

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION TWO

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

Plaintiff and Respondent,

v.

SONY MUSIC
ENTERTAINMENT; JOHN
BRANCA, as Co-Executor of the
Estate of Michael J. Jackson; and
MJJ PRODUCTIONS, INC.,

Defendants and Appellants.

Court of Appeal No. B280526

(Super. Ct. No. BC 548468)

Appeal from Ruling of the
Superior Court, County of Los Angeles
Hon. Ann I. Jones, Judge

RESPONDENT'S BRIEF

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| CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (Check one): <input type="checkbox"/> INITIAL CERTIFICATE <input checked="" type="checkbox"/> SUPPLEMENTAL CERTIFICATE | | |
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1. This form is being submitted on behalf of the following party (name): Respondent Vera Serova
2. a. ☐ There are no interested entities or persons that must be listed in this certificate under rule 8.208.
- b. ☒ Interested entities or persons required to be listed under rule 8.208 are as follows:

| Full name of interested entity or person | Nature of interest (Explain): |
|---|---|
| (1) Sony Music Entertainment | Appellant/Defendant |
| (2) John Branca, Estate of Michael J. Jackson | Appellant/Defendant |
| (3) MJJ Productions, Inc. | Appellant/Defendant |
| (4) Justice Judith Ashmann-Gerst | Respondent's counsel, Jeremy Bollinger, externed for the Justice in 2003. |
| (5) | |

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: May 9, 2018

Jeremy F. Bollinger

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 (SIGNATURE OF APPELLANT OR ATTORNEY)

TABLE OF CONTENTS

| | |
|---|----|
| I. INTRODUCTION | 8 |
| II. SUMMARY OF ALLEGATIONS AND PROCEDURAL HISTORY | 11 |
| A. The Cascio Tracks Controversy..... | 11 |
| B. Serova's Complaint | 14 |
| C. Appellants' Anti-SLAPP Motion | 16 |
| III. SEROVA'S MOTION TO DISMISS APPEAL..... | 18 |
| IV. STANDARD OF REVIEW..... | 19 |
| V. ARGUMENT..... | 20 |
| A. Serova's claims do not arise from a protected activity because Appellants' statements on <i>Michael's</i> cover and in the video ad constitute commercial speech about Appellants' product that does not satisfy the "issue of public interest" requirement..... | 20 |
| B. Appellants' statements on <i>Michael's</i> cover and in the video ad are commercial and therefore actionable under the CLRA and UCL..... | 30 |
| 1. The statements on <i>Michael's</i> cover and in the video ad are commercial under <i>Kasky</i> | 32 |
| 2. The statement in the video ad is commercial under <i>Kasky</i> | 36 |
| 3. The statements on <i>Michael's</i> cover and in the video ad are not adjunct or incidental to the Cascio tracks. | 38 |

| | |
|---|----|
| 4. The statements on <i>Michael's</i> cover and in the video ad are not inextricably intertwined with the Cascio tracks. | 41 |
| C. <i>Michael's</i> cover and the video ad were sufficiently misleading to support the UCL and CLRA claims. | 47 |
| D. Public policy favors strict liability for deceptive advertising of expressive works. | 55 |
| VI. CONCLUSION..... | 61 |

TABLE OF AUTHORITIES

Cases

| | |
|---|------------|
| <i>All One God Faith, Inc. v. Organic & Sustainable Indus.</i> | |
| <i>Standards, Inc.</i> (2010) 183 Cal.App.4th 1186 | 29 |
| <i>Anderson v. City of Hermosa Beach</i> | |
| (9th Cir. 2010) 621 F.3d 1051 | 44 |
| <i>Anthony v. Buena Vista</i> (C.D. Cal., Sept. 28, 2016) | |
| No. 215CV09593SVWJPR, 2016 WL 6836950 | 52, 53, 58 |
| <i>Baral v. Schnitt</i> (2016) 1 Cal.5th 376 | 18, 20 |
| <i>Bardin v. Daimlerchrysler</i> , (2006) 136 Cal.App.4th 1255 | 51 |
| <i>Benson v. Kwikset Corp.</i> (2007) 152 Cal.App.4th 1254..... | 33 |
| <i>Bery v. New York</i> (2d Cir. 1996) 97 F.3d 689 | 35 |
| <i>Board of Trustees of State Univ. of New York v. Fox</i> | |
| (1989) 492 U.S. 469 | 42 |
| <i>Bolger v. Youngs Drug Products Corp.</i> (1983) 463 U.S. 60.... | 30, 33 |
| <i>Brockey v. Moore</i> (2003) 107 Cal.App.4th 86..... | 48 |
| <i>Brodeur v. Atlas Entertainment, Inc.</i> | |
| (2016) 248 Cal.App.4th 665 | 57 |
| <i>Charles v. City of Los Angeles</i> (9th Cir. 2012) 697 F.3d 1146 | 39 |
| <i>Colgan v. Leatherman Tool Grp., Inc.</i> | |
| (2006) 135 Cal.App.4th 663 | 48, 50 |
| <i>Collins v. eMachines, Inc.</i> (2011) 202 Cal.App.4th 249 | 49 |
| <i>Commonwealth Energy v. Investor Data Exchange</i> | |
| (2003) 110 Cal.App.4th 26 | 21 |

| | |
|--|----------------|
| <i>Bernardo v. Planned Parenthood Fed'n of Am.</i> | |
| (2004) 115 Cal.App.4th 322 | 37 |
| <i>ComputerXpress, Inc. v. Jackson</i> (2001) 93 Cal.App.4th 993..... | 20 |
| <i>Consumer Advocates v. Echostar Satellite Corp.</i> | |
| (2003) 113 Cal.App.4th 1351 | 48 |
| <i>Consumer Justice Ctr. v. Trimedica Int'l, Inc.</i> | |
| (2003) 107 Cal.App.4th 595 | 21 |
| <i>Dex Media W., Inc. v. City of Seattle</i> | |
| (9th Cir. 2012) 696 F.3d 952 | 44 |
| <i>Dex Media, supra</i> , 696 F.3d at p. 954 | 46 |
| <i>FilmOn.com v. DoubleVerify, Inc.</i> (2017) 13 Cal.App.5th 707 | 57 |
| <i>Garrison v. State of La.</i> (1964) 379 U.S. 64..... | 57 |
| <i>Gertz v. Robert Welch, Inc.</i> (1974) 418 U.S. 323..... | 57 |
| <i>Hall v. Time Warner, Inc.</i> (2007) 153 Cal.App.4th 1337 | 26 |
| <i>Hilton v. Hallmark Cards</i> (9th Cir. 2009) 599 F.3d 894..... | 26 |
| <i>In re Lorenzo C.</i> (1997) 54 Cal.App.4th 1330 | 28 |
| <i>In re Tobacco II Cases</i> (2009) 46 Cal.4th 298..... | 56 |
| <i>Jewett v. Capital One Bank</i> (2003), 113 Cal.App.4th 805 | 23 |
| <i>Kasky v. Nike</i> (2002) 27 Cal.4th 939..... | 30, 38, 43 |
| <i>Keimer v. Buena Vista Books, Inc.</i> | |
| (1999) 75 Cal.App.4th 1220 | 11, 33, 37, 40 |
| <i>Klem v. Access Ins. Co.</i> (2017) 17 Cal.App.5th 595 | 22 |
| <i>Kronemyer v. Internet Movie Database, Inc.</i> | |
| (2007) 150 Cal.App.4th 941 | 26, 34 |

| | |
|---|----------------|
| <i>L.A. Taxi Coop., Inc. v. Indep. Taxi Owners Ass'n of Los Angeles</i> | |
| (2015) 239 Cal.App.4th 918 | 23 |
| <i>Lavie v. Procter & Gamble Co.</i> (2003) 105 Cal.App.4th 496.. | 48, 49 |
| <i>Linear Technology Corp. v. Applied Materials, Inc.</i> | |
| (2007) 152 Cal.App.4th 115 | 48 |
| <i>Mazza v. Am. Honda Motor Co.</i> (9th Cir. 2012) 666 F.3d 581 | 56 |
| <i>Nagel v. Twin Laboratories, Inc.</i> (2003) 109 Cal.App.4th 39 . | 10,22 |
| <i>No Doubt v. Activision Publishing Inc.</i> | |
| (2011) 192 Cal.App.4th 1018 | 24 |
| <i>Parent v. MillerCoors</i> (S.D. Cal. Oct. 26, 2015) | |
| No. 3:15-CV-1204-GPC-WVG, 2015 WL 6455752 | 51, 53 |
| <i>Peel v. Attorney Registration and Disciplinary Com'n of Illinois</i> | |
| (1990) 496 U.S. 91 | 34 |
| <i>Rezec v. Sony Pictures Entm't, Inc.</i> | |
| (2004) 116 Cal.App.4th 135 | 10, 24, 29, 39 |
| <i>Riley v. Nat'l Fed'n of the Blind of N.C., Inc.</i> | |
| (1988) 487 U.S. 781 | 41 |
| <i>Rubin v. Coors Brewing Co.</i> (1995) 514 U.S. 476..... | 34 |
| <i>Rusheen v. Cohen</i> (2006) 37 Cal.4th 1048 | 19 |
| <i>Scott v. Metabolife Int'l, Inc.</i> (2004) 115 Cal.App.4th 404 | 20 |
| <i>Smith v. California</i> (1959) 361 U.S. 147 | 60 |
| <i>Stewart v. Rolling Stone LLC</i> (2010) 181 Cal.App.4th 664 | 26 |
| <i>Stutzman v. Armstrong</i> (E.D. Cal., Sept. 10, 2013) No. 2:13-CV- | |
| 00116-MCE, 2013 WL 4853333 | 26, 27, 45 |

| | |
|---|--------|
| <i>Trimedica, supra</i> , 107 Cal.App.4th 595..... | 22 |
| <i>United States v. Schiff</i> (9th Cir. 2004) 379 F.3d 621 | 43 |
| <i>Vogel v. Felice</i> (2005) 127 Cal.App.4th 1006 | 57 |
| <i>White v. City of Sparks</i> (9th Cir. 2007) 500 F.3d 953 | 35, 44 |

Statutes

| | |
|--|--------|
| Cal. Bus. & Prof. Code § 17200 | 48 |
| Cal. Civ. Code § 1770 subds. (a)(1)-(3), (5) | 49 |
| Cal. Code Civ. Proc. § 425.16 subd. (b)(1)..... | 10, 21 |
| Cal. Code Civ. Proc. § 425.16 subds. (e)(3), (e)(4)..... | 22 |
| Cal. Code Civ. Proc. § 425.17 subds. (c), (d), (e) | 29, 30 |

I. INTRODUCTION

On this appeal, the Court must decide whether the First Amendment gives distributors of expressive works a constitutional right to sell forged art falsely advertising it to consumers as the work of a famous artist.

