAT IS CCP
15 425.17 (D) THE STATUTE IS VERY CLEAR THAT THE COMMERCIAL
16 SPEECH EXEMPTION DOES NOT APPLY TO WORKS, TO MUSICAL OR
17 ARTISTIC WORKS.

18 ON ITS FACE THIS ENTIRE CONTROVERSY CONCERNS A
19 STATEMENT RELATED TO A WORK THAT IS EITHER MUSICAL,
20 ARTISTIC, LIKELY BOTH. THERE IS NO AMBIGUITY IN THE
21 STATUTE. SO ANY REFERENCE TO THE LEGISLATIVE HISTORY
22 CONCERNING THE EXEMPTION TO THE ANTI-SLAPP STATUTE IS
23 ENTIRELY UNNECESSARY AND PURSUANT TO THE CANONS OF
24 STATUTORY CONSTRUCTION THERE IS SIMPLY NO REASON TO GO
25 THERE. THE STATUTE IS CLEAR ON ITS FACE.

26 NOW REGARDING THE SO-CALLED EXEMPTION TO THE
27 EXEMPTION, AGAIN, THE ANALYSIS IN THE LANCE ARMSTRONG CASE
28 IS ENTIRELY APPLICABLE HERE CONCERNING MR. CASCIO'S

1 STATEMENTS. AGAIN, I SEE NO WAY IN WHICH ANGELIKSON
2 PRODUCTIONS OR MR. PORTE IS SOMEHOW RESPONSIBLE FOR THIS
3 PARTICULAR STATEMENT MADE ON OPRAH.

4 AS LAID OUT IN OUR REPLY BRIEF, YOUR HONOR, THE
5 OVERALL APPEARANCE ON THE OPRAH WINFREY SHOW WAS IN
6 CONNECTION WITH A MATTER OF PUBLIC CONCERN THE CONTROVERSY
7 SURROUNDING MICHAEL JACKSON'S LAST DAYS.

8 AND AS SUCH, THIS SINGLE RESPONSE TO ONE QUESTION
9 POSED BY MS. WINFREY, NOT A PREPARED STATEMENT BY ANY
10 MEANS, YOUR HONOR, WAS SIMPLY INEXTRICABLY INTERTWINED WITH
11 A MATTER OF PUBLIC CONCERN AND THUS ALSO FALLS WITHIN THE
12 EXEMPTION TO THE EXEMPTION OF THE ANTI-SLAPP RULES.

13 SO EVEN IF THIS ISOLATED SENTENCE WERE TO BE
14 CONSIDERED COMMERCIAL SPEECH, WHICH I ARGUE IT WOULD NOT,
15 IT WOULD BE INEXTRICABLY INTERTWINED WITH SPEECH OF A
16 NONCOMMERCIAL CHARACTER, SPEECH CONCERNING A MATTER OF
17 PUBLIC INTEREST.

18 AND I DON'T THINK IF THE OVERALL APPEARANCE ON THE
19 OPRAH WINFREY SHOW WERE TO BE CONSIDERED A COMMERCIAL
20 SPEECH THEN PERHAPS THAT SHOULD HAVE BEEN EXPLORED FURTHER,
21 BUT IT HAS NOT BEEN, YOUR HONOR. I, THEREFORE, SUBMIT THAT
22 THE LAW ON THIS MATTER IS FAIRLY CLEAR, AND FOR THAT REASON
23 THE ANTI-SLAPP MOTION SHOULD BE GRANTED AS TO ALL OF THE
24 ANGELIKSON DEFENDANTS.

25 THE COURT: THANK YOU. SIR.

26 MR. BOLLINGER: THANK YOU, YOUR HONOR, MAY I SIT.

27 THE COURT: YOU ABSOLUTELY MAY.

28 MR. BOLLINGER: I THINK IT'S IMPORTANT FOR US TO

1 TAKE A STEP BACK. COUNSEL JUMPED STRAIGHT INTO THE
2 COMMERCIAL VERSUS NONCOMMERCIAL QUESTION WHICH IS PART OF
3 PRONG TWO. AS I MENTIONED IN OUR SUPPLEMENTAL BRIEF, I
4 WOULD LIKE THE COURT, WE WOULD LIKE THE COURT, TO
5 RECONSIDER ITS TENTATIVE ON PRONG ONE AND TO DO THAT I
6 THINK THE COURT NEEDS TO UNDERSTAND AT LEAST HOW WE SEE THE
7 STATUTE IS SUPPOSED TO BE FOLLOWED.

8 AND THAT IS THE PRONG ONE ASKS IF THIS IS PROTECTED
9 SPEECH IN FURTHERANCE -- IF THE STATEMENTS ARE IN
10 FURTHERANCE OF A CONSTITUTIONALLY PROTECTED FREE SPEECH
11 UNDER THE FIRST AMENDMENT.

12 AND COUNSEL JUMPS TO THESE EXCEPTIONS AND THE
13 EXEMPTIONS AND THE EXCEPTIONS TO THE EXEMPTIONS, BUT THE
14 EXEMPTIONS ARE THERE FOR THE PLAINTIFF TO INVOKE. AND IN
15 OUR OPPOSITION, THE PLAINTIFF DID NOT INVOKE THE EXEMPTION.
16 SO I THINK EVERYONE HAS JUMPED THE GUN AND THE COURT NEEDS
17 TO EVALUATE PRONG ONE.

18 THE COURT: SO GO AHEAD AND DO THAT.

19 MR. BOLLINGER: AND I WILL SAY, IF THE COURT NEEDS
20 US TO ADDRESS THE EXCEPTIONS TO THE COMMERCIAL EXEMPTION WE
21 ARE HAPPY TO DO SO. WE DID PROVIDE SOME OF THAT ARGUMENT
22 IN ORDER TO PRESERVE THAT RECORD, SO THE COURT CAN
23 UNDERSTAND WHY THE EXCEPTION DOES NOT APPLY HERE.

24 THE COURT: AND I AM SHARING WITH YOU THAT YOU HAVE
25 MY UNDIVIDED ATTENTION IN HOWEVER YOU WANT TO USE YOUR TIME
26 TO RESPOND. IF YOU WANT TO START AT THE BEGINNING AND
27 START OVER AND STILL RESPOND, ALL GOOD, FINE WITH ME.

28 MR. BOLLINGER: THANK YOU, YOUR HONOR.

1 THE DEFENDANTS STATE THAT THE STATEMENTS THAT
2 MICHAEL JACKSON IS THE SINGER THAT IT IS HIS VOICE ON THESE
3 THREE SONGS I'LL REFER TO AS THE CASCIO SONGS, IS A MATTER
4 OF PUBLIC -- IS AN ISSUE OF PUBLIC IMPORTANCE ON ONE PRONG
5 BECAUSE IT'S MICHAEL JACKSON AND MICHAEL JACKSON IS A
6 CELEBRITY AND BY VIRTUE OF HIS CELEBRITY HE'S OUT IN THE
7 PUBLIC EYE AND PEOPLE ARE INTERESTED IN THAT. THE CASES
8 SHOW THAT IS NOT SUFFICIENT.

9 IN THE HILTON CASE OR THE LANCE ARMSTRONG CASE, THE
10 STUTZMAN VERSUS ARMSTRONG CASE, WHICH DEFENDANTS RELY ON,
11 THE CIRCUMSTANCES ARE DISTINGUISHABLE. THOSE CASES THE
12 STATEMENTS THAT WERE AT ISSUE, DIRECTLY REFER TO, RELATED
13 TO, THE LIFE OF THOSE -- THE LIFESTYLES OF THOSE
14 CELEBRITIES, THE CAREERS OF THOSE CELEBRITIES, THE CATCH
15 PHRASES, THINGS THAT PARIS HILTON HAD SAID.

16 IT WAS NOT JUST ABOUT THE NAME. THE DEFENDANT HAD
17 INVOKED THE NAME OF A CELEBRITY AND SUDDENLY THERE WAS AN
18 ISSUE OF PUBLIC IMPORTANCE OR PUBLIC INTEREST. SO HERE,
19 ALL THAT IS HAPPENED IS THAT THE, ACCORDING TO OUR
20 COMPLAINT, THE DEFENDANTS HAVE FALSELY STATED THAT MICHAEL
21 JACKSON SANG THOSE SONGS OR THAT IT'S HIS VOICE ON THE
22 ALBUM.

23 THE COURT: COULD YOU IN RESPONSE TO REQUEST BY
24 DEFENSE COUNSEL, AND I THINK IT'S A GOOD REQUEST BECAUSE I
25 THINK YOU NEED TO LOOK AT EVERY SINGLE ONE OF THE
26 ALLEGATIONS, CAN YOU WALK ME THROUGH HOW THE COVER, THE
27 STATEMENT BY WEITZMAN, THE YOUTUBE VIDEO, AND THE OPRAH
28 INTERVIEW.

1 I DON'T WANT TO SAY "STATEMENTS." YOU'RE JUST
2 BUNDLING THEM ALL UP AND YOU'RE NOT HELPING ME. SO WALK
3 THROUGH EACH OF THOSE THINGS AND TELL ME HOW THEY ARE
4 BASICALLY REPRESENTATIONS OF AUTHENTICITY OR
5 REPRESENTATIONS OF SOURCE LIKE "MADE IN U.S.A." LABEL OR
6 "MADE IN FRANCE CHAMPAGNE."

7 MR. BOLLINGER: LET ME FRAME THIS, AND I'LL SPEAK
8 TO EACH ONE OF THOSE --

9 THE COURT: STATEMENTS.

10 MR. BOLLINGER: -- STATEMENTS IN THIS WAY.

11 WE REFER THE COURT TO A SERIES OF CASES THAT TALKED
12 ABOUT LABELING, RIGHT? THE DEFENDANT IS A SELLER OF GOODS,
13 AND THEY LABEL THEIR PRODUCT WITH A STATEMENT OF WHAT IS
14 CONTAINED IN THE --

15 THE COURT: RIGHT. REAL MICHAEL JACKSON INSIDE
16 THIS ALBUM.

17 MR. BOLLINGER: RIGHT. AND IT'S NOT WHAT IT SAYS.
18 HERE THEY SAY MICHAEL JACKSON IS IN THIS AND HE'S NOT THAT
19 IS BASICALLY OUR CASE.

20 THE COURT: SO HOW DOES MR. WEITZMAN SAY THAT?

21 MR. BOLLINGER: MR. WEITZMAN IS AN INDIVIDUAL WHO
22 IS, AND IT SAYS ON THE STATEMENT, THAT HE IS A
23 REPRESENTATIVE OF THE ESTATE OF MICHAEL JACKSON. HE IS
24 STATING THAT HE'S DIRECTING THIS TO THE FANS OF MICHAEL
25 JACKSON WHO ARE THE CONSUMERS OF MICHAEL JACKSON'S MUSIC
26 AND WOULD BE THE CONSUMERS OF THE PRODUCT.

27 AND IN THAT LETTER HE STATES AND CONFIRMS THAT SONY
28 AND THE DEFENSE HAVE TAKEN THE EFFORTS TO CONFIRM THAT

1 MICHAEL JACKSON IS THE SINGER ON THE TRACKS. HE STATES
2 THAT THEY HAVE INVESTIGATED IT. THEY HAVE HIRED PEOPLE
3 TO -- EXPERTS TO ANALYZE THE MUSIC. AND THE VOCAL TRACKS
4 THEY HAD A SESSION WITH PEOPLE WHO KNEW MICHAEL JACKSON THE
5 BEST, THE PRODUCERS, PEOPLE THAT RECORDED WITH HIM, FAMILY
6 MEMBERS, AND HE SAYS EVERY ONE AGREED THIS IS MICHAEL'S
7 VOICE. AND THIS IS A STATEMENT THAT IS MADE ONE WEEK
8 BEFORE THE RELEASE OF THE ALBUM.

9 SO THIS IS A QUESTION OF SPEAKING -- SO, AGAIN,
10 THAT MAY NOT BE A LABEL AS THE ALBUM AND THE CD COVER WOULD
11 BE. THEY SEAT THE FRONT AND BACK OF THE CD. BUT IT'S THE
12 SAME TYPE OF ANALYSIS IN THAT YOU HAVE SOMEONE WHO HAS AN
13 INTEREST OR REPRESENTS A PARTY WHO HAS A COMMERCIAL
14 INTEREST IN THE SALE OF THIS PRODUCT AND IS MAKING A
15 REPRESENTATION ABOUT WHO IS SAYING THAT WHAT IS IN THAT
16 PRODUCT.

17 THE COURT: WHAT IF I WERE TO SAY, NAH, HE'S
18 ACTUALLY REALLY RESPONDING TO WHAT IS A HUGE DUST-UP THAT
19 HAS BEEN OCCASIONED BY THE CLAIM THAT THESE THREE SONGS
20 WERE NOT IN FACT THE PRODUCT OF MICHAEL JACKSON.

21 MR. BOLLINGER: SO THIS --

22 THE COURT: I DON'T WANT TO EXCUSE THE COVERING OR
23 THE REST OF IT, BUT THE WEITZMAN REMARK, I HEAR WHAT YOU'RE
24 SAYING.

25 MR. BOLLINGER: AT THE MOMENT WE'RE TALKING ABOUT
26 IS THIS A MATTER OF PUBLIC INTEREST.

27 THE COURT: IT IS AT THAT POINT IN TIME.

28 ASSUME DIFFERENT FACTS. NOTHING IS HAPPENING.

1 THERE IS NO CONTROVERSY. HOWARD WEITZMAN SENDS OUT AN
2 E-MAIL BLAST SAYING "THOUGHT YOU MIGHT BE INTERESTED. WE
3 DID A LOT OF RESEARCH AND THIS IS REALLY MICHAEL."

4 THERE IS ABSOLUTELY NO CONTROVERSY OUT THERE.
5 THERE IS NO PUBLIC INTEREST. THERE IS NOTHING REMOTELY
6 INTERESTING GOING ON. AND HE JUST SORT OF SENDS AN E-MAIL
7 BLAST OUT THERE A WEEK BEFORE THE RELEASE OF THE ALBUM.

8 THEN YOU HAVE THIS IS MORE LIKE A LABEL; THIS IS
9 MORE LIKE AN ATTESTATION; THIS IS MORE LIKE A COMMERCIAL;
10 THIS IS MORE LIKE A VOUCHING OR A PRODUCT ENDORSEMENT, BUT
11 IT'S NOT WHAT THIS IS, IS IT?

12 MR. BOLLINGER: WHY IS THERE A CONTROVERSY? I
13 THINK WE NEED TO ASK THAT. THIS IS NOT AS IF THIS IS
14 SOMEONE WHO IS -- MICHAEL JACKSON IS NOT ALIVE, SO HE'S NOT
15 IN THE PUBLIC EYE AS A RESULT OF ANYTHING HE DID HERE FOR
16 THE PURPOSE OF THIS CASE.

17 THE ISSUE IS OUT THERE BECAUSE OF THE ALLEGED
18 FRAUD. THE PUBLICITY THAT HAS COME UP FROM THE ALLEGED
19 FRAUD. HIS FAMILY MEMBERS WENT ON TWITTER AND ON IN THE
20 MEDIA, SOCIAL MEDIA, AND SAID, HEY, I HEARD THESE TRACKS
21 THAT'S NOT MICHAEL, RIGHT.

22 FRIENDS SAID THIS IS NOT RIGHT. FANS, PEOPLE ARE
23 SAYING IT'S NOT. SO HERE THE ALLEGATIONS ARE THIS IS NOT
24 MICHAEL. AND FOR PORTIONS OF THIS WE STIPULATED THAT IT IN
25 FACT IS NOT MICHAEL.

26 SO IF DEFENDANTS COULD ALWAYS GET OUT OF THESE
27 CLAIMS BY VIRTUE OF THE FACT OF THEIR WRONGDOING THEN
28 PLAINTIFF COULD NEVER GET PAST THE PLEADING STAGE.

1 THE COURT: NO. YOU COULD GET PAST IT ON SOMETHING
2 THAT IS NOT SO SPEECHY. IN OTHER WORDS, THERE IS A
3 SIGNIFICANT CONTROVERSY IN ADVANCE OF THE RELEASE OF THE
4 ALBUM AS TO THE AUTHENTICITY OF THE TRACKS OF THE SOURCE OF
5 THE TRACKS. SO I'M ACCEPTING FOR THE PURPOSES OF OUR
6 CONVERSATION RIGHT HERE THE CONTENTION THAT THIS IS
7 ESSENTIALLY MISLABELED, PALMING OFF, OR KIND OF A CLASSIC
8 CLRA CASE.

9 BUT WEITZMAN IS NOT REALLY IN THAT CAPACITY. HE
10 REALLY IS IN THE CAPACITY OF THE REPRESENTATIVE OF THE
11 ESTATE DEFENDING THE ESTATE AGAINST NOW THESE PUBLIC CLAIMS
12 AS TO THE FACT THAT THE STATE HAS ENDORSED AND ALLOWED THE
13 LIKENESS AND THE NAME TO BE USED IN CONNECTION.

14 SO I'M A LITTLE -- LOOKING AT THESE THEY ARE ALL
15 SLIGHTLY DIFFERENT. I DON'T WANT TO JUST LUMP THEM ALL IN
16 AND SAY THEY ARE ALL ALLEGATIONS AS TO THE AUTHENTICITY AS
17 TO THE ARTISTRY.

18 MR. BOLLINGER: I'M NOT GOING TO LUMP THEM ALL.
19 I'M STILL ON MR. WEITZMAN'S STATEMENT, AND HE'S NOT MAKING
20 THIS STATEMENT OF HIS OWN ACCORD. HE IS NOT OUT THERE
21 SAYING "I, HOWARD WEITZMAN, DECLARE." HE'S STATING THAT
22 HE'S DOING THIS ON BEHALF OF THE ESTATE. HE'S SAYING SONY
23 HAS ASKED HIM, THE DEFENDANT, SONY, IN THIS CASE, HAS ASKED
24 HIM TO CONDUCT AN INVESTIGATION, OR CONDUCTED AN
25 INVESTIGATION I DON'T HAVE IT IN FRONT OF ME, MY APOLOGIES.

26 HE IS REPRESENTING THE INTEREST OF ONE OF THE
27 DEFENDANTS OR SEVERAL OF THE DEFENDANTS HERE WHO HAVE A
28 COMMERCIAL INTEREST IN THE ALBUM THAT IS GOING TO BE

1 RELEASED THE FOLLOWING WEEK.

2 HE REPRESENTS SOME OF THE PLAYERS HERE WHO ARE
3 ACCUSED OF FRAUDULENTLY PUTTING OUT AN ALBUM UNDER -- OR
4 PUTTING OUT CERTAIN SONGS UNDER MICHAEL JACKSON'S NAME WHEN
5 THEY ARE NOT.

6 JUST TO SORT OF GIVE YOU A CITATION OR IT'S NOT ON
7 POINT, BUT TO THE EXTENT THE COURT NEEDS A CASE THAT HAS A
8 RELEVANT -- A RELEVANT HOLDING IN THE WEINBERG VERSUS
9 FEISEL, F-E-I-S-E-L, CASE 110 CAL.APP.4TH 1122 AT 1133.
10 THE COURT HELD THOSE CHARGED WITH DEFAMATION CANNOT BY
11 THEIR OWN CONDUCT CREATE THEIR OWN DEFENSE BY MAKING THE
12 CLAIMANT A PUBLIC FIGURE.

13 SIMILARLY, THE LABELING CASES DEMONSTRATE THAT EVEN
14 IF THERE IS SOME GENERAL INTEREST, RIGHT, IN THE, I BELIEVE
15 THE SCOTT VERSUS METABOLIFE CASE, THE DEFENDANT TRIED TO
16 SAY THERE IS A GENERAL INTEREST IN HERBAL MEDICINE, RIGHT,
17 THAT DOES NOT MAKE THE MISLABELING OF A PRODUCT OR THE
18 MISREPRESENTATION OF THAT PRODUCT SUDDENLY A MATTER OF
19 PUBLIC INTEREST BY TRYING TO DEFINE THAT INTEREST SO
20 BROADLY THAT IT WOULD ENCOMPASS EVERYTHING, RIGHT?

21 AND WE CITED OTHER CASES TO YOU IN OUR SUPPLEMENTAL
22 BRIEF. THE COURTS -- TO DEFINE IT HERE THE ISSUE IS THE
23 MISREPRESENTATION BY THE DEFENDANTS OF THE PRODUCT AND THE
24 SONGS AS SUNG BY MICHAEL JACKSON.

25 SO I THINK THE PROPER ANALYSIS FOR THIS PRONG AND
26 UNDERSTANDING WHETHER IT'S A MATTER OF PUBLIC INTEREST IS
27 NOT PRECISELY WHETHER THE STATEMENT APPEARS ON THE COVER OF
28 THE ALBUM OR THE LABEL OF THE MEDICINE BOTTLE, BUT WHAT IS

1 THE ROLE OF THAT PERSON IN MAKING THE STATEMENT AT THE TIME
2 IT'S MADE. YOU HAVE TO TAKE IN THE WHOLE CONTEXT.

3 THE COURT: OKAY.

4 MR. BOLLINGER: THE CD COVER I WILL POSIT IS A
5 LITTLE MORE DIRECT. AND I'LL SPEND BRIEF TIME, AND MORE IF
6 YOU ASK ME TO.

7 THE COURT: CAN YOU IN THE COURSE OF YOUR REMARKS
8 RESPOND TO THEIR CONTENTION THAT IT'S ALL PART OF ARTISTIC
9 PRESENTATION?

10 MR. BOLLINGER: SURE. THERE ARE TWO POINTS I THINK
11 COUNSEL MADE WITH REGARD TO THE ARTISTIC PRESENTATION. ONE
12 IS THAT THE ALBUM ITSELF IS AN ARTISTIC WORK, A MUSICAL
13 WORK. AND THE SECOND WAS THAT THE COVER ART IS ART AN
14 ARTIST DESIGNED THAT COVER.

15 THE STATEMENT WE'RE POINTING TO HAVE NO
16 RELATIONSHIP TO ACTUALLY THE ARTISTIC ELEMENTS OR QUALITY
17 OF THE CD ITSELF, OF THE SONGS. WE'RE NOT TALKING ABOUT
18 THE LYRICS. WE'RE NOT TALKING ABOUT THE EFFORT THAT WAS
19 EXERTED IN MAKING THE ART.

20 WE'RE NOT TALKING ABOUT THE COMMENTARY THAT MIGHT
21 BE DRAWN FROM THE SONGS OR FROM THE ART ITSELF. THEY ARE
22 SIMPLY TO THE CONSUMER, RIGHT, THE STATEMENTS ON THE BACK
23 OF THE COVER SAYING, YOU KNOW, "NINE NEW SONGS BY MICHAEL
24 JACKSON" IS NOT SAYING ANYTHING OTHER THAN ATTRIBUTION OF
25 WHO SANG THOSE SONGS.

26 THE COVER ART THAT SAYS MICHAEL AND HAS MULTIPLE
27 IMAGES OF MICHAEL, IT MAY BE ART, IT MAY HAVE ITS OWN
28 MESSAGES, BUT THE MESSAGE THAT THIS CONTAINS MICHAEL

1 JACKSON'S MUSIC IS SIMPLY A MESSAGE OF, LIKE A LABEL, WHAT
2 THIS CONTAINS.

3 AND THE SAME WAY IF A, YOU KNOW, IF A LABEL SAID --
4 HAD A PICTURE OF CHERRIES ON THE MEDICINE BOTTLE AND YOU
5 THINK THIS IS GOING TO TASTE LIKE CHERRIES OR THAT -- MAYBE
6 THAT IS NOT A GREAT EXAMPLE. BUT IT'S MAYBE THE SYMBOL OF
7 BAYER SO YOU ASSUME THIS IS A PRODUCT MADE BY BAYER BECAUSE
8 THEY ARE USING THE BAYER SYMBOL. BUT IN FACT IT WAS NOT
9 MADE BY BAYER, IT WAS SOMEONE ELSE AND THAT SYMBOL MAY HAVE
10 SIMPLY BEEN PUT ON THERE SO PEOPLE WILL BUY IT THINKING
11 IT'S AN ESTABLISHED BRAND AS OPPOSED TO A GENERIC.