In December 2010, Sony Music Entertainment, MJJ Productions, Inc., and John Branca, as executor of the estate of Michael Jackson, (together Appellants) released *Michael*, the first posthumous album of Michael Jackson consisting of previously unreleased material. Three of the ten album songs (known as the Cascio tracks) were provided to Appellants by individuals Edward Cascio and James Porte, who claimed that Jackson recorded these songs in the basement of their house in 2007 without any witnesses besides Cascio and Porte. It turned out that these songs were sung by a Jackson impersonator.¹

Before *Michael's* release, multiple Jackson family members and fans informed Appellants that the vocals in the Cascio tracks sounded inauthentic and inconsistent with Jackson's recording style. Appellants conducted their own assessment of the Cascio tracks and purportedly obtained opinions of several producers, musicians and experts that the voice in the Cascio tracks belonged to Jackson. Despite this conflicting evidence, Appellants opted to release the Cascio tracks on *Michael* and attribute them to Michael Jackson. Appellants advertised *Michael* as an album "from" Michael Jackson and sold it with a cover consisting of

¹ Appellants agreed for purposes of this motion that the Cascio tracks are sung not by Jackson. (AOB 24, 42 n.19.)

sixteen depictions of Michael Jackson and the title “Michael” on the front, and a statement on the back that the album songs contained vocal tracks performed by Jackson.

Serova purchased a copy of *Michael* based on Appellants’ representations, and later learned multiple facts suggesting Jackson was not the singer of the Cascio tracks and could not have recorded them in 2007. Serova then hired a forensic audiologist, who concluded that the Cascio tracks’ vocals very likely did not belong to Jackson. Serova shared her expert report with Appellants and asked them to stop selling the Cascio tracks to consumers under Michael Jackson’s name.

Appellants refused to correct the labelling and advertising of *Michael* and the Cascio tracks. In June 2014, Serova sued Appellants for violating California’s Consumers Legal Remedies Act (CLRA) and Unfair Competition Law (UCL). She also sued Cascio, Porte and their production company for fraud and violations of the CLRA and UCL.

Appellants brought an anti-SLAPP motion seeking to strike Serova’s CLRA and UCL claims based on an assertion that *Michael’s* labelling and advertising was activity in furtherance of Appellants’ constitutional speech rights in connection with a public issue. (Cal. Code Civ. Proc. § 425.16 subd. (b)(1).) Appellants argued that Serova could not prevail on her CLRA and UCL claims because the statements on which she based her claims were constitutionally protected noncommercial speech and not misleading as a matter of law.

Appellants conceded in trial court that Jackson may not have been the singer on the Cascio tracks² and subsequently waived Serova's burden to present evidence in support of her case ordinarily imposed by the anti-SLAPP procedure. At the same time, Appellants continued selling *Michael* and the Cascio tracks with attribution to Michael Jackson in music stores around the world. In trial court, Appellants argued they had the right to sell the Cascio tracks with attribution to Jackson even if he did not sing these songs because such false attribution was constitutionally protected speech. Appellants also argued that *Michael's* cover with its sixteen depictions of Jackson and a statement on the back that the album's vocal tracks were performed by Jackson, as well as the video commercial presenting *Michael* as an album "from" Michael Jackson could not mislead a reasonable consumer to believe all songs on the album were sung by Michael Jackson.

The trial court denied the Appellants' anti-SLAPP motion as to the album cover and the video commercial finding them to be commercial speech likely to deceive a reasonable consumer.

The trial court's order should be affirmed. Product labelling and advertising are commercial speech that receives diminished constitutional protection and can be regulated by the CLRA and UCL. (*Nagel v. Twin Laboratories, Inc.* (2003) 109 Cal.App.4th 39, 47-48; *Rezec v. Sony Pictures Entm't, Inc.* (2004) 116 Cal.App.4th 135, 142-143; *Keimer v. Buena Vista Books, Inc.*

² RT 637:22-26 ["Mr. Demko: . . . We are submitting now it may have turned out not to be [Michael Jackson]"].

(1999) 75 Cal.App.4th 1220, 1228-1230.) Advertising of *Michael* as a Michael Jackson album that contains vocal tracks performed by Michael Jackson is clearly deceptive if three of the ten album songs are performed by an undisclosed impersonator instead of Jackson. Moreover, under California law, commercial speech about properties of one's product does not concern a public issue within the meaning of the anti-SLAPP statute. (*Nagel*, at p. 47; *Rezec*, at p. 140.) Therefore, Appellants' false advertising does not fall within the ambit of section 425.16's protection.

II. SUMMARY OF ALLEGATIONS AND PROCEDURAL HISTORY

A. The Cascio Tracks Controversy

Michael is the first posthumous compilation album of previously unreleased songs by recording artist Michael Jackson. *Michael* was released by Appellants in December of 2010, approximately a year and a half after Jackson's death. (CT 1:116 [FAC ¶ 10].)

In the lead-up to its release, *Michael* became a topic of public controversy when many people disputed that Michael Jackson was the singer on three of the ten album songs—"Breaking News," "Monster," and "Keep Your Head Up." (CT 1:116, 118 [FAC ¶ 11, 20].)

"Breaking News," "Monster," and "Keep Your Head Up"—collectively known as the Cascio tracks—were produced by defendants Edward Cascio, James Porte and Angelikson Productions, LLC (together Angelikson Defendants), who claimed that Jackson had recorded the Cascio tracks in the basement of

the Cascio family's house in 2007. (CT 1: 116 [FAC ¶ 11, 12].) After Jackson's death, Angelikson Defendants sold the Cascio tracks to Appellants as Michael Jackson songs. (CT 1:117 [FAC ¶ 14, 16-17].) Appellants decided to release the Cascio tracks on *Michael*. (CT 1:117 [FAC ¶ 17].)

Before *Michael's* release, multiple members of the Jackson family publicly stated that the lead vocalist in the Cascio tracks was not Michael Jackson. Such statements were made by Michael Jackson's brothers Jackie, Jermaine and Randy, his nephews Taj, Taryll and TJ, his daughter Paris, and reportedly his son Prince and mother Katherine. (CT 1:118 [FAC ¶ 20]; 198-204.) Thousands of Michael Jackson fans worldwide also insisted that Jackson was not the singer on the Cascio tracks and petitioned Appellants not to include these tracks on *Michael*.³

In response to the controversy, on November 11, 2010, Howard Weitzman, the attorney for Michael Jackson's estate, released a statement to Jackson's fans addressing the questions that had arisen regarding the authenticity of the Cascio tracks. (CT 1:118 [FAC ¶ 22].) Weitzman's statement relayed numerous findings supporting the authenticity of the tracks, including that six of Jackson's former producers and engineers were invited to listen to *a cappella* versions of the Cascio tracks and "all confirmed that the vocal was definitely Michael," and that two

³ See *Michael Jackson fans unite against some tracks from the new "Michael" album*, PETITIONS24.COM, <https://www.petitions24.com/michael> [petition against the release of the Cascio tracks signed by 39 Michael Jackson fan clubs and 7,648 individuals worldwide] (last accessed Apr. 25, 2018).

unnamed forensic musicologists concluded that the lead vocals on the Cascio tracks “were the voice of Michael Jackson.” (CT 1:118 [FAC ¶ 22]; 2:279-280⁴.) Weitzman’s statement did not disclose that two more people were present at the listening session and vehemently disagreed that Jackson was the singer. (CT 1:119 [FAC ¶ 23], 198-201 ¶¶ 4, 5.)

On December 3, 2010, Appellants released a video advertisement (the “video ad”) for *Michael* in which the album cover was shown and the narrator presented *Michael* as “a brand new album from the greatest artist of all time.” (CT 1:119 [FAC ¶ 24]; Lodged CD, Video No. 1 at 0min 23sec.)⁵

On December 6, 2010, eight days before the release of *Michael*, defendant Cascio made an appearance on Oprah Winfrey’s show, where he addressed the controversy and insisted that the singer of the Cascio tracks was Michael Jackson. (CT 1:119 [FAC ¶ 25].)

Appellants released *Michael* on December 14, 2010. (CT 1:119 [FAC ¶ 26].) The album comprises ten songs, including the three Cascio tracks. (CT 1:147.) *Michael*’s front cover consists primarily of the word “Michael,” a portrait of Michael Jackson, and 15 other images of Michael Jackson recollecting his 1979

⁴ The parties stipulated that this November 11, 2010 email was a true a correct copy of Howard Weitzman’s statement meant for distribution to Michael Jackson fans alleged at FAC ¶ 22. (CT 2:275 ¶ 5(a).)

⁵ Serova lodged a copy of this video with the trial court, and the parties stipulated that it is a true and correct copy. (CT 2:269–70; 275 ¶ 5(c).) At the request of the Court Clerk, Appellants have transmitted a copy of the disc to this Court.

through 1991 recordings. (CT 1:119 [FAC ¶ 27], 147.)⁶ Its back cover lists *Michael's* ten songs, beneath which it states:

This album contains 9 previously unreleased vocal tracks performed by Michael Jackson. These tracks were recently completed using music from the original vocal tracks and music created by the credited producers.

This statement refers to nine previously unreleased vocal tracks instead of the ten songs on the album because one of the songs—"The Way You Love Me"—was previously released in 2004. (CT 1:119 [FAC ¶ 27], 147.) No disclosures regarding the questionable authenticity of the Cascio tracks are made on the cover.

B. Serova's Complaint

In June 2011, Serova purchased a CD of *Michael* relying on Appellants' advertisements of the album. (CT 1:120 [FAC ¶ 30].) Serova later learned numerous facts indicating that Michael Jackson did not sing on the Cascio tracks and could not have recorded them in 2007. (CT 1:120 [FAC ¶ 32].) Among other things, she learned that shortly before Jackson's death in 2009, Angelikson Defendants hired a sound engineer to prepare the Cascio tracks' instrumentals for *future* recording by Jackson. (CT 1:121 [FAC ¶ 32(g)].) Serova also learned that, when asked to produce demos, outtakes, alternate takes and multi-track

⁶ The parties stipulated that these photocopies of Michael's front and back cover are true and correct. (CT 2:275 ¶ 5(b).) For help identifying all 16 images and their references to Michael Jackson's career, see <http://www.npr.org/sections/therecord/2010/11/08/131177343/a-guide-to-almostevery-image-on-the-cover-of-michael-jackson-s-new-album>.

recordings for the Cascio tracks, Angelikson Defendants claimed that the hard drive with these materials had stopped working and that Jackson had instructed them to delete everything. (CT 1:120-121 [FAC ¶ 32(b)].) Moreover, not all people listed in Howard Weitzman's statement as confirming the authenticity of the tracks agreed the voice on the Cascio tracks was "definitely Michael," and some of the named individuals, in fact, expressed concerns that the vocal tracks were inconsistent with Jackson's recording style. (CT 1:120 [FAC ¶ 32(i)].) For example, Jackson's long-time engineer Michael Prince told Appellants that there were "too many musical dead ends" in these tracks for them to be identified as Jackson's. (CT 1:120 [FAC ¶ 32(i)], 204.) Serova then retained forensic audiologist Dr. George Papcun, PhD, who did a comprehensive assessment of the Cascio tracks and concluded that the singer was very likely not Jackson. (CT 1:122 [FAC ¶ 33].)