12 WOULD THE COURT LIKE ME TO SPEAK FURTHER ON THOSE
13 TWO?

14 THE COURT: NO, GOT IT.

15 MR. BOLLINGER: WITH REGARD TO OPRAH WINFREY OR
16 MR. CASCIO'S APPEARANCE ON OPRAH WINFREY. AGAIN, THIS --

17 THE COURT: AND LET ME JUST ASK YOU. MORE
18 SPECIFICALLY, YOU'RE COMPLAINING ABOUT HIS STATEMENT ON
19 OPRAH WINFREY WITH REGARDS TO THE ORIGINATION OF THE VOCAL
20 AS THAT OF MICHAEL JACKSON.

21 MR. BOLLINGER: CORRECT.

22 THE COURT: MR. CASCIO IS NOT THE SUBJECT --

23 MR. BOLLINGER: NO. IT'S SPECIFICALLY -- ALTHOUGH
24 I SHOULD SAY UNDER THE RECENT CASE THAT CAME DOWN AFTER ALL
25 THE PLEADINGS HAD BEEN FILED, BUT THE CALIFORNIA SUPREME
26 COURT IN BARAL V. SCHNITT BASICALLY STATED IT'S THE
27 DEFENDANTS' BURDEN ON ANTI-SLAPP TO IDENTIFY WHICH
28 STATEMENTS THEY ARE SAYING ARE AT ISSUE IN THE MOTION AND

1 NOT REALLY FOR THE PLAINTIFF.

2 THE COURT: WE GOT THAT "FUNK-A-DOODLE" STIPULATION
3 HERE. MY UNDERSTANDING OF THE STIPULATION IS WE'RE GOING
4 TO LOOK AT CASCIO'S STATEMENT WITH REGARD TO SOURCE.

5 MR. BOLLINGER: FAIR ENOUGH.

6 THE COURT: I DIDN'T MEAN TO CALL IT FUNK-A-DOODLE.

7 MR. MODABBER: WE KNOW HOW MUCH YOU LIKE IT, YOUR
8 HONOR.

9 THE COURT: WE HAVE THE STIPULATION.

10 MR. BOLLINGER: YES, WE DO HAVE A STIPULATION.

11 THE SPECIFIC STATEMENT THAT IS AT ISSUE IN THESE
12 PLEADINGS IS A RESPONSE TO A QUESTION FROM OPRAH WINFREY IN
13 WHICH SHE SAYS, I'M PARAPHRASING, THAT THERE ARE CLAIMS
14 THAT THE VOICE ON THESE THREE SONGS IS NOT MICHAEL
15 JACKSON'S, WHAT DO YOU SAY MR. CASCIO?

16 AND HE SAYS "IT'S MICHAEL" OR "THAT IS MICHAEL'S
17 VOICE" VERY DEFINITELY SO THAT IS THE STATEMENT. WE'RE
18 NOT TALKING ABOUT IT'S NOT AN ISSUE ALL OF THE DISCUSSIONS
19 ABOUT HIS RELATIONSHIP WITH MICHAEL JACKSON AND HIS
20 FAMILY'S RELATIONSHIP WITH MICHAEL JACKSON.

21 IT IS HIM COMING OUT ONE MONTH BEFORE THE RELEASE
22 OF THE ALBUM TO TRY TO STEM THE DAMAGE THAT IS BEING DONE
23 BY THE PUBLICITY THAT THIS IS NOT MICHAEL JACKSON ON AN
24 ALBUM THAT IS COMING OUT. THE SONGS THAT HE SOLD TO SONY
25 FOR THIS RECORD AND FOR WHICH HE GETS CREDITED ON THAT
26 ALBUM AND ON THOSE SONGS AND WOULD ALSO GET ROYALTIES FOR
27 THEM AS WELL.

28 SO THOSE STATEMENTS AGAIN ARE SIMILAR TO ALL THE

1 OTHER STATEMENTS IDENTIFYING AND CONFIRMING, RIGHT, THIS IS
2 NOT JUST IDENTIFYING, BUT IT'S IN THE FACE OF CONTROVERSY
3 DOUBLING DOWN AND CONFIRMING RIGHT BEFORE THIS GOES ON
4 SALE. SO THAT CONSUMER HAS TO MAKE THE DECISION, DO I WANT
5 TO BUY THIS ALBUM OR NOT.

6 DIRECTED TO THE FANS. DIRECTED TO ALL OF OPRAH
7 WINFREY'S AUDIENCE, RIGHT, AND I SUBMITTED ARTICLES TO YOU
8 ABOUT OPRAH WINFREY'S IMPACT ON THE SALE OF PRODUCTS THAT
9 ARE PROMOTED ON HER SHOW.

10 THIS IS PART AND PARCEL OF THE COMMERCIAL EFFORTS
11 OF THE DEFENDANTS, INCLUDING MR. CASCIO, TO BOOST THE SALES
12 OF THESE SONGS.

13 HAVE I MISSED ANY STATEMENTS, YOUR HONOR?

14 THE COURT: NO. YOU'VE GOT THEM.

15 MR. BOLLINGER: SO I WOULD JUST CLOSE ON THE PRONG
16 ONE THAT THE COURT STILL NEEDS TO RULE ON THESE ISSUES.
17 EVEN IF THE COURT DECIDES TO ADDRESS THE EXCEPTIONS, THE
18 COURT HAS TO COME BACK AND RULE ON THIS PART OF PRONG ONE.

19 LET ME ADDRESS THE COMMERCIAL/NONCOMMERCIAL ISSUE
20 THAT HAS BEEN BROUGHT UP. AND I THINK THERE HAS BEEN MAYBE
21 SOME CONFUSION WITH REGARD TO WHAT IS THE APPROPRIATE TEST
22 FOR DETERMINING WHETHER A SPEECH IS COMMERCIAL OR
23 NONCOMMERCIAL.

24 IN THE COURT'S TENTATIVE YOU APPEAR TO DISMISS
25 KASKY AS THE APPROPRIATE TEST THAT SHOULD BE FOLLOWED HERE.
26 I BELIEVE COUNSEL IN THEIR JOINT SUPPLEMENTAL RESPONSE
27 CONCURS THAT KASKY IS RELEVANT HERE. AND I WOULD ALSO
28 POINT, TO THE EXTENT YOU WILL CONSIDER THE LEGISLATIVE

1 HISTORY, I PROVIDED COPIES IN THE REQUEST FOR JUDICIAL
2 NOTICE IN SUPPORT OF THE SUPPLEMENTAL BRIEF OF PLAINTIFF.

3 THE COURT: TO RESPOND TO COUNSEL'S CONCERN THAT
4 LEGISLATIVE HISTORY IS NOT TO BE REFERRED TO WHERE THE
5 STATUTE IS UNAMBIGUOUS, WHAT IS YOUR AMBIGUITY THAT YOU'RE
6 ATTEMPTING TO HAVE ME RESOLVE?

7 MR. BOLLINGER: WITH REGARD TO THIS, AT THIS POINT
8 WE'RE NOT LOOKING TO RESOLVE ANY AMBIGUITY. THERE IS AN
9 ABSENCE OF REFERENCE AS TO WHICH TEST ON PRONG TWO, IN
10 TERMS OF COMMERCIAL/NONCOMMERCIAL THAT YOU ARE REQUIRED TO
11 FOLLOW, RIGHT.

12 THE KASKY'S DECISION FROM THE CALIFORNIA SUPREME
13 COURT STATES THAT THE U.S. SUPREME COURT AT THAT TIME, AND
14 THIS CAME AFTER BOLGER, SO BOLGER PRESIDES KASKY AND KASKY
15 STATES THAT THE U.S. SUPREME COURT HAS NOT SET FORTH WHAT
16 THE ACTUAL TEST IS AND, THEREFORE, PROCEEDS IN SAYING THIS
17 IS WHAT CALIFORNIA LAW IS AND WHAT WE SHOULD FOLLOW.

18 AND SO THE LEGISLATIVE HISTORY IS SIMPLY HELPFUL
19 BECAUSE IT SHOWS THAT THE LEGISLATURE IN DRAFTING THIS
20 LOOKED TO KASKY AND IN A SENATE BILL 515 AT PAGE 10, WHERE
21 IT ASKS THE QUESTION "DOES THIS BILL IMPACT COMMERCIAL OR
22 NONCOMMERCIAL SPEECH?"

23 RESPONDS, "THIS BILL CLOSELY TRACKS KASKY'S
24 GUIDELINES ON COMMERCIAL SPEECH FOCUSING ON THE SPEAKER,
25 CONTENT OF THE MESSAGE, AND INTENDED AUDIENCE." THAT
26 STATEMENT COMES AFTER THE LEGISLATURE HAS SET FORTH THIS IS
27 WHAT KASKY SAYS WE ARE SUPPOSED TO DO AND THEN THEY SAY
28 THIS BILL TRACKS THAT.

1 SO I WOULD SIMPLY POSIT THAT THE COURT SHOULD
2 RECONSIDER HOW IT --

3 THE COURT: KASKY.

4 MR. BOLLINGER: -- HOW IT APPROACHES THAT.

5 THE COURT: GOT IT.

6 MR. BOLLINGER: I WILL ALSO SAY THAT WE BELIEVE
7 THAT THESE STATEMENTS SHOULD BE FOUND TO BE COMMERCIAL
8 SPEECH UNDER EITHER TEST, BUT CLEARLY UNDER KASKY THEY
9 SHOULD BE. IT'S FOCUSING ON THE SPEAKER, THE AUDIENCE, AND
10 THE CONTENT AND THAT IS WHAT CALIFORNIA ASKS US TO DO.

11 AND IF YOU LOOK AT EACH OF THOSE, IT'S EASY TO SEE
12 THAT ALL OF THE SPEAKERS, WHETHER IT BE MR. WEITZMAN,
13 WHETHER IT BE MR. CASCIO, WHETHER IT BE THE DEFENDANTS
14 PUTTING TOGETHER THE ALBUM COVER THAT IS THEN PRESENTED TO
15 CONSUMERS THAT EACH OF THESE SPEAKERS ARE IN THE STREAM OF
16 COMMERCE OF THAT PRODUCT.

17 THEY ALL HAVE SOME SORT OF EXPECTATION TO PROFIT OR
18 BENEFIT FINANCIALLY FROM THE SALE OF THAT PRODUCT TO THOSE
19 CONSUMERS. AND THE AUDIENCE IN EACH OF THEM, WHETHER IT'S
20 THE FANS OF MICHAEL JACKSON TO WHOM MR. WEITZMAN SENT HIS
21 LETTER OR THE AUDIENCE OF OPRAH THAT IS HEARING THE
22 STATEMENT OF MR. CASCIO OR THE PEOPLE IN THE RECORD STORE
23 OR WHEN THEY CLICK AN I-TUNES, THE ALBUM ON I-TUNES, AND
24 SEE THE ALBUM COVER AND THEN THE STATEMENT "NEW SONGS BY
25 MICHAEL JACKSON." THEY ARE THE AUDIENCE THAT IS GOING TO
26 BE RECEIVING THAT STATEMENT AND BE INFLUENCED AS TO WHETHER
27 TO BUY IT OR NOT.

28 AND THEN THE CONTENT OF THE MESSAGE IS SIMPLY PART

1 OF THAT PROMOTION. IT'S NOT ABOUT THE PROTECTED WHAT WE
2 WOULD TYPICALLY, I AGREE, ARTISTIC WORKS THEMSELVES WITHOUT
3 A DOUBT ARE PROTECTED SPEECH.

4 THE CONTENT OF THE BOOK IN ARMSTRONG, ABSOLUTELY
5 PROTECTED SPEECH. BUT A STATEMENT ON THE COVER OF AN ALBUM
6 THAT TELLS THE CONSUMER YOU'RE BUYING -- ALL THESE ARE
7 MICHAEL JACKSON'S SONGS. HOW CAN WE POSSIBLY SAY THAT IS
8 FREE SPEECH.

9 HOW COULD WE WANT THAT TO HAPPEN IN OUR SOCIETY
10 THAT A PERSON CAN -- YOU CAN SEE ME MAKE A SCRIBBLE ON MY
11 SHEET. YOU KNOW I DID IT. I WALK OUT THE DOOR AND I GO TO
12 THE JURY ROOM AND I MAKE PHOTOCOPIES AND GO AROUND TRYING
13 TO SELL THEM AND IT SAYS AT THE BOTTOM PICASSO AND THEY
14 BELIEVE ME. THEY ARE LIKE, PICASSO, WHAT A GREAT PRICE,
15 I'LL TAKE ONE.

16 HOW CAN WE PERMIT THAT? THAT IS WHAT THIS IS
17 ABOUT. IT'S ABOUT ATTRIBUTION; IT'S NOT ABOUT ARTISTIC
18 IMPRESSION.

19 THE COURT: OKAY.

20 MR. BOLLINGER: I'D LIKE TO TALK ABOUT THE
21 ARMSTRONG CASE BECAUSE COUNSEL HAS STATED THAT ALL YOU NEED
22 TO DO IS READ THAT ONE CASE AND YOU HAVE EVERYTHING YOU
23 NEED TO RULE ON THIS MOTION.

24 LET ME BEGIN BY SAYING, FIRST OF ALL, IT'S NOT
25 BINDING PRECEDENT. IT'S FROM THE EASTERN DISTRICT
26 CALIFORNIA. IT'S A FEDERAL COURT DECISION. IT'S
27 UNPUBLISHED. AND CERTAINLY IN THE FACE OF OTHER PUBLISHED
28 CALIFORNIA COURT OF APPEAL DECISIONS, SUCH AS REZIK VERSUS

1 SONY OR KIEMER VERSUS I THINK BUENA VISTA BOOKS. THOSE
2 CASES ARE, THESE ARE CASES THIS COURT OUGHT TO BE
3 FOLLOWING.

4 LET'S LOOK AT ARMSTRONG AND UNDERSTAND WHY IT'S NOT
5 APPLICABLE HERE OR DISTINGUISHABLE OR EVEN WRONGLY DECIDED.
6 IN THAT CASE THE COURT AND I'M GOING TO BRING IN THE
7 INEXTRICABLY INTERTWINED BECAUSE THAT CASE REALLY DISCUSSES
8 THAT A LOT THIS WAY, I CAN ADVANCE OUR DISCUSSION TO COVER
9 THE LAST TOPIC.

10 IN THAT CASE WE'RE TALKING ABOUT, FIRST OF ALL, A
11 BOOK OR SEVERAL BOOKS THAT EITHER WERE BY LANCE ARMSTRONG
12 OR ABOUT LANCE ARMSTRONG THAT PURPORTED TO BE NON FICTION
13 BIOGRAPHIES AND IN FACT TURNED OUT TO CONTAIN LIES THAT
14 LANCE ARMSTRONG MADE ABOUT HIS CAREER, HIS EXPERIENCE IN
15 TAKING PERFORMANCE-ENHANCING DRUGS. AND ALL OF THAT TURNED
16 OUT TO BE FALSE. BUT ON THE COVER OF THE BOOK IT SAID
17 "THIS IS A BIOGRAPHY."

18 THE PLAINTIFFS ARE SAYING THAT IS A LIE, THAT IS A
19 FRAUD ON THE CONSUMER. AND WE WOULD NEVER HAVE BOUGHT THE
20 BOOK IF WE HAD KNOWN HE HAD ACTUALLY TAKEN
21 PERFORMANCE-ENHANCING DRUGS. BUT THE COVER IS SIMPLY
22 REPEATING WHAT IS IN THE BOOK, RIGHT. IT'S TAKING THE
23 CONTENT OF THE BOOK AND REPEATING IT OUTSIDE. SO THAT
24 IS -- IT'S REACHING INSIDE TO SOME OF THE PROTECTED
25 CONTENT.

26 SO NOW YOU'RE STARTING TO MIX TOGETHER PROTECTED
27 SPEECH AND COMMERCIAL SPEECH.

28 THE STATEMENTS TO THE MEDIA, RIGHT, SAYING WHAT A

1 GREAT GUY HE IS AND NEVER TOOK DRUGS. THEY ARE
2 PERPETUATING LANCE ARMSTRONG'S LIES. HERE ALL WE'RE
3 TALKING ABOUT IS DEFENDANTS' STATEMENTS WHICH WE ARE
4 CONTENDING TO BE FALSE, THAT MICHAEL JACKSON IS THE VOICE
5 ON THESE THREE SONGS ON THIS RECORD.

6 THAT IS TOTALLY DIFFERENT. WE'RE NOT REACHING INTO
7 THE ALBUM. WE'RE NOT REACHING IN AND SAYING ANYTHING ABOUT
8 THESE SONGS ARE NOT SONGS, RIGHT, OR WE'RE SAYING THESE
9 SONGS ARE REALLY BROADWAY THEATER.

10 THE COURT: AND ISN'T THAT WHAT HOWARD WEITZMAN IS
11 DOING SAYING THESE ARE HIS SONGS. YOU MAKE YOUR OWN MIND
12 UP.

13 MR. BOLLINGER: SO NOW WE'RE INTO THE SECOND PRONG.
14 THIS IS THE COMMERCIAL VERSUS NONCOMMERCIAL SPEECH. SO WE
15 HAVE TO LOOK AT HIM AND SAY, FIRST OF ALL, UNDER KASKY, IS
16 HE, IS THE SPEAKER SOMEONE WHO HAS SOME SORT OF FINANCIAL
17 INTEREST OR REPRESENTS THE DEFENDANT. WE'RE NOT SUING
18 HOWARD WEITZMAN. WE'RE SUING THE COMPANIES HE REPRESENTS
19 AND WHO HE WAS SPEAKING FOR.

20 IS HE A SPEAKER THAT HAS THAT FINANCIAL INTEREST.
21 ARE THEY IN THAT WHAT I'M CALLING THE CHAIN OF COMMERCE,
22 BUT IT'S SONY. SONY IS SELLING THESE RECORDS.

23 THE COURT: BUT MECHANICALLY, HAVEN'T I FOUND
24 MYSELF NOW IN THIS HORRIBLY INEXTRICABLY DEFINED PROBLEM
25 HAVING TO REFER TO THE SONGS THEMSELVES IN ORDER TO
26 DETERMINE THE AUTHENTICITY OR ATTRIBUTION CLAIM AND DOESN'T
27 THAT PUT ME IN THE POSITION OF HAVING TO BASICALLY STEP
28 INTO THE FIRST AMENDMENT TERRITORY?

1 MR. BOLLINGER: SO THE ANALYSIS --

2 THE COURT: MY KINGDOM FOR THIS WERE VITAMINS, BUT
3 IT'S NOT.

4 MR. BOLLINGER: RIGHT.

5 THE COURT: IF HE WERE A SPOKESPERSON, EVERYTHING
6 IS DIFFERENT.

7 MR. BOLLINGER: SO ASSUME FOR THE MOMENT WE'RE
8 SAYING THIS IS MIXED CONTENT OR THIS IS MIXED SPEECH IN
9 HERE, RIGHT. THE QUESTION IS, IS IT INEXTRICABLY
10 INTERTWINED. THE QUESTION IS: CAN YOU SEPARATE THE TWO
11 WITHOUT SOMEHOW HARMING THE NONCOMMERCIAL SPEECH, RIGHT?

12 THE COURT: UH-HUH.

13 MR. BOLLINGER: SO THE STATEMENT THIS IS MICHAEL
14 JACKSON IN THE FACE OF IT'S NOT BEING MICHAEL JACKSON.
15 WHAT HARM COMES FROM TAKING THAT AWAY PREVENTING THE
16 SPEAKER FROM BEING ABLE TO SAY THAT, RIGHT.

17 SO IF YOU LOOK AT THE INEXTRICABLY INTERTWINED
18 CASES IN WHICH THE COURT SAID NO YOU CANNOT DO THIS, RIGHT.
19 YOU CANNOT REGULATE THIS SPEECH WITHOUT HARMING THE FREE
20 EXPRESSION OR THE FREE SPEECH OF THESE ACTORS.

21 WHEN THEY BAN THE TATTOOS, I THINK THAT IS
22 ANDERSON, THEY ARE SAYING NO ONE CAN REGULATE THIS. YOU
23 CAN'T MAKE TATTOOS HERE AND THAT MEANS THERE ARE NOT GOING
24 TO BE ANY TATTOOS. THOSE ARTISTS CANNOT CREATE THEIR
25 ARTWORK, RIGHT.

26 WHEN THEY SAY YOU CANNOT ADVERTISE IN THE YELLOW
27 PAGES IN THE DEX MEDIA CASE. THE COURT SAYS IF YOU TAKE
28 AWAY ALL THE ADVERTISING, RIGHT, YOU DON'T HAVE YELLOW

1 PAGES ANYMORE. YOU CANNOT GET THE INFORMATION. YOU CANNOT
2 GET THE INFORMATION THAT IS IMPORTANT TO THE PUBLIC.

3 HERE CAN WE TAKE AWAY THE STATEMENT THAT THESE
4 THREE SONGS WERE SUNG BY MICHAEL JACKSON WITHOUT IMPACTING
5 THE PROTECTED SPEECH. CAN SONY AND DEFENDANTS STILL SELL A
6 RECORD OF SONGS IF THEY DON'T ATTRIBUTE THOSE THREE SONGS
7 TO MICHAEL JACKSON. I SAY YES. THEY STILL CAN PUT IT OUT.

8 MAYBE THEY CAN'T SELL IT FOR AS MUCH MONEY. BUT
9 WHAT YOU'RE REALLY DOING IS YOU ARE PUTTING THE ACTUAL
10 VALUE ON THE ALBUM, RIGHT. SO EITHER YOU PUT THE CORRECT
11 PERSON, IF IT'S JASON MALACHI, YOU PUT JASON MALACHI SANG
12 THESE THREE SONGS. AND NOW THE ALBUM IS WORTH SIX SONGS BY
13 MICHAEL JACKSON AND THREE BY MR. MALACHI. MAYBE IT'S \$2
14 LESS. MAYBE NOBODY IS GOING TO BUY IT. MAYBE THAT IS WHY
15 THEY PUT MICHAEL JACKSON'S NAME ON ALL OF IT.

16 SO CAN MR. CASCIO GO ON OPRAH AND YOU CAN SAY CAN'T
17 MAKE THIS FALSE STATEMENT ABOUT MICHAEL JACKSON BEING THE
18 SINGER. HE CAN STILL GO ON AND HAVE HIM AND HIS FAMILY
19 TALK ABOUT THEIR PILLOW FIGHTS WITH MICHAEL JACKSON AS KIDS
20 AND WHAT HIS MOM MADE MICHAEL JACKSON FOR BREAKFAST AND --

21 THE COURT: YOU REALLY THINK OPRAH WOULD HAVE ASKED
22 HIM TO COME ON THE SHOW IF THAT WAS THE CONVERSATION?

23 MR. BOLLINGER: THAT GOES EXACTLY TO THOSE
24 ARTICLES. THE WHOLE PURPOSE OF THAT SEGMENT WAS FOR HIM TO
25 COME ON AND PROMOTE THE SHOW. IF YOU LISTEN TO THE WHOLE
26 THING, THE BEGINNING OF THE SEGMENT OPRAH SAYS YOU'VE JUST
27 BEEN ENJOYING AN EXCLUSIVE VIDEO OF, I THINK IT'S "BREAKING
28 NEWS" THAT IS ONE OF THE SONGS, RIGHT.

1 COMING OUT DECEMBER 14, YOU KNOW, FROM SONY AND
2 WHATEVER MICHAEL JACKSON PRODUCTION. THEN SHE GOES ON TO
3 TALK ABOUT MICHAEL JACKSON. AND HERE I AM WITH THE CASCIO
4 FAMILY. WHAT A GREAT EXPERIENCE THEY HAD. HEY, ARE THESE
5 REALLY MICHAEL JACKSON? YES, MR. CASCIO SAYS THAT IS
6 MICHAEL.

7 IT ENDS WITH ANOTHER VIDEO CLIP AND SHE SAYS, YOU
8 KNOW, DON'T FORGET, DECEMBER 14 THIS GOES ON SALE WHICH IS
9 THE VERY NEXT WEEK THAT IS AN AD. YOUR HONOR SAID IT
10 YOURSELF, WOULD OPRAH PUT THIS ON IF IT WAS NOT ABOUT THE
11 CD.

12 I WOULD SIMPLY SAY IT'S NOT INEXTRICABLY
13 INTERTWINED. MAYBE NOBODY WOULD BE INTERESTED IN THE FREE
14 SPEECH ASPECTS OF THAT OPRAH WINFREY SEGMENT IF MR. CASCIO
15 WAS NOT COMING ON THERE TO CONFIRM IT ACTUALLY IS MICHAEL
16 JACKSON SINGING, BUT SO BE IT. LET THE MARKET PLACE MAKE
17 IT'S DETERMINATION.