Serova shared Dr. Papcun's 41-page expert report with Appellants and asked them to stop representing that Michael Jackson sang the Cascio tracks. Appellants refused to do so. (CT 1:125 [FAC ¶ 49].)

Serova sued Appellants and Angelikson Defendants for violation of the CLRA and UCL and Angelikson Defendants additionally for fraud. (CT 1:125-129 [FAC ¶¶ 45-63].) Serova alleged *Michael's* cover, the video ad, Howard Weitzman's statement and Cascio's statements on the Oprah Winfrey show were deceptive because Jackson did not perform the lead vocals on the Cascio tracks. (CT 1:116, 125, 127 [FAC ¶¶ 13, 46, 54].)

C. Appellants' Anti-SLAPP Motion

On February 3, 2016, Appellants moved to strike Serova's CLRA and UCL causes of action under section 425.16 of the California Code of Civil Procedure (the anti-SLAPP statute), asserting that the statements on which Serova based her false advertising claims were made in furtherance of Appellants' constitutional right to free speech in connection with a public issue. (CT 1:151-92.)

Appellants did not argue that Serova was factually wrong or could not prove her case. Instead, they claimed she could not prevail because the representations they made on *Michael's* cover, in the video ad, and in Howard Weitzman's statement were noncommercial speech beyond the reach of consumer protection laws, or, alternatively, not false or misleading as a matter of law even assuming Jackson did not sing the Cascio tracks. (CT 1:165-173.)⁷

On April 18, 2016, the parties agreed to bifurcate Appellants' anti-SLAPP motion to address questions of law raised by it ahead of the factual issues. (CT 2:273-276.) The first phase was to be limited to ruling on Appellants' burden under the first prong of the anti-SLAPP analysis and determining whether the various representations on which Serova based her UCL and CLRA claims constituted noncommercial speech and contained

⁷ Appellants did not challenge Cascio's statement on the Oprah Winfrey show as the basis of Serova's claims. That statement was challenged by Angelikson Defendants' separate anti-SLAPP motion. The parties did not appeal its resolution, and it is not included in the record.

statements that could be found false or misleading *assuming Jackson was not the singer* on the Cascio tracks. (CT 2:274 ¶ 2.) The remaining issues, including Serova's burden to establish a *prima facie* case and each defendant's responsibility for the various representations, were postponed "for one or more subsequent phases, if necessary." (CT 2:275 ¶ 4.) The parties stipulated that, if a subsequent phase were necessary to decide the motion, the parties would meet and confer about whether discovery was necessary for Serova to meet her evidential burden. (CT: 2:276 ¶ 7.) Pursuant to the stipulation, Serova's counsel briefed and the parties argued only the legal questions raised by Appellants' anti-SLAPP motion. (CT 2:290-318, RT 601-650.)

At the motion hearing on December 7, 2016, Appellants conceded that Jackson might have been not the singer on the Cascio tracks. (RT 637:22-26.) However, Appellants maintained that they nonetheless had the right to deceptively sell the tracks as Michael Jackson songs to consumers because the attribution of the tracks to Jackson was constitutionally protected noncommercial speech. (RT 605-607, 641; *see also* RT 650:6-8 [“Mr. Modabber: If we ripped people off and it's noncommercial speech they lose under the statutes that is just the law.”].)

On December 9, 2016, the trial court ruled that Appellants' representations about the Cascio tracks were made in furtherance of their free speech right in connection with a public issue and granted their motion as to Howard Weitzman's statement, finding it noncommercial. (CT 4:892-904.) The court

denied the motion as to the statements on *Michael's* cover and in the video ad, finding them commercial and likely misleading to a reasonable consumer. (CT 4:905-908.)

On January 30, 2017, Appellants filed a notice of appeal of the partial denial of their anti-SLAPP motion. (CT 4:888.) Serova did not cross-appeal the part of the trial court's decision striking Weitzman's statement as a basis of the CLRA and UCL causes of action. Thus, only the statements on *Michael's* cover and in the video ad are subject to this appeal.

III. SEROVA'S MOTION TO DISMISS APPEAL

Following the parties' April 18, 2016 stipulation, the trial court ruled only on the legal issues within the scope of phase one of Appellants' bifurcated anti-SLAPP motion. The trial court resolved the questions of the first phase in a way that was not entirely dispositive of Appellants' motion. Specifically, the court found that Appellants met their burden under the first prong of the anti-SLAPP analysis, but *Michael's* cover and the video ad were commercial speech that were likely to mislead a reasonable consumer. Consequently, the anti-SLAPP procedure required the parties to proceed to phase two and Serova to substantiate her claims based on the actionable statements with evidence. (*See Baral v. Schnitt* (2016) 1 Cal.5th 376, 396 [requiring plaintiff to show that each challenged claim based on protected activity is legally sufficient and factually substantiated].)

Instead of proceeding to the second phase of their motion, Appellants initiated this appeal. Serova responded with a motion to dismiss the appeal arguing the appeal was premature because

Appellants' anti-SLAPP motion had not been fully resolved. In her motion to dismiss, Serova expressed concern that, after this appeal had been heard on the merits, Appellants might have demanded litigation of the second phase of their anti-SLAPP motion in accordance with the rules of Civil Procedure, and then appealed again, which would have delayed the case and violated the rule against interlocutory appeals. (Resp'ts Mot. to Dismiss Appeal at p. 12.) Appellants opposed dismissal, stating that they "would not prosecute the Anti-SLAPP Motion further" and that this appeal was "the end of the line" for their anti-SLAPP motion. (Appellants' Opp'n at p. 9.) The Court deferred ruling on the motion to the Panel.

Insofar as Appellants have waived their right to litigate the second phase of their anti-SLAPP motion by pledging not to prosecute it further, Serova withdraws her motion to dismiss and agrees that the appeal should be heard on the merits.

IV. STANDARD OF REVIEW

"A SLAPP suit—a strategic lawsuit against public participation—seeks to chill or punish a party's exercise of constitutional rights to free speech and to petition the government for redress of grievances. The Legislature enacted ... section 425.16—known as the anti-SLAPP statute—to provide a procedural remedy to dispose of lawsuits that are brought to chill the valid exercise of constitutional rights." (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055-1056.) To determine whether a cause of action should be stricken under the anti-SLAPP statute, section 425.16 establishes a two-part test. First, the court must

decide whether the defendant has satisfied its burden of showing that the challenged cause of action arose from the defendant's protected activity. (*Baral, supra*, 1 Cal.5th 376, 384.) “If the defendant makes the required showing, the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success.” (*Ibid.*)

A Court of Appeal reviews an order denying a special motion to strike under section 425.16 de novo. (*Scott v. Metabolife Int'l, Inc.* (2004) 115 Cal.App.4th 404, 413.) “Whether section 425.16 applies and whether the plaintiff has shown a probability of prevailing are *both* reviewed independently on appeal.” (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 999, *italics added.*)

Due to the parties’ stipulation limiting the scope of the litigated issues and Appellants’ subsequent waiver of Serova’s evidential burden, the Court’s second-step inquiry is limited to whether Serova’s claims are legally sufficient.

V. ARGUMENT

- A. Serova’s claims do not arise from a protected activity because Appellants’ statements on Michael’s cover and in the video ad constitute commercial speech about Appellants’ product that does not satisfy the “issue of public interest” requirement.

Code of Civil Procedure section 425.16 protects any act “in furtherance of [a] person's right of petition or free speech under [the] United States Constitution or the California Constitution in connection with a public issue.” (Cal. Code Civ. Proc. § 425.16 subd. (b)(1).) Where, as here, the challenged speech was not connected with a governmental proceeding, an act in furtherance

of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue includes:

(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.

(Cal. Code Civ. Proc. § 425.16 subds. (e)(3), (e)(4).)

For speech to come within these prongs of section 425.16 subdivision (e), it must be made “in connection with a public issue or an issue of public interest.” (*Consumer Justice Ctr. v. Trimedica Int'l, Inc.* (2003) 107 Cal.App.4th 595, 600-01 [“If ... the defendant’s alleged acts fall under the third or fourth prongs of subdivision (e), there is an express ‘issue of public interest’ limitation.”].) The determination of whether speech concerns an issue of public interest requires “examination of the specific nature of the speech rather than the generalities that might be abstracted from it.” (*Commonwealth Energy v. Investor Data Exchange* (2003) 110 Cal.App.4th 26, 34.)

The trial court found that Appellants’ statements on *Michael’s* cover and in the video ad were made in connection with an issue of public interest. The trial court erred in so finding because commercial speech about the properties of one’s own product does not satisfy the public interest requirement.⁸

⁸ Prevailing plaintiff need not cross-appeal to preserve disagreement with the trial court’s reasoning on the first prong of

In *Trimedica, supra*, 107 Cal.App.4th 595, plaintiff sued the manufacturer of breast enlargement dietary supplement Grobust under the UCL and CLRA for false advertisements stating that Grobust “offers a revolutionary breakthrough that provides a 100% natural alternative to breast implants” and “[c]laims of a breast enlargement of one half inch in 45 days have been substantiated.” (*Id.* at p. 599.) Defendant Trimedica brought an anti-SLAPP motion claiming that herbal dietary supplements were a subject of public interest; therefore, its statements about Grobust were protected by the anti-SLAPP statute. (*Id.* at p. 601.) The Court of Appeal refused to afford Trimedica’s advertisements protection based on their connection to the general topic of herbal supplements. The court explained:

Trimedica's speech is not about herbal supplements in general. It is commercial speech about the specific properties and efficacy of a particular product, Grobust. If we were to accept Trimedica's argument that we should examine the nature of the speech in terms of generalities instead of specifics, then nearly any claim could be sufficiently abstracted to fall within the anti-SLAPP statute.

(*Ibid.*)

In *Nagel, supra*, 109 Cal.App.4th 39, plaintiff brought UCL and CLRA claims against Twin Labs, a manufacturer of another dietary supplement, for stating that its product was “standardized for 6% ephedrine,” when the ephedrine content actually differed dramatically between lots. (*Id.* at pp. 42-43.)

the anti-SLAPP motion. (*Klem v. Access Ins. Co.* (2017) 17 Cal.App.5th 595, 609.)

Twin Labs moved to strike plaintiff's complaint under section 425.16, but the Court of Appeal found that Twin Labs' list of product ingredients on labels and the website was not protected under the anti-SLAPP statute. (*Id.* at pp. 46-47.) Examining the specific nature of the speech under *Trimedica*, the court held that the list of supplement ingredients was "not participation in the public dialogue on weight management issues," but rather "designed to further Twin Labs' private interest of increasing sales for its products." (*Id.* at pp. 47-48; *see also Metabolife, supra*, 115 Cal.App.4th at p. 423 ["advertising by a manufacturer . . . about the safety and efficacy of its . . . product . . . for the profit-generating purpose of selling that product to the consuming public . . . does not concern an issue of public interest"]; *L.A. Taxi Coop., Inc. v. Indep. Taxi Owners Ass'n of Los Angeles* (2015) 239 Cal.App.4th 918, 927-929 [finding advertisement of taxicab services not a matter of public interest because defendants sought not to participate in public dialogue about the taxicab industry but to sell their services].)