18 THE COURT: ANYTHING IN CLOSING? DEFENDANTS ARE
19 CHOMPING AT THE BIT.

20 MR. BOLLINGER: I WOULD JUST COMMENT ON THE
21 DAMAGES. COUNSEL SAID THAT THE DAMAGES HERE, YOU KNOW,
22 THAT MS. SEROVA HAS OTHER REMEDIES; SHE HAS A FRAUD CLAIM.
23 BUT HERE WE ARE TALKING ABOUT THE CHILLING EFFECT ON
24 DEFENDANTS RIGHT TO FREE SPEECH.

25 I WOULD SIMPLY SAY THAT BASED ON MY PRIOR ARGUMENTS
26 THERE IS NO CHILLING HERE. THERE IS NO CHILLING OF FREE
27 SPEECH. YOU DON'T HAVE TO LOOK AT THE LEGISLATIVE HISTORY
28 IF YOU DON'T WANT TO, ALTHOUGH IT DISCUSSES REALLY THE

1 PURPOSE OF WHOSE SPEECH IS REALLY SUPPOSED TO BE PROTECTED
2 HERE AND THE FEAR OF WHOSE SPEECH IS GOING TO BE CHILLED.

3 THE LEGISLATURE DID NOT SET OUT TO PROTECT SONY'S
4 RIGHT TO FREE SPEECH. IN FACT IT SAYS BIG CORPORATIONS
5 WITH LOTS OF MONEY REALLY DON'T HAVE TO WORRY ABOUT THEIR
6 FREE SPEECH BEING CHILLED.

7 I WILL CLOSE THERE AND CERTAINLY RESPOND TO
8 QUESTIONS.

9 THE COURT: COULD YOU BRIEFLY RESPOND TO THE
10 ARGUMENT ASSERTED BY SONY AND SONY DEFENDANTS THAT EVEN IF
11 YOU WERE TO CONCLUDE THERE HAD BEEN A SCHEME TO FALSELY
12 ATTRIBUTE CERTAIN ELEMENTS OF THE ALBUM TO MICHAEL JACKSON
13 THAT THEY WERE AS DUPED AS THE CONSUMER.

14 MR. BOLLINGER: SO MAYBE THAT ARGUMENT WORKS AT THE
15 VERY BEGINNING WHEN THEY PURCHASED THE SONGS, RIGHT. MAYBE
16 THE ANGELIKSON DEFENDANTS CAME AND SAID "LOOK WHAT I
17 RECORDED IN MY BASEMENT. IT'S A GREAT FIND. HERE YOU GO."
18 AT THAT POINT MAYBE THAT ARGUMENT WOULD HAVE WORKED.

19 BUT SINCE THAT TIME THE ORIGINALS HAVE MYSTERIOUSLY
20 DISAPPEARED OF THOSE RECORDINGS. SINCE THEN, FAMILY
21 MEMBERS HAVE COME OUT. I BELIEVE HIS MOTHER, MICHAEL
22 JACKSON'S MOTHER, CAME OUT PUBLICLY AND SAID "THAT IS NOT
23 MY SON. THIS IS WRONG WHAT YOU'RE DOING." OTHER FAMILY
24 MEMBERS CAME OUT.

25 THERE IS THE, I MEAN, IT'S ALL IN THE COMPLAINT,
26 BUT EVEN WHEN AT THE TIME THAT MR. WEITZMAN'S STATEMENT
27 CAME OUT IT WAS IN RESPONSE TO THIS CONTROVERSY BECAUSE
28 EVERYONE WAS SAYING THIS IS NOT MICHAEL JACKSON. AT THIS

1 POINT IT'S INCUMBENT ON SONY TO TAKE RESPONSIBILITY TO BE
2 HELD ACCOUNTABLE AND SAY "MAYBE THIS ISN'T MICHAEL. MAYBE
3 WE SHOULD TAKE HIS NAME OFF OR PUT SOMETHING ON THE ALBUM
4 BUYER BEWARE."

5 WE CAN'T JUST SAY BECAUSE WHEN YOU GOT DUPED IN THE
6 BEGINNING YOU ARE NOW GOING TO PASS THE BUCK TO THE
7 CONSUMER.

8 THE COURT: OKAY. THANK YOU. YES, SIR.

9 MR. MODABBER: THANK YOU, YOUR HONOR.

10 I'M GOING TO SUBMIT ON PRONG ONE. I DON'T THINK
11 IT'S A CLOSE QUESTION. MOVING TO PRONG TWO AND FRANKLY
12 WHETHER THIS IS COMMERCIAL SPEECH OR INEXORABLY
13 INTERTWINED.

14 COUNSEL SEEMS TO BE FOCUSED ON IF WE CANNOT SHOW
15 IT'S THE ACTUAL ART ITSELF THAT WE'RE TALKING ABOUT THAT IS
16 COMMERCIAL SPEECH AND WITH ALL DUE RESPECT, HE'S JUST
17 WRONG. NUMEROUS COURTS HAVE SAID THAT, AND THE YELLOW
18 PAGES, THE DEX MEDIA CASE, SAYS IT, STUTZMAN SAYS, AND I'LL
19 READ FROM PART OF IT:

20
21 "THE ECONOMIC REALITY IN THIS AGE
22 OF TECHNOLOGY IS THAT PUBLISHING
23 COMPANIES AND AUTHORS MUST PROMOTE THE
24 BOOKS IN THIS CASE THEY PUBLISH AND
25 WRITE IN ORDER TO SELL THEM.
26 PUBLISHING HOUSES ARE TO CONTINUE TO
27 OPERATE AND BOOKS ARE TO CONTINUE TO BE
28 SOLD IN PAPER AND HARD COPIES. AS

1 PLAINIFFS THEMSELVES SUGGESTED IN ORAL
2 ARGUMENT, IT'S NEARLY IMPOSSIBLE TO
3 SEPARATE THE PROMOTIONAL MATERIALS FOR
4 THE BOOKS FROM THE BOOKS THEMSELVES.
5 AS SUCH, THE PROMOTIONAL MATERIALS
6 RELATING TO THE BOOKS ARE INEXORABLY
7 INTERTWINED WITH THE BOOK'S CONTENTS
8 WHICH IS NONCOMMERCIAL SPEECH. THUS
9 THESE PROMOTIONAL MATERIALS ARE ALSO
10 ENTITLED TO FULL FIRST AMENDMENT
11 PROTECTION AS NONCOMMERCIAL SPEECH. AS
12 SUCH THE UCL AND THE CLRA DON'T APPLY."

13
14 HE'S GOT A REMEDY. IF HE CAN PROVE FRAUD AGAINST
15 SOMEBODY HE HAS GOT A REMEDY. HE DOES NOT HAVE STRICT
16 LIABILITY AGAINST AN ESTATE OR A THIRD PARTY RECORD COMPANY
17 WHO HAVE NO PERSONAL KNOWLEDGE ONE WAY OR THE OTHER AND
18 HAPPEN TO BE IN THE CHAIN OF COMMERCE.

19 I WOULD POSE THE RHETORICAL QUESTION: HOW DO YOU
20 SELL A MICHAEL JACKSON RECORD WITHOUT CALLING IT A MICHAEL
21 JACKSON RECORD.

22 THE COURT: MICHAEL AND FRIENDS.

23 MR. MODABBER: I SUPPOSE.

24 THE COURT: MICHAEL AND SOMEBODY OTHER THAN
25 MICHAEL.

26 MR. BOLLINGER: OR MAYBE IT'S MICHAEL, MAYBE IT'S
27 NOT, BUT IT'S A RECORD AND HERE HAVE A LISTEN.

28 NONE OF THOSE ARE COMMERCIAL REALITIES. NONE OF

1 THOSE ARE WHAT THE FIRST AMENDMENT REQUIRES --

2 THE COURT: "MAYBE MICHAEL" WOULD HAVE BEEN A MUCH
3 BETTER TITLE.

4 MR. MODABBER: I LIKE IT. I'M NOT SURE YOU WOULD
5 HAVE LIKED IT.

6 MR. HARDY: INCOMPLETE HYPOTHETICAL.

7 MR. MODABBER: AND YOUR HONOR ALSO MAKES THE POINT
8 THAT I'M NOT SURE WE MADE IN OUR BRIEF WHICH IS HOW DO YOU
9 REALLY PEEL THE LAYERS OF THE ONION BACK WITHOUT GOING INTO
10 THE ACTUAL CONTENT OF THE WORK ITSELF TO FIGURE OUT WHETHER
11 OR NOT CALLING IT MICHAEL IS SOMEHOW INACCURATE OR ACCURATE
12 YOU CAN'T.

13 I UNDERSTAND IT'S EASY TO STAND UP AND POUND THE
14 TABLE ABOUT CONSUMERS HAVE BEEN DEFRAUDED WE CAN'T LET THIS
15 HAPPEN. WE CAN'T LET SOMEBODY SELL THESE GOODS BY CALLING
16 IT A MICHAEL JACKSON RECORD WHEN MICHAEL IS NOT SINGING THE
17 LEAD VOCALS ON THESE THREE SONGS.

18 THE ANSWER AGAIN IS THEY ARE RIGHT, BUT THESE
19 STATUTES DON'T GET THEM THERE. THAT IS NOT WHAT THESE
20 STATUTES ALLOW THIS PLAINTIFF TO DO. FRAUD ALLOWS YOU TO
21 DO IT BECAUSE, LIKE IT OR NOT, WE ARE TALKING ABOUT WORKS
22 OF ARTISTIC IMPRESSION AND THE FIRST AMENDMENT CONTROLS.

23 THE COURT: ANYTHING ELSE?

24 MR. HARDY: YES, YOUR HONOR.

25 JUST TO BRIEFLY ADDRESS THE POINTS OF PLAINTIFF'S
26 COUNSEL. REGARDING PRONG ONE, PLAINTIFF'S COUNSEL IS
27 RIGHT. THIS WAS A PREEXISTING CONTROVERSY. IT WAS ALREADY
28 A MATTER OF PUBLIC INTEREST BY THE TIME MR. CASCIO APPEARED

1 ON THE OPRAH SHOW. HE SEEMED TO BE SUGGESTING IF THIS WERE
2 CONCOCTED ON THE SPOT OR REVEALED TO THE PUBLIC ON THE
3 OPRAH WINFREY SHOW FOR THE FIRST TIME IT MIGHT HAVE BECOME
4 A MATTER OF PUBLIC INTEREST, BUT THAT IS NOT THE CASE AT
5 ALL.

6 IT WAS A PREEXISTING CONTROVERSY AS THE VIDEO MAKES
7 CLEAR, THE VIDEO OF THE OPRAH SHOW. PART OF THE PROGRAM
8 WAS MEANT TO ADDRESS THE CONTROVERSY OVER THE UPCOMING
9 ALBUM AND VOCAL TRACKS. SPECIFICALLY WHEN MS. WINFREY
10 ASKED TEDDY RILEY, WHO IS NOT A DEFENDANT HERE, ONE OF
11 PRODUCERS OF THE ALBUM "WHAT DO YOU SAY TO THE DOUBTERS?"

12 AND MR. RILEY STATED "I SAY TO THE DOUBTERS, THIS
13 IS MICHAEL'S VOICE."

14 AND MS. WINFREY ASKED "WOULD MICHAEL HAVE LIKED THE
15 HEAT ON THIS NEW ALBUM? WOULD HE HAVE LIKED THE
16 CONTROVERSY?"

17 RILEY RESPONDED "HE LIVED FOR CONTROVERSY."

18 THIS WAS A SEPARATE CONVERSATION BETWEEN A NONPARTY
19 IN THIS ACTION IN A SEPARATE PART OF THE PROGRAM, YOUR
20 HONOR.

21 SO, AGAIN, MS. WINFREY'S SUBSEQUENT LATER QUESTION
22 POSED TO MR. CASCIO WAS RELATED TO THE GREAT PUBLIC
23 INTEREST IN NOT ONLY MICHAEL JACKSON GENERALLY, AS A
24 WELL-KNOWN PUBLIC FIGURE, BUT THE IMMENSE PUBLIC INTEREST
25 SURROUNDING THE UPCOMING ALBUM THAT EXISTED OUTSIDE OF ANY
26 PROMOTIONAL MATERIALS THAT HAD BEEN GENERATED THROUGH
27 COMMENTS OF FAMILY MEMBERS AND SO FORTH AS PLAINTIFF'S
28 COUNSEL SUGGESTED.

1 SO IN TERMS OF PRONG ONE, YOUR HONOR, I AGREE WITH
2 MY CO-COUNSEL, IT'S NOT EVEN A CLOSE CALL.

3 GETTING BACK TO THE SECOND PRONG AND COMMERCIAL
4 SPEECH EXEMPTION. AGAIN, YOUR HONOR, YOUR HONOR IS RIGHT.
5 IT'S A STICK TO THE BLACK LETTER OF THE STATUTE. IT'S VERY
6 CLEAR THAT THE EXEMPTION DOES NOT APPLY TO ARTISTIC OR
7 MUSICAL WORKS.

8 PLAINTIFF'S COUNSEL TRIES TO TILT THE WINDMILLS TO
9 TRY TO SAY THAT NOTICE IS IN FACT NOT AN ARTISTIC MUSICAL
10 WORK. BUT, AGAIN, YOUR HONOR REGARDLESS OF THE SONY
11 DEFENDANTS' INVOLVEMENT, MY CLIENTS, MR. CASCIO AND
12 MR. PORTE ARE ARTISTS, JUST AS MUCH AS MR. JACKSON BY
13 PLAINTIFF'S OWN ALLEGATIONS AND THOSE JUDICIALLY NOTICED,
14 THEY HELPED AUTHOR, PRODUCE, AND RECORD THE RECORDINGS AT
15 ISSUE.

16 SO THEY ARE CONTENT CREATORS, NOT A MARKETING TEAM,
17 YOUR HONOR. CLEARLY THE COMMERCIAL SPEECH EXEMPTION
18 APPLIES TO MY CLIENTS.

19 THE COURT: OKAY.

20 MR. HARDY: FURTHER, YOUR HONOR, PLAINTIFF'S
21 COUNSEL ATTEMPTS TO APPEAL TO PUBLIC POLICY TO EXPLAIN WHY
22 THE STATUTES SHOULD NOT APPLY HERE. WITH ALL DUE RESPECT,
23 HE'S ASKING THIS COURT TO REWRITE THE STATUTE AND WORK IN
24 EXEMPTIONS TO THE EXEMPTION THAT DON'T EXIST.

25 THERE IS SIMPLY NO NEED IN TERMS OF LEGISLATIVE
26 HISTORY FOR PUBLIC POLICY WHEN THE STATUTE IS AS CLEAR AS
27 IT IS.

28 AGAIN, PLAINTIFF'S COUNSEL FAILS TO ADDRESS HOW

1 ANGELIKSON OR PORTE ARE RESPONSIBLE FOR THE STATEMENTS ON
2 OPRAH. AND EVEN LOOKING AT THE LIGHT MOST FAVORABLE TO
3 THEM, IT ONLY CONCERNS MR. CASCIO.

4 AND AS ALL PARTIES AGREE SHOULD THE ANTI-SLAPP BE
5 GRANTED, AS I BELIEVE IT SHOULD BE, THAT STILL LEAVES THE
6 FRAUD CLAIM WHICH WILL BE ADDRESSED SEPARATELY IN DEMURRER.

7 REGARDING THE ATTEMPTS TO DISTINGUISH THE ARMSTRONG
8 CASE FROM THE FACTS AT ISSUE, YOUR HONOR, AGAIN, AS ARGUED
9 IN THE PAPERS, THERE IS A DIRECT CONNECTION BETWEEN THE
10 MATTER OF PUBLIC INTEREST, NAMELY MICHAEL JACKSON GENERALLY
11 AND SPECIFICALLY. THE CONTROVERSY OVER WHETHER HE SANG THE
12 VOCALS AND CASCIO'S STATEMENT IN RESPONSE TO OPRAH'S
13 QUESTION.

14 THE COURT: BUT THE PLAINTIFF WOULD SAY, BUT YOU
15 CREATED THE VERY CONTROVERSY BY ASCRIBING OR ATTRIBUTING
16 THE WORKS TO MICHAEL IN THE FIRST INSTANCE AND NOW CLAIM
17 OH, IT'S A MATTER OF PUBLIC INTEREST BECAUSE OF A
18 CONTROVERSY I CREATED BY MISLABELING THE ALBUM.

19 SO IT'S QUITE CIRCULAR TO THEN ATTEMPT TO SAY AND,
20 THEREFORE, IT'S SLAPP BECAUSE I DON'T NEED TO CHILL THAT.
21 ARE YOU SAYING IF YOU HADN'T MISLABELED THE ALBUM IN THE
22 FIRST INSTANCE, YOU WOULDN'T HAVE THE CONTROVERSY, YOU
23 WOULDN'T HAVE THE MISSTATEMENTS. AND INVARIABLY OR
24 INEVITABLY IF PEOPLE SPEAK OUT AGAINST FALSE ATTRIBUTION
25 THERE IS GOING TO BE A DEBATE AND THEN IT TURNS INTO A
26 MATTER OF PUBLIC INTEREST.

27 SO CITING THE OLDER CASES THAT SAY IF THE INTEREST
28 IS CREATED BY THE VERY ACTIONABLE CONDUCT THAT IS A

1 DIFFERENT ISSUE.

2 DOES ANYBODY HAVE ANYTHING ELSE? I'LL TAKE IT
3 UNDER SUBMISSION.

4 MR. MODABBER: I DO. I'D LIKE TO GIVE
5 MR. BOLLINGER A CHANCE TO RESPOND IF HE WANTS TO. I WOULD
6 SUBMIT THAT THE COMMENTS YOUR HONOR JUST MADE DO NOT APPLY
7 TO MY CLIENTS. THEY REALLY DON'T. WE IN NO WAY CAN BE
8 CREATOR OF THE CONTROVERSY.

9 THE COURT: ACCORDING TO THE PLAINTIFF, YOU SICCED
10 MR. WEITZMAN ON HIM SO THAT --

11 MR. MODABBER: THERE IS THAT.

12 THE COURT: THAT IS WHERE YOU COME IN.

13 MR. MODABBER: THE ANOTHER THING I WOULD ASK, WHAT
14 DO WE DO, THE ESTATE, MJJ PRODUCTIONS AND SONY, IF IT WAS
15 MICHAEL JACKSON. IT'S PRESENTED TO US, ARE WE SUPPOSED TO
16 CALL IT "MICHAEL JACKSON AND FRIENDS" OR "MAYBE MICHAEL"
17 BECAUSE MS. SEROVA'S OPINION IS THAT IT'S NOT?

18 THE COURT: I'M STUCK WITH YOUR STIPULATION.

19 MR. MODABBER: I'M SORRY.

20 THE COURT: I'M STUCK WITH YOUR STIPULATION THAT IT
21 WASN'T.

22 MR. DEMKO: WE DIDN'T KNOW THAT AT THE TIME WE WERE
23 MARKETING IT. WE DIDN'T KNOW IT WAS MICHAEL JACKSON. WE
24 ARE SUBMITTING NOW IT MAY HAVE TURNED OUT NOT TO BE, BUT AT
25 THE TIME WE MADE THE STATEMENTS THERE IS NO STIPULATION
26 THAT AT THE TIME WE MADE THE STATEMENTS WE KNEW.

27 MR. MODABBER: MY POINT IS THE CHILLING EFFECT OF
28 IT. IN OTHER WORDS, IF IT'S MICHAEL, IT'S NOT MICHAEL.

1 SAY IT'S NOT MICHAEL. THE SHOES WE ARE IN, WE DO NOT KNOW.
2 MR. BOLLINGER ARGUED, WAIT, THERE WAS THIS INFORMATION OUT
3 THERE THAT YOU COULD HAVE REACHED THE CONCLUSION THAT MAYBE
4 IT WASN'T HIM.

5 I'M SAYING, WHAT ARE WE SUPPOSED TO DO THAT POINT?
6 WE ARE CHILLED. THERE IS CHILLING. IF WE HAVE TO SAY
7 MAYBE IT'S NOT MICHAEL OR MAYBE MICHAEL OR MICHAEL AND
8 FRIENDS AND THAT IS THE UNDERPINNING OF WHY THESE TWO
9 STATUTES DON'T APPLY.

10 THE COURT: OR YOU MAKE A VERY COMMERCIAL MARKETING
11 ON THE DECISION TO EXCLUDE THOSE FEW CUTS AND THEY ARE NOT
12 RELEASED.

13 MR. MODABBER: THAT IS PER CHILLING. THAT IS YOU
14 DON'T GET TO RELEASE THE SONGS.

15 THE COURT: WE HAVE AN ADMISSION THAT MICHAEL DID
16 NOT SING THOSE SONGS. IT'S THE PROBLEM WITH THE
17 STIPULATION. AND THE STIPULATION DIDN'T SAY WE DIDN'T KNOW
18 AT THE TIME. IT SAYS, MICHAEL DID NOT MAKE THE THREE
19 SONGS.

20 MR. DEMKO: THE ALLEGATIONS MADE THAT POINT THAT WE
21 DIDN'T KNOW AT THE TIME.

22 THE COURT: AND IT WAS STIPULATED FOR PURPOSES OF
23 PRONG TWO TO BE TRUE WHICH WOULD HAVE BEEN REALLY
24 INTERESTING TO ADJUDICATE, BUT NO.

25 GOING DOWN THIS TRACT IS REALLY HARD. YOU COULD
26 HAVE HAD ELABORATE PRESENTATION OF SUBSTANTIVE EVIDENCE OF
27 WHEN YOU KNEW AND WHAT KNEW, AND WHO KNEW AND WHEN THEY
28 KNEW IT OR NO ONE KNEW IT EVER. BUT ALL OF THAT HAS BEEN

1 OBVIATED BY A STARTLING ADMISSION SO THAT IS WHAT I'M LEFT
2 WITH.

3 MR. MODABBER: I'M NOT ARGUING THAT SOMEHOW THERE
4 IS MERIT OR LACK OF MERIT ON WHETHER OR NOT IT'S HIM. I'M
5 MERELY POINTING OUT THAT IF THE CHOICE IS UNDER THE FACTS
6 PRESENTED TO MY CLIENTS, MICHAEL IS DEAD. NOBODY KNOWS
7 OTHER THAN THE OTHER DEFENDANTS IN THIS CASE, NOT US. IT
8 COMES TO US. IF THE RULE ON US IS WE ARE STRICTLY
9 LIABLE --

10 THE COURT: LET'S GO BACK AND LOOK AT WHAT WEITZMAN
11 SAID YOU DID TO INVESTIGATE. AND THE CONTENTION IS THAT IS
12 NOT EVEN ACCURATE.

13 MR. MODABBER: IF IT'S NOT --

14 THE COURT: BUT I DIGRESS.

15 MR. MODABBER: THERE IS A FRAUD CLAIM FOR THAT IF
16 THEY CAN PROVE IT.

17 THE COURT: I DIGRESS.

18 MR. MODABBER: THAT IS NOT COMMERCIAL SPEECH.

19 THE COURT: HERE IS THE PROBLEM, I READ THAT --

20 MR. BOLLINGER: ARE YOU LOOKING FOR THE WEITZMAN
21 STATEMENT?

22 THE COURT: UH-HUH.

23 MR. MODABBER: I HAVE GOT A COPY; IT'S A LITTLE
24 MARKED UP.

25 THE COURT: I HAVE GOT WEITZMAN E-MAIL AND THE
26 JOINT STIPULATION. SO I HAVE THE STIPULATION. SOLELY FOR
27 THE PURPOSE OF DECIDING IN THE FIRST PHASE. HE'S WRITING
28 ON WEDNESDAY THE 10TH OF NOVEMBER, 2010, HE REPRESENTS

1 THERE ARE SIX OF MICHAEL'S FORMER PRODUCERS AND ENGINEERS
2 INVITED TO A LISTENING TO HEAR THE RAW VOCALS. THEY ALL
3 CONFIRM THE VOCAL IS DEFINITELY MICHAEL. ACCORDING TO
4 PLAINTIFF THAT IS FACTUALLY INACCURATE.