This Court reached the same conclusion in *Jewett v. Capital One Bank* (2003), 113 Cal.App.4th 805, holding defendants' allegedly misleading credit card solicitations did not qualify for protection under section 425.16, despite the defendants' contention that their speech concerned an important matter of consumer credit. (*Id.* at p. 815.) This Court found that the solicitations were designed not "to inform the public of an issue of public interest," but "solely for the purpose of commercial activity and that to allow such solicitations the protection of

section 425.16 by virtue of the fact that they touch upon matters of general public interest would eviscerate the unfair business practices laws.” (*Ibid.*)

The same rule applies to media defendants’ advertising of their media products. In *Rezec, supra*, 116 Cal.App.4th 135, a Court of Appeal addressed whether reviews of Sony Pictures’ films fabricated and published by Sony under the name of a made-up critic qualified for protection under the anti-SLAPP statute. (*Id.* at pp. 137-138.) The court answered the question in the negative, concluding that, under *Nagel*, the anti-SLAPP statute did not apply to Sony’s reviews because they constituted commercial speech and such speech did not further Sony’s constitutional right to free speech in connection with a public issue. (*Id.* at pp. 140-144.) In reaching its conclusion, the court noted that neither the public’s interest in films nor the fake reviews’ wide distribution rendered the reviews a matter of public interest. (*Id.* at p. 143.)

Under these authorities, commercial speech about the properties of one’s product does not concern an “issue of public interest” within the meaning of the anti-SLAPP statute. As discussed below, Appellants statements on *Michael’s* packaging and in the video ad constitute commercial speech about the properties of Appellants’ product, the *Michael* album. Therefore, these statements do not qualify as protected speech.

Relying on *No Doubt v. Activision Publishing Inc.* (2011) 192 Cal.App.4th 1018, the trial court concluded otherwise, as it found the statements on the album cover and in the video ad to

be a matter of public interest “solely because of the fame that the artist [Michael Jackson] achieved.” (CT 4:901.) In *No Doubt*, rock band No Doubt sued a videogame publisher for violation of the right of publicity and unfair competition based on the publisher’s use of computer-generated images of No Doubt members in the videogame. (*Id.* at p. 1022.) Reviewing the game publisher’s anti-SLAPP motion, the court found the use of No Doubt’s likenesses in the video game to be a matter of public interest “because of the widespread fame No Doubt has achieved.” (*Id.* at p. 1027.) The trial court in the present case reasoned that “Michael Jackson’s professional standing and accomplishments” likewise “created legitimate and widespread attention to the release of a new album.” (CT 4:901.)

Superficially, the two cases appear comparable. However, under *Rezec*, the fact that the public is interested in Michael Jackson albums is insufficient to turn statements about the album *Michael* into speech on an issue of public interest within the meaning of section 425.16. (*Rezec, supra*, 116 Cal.App.4th at p. 143 [rejecting Sony’s argument that, because the public is interested in films, film advertisements necessarily meet “an issue of public interest” standard within the meaning of the anti-SLAPP statute].) Indeed, if the determination of public interest turned on the popularity of the product, false advertising of the most popular products that elicits the widest response and misleads the most consumers would enjoy the strongest protection. (*See ibid.* [“Such a rule would simply . . . reward the most notorious of false advertisers.”].)

No Doubt is distinguishable because it did not involve commercial speech about the defendant's product. The challenged speech there—portrayal of celebrities in the videogame—was noncommercial speech about celebrities. Here, the challenged statements that *Michael* is an album from Michael Jackson containing Michael Jackson's vocal tracks are representations about the Appellants' product. Under *Trimedica*, the court must focus on the specific nature of the speech, rather than generalities that may be abstracted from it, and the specific nature of Appellants' speech was the presentation of their product to consumers rather than participation in any discussion of Jackson or his career.

The cases Appellants rely on in their motion and Opening Brief, like *No Doubt*, did not arise from defendants' speech about their own products. (*Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337 [plaintiff's claims based on her portrayal in a TV show about Marlon Brando]; *Hilton v. Hallmark Cards* (9th Cir. 2009) 599 F.3d 894, 906-08 [claims based on the use of Paris Hilton's quote inside a greeting card]; *Kronemyer v. Internet Movie Database, Inc.* (2007) 150 Cal.App.4th 941, 948-49 [claims based on IMDb's website listing of credits for a third-party's movie]; *Stewart v. Rolling Stone LLC* (2010) 181 Cal.App.4th 664, 677-78 [claims based on the magazine's editorial about a music band]; *Stutzman v. Armstrong* (E.D. Cal., Sept. 10, 2013) No. 2:13-CV-00116-MCE, 2013 WL 4853333 at *7 [claims based on famous cyclist's denial of the use of doping in autobiographies and interviews].)

The only instance of defendants' speech about the properties of their product that a court found to concern an issue of public interest involved statements on book covers and promotional materials made by the defendant publisher in *Stutzman, supra*, 2013 WL 4853333. In that case, consumers sued famous cyclist Lance Armstrong and the publishers of his autobiographies over false statements concerning his use of doping. (*Id.* at *1-2.) The case was brought in the aftermath of Armstrong's public admission of the use of doping and his fall from grace in sports. (*Ibid.*) The plaintiffs alleged that Armstrong's and his publishers' claims in books and interviews denying his use of doping, as well as the publishers' statements on book covers and promotional materials characterizing the books as "nonfiction biography" about "five time Tour de France winner" mislead the plaintiffs into buying the books by conveying false information that Armstrong had achieved his success without the use of performance enhancing drugs. (*Id.* at *17.) Addressing the first prong of the defendants' anti-SLAPP motions, the district court analyzed all of the challenged statements together and concluded that Armstrong's fame made him a topic of public interest, bringing all of the challenged statements within the ambit of section 425.16. (*Id.* at *6-7.) The district court was right in finding statements Armstrong and his publishers made about his use of doping in the books and interviews to be protected by the statute. However, the court failed to properly distinguish under California law statements *about* the books made by the publishers on the book covers and

promotional materials. The opinion does not quote the promotional statements in full, making it difficult to analyze the specific nature of the speech, but to the extent the statements talked about the defendants' product (calling the books "nonfiction biography"), instead of Armstrong's persona and career, these statements did not meet the standard for protected speech under the anti-SLAPP statute. (See *Rezec, supra*, 116 Cal.App.4th at p. 144 [suggesting that labelling a book "autobiographical" would be commercial speech not in furtherance of the advertiser's constitutional rights].) *Stutzman* is an unpublished district court opinion and does not create a binding precedent in California.

Appellants also bring up section 425.17 subdivision (c) exempting commercial speech about defendant's own products from the ambit of the anti-SLAPP protection, and the exception to this exemption made for media defendants under section 425.17 subdivision (d) as the grounds for holding their speech protected. (AOB 28.) Discussion of section 425.17 is simply a red herring. Section 425.17 subdivision (d) operates only as an exception to subdivision (c) and is not relevant unless the plaintiff establishes applicability of subdivision (c). (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1345 ["One who claims an exemption from a general statute has the burden of proving that he or she comes within the exemption."].) Serova did not invoke section 425.17 subdivision (c)—she agrees it is inapplicable to media companies. However, this does not mean that any speech by a media company automatically satisfies prong one of the anti-

SLAPP framework; and by saying that section 425.17 subdivision (d) is “essentially dispositive of step one of the anti-SLAPP analysis,” Appellants misconstrue the law. As the trial court correctly recognized (CT 4:900), this subdivision means only that media defendants’ speech about their products *may* be entitled to protection if they establish that it concerns an issue of public interest under prong one of the standard anti-SLAPP procedure.⁹

For example, *Rezec, supra*, 116 Cal.App.4th 135, was decided shortly after section 425.17 had been enacted, yet the Court of Appeal there found that Sony’s film advertisements did not concern an issue of public interest under step one of the standard anti-SLAPP analysis. (*Id.* at pp. 140-144; *see also All One God Faith, Inc. v. Organic & Sustainable Indus. Standards, Inc.* (2010) 183 Cal.App.4th 1186, 1210, 1219 [finding section 425.17 subdivision (c) inapplicable, yet holding trade association’s speech did not concern an issue of public interest because it was commercial speech about the association members’ products].)

In sum, Appellants’ statements about *Michael* would be protected only if they were made in furtherance of Appellants’ constitutional speech right in connection with an issue of public interest within the meaning of section 425.16. On that question, *Trimedica, Nagel, Metabolife, L.A. Taxi, Jewett* and *Rezec* control:

⁹ Section 425.17 subdivision (d) also gives such defendants an advantage of immediate appeal if the court denies their motion under the standard two-step anti-SLAPP procedure, in contrast to no right of appeal when a motion is denied under section 425.17 subdivision (c). (*See* § 425.17 subd. (e).)

Appellants' commercial speech about the properties of their product does not satisfy this requirement.

B. Appellants' statements on *Michael's* cover and in the video ad are commercial and therefore actionable under the CLRA and UCL.

Appellants contend that should their speech be deemed to concern an issue of public interest, Serova cannot meet her burden under the second anti-SLAPP prong because the challenged statements on *Michael's* cover and in the video ad are noncommercial and therefore not actionable under the CLRA and UCL. However, Appellants' statements are clearly commercial speech.

The California Supreme Court established the test to determine whether a particular statement qualifies as commercial speech that is subject to laws aimed at preventing false advertising in *Kasky v. Nike* (2002) 27 Cal.4th 939. In that case, defendant Nike responded to negative publicity concerning working conditions in its factories with press releases, letters to newspapers and university leaders, and advertisements that allegedly misrepresented Nike's treatment of its workers. (*Id.* at pp. 947-948.) Kasky sued Nike for UCL violations based on these public statements. (*Id.* at pp. 945, 948.) The trial court sustained Nike's demurrer on the grounds that Kasky's claims were barred by the First Amendment and the Court of Appeal affirmed. (*Id.* at p. 948.)

Drawing on U.S. Supreme Court authority and indicia of commercial speech articulated in *Bolger v. Youngs Drug Products Corp.* (1983) 463 U.S. 60, 66–67, the California Supreme Court

held that to decide whether a statement is commercial speech that may be subjected to false advertising laws, a court should consider: (1) the speaker, (2) the intended audience, and (3) the content of the message, explaining:

In typical commercial speech cases, the speaker is likely to be someone engaged in commerce—that is, generally, the production, distribution, or sale of goods or services—or someone acting on behalf of a person so engaged, and the intended audience is likely to be actual or potential buyers or customers of the speaker's goods or services, or persons acting for actual or potential buyers or customers, or persons (such as reporters or reviewers) likely to repeat the message to or otherwise influence actual or potential buyers or customers. ...[¶]

[T]he factual content of the message should be commercial in character. In the context of regulation of false or misleading advertising, this typically means that the speech consists of representations of fact about the business operations, products, or services of the speaker (or the individual or company that the speaker represents), made for the purpose of promoting sales of, or other commercial transactions in, the speaker's products or services.