5 MR. MODABBER: AND THE RESPONSE TO THAT IS BECAUSE
6 THAT STATEMENT IS NOT COMMERCIAL SPEECH --

7 THE COURT: YOU ASKING WHAT COULD YOU DO? I HAVE A
8 VOTE. WHAT YOU COULD DO IS NOT HAVE SAID THAT.

9 MR. MODABBER: I'M SORRY, TELL ME WHAT THE "THAT"
10 IS AGAIN.

11 THE COURT: THEY ALL CONFIRM THE VOCAL IS
12 DEFINITELY MICHAEL.

13 MR. MODABBER: SO ARE WE TALKING ABOUT PREDICATED
14 LIABILITY ON MR. WEITZMAN'S STATEMENT?

15 THE COURT: NO. I'M SAYING YOU HAD THE SENSE I WAS
16 ABSOLUTELY IN THE DARK AND DIDN'T KNOW ANYTHING IN ADVANCE
17 OF THE RELEASE OF THIS ALBUM.

18 MR. MODABBER: NO, WE ARE NOT SAYING THAT.

19 THE COURT: AND THE REPRESENTATIVE OF THE PRODUCERS
20 OF THE ALBUM REPRESENTED SOMETHING AT THE TIME THAT WAS
21 STATED WAS ARGUABLY FALSE AND MISLEADING. AND I GET THAT
22 GOES TO FRAUD, BUT YOU ARE ASKING WHAT COULD I DO. I
23 DIDN'T KNOW ANYTHING. I WAS IN THE DARK. I WAS AS TAKEN
24 AND DUPED AS THE PUBLIC.

25 MR. MODABBER: I'M NOT GOING THAT FAR, YOUR HONOR.

26 THE COURT: THIS WOULD ARGUE AGAINST THAT.

27 MR. MODABBER: I'M NOT GOING THAT FAR.

28 WHAT I SAID IS WE WERE NOT IN THE ROOM TO

1 EMPIRICALLY KNOW THE TRUTH OF IT. WE'RE NOT IN A POSITION
2 TO KNOW IT.

3 THE COURT: I UNDERSTAND, BUT YOU DID DUE
4 DILIGENCE.

5 MR. MODABBER: CORRECT.

6 THE COURT: AND THEN YOU MISREPRESENTED TO JEFF IN
7 RESPONSE TO AN INQUIRY ISSUED BY HIM SOMETHING THAT WASN'T
8 ENTIRELY CORRECT.

9 MR. MODABBER: ASSUME WE DID AND WE DIDN'T
10 MISREPRESENT. ASSUME WE DID. THIS IS NONCOMMERCIAL
11 SPEECH. THIS IS NOT AN ADVERTISEMENT AND THEIR ONLY REMEDY
12 IS FOR FRAUD. THERE IS NO UCL OR CLRA LIABILITY.

13 THE COURT: I HEAR THAT ARGUMENT. BUT TO JUST SAY
14 I COULDN'T DO ANYTHING. I'M SONY. I DIDN'T KNOW ANY
15 BETTER. THIS IS THE PART THAT SONY DID.

16 MR. MODABBER: THE ESTATE DID ALL THESE THINGS.
17 AND MY QUESTION ON WHAT COULD WE DO IS REALLY TO THE ISSUE
18 IS, IS THERE CHILLING.

19 IF THE ALTERNATIVE IS WE HAVE TO ACCEPT IN THE FACE
20 OF CONTROVERSY UNDER THREAT OF THE STRICT LIABILITY BECAUSE
21 THAT IS WHAT WE'RE TALKING ABOUT HERE, WE HAVE TO ACCEPT A
22 DOUBTER. AND OUR CHOICE IS, EITHER DON'T PUT IT OUT, OR
23 SOMEHOW TELL PEOPLE IT MAY OR MAY NOT BE, IN OTHER WORDS,
24 CHANGE THE ARTISTIC IMPRESSION. THOSE ARE NOT CHOICES OF
25 THE FIRST AMENDMENT COUNTERANCES THAT IS NOT HOW IT WORKS.

26 IF WE LIE WE CAN BE SUED FOR FRAUD. BUT TO COME TO
27 US AND SAY YOUR CHOICES ARE WE'LL TAKE THE THREE SONGS AND
28 DON'T RELEASE THEM.

1 THE COURT: LET'S USE THE PICASSO ANALOGY. AND
2 YOU'RE ACTUALLY THE DISTRIBUTOR OF THE NOW
3 SCRIBBLE-SCRABBLE PIECE OF PAPER THAT IS A FORGED PICASSO.
4 SO THAT IS ESSENTIALLY TO SAY I CAN ACCEPT IT REGARDLESS OF
5 ANY VERIFICATION? BECAUSE FRANKLY YOU'RE A HUGE PROFITER
6 OFF OF THE LACK OF LOOKING AT THIS BECAUSE OBVIOUSLY IT'S
7 WORTH MUCH, MUCH MORE AS MICHAEL THAN IT IS AS MICHAEL'S
8 FRIEND WHO RECORDED THIS IN THE BASEMENT. AND THEN YOU
9 JUST SAY I ACCEPTED IT, IT LOOKED LIKE PICASSO TO ME.

10 MR. MODABBER: THAT IS A FRAUD ANALYSIS. DID YOU
11 HAVE A REASONABLE BASIS TO DO IT. DID YOU BURY YOUR HEAD.
12 THAT IS NOT A SITUATION WHERE WE'RE IMPOSED WITH STRICT
13 LIABILITY THAT IS THE ISSUE HERE. IS THIS A STRICT
14 LIABILITY SITUATION BECAUSE WE'RE TALKING ABOUT A POTATO
15 CHIP OR A LOCK --

16 THE COURT: ONLY IF IT'S MISLABELED.

17 MR. MODABBER: MISLABELING CASES FOR LOCKS AND FOR
18 POTATO CHIPS ARE --

19 THE COURT: YOU ARE SAYING IT'S NOT MISLABELED.
20 I'M GOOD. YOU CAN CHALLENGE IT.

21 MR. MODABBER: WE ARE SAYING WE HAVE ASSUMED FOR
22 PURPOSES OF DISCUSSION THAT IT'S MICHAEL.

23 THE COURT: I KNOW IT'S NOT MICHAEL.

24 MR. MODABBER: OR IT'S NOT MICHAEL. THIS IS NOT A
25 MISLABELING CASE. WE ARE TALKING ABOUT A WORK OF ART.
26 THOSE ARE NOT THE SAME --

27 THE COURT: SO HE GETS TO BE PICASSO FOR A DAY.

28 MR. MODABBER: HE CAN SUE THEM FOR FRAUD.

1 THE COURT: REALLY. A SCREWDRIVER THAT IS MADE IN
2 CHINA AND HAS A LABEL MADE IN THE U.S.A. I CAN SUE FOR, BUT
3 I CAN'T SUE FOR A FORGED PIECE OF ART.

4 MR. MODABBER: YOU CAN. THE STANDARDS OF WHICH YOU
5 HAVE TO PROVE ARE JUST DIFFERENT. WE ARE TALKING ABOUT
6 ARTISTIC IMPRESSION AND CHILLING IT. WHEN YOU ARE TALKING
7 ABOUT THE PUBLIC NOT BEING ABLE TO SEE THE PICASSO --

8 THE COURT: FORGERY IS WITHOUT REDRESS UNDER --

9 MR. MODABBER: THERE IS REDRESS.

10 THE COURT: UNDER THE MISLEADING LABELING STATUTE.

11 MR. MODABBER: CORRECT. IT'S WITHOUT REMEDY UNDER
12 THE CLRA AND THE UCL BECAUSE IT'S ART.

13 MR. DEMKO: IF I CAN ELABORATE ON THE PICASSO
14 THING. IMAGINE THE SITUATION OF THE MUSEUM EXHIBITOR OR
15 THE AUCTIONEER DOES GIVE IT DUE DILIGENCE. EVERYTHING
16 COMES OUT AS IT BEING PICASSO. THEY SELL IT OR THEY
17 EXHIBIT IT AND THEN SOME DAY SOMEONE LATER COMES BY AND
18 SHOWS YOU DEFINITIVE EVIDENCE IT'S NOT A PICASSO.

19 THE PROBLEM WITH THE CONSUMER STATUTES IS THE
20 EXHIBITOR CAN THEN BE LIABLE EVEN THOUGH THEY DID
21 EVERYTHING RIGHT BECAUSE IT'S STRICT LIABILITY.

22 IF THERE IS ANY DOUBT THE EXHIBITER HAS TO NOT SHOW
23 IT OR FACE THE STRICT LIABILITY. AND IF THEY DON'T SHOW
24 IT, THE AUDIENCE NEVER SEES IT, NO ONE COMES INTO THE
25 MUSEUM TO SEE THE PICASSO AND THAT IS THE PROBLEM APPLYING
26 CLRA OR UCL STANDARD.

27 THE COURT: THE OTHER PROBLEM IS I GO ON EBAY TO
28 GET A BASEBALL SIGNED BY SOME FAMOUS BASEBALL PLAYER AND

1 IT'S NO MORE SIGNED BY HIM THAN A MAN ON THE MOON AND I PAY
2 A LOT EXTRA AND I AM WITHOUT REDRESS BECAUSE WHOEVER THE
3 SELLER IS CLAIMED IT WAS AUTHENTIC.

4 MR. DEMKO: THAT WOULD PRESUME THAT THE AUTOGRAPH
5 WAS A WORK OF ART, AND IT'S ENTITLED TO THE FIRST AMENDMENT
6 EXPRESSION AND --

7 THE COURT: IT'S JUST ATTRIBUTION. I'M PICKING
8 ATTRIBUTION. IT'S JUST PART OF THE VALUE COMES FROM ITS --

9 MR. DEMKO: THE POINT IS THE EXPRESSION DOESN'T GET
10 OUT.

11 THE COURT: PART OF ITS VALUE COMES FROM THE
12 ATTRIBUTION OF SOURCE.

13 MR. DEMKO: OF COURSE.

14 THE COURT: AND IT'S TRUE WHETHER IT'S A FAKE
15 BASEBALL OR WHETHER IT'S A FAKE PICASSO OR WHETHER IT'S A
16 FAKE MICHAEL.

17 MR. DEMKO: I DON'T THINK ANYBODY HAS CHALLENGED
18 THAT.

19 THE COURT: FAKE BE TOLD.

20 MR. MODABBER: OR A POTATO CHIP THAT DOESN'T HAVE
21 THE INGREDIENT YOU SAY IT DOES.

22 THE QUESTION IS: WHAT IS THE PLAINTIFF'S BURDEN IN
23 EACH OF THOSE SCENARIOS. WE ARE SUGGESTING THEY ARE NOT
24 THE SAME.

25 NOT BEING ABLE TO SELL A POTATO CHIP WITH A FALSE
26 LABEL IS DIFFERENT THAN NOT BEING ABLE TO SELL A PICASSO
27 WITH A FALSE LABEL.

28 THE COURT: NOT IF YOU'RE THE CONSUMER WHO JUST

1 PAID TOO MUCH THAT IS HIS CONTENTION.

2 MR. MODABBER: THAT IS HIS CONTENTION.

3 THE COURT: THE CONSUMER HAS EXACTLY THE SAME I
4 HAVE BEEN RIPPED OFF POSITION WHETHER THEY GOT A POTATO
5 CHIP THAT ISN'T VEGAN OR THEY GOT A MICHAEL JACKSON ALBUM
6 THAT IS NOT MICHAEL JACKSON.

7 MR. MODABBER: THEN JUST REWRITE THE CONSTITUTION
8 TO SAY POTATO CHIPS ARE AS IMPORTANT TO THE PUBLIC AND OUR
9 SOCIETY AS ARTISTIC EXPRESSION.

10 THE COURT: I COULD SAY THAT THE COVER OF THE
11 ARTISTIC EXPRESSION ISN'T ARTISTIC IMPRESSION AND,
12 THEREFORE, THE COVER AND THE ADVERTISEMENT FOR THE COVER,
13 WHICH DOES NOT REITERATE OR RESTATE OR CONTAIN THE CONTENTS
14 OF THE ITEM ITSELF WHICH DISTINGUISHES IT FROM YOUR CASES,
15 IS IN FACT PURE MARKETING AND SUBJECT TO PURE MARKETING AND
16 ADVERTISING RULES.