(*Id.* at pp. 960-961.)

Applying this test, the court deemed Nike's statements commercial. Nike qualified as a commercial speaker because it made and sold athletic apparel. (*Id.* at p. 963.) Nike's statements were directed to a commercial audience because they were intended to reach and influence actual and potential purchasers of Nike's products. (*Ibid.*) And Nike's statements were representations of fact of a commercial nature because Nike was making factual representations about its own business operations. (*Ibid.*)

1. The statements on *Michael's* cover and in the video ad are commercial under *Kasky*.

The three challenged statements on *Michael's* cover—the title, the cover image, and the statement of attribution of the vocals on the back cover—are each commercial under *Kasky*. The speakers—Appellants—are engaged in the production, sale, and distribution of *Michael*.¹⁰ The intended audience is prospective buyers of the album. And the factual content of the message is commercial in character as it consists of a representation of fact about the Appellants' product, made for the purpose of promoting sales of that product. As further discussed below, the album's imagery, its title, and the express statement of attribution of vocal tracks on the back cover all convey that the album consists of songs vocally performed by Michael Jackson. Appellants had strong economic incentives to attribute the songs to Jackson. Common sense dictates that *Michael* derived all or nearly all of its value from buyers' belief that Michael Jackson, one of the best-selling musical artists of all time, sang its songs. The sixteen images of Jackson on the album's cover and its name—*Michael*—also strongly suggest that Jackson's purported performance of the songs was the album's primary selling point. As the challenged

¹⁰ *Michael* was announced as an album released by Sony Music's label Epic Records in conjunction with the Estate of Michael Jackson. (<http://www.michaeljackson.com/news/much-anticipated-new-album-king-pop-michael-be-released-december-14/> [https://perma.cc/9QGK-Z4TZ].) *Michael's* cover lists copyrights of Sony Music Entertainment and MJJ Productions, Inc. (CT 1:147; for a better-quality image, see [https://www.dropbox.com/s/buxhbk0lt5hx6sy/Michael CD cover.pdf](https://www.dropbox.com/s/buxhbk0lt5hx6sy/Michael%20CD%20cover.pdf).)

statements on *Michael's* cover satisfy the three elements of the *Kasky* test, they are commercial.

California courts routinely deem factual statements on the packaging and labels of commercial products concerning the products themselves to be commercial speech. (See *Keimer, supra*, 75 Cal.App.4th 1220, 1228-1230 [drawing “commonsense conclusion” that statements about inflated investment returns on the covers of investment books “were designed with a single purpose in mind, to sell the books” and thus were commercial]; *Nagel, supra*, 109 Cal.App.4th at pp. 48-49 [holding the description of ingredients on the label of a nutritional supplement was commercial speech]; *Benson v. Kwikset Corp.* (2007) 152 Cal.App.4th 1254, 1268 [holding “Made in U.S.A.” and similar labels on locksets were commercial speech].)

Appellants rely on the United States Supreme Court’s definition of “pure commercial speech” as speech that “does no more than propose a commercial transaction.” (*Bolger, supra*, 463 U.S. 60, 66.) They argue statements on *Michael's* cover do more than propose a commercial transaction because (1) the title and cover image are part of the expressive work, and (2) the attribution of the Cascio tracks to Michael Jackson is informational in nature and imparts meaning to the songs as “a message from the artist.” (AOB 33-35.)

However, the Supreme Court’s standard for commercial speech was never so narrowly limited. In *Bolger*, the Court found informational pamphlets promoting the sale of contraceptives to be commercial speech, notwithstanding that they were more than

proposals to engage in commercial transactions and contained discussions of important public issues. (*Bolger*, 463 U.S. at pp. 66-68.). In other cases, the Court likewise treated factual representations about defendants' own products or services directed at consumers as commercial speech, consistently with the test later formulated by *Kasky*. (See *Peel v. Attorney Registration and Disciplinary Com'n of Illinois* (1990) 496 U.S. 91, 99-100 [analyzing statements on attorney's letterhead relaying the attorney's professional qualifications as commercial speech]; *Rubin v. Coors Brewing Co.* (1995) 514 U.S. 476, 481 [accepting that information on beer labels, including their alcohol content, was commercial speech].) Accordingly, that *Michael's* cover statements convey information about the album to consumers does not preclude them from being commercial—it is what *makes* them commercial.

Kronemyer, supra, 150 Cal.App.4th 941, cited by Appellants in support of the argument that informational statements are protected speech, is distinguishable. The speech there—movie credits on IMDb's website—did not concern any commercial product of IMDb and consisted of IMDb's free information available to all Internet users about movies of others. (*Id.* at pp. 948-949.) The speech on *Michael's* cover, in contrast, was made by the producer and distributor of the album for the purpose of selling the album.

Further, contrary to Appellants' contention (AOB 34), the album's title, *Michael*, and cover image containing sixteen depictions of Michael Jackson are not a part of the album's

expressive work. They bear no relation to the album's expressive work other than identifying the source of the songs to a consumer. If, as Appellants agreed for this motion, the Cascio tracks were *not* sung by Jackson, the album's title and cover image bear no relation to the Cascio tracks at all. Moreover, *Michael's* title and cover image were selected not by Jackson (who was then already dead), or the real singer of the Cascio tracks (with whom Appellants did not collaborate). The title and cover image were chosen by Appellants—Jackson's estate executor, record company and label—who packaged the album for sale. Their choice was dictated by the need to make the album appealing to the consuming audience of Jackson fans and had nothing to do with the recording "artist's expression." (AOB 34.)

It is true that the image selected by Appellants for the album cover was an expression by the visual artist who had created that image. But Serova's suit does not burden that artist's protected right to display, license, or sell his artwork. Rather, Serova seeks to prevent Appellants from using that artwork to increase sales of the Cascio tracks—products completely unrelated to the artwork. This case is readily distinguishable from *White v. City of Sparks* (9th Cir. 2007) 500 F.3d 953 and *Bery v. New York* (2d Cir. 1996) 97 F.3d 689, which addressed government regulations restricting artists' rights to sell *their own paintings*.

Next, Appellants' contention that attribution of the Cascio tracks to Jackson "imparts meaning to the songs because it is a

message” from Jackson (AOB 34)¹¹ makes no sense if Jackson is not the singer of these songs, as Appellants stipulated. If the artist’s identity is a lie, whatever meaning it imparts on the songs is false and has no constitutional value.

Finally, Appellants argue that attribution of the Cascio tracks to Jackson on *Michael’s* cover is noncommercial because the public controversy around the Cascio tracks centered on whether these tracks should be included in the canon of Jackson’s work, and not on economic matters. (AOB 35.) But even though the place of the Cascio tracks in Jackson’s canon of work may have been discussed by the public, Appellants’ statements on *Michael’s* cover did not constitute participation in that discussion. Rather, they described the contents of Appellants’ product to the audience of its buyers. Under *Kasky*, such statements are plainly commercial.

2. The statement in the video ad is commercial under *Kasky*.

The statement in the video ad describing *Michael* as “a brand new album from the greatest artist of all time” is a traditional advertisement that is commercial under *Kasky*. The speakers—Appellants—were engaged in *Michael’s* production, sale, and distribution. The video ad’s intended audience was potential buyers of the album. And the statement consists of

¹¹ Appellants similarly argue that “the songs would have less meaning as a form of Michael Jackson’s self-expression if the songs were not attributed fully to him” (AOB 37), but they cannot be a form of Jackson’s self-expression if he didn’t sing them. What Appellants cannot admit is that the songs would have no commercial value if not attributed to Jackson.

factual representations about the source and nature of the speakers' product—*Michael*—to promote sales of the album.

Appellants argue that the video ad's statement presenting *Michael* as an album "from" Michael Jackson was noncommercial because they could not verify its truth. (AOB 39-40.) However, under Appellants' own authorities, the speech only needs to be *objectively* verifiable, i.e. be a statement of fact rather than a statement of opinion. (*Compare Bernardo v. Planned Parenthood Fed'n of Am.* (2004) 115 Cal.App.4th 322, 348 [holding plaintiff's claims challenged not factual assertions, but defendant's statements of opinion about the link between abortions and breast cancer that was the subject of "[t]wo schools" of "scientific debate"] *with Keimer, supra*, 75 Cal.App.4th 1220, 1224 [advertisements were commercial speech where defendant misrepresented the "verifiable fact" that the investment club's actual return rate was lower than advertised].) Unlike in *Bernardo*, where the truth about the link between abortions and breast cancer could not be verified by *anyone* at the time of the suit, and like in *Keimer*, where the inflation of investment returns was *objectively* verifiable, the identity of the singer of the Cascio tracks here was objectively verifiable because it was known at least to Angelikson Defendants who witnessed the recording of the vocals. Appellants acknowledged as much. (RT 603:27-604:1 ["Mr. Modabber: . . . Cascio, Porte and Angelikson had an exclusive knowledge of the fact that Jackson did not perform the songs."].)

Appellants also bring up policy justifying regulation of commercial speech because it is “more easily verifiable by its disseminator,” and contend that with the Cascio tracks, this was not the case. (AOB 39 [citing *Kasky, supra*, 27 Cal.4th at p. 955.]) But this certainly *was* the case: Appellants were in a better position than album buyers to verify whether Jackson sang the Cascio tracks. Appellants could have extensively questioned Angelikson Defendants about the history and recording sessions of the Cascio tracks, inquired into the copyright registrations of the Cascio tracks, demanded that Angelikson Defendants produce the Cascio tracks’ demos, early and alternate versions, dated music sheets and lyrics sheets as the proof of the songs’ authenticity, and spoken to musicians and engineers whom Angelikson Defendants hired to work on the Cascio tracks before and after Jackson’s death. Consumers, on the other hand, did not have access to most of this evidence. This further supports the conclusion that Appellants’ attribution of the Cascio tracks to Jackson was commercial speech.

3. The statements on *Michael’s* cover and in the video ad are not adjunct or incidental to the Cascio tracks.

Appellants claim that even if the statements on the album cover and in the video ad are commercial, they should nevertheless be protected as speech “adjunct” or “incidental” to the protected contents of the *Michael* album. (AOB 35-36, 38.)

To the extent necessary to safeguard the ability to truthfully promote protected speech, courts treat *truthful* advertisements for protected expressive works as adjunct or

incidental to the protected work, and thus entitled to the same First Amendment status as the advertised work. (*Charles v. City of Los Angeles* (9th Cir. 2012) 697 F.3d 1146, 1153-1156.) This exception does not apply here because it only protects advertising that accurately reflects the content of a protected work.

For example, in *Rezec, supra*, 116 Cal.App.4th 135, Sony argued its film advertisements containing a fictitious critic's favorable opinions of the films were protected by the First Amendment because the films themselves were protected noncommercial speech. (*Id.* at pp. 141-142.) The California Court of Appeal rejected Sony's position, explaining:

Had the advertisements here been 'merely ... adjunct[s] to the exhibition of the film[s]', such as by using photographs of actors in the films, Sony would have a point because, just as the films are noncommercial speech, so is an advertisement reflecting their content.

But in this case, the advertisements did not reflect any character or portion of the films. Rather, they contained a fictitious critic's favorable opinion of the films. As such, the advertisements constitute commercial speech and are subject to regulation under consumer protection laws.

(*Id.* at 142-143.)

Appellants mischaracterize *Rezec* as affording protection to any advertisement that "describes" (rather than merely accurately reflects) the protected work. (AOB 38.) But *Rezec* expressly rejected such an "absolutist approach" under which "every film advertisement, no matter how false, would be outside the scope of consumer protection laws." (*Id.* at pp. 142, 144.)

Likewise, in *Charles, supra*, 697 F.3d 1146, the Ninth Circuit vehemently rejected the categorical contention that

truthful advertisements for expressive works are inherently noncommercial speech. Concerning the adjunct and incidental use exceptions, the court explained:

Doctrines extending noncommercial status from a protected work to advertising for that work are justified only to the extent necessary to safeguard the ability to truthfully promote protected speech. ... Appellants' proposed categorical rule would radically enlarge the recognized exceptions to the First Amendment's limited protection for advertising. Such a rule would place truthful advertisements for books, films, video games, topless dancing, and all other forms of noncommercial expression beyond the reach of commercial speech regulations. No court has ever suggested that such a broad exception to the commercial speech doctrine is required, and Appellants have presented no cause for us to so hold.

(*Id.* at p. 1156.)

In *Keimer, supra*, 75 Cal.App.4th 1220, the California Court of Appeal refused to extend the “adjunct” or “incidental” use exception to statements made on book and videotape covers that reiterated false statements in the protected books and videotapes. (*Id.* at p. 1231-1232.) The falsity of the statements overrode the fact that the statements repeated content from the protected works.

Under these authorities, Appellants' challenged statements do not qualify for the adjunct or incidental use exception because they do not accurately reflect *Michael's* songs, but mislead as to their origin.

4. The statements on *Michael's* cover and in the video ad are not inextricably intertwined with the Cascio tracks.

Appellants also argue that the challenged statements on *Michael's* cover are inextricably intertwined with the Cascio tracks. (AOB 36-38.) Commercial speech is rarely “inextricably intertwined” with protected speech; only if there is legal or practical compulsion to consider the two kinds of speech as inseparable will the principle apply to confer enhanced protection for commercial speech. This doctrine does not apply here, as there is nothing inextricable between the noncommercial contents of the Cascio tracks and Appellants’ attribution of the tracks to Michael Jackson.

In *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.* (1988) 487 U.S. 781, the United States Supreme Court addressed whether a state statute requiring charitable fundraisers to tell donors the percentage of funds they collected that historically went to charity was subject to strict scrutiny—the test for restrictions on fully protected speech—or the more deferential standard for restrictions on commercial speech. (*Id.* at pp. 784-786, 795.) Assuming, without deciding, that the speech compelled by the statute was commercial in the abstract, the Court held that such speech does not retain “its commercial character when it is inextricably intertwined with otherwise fully protected speech.” (*Id.* at p. 796.) The Court explained that “in deciding what level of scrutiny to apply to a compelled statement” it needed to assess “the nature of the speech taken as a whole and the effect of the compelled statement thereon.” (*Ibid.*) Assessing charitable

solicitations as a whole, the Court found that the commercial aspects of charitable solicitations are inextricably intertwined with charities' protected informative and persuasive speech because "without solicitation the flow of such information and advocacy would likely cease." (*Ibid.*) The Court concluded:

Thus, where, as here, the component parts of a single speech are inextricably intertwined, we cannot parcel out the speech, applying one test to one phrase and another test to another phrase. Such an endeavor would be both artificial and impractical. Therefore, we apply our test for fully protected expression.

(*Ibid.*)

The following year in *Board of Trustees of State Univ. of New York v. Fox* (1989) 492 U.S. 469, the U.S. Supreme Court made clear that *Riley* was a special case and reiterated that the inextricably intertwined principle was a narrow exception. *Fox* dealt with a state university's attempt, by resolution, to bar campus Tupperware parties where students sold housewares (commercial speech) and discussed home economics (noncommercial speech). (*Id.* at pp. 471-474.) The students challenging the resolution argued that the commercial and noncommercial aspects of the Tupperware parties were inextricably intertwined under *Riley*. (*Id.* at p. 474.) The Court disagreed, explaining:

[In *Riley*] of course, the commercial speech (if it was that) was "inextricably intertwined" because the state law required it to be included. By contrast, there is nothing whatever "inextricable" about the noncommercial aspects of these presentations. No law of man or of nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares. Nothing in the resolution prevents the speaker

from conveying, or the audience from hearing, these noncommercial messages, and nothing in the nature of things requires them to be combined with commercial messages.

(*Ibid.*, italics added.)

Following *Fox*, the California Supreme Court and the Ninth Circuit have rejected similar attempts to characterize commercial and noncommercial speech as inextricably intertwined where there was no legal or practical compulsion to combine them. In *Kasky, supra*, 27 Cal.4th 939, Nike argued that the commercial elements in its allegedly deceptive speech (factual representations about its labor practices) were inextricably intertwined with noncommercial elements (expressions of opinion about economic globalization). (*Id.* at pp. 966-967.) The California Supreme Court disagreed because: “No law required Nike to combine factual representations about its own labor practices with expressions of opinion about economic globalization, nor was it impossible for Nike to address those subjects separately.” (*Id.* at p. 967.) Similarly, in *United States v. Schiff* (9th Cir. 2004) 379 F.3d 621, the Ninth Circuit found the expressive and political portions of the book *The Federal Mafia* were not inextricably intertwined with its deceptive commercial elements because the author could “relate his long history with the IRS and explain his unorthodox tax theories without simultaneously urging his readers to buy his products.” (*Id.* at pp. 627, 629.)

Under these authorities, Appellants’ statements naming Jackson as the performer of the Cascio tracks are not inextricably intertwined with the protected expressive elements of the Cascio tracks because no law of man or nature required Appellants to

combine the Cascio tracks with false representations that Michael Jackson performed those tracks: Appellants were free to sell the Cascio tracks without claiming that Michael Jackson performed them.

In contrast, in *Dex Media W., Inc. v. City of Seattle* (9th Cir. 2012) 696 F.3d 952, the Ninth Circuit found yellow pages phone directories' commercial elements (paid advertisements) were inextricably intertwined with their noncommercial elements (telephone listings and community information) for purposes of deciding which First Amendment standard of review governed a Seattle ordinance that imposed substantial conditions and costs on the distribution of yellow pages. (*Id.* at pp. 953, 962-965.) The court began by readily finding yellow pages, considered as a whole (since the ordinance regulated them as a whole), are noncommercial. (*Id.* at pp. 957-960, 962.) As an additional reason, the court deemed phonebooks' commercial and noncommercial elements inextricably intertwined because economic reality generally compels phone book publishers to publish advertisements to sustain phonebooks' noncommercial elements. (*Id.* at p. 963.)

Appellants cite two similar cases in which plaintiffs challenged city ordinances restricting the sale of expressive goods and services, *White, supra*, 500 F.3d 953 and *Anderson v. City of Hermosa Beach* (9th Cir. 2010) 621 F.3d 1051. In those cases, the sale of expressive goods and services was intertwined with the expressive content of the goods or services themselves, and therefore entitled to the same degree of First Amendment

protection as the expressive goods or services. (See *White*, at pp. 954-957 [finding paintings and their sale protected speech]; *Anderson*, at pp. 1062-1063 [finding tattoos and their sale protected speech].) This ensures that expressive goods and services are not indirectly burdened by restrictions on their sale.

Riley, *Dex Media*, *White*, and *Anderson* are distinguishable because they addressed regulations that burdened both the commercial and noncommercial elements of mixed speech, where it was not legally or practically feasible to separate the two kinds of speech. In *Riley*, the regulation injected a compelled statement into a protected charitable solicitation. In *Dex Media*, the regulation imposed substantial conditions and costs on the distribution of yellow pages as a whole. And in *White* and *Anderson*, the regulations prohibiting the sale of expressive goods or services would have effectively stopped the expressive activity altogether. There is no such problem here. Applying the UCL and CLRA here would not burden the expressive elements of the Cascio songs themselves but would only preclude Appellants from selling them deceptively.

Appellants dispute this straightforward application of the inextricably intertwined analysis based primarily on *Stutzman*, *supra*, 2013 WL 4853333 decided by the District Court for the Eastern District of California. *Stutzman* found statements on covers and promotional materials for Lance Armstrong's autobiographies characterizing the books as nonfiction biography about five time Tour de France Winner inextricably intertwined with the books' noncommercial contents. (*Id.* at *18.) Although

the court's reasoning supporting its inextricably intertwined analysis is not explicit, relying on *Dex Media*, the court noted that economic realities compel book publishers to advertise and found it "nearly impossible to separate the promotional materials for the Books from the Books themselves." (*Ibid.*)

Stutzman misapplied the "inextricably intertwined" doctrine. The yellow pages phone directory in *Dex Media* was distributed to consumers free of charge; its publication was funded by paid advertising. (*Dex Media, supra*, 696 F.3d at p. 954.) The regulations affecting the directory because of its commercial component created an unavoidable burden on the publication as a whole. In *Stutzman*, the cost of publishing the books was built into their retail price, rather than covered by proceeds from advertising. Had the court found any of the challenged advertisements deceptive, they could have been removed or replaced with truthful advertisements without burdening the publication of the books. There was nothing inextricable between the challenged advertisements and the noncommercial contents of the books. To the extent statements on the book covers and promotional materials in *Stutzman* merely accurately reflected the contents of the books (for example, calling Armstrong a "five time Tour de France winner"), they were protected under the adjunct speech exception. But as discussed above, this exception is inapplicable in the case of attribution of the expressive work to a false source. Thus, *Stutzman* does not help Appellants.

Appellants also argue the attribution of songs to the performer is inextricable from the songs because it would be impossible to sell an album without identifying the performer. (AOB 37.) But Serova seeks only to prevent Appellants from identifying the *wrong* performer. Appellants could sell the Cascio tracks attributing them to their real singer, or acknowledge uncertainty about the singer's identity on the album cover.

In short, Appellants' challenged speech is commercial and subject to the UCL and CLRA. A contrary finding would leave the sellers of music, film, books, magazines, newspapers, and other expressive goods and services beyond the scope of California's consumer protection laws. California courts have consistently rejected publishers' pleas for such blanket immunity, and there is no reason to deviate from that precedent here.