17 MR. MODABBER: BUT MARKETING AND ADVERTISING DOES
18 NOT END THE ANALYSIS AS THE STUTZMAN CASES AND ALL THE
19 OTHER CASES WE CITED IN OUR BRIEF SAY.

20 THE COURT: IT DEPENDS ON THE ADVERTISING, I AGREE
21 WITH YOU, IT DEPENDS ON THE ADVERTISING. IT'S NOT A
22 BRIGHT-LINE RULE THAT NO ADVERTISING CAN EVER BE
23 CONSIDERED. IT'S WHERE THE ADVERTISING ITSELF REPEATS,
24 REITERATES OR REALLEGES WHAT IS CONTAINED IN THE WORK
25 ITSELF.

26 MR. MODABBER: NO.

27 THE COURT: THAT'S NOT A PROBLEM HERE.

28 MR. MODABBER: NO. THE YELLOW PAGES ARE NOT

1 REPEATING --

2 THE COURT: I AGREE THE YELLOW PAGES CANNOT EXIST
3 WITHOUT THE ADVERTISING. THIS ALBUM COULD HAVE EXISTED
4 WITH A DISCLOSURE ON THE COVER -- EXACT SAME ALBUM.

5 MR. BOLLINGER: OR SIMPLY SAYING SIX ALBUMS.

6 THE COURT: MICHAEL ASTERISK.

7 MR. DEMKO: I THINK ALSO THEM SAYING, OR THE
8 PLAINTIFF SAYING --

9 THE COURT: THEN THE BUYERS ARE ON NOTICE. THESE
10 ARE CONSUMER WELFARE STATUTES. AND SO WHILE I GET THAT
11 THIS ARISES IN A UNIQUE CONTEXT, THE POLICY BEHIND THESE
12 STATUTES IS THE SAME WHICH IS THE PROTECTION OF THE
13 CONSUMER AGAINST UNSCRUPULOUS BUSINESS PRACTICES.

14 MR. MODABBER: THEY DON'T EXIST IN A VACUUM. THEY
15 EXPRESSLY DO NOT APPLY TO CERTAIN THINGS THAT ARE PROTECTED
16 IN THE FIRST AMENDMENT. THE UCL AND CLRA DO NOT APPLY, SO
17 WE ARE TAKING ABOUT HOW FAR AWAY FROM THE ACTUAL ARTISTIC
18 EXPRESSION DO WE GO.

19 THE COURT: ACTUALLY THE PICASSO IS TERRIBLE
20 BECAUSE IT REALLY IS THE SAME THING.

21 MR. MODABBER: BUT THE ADVERTISEMENTS IN THE
22 LANGUAGE THAT I READ EARLIER, THE COURTS RECOGNIZE UNLESS
23 YOU CAN SOMEHOW SEPARATE IT. THE GREATER EXAMPLE IN THE
24 TUPPERWARE CASE PEOPLE ARE TRYING TO MORPH INTO THE
25 ADVERTISING THINGS THAT ARE REALLY NOT NECESSARY FOR THE
26 PRODUCT.

27 IN OTHER WORDS AT A TUPPERWARE PARTY YOU ARE
28 TALKING ABOUT WE ALL OUGHT TO BE CONCERNED HOW MUCH MONEY

1 WE SPEND AS A HOUSEHOLD. OR IN THE NIKE CASE THEY WOVE
2 INTO PART OF IT AN ECONOMIC GLOBALIZATION THAT THAT IS A
3 PUBLIC ISSUE AND WE NEED TO BE CONCERNED ABOUT IT.

4 YOU ARE SHOE HORNING IN SOMETHING THAT IS
5 NONCOMMERCIAL SPEECH IN ORDER TO TAKE ADVANTAGE OF THIS
6 INEXORABLY INTERTWINED DOCTRINE THAT IS NOT WHAT IS GOING
7 ON HERE. YOU CANNOT SEPARATE THESE TWO LOGICALLY WITHOUT
8 CHANGING THE ARTISTIC EXPRESSION.

9 IT'S NOT A SITUATION WHERE YOU ARE AT A TUPPERWARE
10 PARTY. YOU WANT TO SELL SOMEBODY A PIECE OF TUPPERWARE AND
11 YOU SAY THE ADVERTISING ABOUT IT IS TALKING ABOUT GOOD
12 HOUSEKEEPING.

13 MR. DEMKO: IF I MAY GIVE YOU EXAMPLE, IF ADELL
14 WRITES A BREAKUP CD AND EXPRESSES THIS BREAKUP CD, AND IT
15 TURNS OUT NOT TO BE ADELL THAT CHANGES THE MEANING OF THOSE
16 SONGS AND WHAT THOSE SONGS SAY ABOUT THE PERSON EXPRESSING
17 THEM.

18 IN THE SAME WAY, IF YOU SAY IT'S NOT MICHAEL THAT
19 CHANGES THE CONTENT AND THE MEANING OF THOSE SONGS AND WHAT
20 IT SAYS ABOUT MICHAEL AND HOW IT FITS INTO HIS HISTORIC
21 PRODUCTION.

22 THE COURT: REALLY.

23 MR. DEMKO: OF COURSE IT DOES.

24 THE COURT: I GUESS I'M NOT THAT SOPHISTICATED WHEN
25 IT COMES TO CONTENT.

26 MR. BOLLINGER: YOUR HONOR, MAY I ADD A COUPLE
27 THINGS. MAYBE I SHOULDN'T, BUT IF IT'S NOT MICHAEL THEN
28 PUTTING THE NAME MICHAEL ON IT IS NOT INEXTRICABLY

1 INTERTWINED WITH THE MUSIC. IF --

2 THE COURT: IT MEANS SOMETHING BECAUSE HE RECORDED
3 IT THAT IS THE ADELL BREAKUP. IT MEANS SOMETHING BECAUSE
4 ADELL RECORDED IT.

5 MR. BOLLINGER: I WOULD REALLY ENCOURAGE YOUR HONOR
6 TO READY THE KIEMER CASE. IN THE KIEMER CASE THEY ACTUALLY
7 DID DENY THE ANTI-SLAPP MOTION BECAUSE, ACTUALLY I'M NOT
8 SURE IF IT'S ANTI-SLAPP MOTION, BUT THEY DID FIND THAT THE
9 WORDS ON THE COVER WHICH SIMPLY QUOTED THE CONTENT.

10 THE COURT: THAT IS DIFFERENT.

11 MR. BOLLINGER: WHAT WE'RE SAYING IS THAT IS WHERE
12 ARMSTRONG WAS SAYING, OH --

13 THE COURT: RIGHT THAT IS YOUR LANCE ARMSTRONG
14 EXAMPLE.

15 MR. BOLLINGER: BUT HERE THEY ACTUALLY FOUND FOR
16 THE PLAINTIFF EVEN THOUGH THE LIES WERE ON THE COVER AS
17 WELL. AND THAT, YOUR HONOR, IS A CALIFORNIA COURT OF
18 APPEAL CASE.

19 THE COURT: I'LL LOOK AT ALL THIS AGAIN. I'M
20 STRUGGLING WITH -- I GET THE ARTISTIC CONTENT. I GET THE
21 FIRST AMENDMENT, AND I GET THE BREADTH AND I UNDERSTAND THE
22 NARROW PARAMETERS OF COMMERCIAL SPEECH, ET CETERA. GOT IT.
23 GOT IT. GOT IT.

24 WHAT IS PROBLEMATIC IS THAT YOU ARE RIPPING PEOPLE
25 OFF UNDER YOUR ADMITTED FACTS. I DON'T KNOW IF YOU WERE OR
26 NOT. I'M LEFT WITH THE STIPULATION THAT SAYS YOU WERE FOR
27 PURPOSES OF THIS MOTION AND THAT IS JUST PROBLEMATIC, BUT
28 IT MAY BE NOT ACTIONABLE.

1 MR. MODABBER: YOU ARE SKIPPING AHEAD WHEN YOU GET
2 TO YOU RIPPED PEOPLE OFF. YOU ARE SKIPPING IF WE RIPPED
3 THEM OFF IN COMMERCIAL SPEECH OR NONCOMMERCIAL SPEECH. YOU
4 DON'T GET TO TALK ABOUT FALSITY UNTIL YOU ANSWER THE FIRST
5 QUESTION.

6 THE COURT: YOU TOOK MONEY THEY WOULD NOT HAVE
7 GIVEN YOU HAD THEY KNOWN AND YOU STIPULATED TO THAT FACT.
8 IT COULD BE THAT DIDN'T HAPPEN AT ALL, I DON'T KNOW. I'M
9 JUST DEALING WITH WHAT WAS STIPULATED TO AND YOU SAID
10 SOMETHING IS TRUE AND IT WASN'T.

11 MR. MODABBER: FOR THE STIPULATION IT DOESN'T
12 MATTER. ON THE ANALYSIS ON COMMERCIAL VERSUS NONCOMMERCIAL
13 SPEECH TRUTH OF FALSITY DOESN'T MATTER.

14 THE COURT: I UNDERSTAND THE LEGAL OBSERVATIONS. I
15 AM STRUGGLING WITH LETTING PEOPLE PUT WHATEVER THEY WANT
16 OUT THERE WHICH IS YOUR CONTENTION UNLESS IT'S KNOWINGLY
17 FRAUDULENT.

18 MR. MODABBER: WITH ALL DUE RESPECT, YOUR HONOR,
19 THAT IS NOT WHAT WE'RE TALKING ABOUT. WE ARE TALKING ABOUT
20 WHETHER OR NOT WHAT THE STANDARD OF PROOF IS ON WHETHER OR
21 NOT YOU CAN SUE SOMEBODY FOR PUTTING SOMETHING FALSE OUT
22 THERE. AND THE STANDARD IS YOU DON'T. YOU DON'T GET INTO
23 THE INQUIRY OF WHETHER OR NOT IT'S MICHAEL OR NOT WHICH IS
24 WHY --

25 THE COURT: I UNDERSTAND.

26 MR. MODABBER: -- IT DOESN'T MATTER.

27 THE COURT: I GET IT.

28 MR. MODABBER: WE HAVE TO ANSWER UNDER THE

1 DOCTRINES THAT WE HAVE. IS THIS COMMERCIAL SPEECH --

2 THE COURT: PROTECTED SPEECH OR IT'S ADVERTISEMENT.

3 MR. MODABBER: AND IF WE RIPPED PEOPLE OFF.

4 THE COURT: OR IT'S A LABEL OR AN AD, ONE OR THE
5 OTHER.

6 MR. MODABBER: IF WE RIPPED PEOPLE OFF AND IT'S
7 NONCOMMERCIAL SPEECH THEY LOSE UNDER THE STATUTES THAT IS
8 JUST THE LAW.

9 THE COURT: I GOT IT.

10 MR. MODABBER: THANK YOU FOR YOUR PATIENCE.

11 THE COURT: I'LL TAKE IT UNDER SUBMISSION.

12 MR. BOLLINGER: THANK YOU, YOUR HONOR.

13 MR. DEMKO: THANK YOU, YOUR HONOR.

14 MR. HARDY: THANK YOU.

15

16 (END OF PROCEEDING.)

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1 SUPERIOR COURT OF THE STATE OF CALIFORNIA

2 COUNTY OF LOS ANGELES

3 DEPARTMENT CCW 308

HON. ANN I. JONES, JUDGE

4
5 VERA SEROVA,

6 PLAINTIFF,

7 VS.

8 SONY MUSIC ENTERTAINMENT, ET AL.,

9
10 DEFENDANTS.

CASE NO. BC548468
REPORTER'S CERTIFICATE

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14 I, ANITA B. ALDERSON, OFFICIAL REPORTER PRO
15 TEMPORE OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA,
16 FOR THE COUNTY OF LOS ANGELES, DO HEREBY CERTIFY THAT THE
17 FOREGOING PAGES, 1 THROUGH 50, COMPRISE A TRUE AND CORRECT
18 TRANSCRIPT OF THE PROCEEDINGS TAKEN IN THE ABOVE-ENTITLED
19 CAUSE ON WEDNESDAY, DECEMBER 7, 2016.

20 DATED THIS 21ST DAY OF DECEMBER, 2016.

21
22
23  , CSR 11843
24 ANITA B. ALDERSON
25 OFFICIAL REPORTER PRO TEMPORE
26
27
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