C. Michael's cover and the video ad were sufficiently misleading to support the UCL and CLRA claims.

Appellants contend Serova's UCL and CLRA claims fail as a matter of law because neither *Michael's* cover, nor the video ad could mislead a reasonable consumer into thinking that Michael Jackson sang all of the songs on *Michael*. (AOB 40.) This contention is meritless.

The UCL prohibits any "unlawful, unfair or fraudulent business act or practice." (Cal. Bus. & Prof. Code § 17200.) The CLRA prohibits certain "unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer, including, inter alia: "[p]assing off goods ... as those of another"; "[m]isrepresenting

the source ... of goods”; “[m]isrepresenting the affiliation, connection, or association with ... another; and [r]epresenting that goods ... have ... characteristics ... which they do not have.” (Cal. Civ. Code § 1770, subds. (a)(1)–(3), (5).)

Under both the UCL and CLRA, conduct is considered deceptive or misleading if the conduct is likely to deceive a reasonable consumer. (*Consumer Advocates v. Echostar Satellite Corp.* (2003) 113 Cal.App.4th 1351, 1360.) A “reasonable consumer” is defined as an ordinary member of the consuming public who acts reasonably under all the circumstances. (*Lavie v. Procter & Gamble Co.* (2003) 105 Cal.App.4th 496, 518, 512.) “The primary evidence in a false advertising case is the advertising itself.” (*Brockey v. Moore* (2003) 107 Cal.App.4th 86, 100.) Indeed, California courts have expressly rejected the “view that a plaintiff must produce a consumer survey or similar extrinsic evidence to prevail on a claim that the public is likely to be misled by a representation.” (*Echostar*, at p. 1362; *Colgan v. Leatherman Tool Grp., Inc.* (2006) 135 Cal.App.4th 663, 681–682.)

California courts, however, recognize that whether a business practice is deceptive will usually be a question of fact reserved for the jury. (See, e.g., *Linear Technology Corp. v. Applied Materials, Inc.* (2007) 152 Cal.App.4th 115, 134–135 [“Whether a practice is deceptive, fraudulent, or unfair is generally a question of fact which requires ‘consideration and weighing of evidence from both sides’ and which usually cannot be made on demurrer.”].) The trial court properly concluded that

Appellants did not meet their heavy burden of showing no reasonable trier of fact would find the statements likely to deceive a reasonable consumer.

Appellants argue that no reasonable consumer would be misled by the statements on *Michael*'s cover because none of these statements stated or implied that Jackson performed lead vocals on the Cascio tracks. (AOB 40, 42.) This is simply not true.

To begin with, the statement on *Michael*'s back cover says that the album "contains 9 previously unreleased vocal tracks performed by Michael Jackson." (See CT 1:119 [FAC ¶ 27 alleging "'The Way You Love Me' ... was previously released in 2004."].) Even a consumer who did not know why the statement referred to nine vocal tracks instead of ten would reasonably understand this statement to mean that Jackson sang on at least two of the three Cascio tracks.

Furthermore, in analyzing whether product packaging is misleading, courts consider the packaging as a whole. (*Lavie*, *supra*, 105 Cal. App. 4th at p. 509.) And "when the defendant makes partial representations that are misleading because some other material fact has not been disclosed," California law imposes a duty to disclose those facts. (*Collins v. eMachines, Inc.* (2011) 202 Cal.App.4th 249, 255.) The album title *Michael* and the sixteen depictions of Jackson on the cover were likely to lead consumers to believe that the entire album is performed by Jackson because nothing else on the front of the album indicates who performed *Michael*—a key factor for virtually all consumers purchasing popular music records. By Appellants' own

contention, at the time of the release of *Michael* they believed that the Cascio tracks were performed by Jackson. (RT 605:9-17.) Thus, they designed *Michael*'s cover to communicate the message that Michael Jackson sang all of the album songs, and if Jackson did not sing three of them (pursuant to the parties' stipulation), the cover was plainly misleading.

At a minimum, if Michael Jackson did not perform all of the songs on the album, the title and cover art were sufficient to trigger a duty to disclose that fact. Nothing on the album cover indicates that some of the songs are performed by an impersonator, or discloses uncertainty as to the performer's identity. Appellants attempt to analogize the deception here to the established practice of artists such as Jackson, the Beatles, and Nirvana releasing albums featuring guest vocalists under their own names. This case is not about a guest vocalist, but an undisclosed impersonator. As evinced by the infamous fraud of Milli Vanilli, releasing songs performed by an impersonator drastically departs from consumers' reasonable expectations. Moreover, *Michael*'s legitimate guest vocalists—Akon, 50 Cent, and Lenny Kravitz—are disclosed on the album's back cover, and nothing on the cover suggests to a consumer that this disclosure is incomplete.

Appellants also argue the trial court erred when it found the video ad misleading relying on *Colgan, supra*, 135 Cal.App.4th 663. In *Colgan*, Leatherman argued to the Second District Court of Appeal that, even though a significant portion of the parts of its products were manufactured abroad, the trial

court erred in finding its “Made in U.S.A.” labels and advertising deceptive on summary judgment because “the products were designed, engineered, assembled, and finished in the United States.” (*Id.* at pp. 681-684.) The Court of Appeal affirmed the lower court’s finding that Leatherman's representations were deceptive as a matter of law because a reasonable consumer of Leatherman's products with the “Made in U.S.A.” representation would not expect that a significant portion of the products’ parts were manufactured abroad. (*Id.* at p. 682-83.)

The trial court was correct to rely on *Colgan*. Just as a reasonable consumer would not expect a significant portion of a product labeled “Made in U.S.A.” to be manufactured abroad, a reasonable consumer would not expect three of ten songs on an album advertised to be “from” Michael Jackson to be performed by an undisclosed impersonator. Appellants attempt to distinguish *Colgan* arguing that parts of Leatherman tools that were made abroad are separable in a way a song’s components are not. (AOB 44.) But the analysis here did not require separating expressive components of a song. Rather, the trial court separated the compilation album put together by Appellants into seven songs performed by Jackson and three songs performed by an impersonator. This is not at all different from separating a tool put together by Leatherman into parts manufactured in the U.S.A. and parts manufactured abroad.

Appellants’ authorities, *Bardin v. Daimlerchrysler*, (2006) 136 Cal.App.4th 1255, *Parent v. MillerCoors* (S.D. Cal. Oct. 26, 2015) No. 3:15-CV-1204-GPC-WVG, 2015 WL 6455752, and

Anthony v. Buena Vista (C.D. Cal., Sept. 28, 2016) No. 215CV09593SVWJPR, 2016 WL 6836950 are inapposite. In *Bardin*, plaintiffs sued automobile manufacturer DaimlerChrysler for violations of the CLRA and UCL alleging that the industry standard was to use cast iron in exhaust manifolds of vehicles, and that DaimlerChrysler used cheaper and less durable tubular steel instead of cast iron in certain vehicles and concealed this fact from consumers. (*Bardin*, at pp. 1260-1262.) The trial court sustained a demurrer to the complaint and the Court of Appeal affirmed. (*Ibid.*) The appellate court held that the plaintiffs failed to state a cause of action under the fraudulent prong of the UCL because the complaint did not plead that members of the public had an expectation or assumption that exhaust manifolds would be made of cast iron or have a particular lifespan, nor alleged any misrepresentations by DaimlerChrysler about the material used, and thus the likelihood of deception was not sufficiently alleged. (*Id.* at pp. 1274-1275.) The court similarly concluded that the plaintiffs failed to state the CLRA claim because the complaint alleged neither DaimlerChrysler's duty to disclose the material used for exhaust manifolds, nor "a single affirmative representation" by DaimlerChrysler regarding the exhaust manifolds. (*Id.* at p. 1276.) Here, Serova alleged four affirmative representations Appellants made about *Michael* on its cover and in the video ad and, as discussed above, these representations were misleading.

In *Parent*, plaintiff sued beer manufacturer MillerCoors for advertising Blue Moon beer as "artfully crafted," which allegedly

misled consumers into thinking that it was a “craft beer.” (*Parent, supra*, 2015 WL 6455752, at *1.) The district court found the statement that Blue Moon was “artfully crafted” nonactionable because it could not be “reasonably interpreted as a statement of objective fact.” (*Id.* at *9.) The court distinguished *Colgan*, observing that there, “the defendant made a specific claim about the method of production for a consumer product”. (*Ibid.*) As discussed earlier, the statement that Michael Jackson is the performer of lead vocals on *Michael* is an objectively verifiable factual claim about the source of Appellants’ product. Thus, this case is analogous to *Colgan* and not *Parent*.

In *Anthony*, deaf and hard hearing consumers alleged that movie producers violated, *inter alia*, the UCL and CLRA by distributing movies and TV shows advertised as subtitled or captioned, when in fact those movies and TV shows did not include subtitles for music and song lyrics. (*Anthony, supra*, 2016 WL 6836950, at *1.) The district court granted defendants’ motion to dismiss the misrepresentation claims based on (1) the plaintiff’s failure to allege a reasonable consumer’s expectation that music and songs would be captioned, or the defendant’s representations that the songs were captioned or the content was “fully” captioned, and (2) failure to allege actual reliance. (*Id.* at *2.) The court also granted the defendant’s anti-SLAPP motion finding that the plaintiff failed to establish a legally tenable claim.¹² (*Id.* at *9.)

¹² The district court also held the plaintiff failed to meet her evidential burden under the anti-SLAPP’s second prong. Because

Captioning of sounds in a movie or TV show is distinguishable from indicating the source of songs in an album. Music in movies is not always subtitled, and sometimes it cannot be subtitled in a non-confusing manner when it plays in the background of characters' dialogue. Music in movies is usually secondary to the dialogue because it conveys the ambience rather than communicates the plot. Thus, a reasonable consumer does not expect that the music in a movie be necessarily subtitled unless the manufacturer expressly states so. *Michael*, in contrast, contained ten songs of equal prominence, each with a particular lead vocalist. Popular music records are customarily attributed to singers and bands who perform lead vocals on them, and virtually all consumers rely on this custom in purchasing music. A reasonable consumer would thus understand multiple references to Michael Jackson on the album cover as attribution of every song on the album to Jackson. Like a consumer buying a diamond band ring expects all stones in the band to be genuine diamonds, a consumer buying a Michael Jackson album expects all songs in it to be performed by Michael Jackson.

Finally, Appellants argue that the challenged statements cannot be misleading because Serova does not allege that Jackson had nothing whatsoever to do with the Cascio tracks. (AOB 42, 44.) But whether Jackson contributed to the Cascio tracks as a composer, arranger or lyricist¹³ is irrelevant because

Appellants waived Serova's evidential burden, this part of the court's holding is inapposite here.

¹³ In fact, Jackson's involvement in the Cascio tracks in any capacity was never positively established.

the album cover and the video ad communicate to consumers Jackson's role as the lead singer on these tracks. As already mentioned, popular songs are customarily attributed to their singers (rather than to composers, arrangers, or lyricists) at the point of sale.¹⁴ Consequently, Appellants' attribution of *Michael* to Jackson implied that Jackson was the singer on all of the album songs.

If Jackson did not perform lead vocals on the Cascio tracks, Michael's packaging, taken as a whole, and the video ad were likely to deceive a reasonable consumer (and doubtless actually did mislead purchasers).

D. Public policy favors strict liability for deceptive advertising of expressive works.

Appellants argue that a seller of art who falsely attributes a work of art to a famous artist should not be held strictly liable under the UCL and CLRA, and that Serova's remedy is limited to a fraud claim against Angelikson Defendants. (AOB 44-47.) This proposition belies the law, leaves consumers without an adequate remedy and goes against considerations of public policy.

¹⁴ Appellants point at Nirvana's *Unplugged in New York*, which featured undisclosed musicians from the Meat Puppets on three of the album songs. (AOB 43 n.20.) This example illustrates the rule: the Meat Puppets provided only an instrumental arrangement for the songs, and the lead singer on all of the album's tracks was Nirvana's frontman Kurt Cobain. See Chris Payne, *Nirvana's 'MTV Unplugged' 20 Years Later: Meat Puppets' Curt Kirkwood Looks Back*, BILLBOARD (Nov. 18, 2004), <https://www.billboard.com/articles/news/6319909/nirvana-mtv-unplugged-new-york-meat-puppets-interview>.

As argued above, Appellants' false statements are commercial speech, therefore they can be regulated under the UCL and CLRA even in the absence of scienter. (See *Mazza v. Am. Honda Motor Co.* (9th Cir. 2012) 666 F.3d 581, 591 [observing the UCL and CLRA "have no scienter requirement"]; *In re Tobacco II Cases* (2009) 46 Cal.4th 298, 312 [explaining that the UCL does not require a showing that the deception was "known to be false by the perpetrator," which "reflects the UCL's focus on the defendant's conduct . . . in service of the statute's larger purpose of protecting the general public against unscrupulous business practices."].)

The fraud claim against Angelikson Defendants alone provides inadequate remedy for two reasons. First, Appellants—the publisher and the record label—retain the bulk of revenues from selling the Cascio tracks. Restitution from Angelikson Defendants alone would not make consumers whole, nor are Angelikson Defendants—two private individuals and a small entity—likely to be able to pay damages adequately compensating for the harm. Second, Serova seeks to enjoin Appellants' ongoing distribution of the Cascio tracks under Michael Jackson's name. Production and distribution of *Michael* is wholly controlled by Jackson's estate and Sony Music, and an injunction against the Angelikson Defendants will not prevent Appellants from future deceptive sales of the forged songs to consumers. Appellants have seen evidence of forgery, received many complaints about the inauthenticity of the Cascio tracks from the Jackson family and fans and conceded in court that the

songs may indeed be forged—yet they have not modified the labelling of the product, started a corrective advertising campaign, or otherwise disclosed to consumers that the Cascio tracks may be inauthentic. To this day, they continue advertising the Cascio tracks as Michael Jackson’s songs.¹⁵ Appellants’ conduct up to this point provides no reason to believe that anything short of a court order will make them stop selling the Cascio tracks deceptively.

Appellants talk about the danger of courts shaping the creative process. (AOB 47-49.) But this case does not concern the creative process of songwriting or song recording; rather, it is about false advertising of completed songs, offered as a product, on the product packaging and in a TV commercial. Authorities cited by Appellants—*Garrison v. State of La.* (1964) 379 U.S. 64, *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, *Vogel v. Felice* (2005) 127 Cal.App.4th 1006, *Brodeur v. Atlas Entertainment, Inc.* (2016) 248 Cal.App.4th 665, and *FilmOn.com v. DoubleVerify, Inc.* (2017) 13 Cal.App.5th 707—are inapposite because they all were libel actions based on noncommercial speech, not cases arising out of false commercial advertising. And the *Anthony* court’s conclusion that captioning qualifies as protected speech because it “is a component of the moviemaking process,” cited by Appellants (AOB 48) pertained to the court’s

¹⁵ See, e.g., *Michael by Michael Jackson*, AMAZON.COM, <https://www.amazon.com/Michael-Jackson/dp/B004FEWYXS/> (last accessed Apr. 25, 2018); *Michael by Michael Jackson*, ITUNES, <https://itunes.apple.com/us/album/michael/408082743> (last accessed Apr. 25, 2018).

analysis of the warranty and Unruh Act claims that attacked the product defect (insufficient captioning), rather than advertising of the movies as captioned. (*Anthony, supra*, 2016 WL 6836950, at *6-7 [“the ‘principal thrust’ of both the warranty and Unruh Act claims is clearly the captions and subtitles themselves, not the labeling on the box”].) *Anthony’s* conclusion has no relevance here because Serova does not attack the Cascio tracks themselves, only their deceptive advertising.

Appellants further argue that demanding perfect certainty about the nature of a deceased performer’s contribution to an expressive work, or detailed descriptions of uncertainty, would result in posthumous music never being released. (AOB 48.) But in nearly all cases, a performer’s contribution in the work is certain. Ordinarily, there are multiple witnesses such as producers, musicians and sound engineers, who can corroborate the performer’s contribution, and there are work-related materials such as demo recordings and notes available.¹⁶ This is the first case in the history of the music industry of a record label being sued for releasing forged songs it obtained from a third party—and likely will be the last one. Indeed, a quick survey of Sony Music’s releases shows no chilling effect: since the filing of this suit in June 2014, Sony-owned record labels released posthumous compilations of various artists, including Whitney Houston, Elvis Presley, David Bowie, Michael Jackson, and

¹⁶ Such evidence exists for all Michael Jackson’s songs, except for the Cascio tracks.

George Michael.¹⁷ If anything may be deterred by this lawsuit, it is commercial attribution of dubious material to popular artists. Importantly, a publisher can release even such dubious material without fear of liability if it fairly discloses the doubt about the artist's identity. This duty to disclose does not burden the expressive material itself.

Appellants' position advocating for immunity for false advertisers of expressive works in the absence of actual knowledge of falsity incentivizes fraud because it discourages the advertisers (book publishers, music publishers and auction houses) from verifying the provenance of works they publish and sell. In addition to the already present economic incentive to sell

¹⁷ See *Whitney Houston – Whitney Houston Live: Her Greatest Performances*, AMAZON, <https://www.amazon.com/Whitney-Houston-Live-Greatest-Performances/dp/B00NG6FMOE/> [released by Sony Legacy on Nov. 10, 2014]; *Elvis Presley – Way Down in the Jungle Room*, AMAZON, <https://www.amazon.com/Down-Jungle-Room-Elvis-Presley/dp/B01GQMJENY/> [released by Sony Legacy on Aug. 5, 2016]; *Elvis Presley – The Wonder of You: Elvis Presley with The Royal Philharmonic Orchestra*, AMAZON, <https://www.amazon.com/Wonder-You-Presley-Philharmonic-Orchestra/dp/B01LOMM8QG/> [released by Sony Legacy on Oct. 21, 2016]; *David Bowie – No Plan – EP*, AMAZON, <https://www.amazon.com/No-Plan-EP-David-Bowie/dp/B01N4WCEZN/> [released by Columbia on Feb. 24, 2017]; *Michael Jackson – Scream*, AMAZON, <https://www.amazon.com/Scream-Michael-Jackson/dp/B074R45D51/> [released by Legacy on Sept. 29, 2017]; *George Michael - Listen Without Prejudice / MTV Unplugged (3CD+1DVD Set)*, AMAZON, <https://www.amazon.com/Listen-Without-Prejudice-Unplugged-1DVD/dp/B01LQV2Z7C> [released by Sony Legacy on Oct. 20, 2017].

works the original owner pitches as valuable, immunity in the absence of scienter gives the publisher or auctioneer a legal incentive to take the original owner at his or her word as to the work's authenticity, because the less the publisher or auctioneer inquires into the provenance of the work, the stronger his defense. This, in turn, encourages forgers to create forgeries because it opens up a market for those forgeries, in which the publisher or auctioneer will advertise the forgery as an authentic work to the consuming public without asking about its provenance.

Were Appellants mere distributors of an album manufactured by someone else, their reliance on *Smith v. California*—a case where the Supreme Court held a bookshop owner could not be held criminally liable for the sale of obscene material in the absence of knowledge of the material's character—might be at least partly justified.¹⁸ (*Smith v. California* (1959) 361 U.S. 147, 152-154 [observing that the challenged ordinance would penalize booksellers who “had not the slightest notice of the character of the books they sold”].) But Appellants are not retailers who received *Michael* from the

¹⁸ *Smith* is distinguishable in two other important aspects. First, it involved a criminal ordinance that imposed a jail sentence on the defendant, not civil liability statutes like here. (*Smith*, at pp. 148-149.) Second, preventing the sale of obscene literature is a less compelling government interest than preventing consumer deceit because obscenity, unlike false advertising, does not violate consumers' rights. As *Smith* recognized, a defendant's First Amendment right is not absolute, but must be balanced against the opposing side's interests. (*Id.* at p. 155.)

manufacturer and sold it “as is” without the knowledge of its content. Appellants *are* manufacturers who selected songs for inclusion in *Michael*, inquired (or should have inquired) into the provenance of each song, and advertised the resulting compilation to consumers based on that information. It was Appellants’ job to know their product and advertise it truthfully.

Before *Michael*’s release, multiple Jackson family members and fans told Appellants that the vocals in the Cascio tracks sounded forged and pointed at various red flags in the sound and history of the tracks. Appellants knew of these concerns—by their own admission, they conducted a listening session and hired two forensic musicologists to address them. Appellants ultimately chose to advertise the Cascio tracks as genuine—which allowed Appellants to derive substantial revenue from selling the tracks under Michael Jackson’s name to consumers. Now Appellants contend that their decision to believe a more financially attractive story at the time of the album release amounts to the lack of scienter which entitles them to retain the revenues from the forged songs and continue selling them deceptively.

Essentially, Appellants ask the Court for license to build a business on art forgery.

VI. CONCLUSION

For the foregoing reasons, Serova respectfully request that the Court affirm the trial court’s order denying the anti-SLAPP motion with regards to Appellant’s statements on *Michael*’s cover and in the video ad.

//

Respectfully submitted,

Date: May 9, 2018

MOSS BOLLINGER LLP

By: /s/ Jeremy F. Bollinger
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CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 12,682 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief. Executed at Sherman Oaks, California, on May 9, 2018.

By: /s/ Jeremy Bollinger
Jeremy F. Bollinger

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 15300 Ventura Boulevard, Suite 207, Sherman Oaks, California 91403.

On May 9, 2018, I served the foregoing document described as **RESPONDENT'S BRIEF** as follows:

X (By US 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 Sherman Oaks, California in the ordinary course of business.

SEE ATTACHED SERVICE LIST

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

Executed on May 9, 2018 at Sherman Oaks, California.

By: /s/ Lea Garbe

SERVICE LIST

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