

Case No. B280526

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION TWO

Vera Serova,
Plaintiff and Respondent,

v.

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

Appeal from the Los Angeles Superior Court

Case No. BC 548468

Honorable Ann I. Jones

APPELLANTS' REPLY BRIEF

*ZIA F. MODABBER (SBN 137388)
ANDREW J. DEMKO (SBN 247320)
CHARLOTTE S. WASSERSTEIN (SBN 279442)

KATTEN MUCHIN ROSENMAN LLP

2029 Century Park East, Suite 2600

Los Angeles, California 90067

Telephone: (310) 788-4400 Facsimile: (310) 788-4471

HOWARD WEITZMAN (SBN 38723)

SUANN C. MACISAAC (SBN 205659)

KINSELLA WEITZMAN ISER KUMP & ALDISERT LLP

808 Wilshire Boulevard, 3rd Floor

Santa Monica, California 90401

Telephone: (310) 566-9800 Facsimile: (310) 566-9850

[caption continued on following page]

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

Service on California Attorney General and L.A. County District
Attorney (Bus. & Prof. Code, § 17209)

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	5
I. INTRODUCTION.	8
II. ARGUMENT.	12
A. Step One: Serova's Claims Arise Out Of Speech Protected By The First Amendment.	12
1. The Album Cover and Announcement Video Fall Under Subdivision (e)(3) and Subdivision (e)(4) Of Section 425.16.	12
2. Specific Statutory Provisions Protecting Speech Related To Music Confirm That Identifying Michael Jackson As The Performer Was In Furtherance Of Protected Activity Of Public Interest.	17
B. Step Two: Serova Cannot Establish A Probability Of Prevailing On The Merits Of Her Claims.	19
1. The Album Cover And Announcement Video Are Protected As Non-Commercial Speech And Thus Fall Outside The Purview Of The UCL And CLRA.	19
2. Alternatively, Serova Has No Probability of Success on the Merits Because The Album Cover And Announcement Video Were Not Misleading As A Matter Of Law.	30
C. Public Policy Support A Reversal Of The Trial Court's Order.	33
D. Serova Has Withdrawn Her Motion To Dismiss This Appeal.	35

III. CONCLUSION.....	35
WORD COUNT CERTIFICATION.....	37

www.themjcast.com

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>All One God Faith, Inc. v. Organic & Sustainable Industry Standards, Inc.</i> (2010) 183 Cal.App.4th 1186.....	10
<i>Bernardo v. Planned Parenthood Federation of America</i> (2004) 115 Cal.App.4th 322.....	17, 21
<i>Board of Trustees of State University of New York v. Fox</i> (1989) 492 U.S. 469.....	20
<i>Bolger v. Youngs Drug Products Corp.</i> (1983) 463 U.S. 60.....	15
<i>Brodeur v. Atlas Entertainment, Inc.</i> (2016) 248 Cal.App.4th 665.....	21
<i>Charles v. City of Los Angeles</i> (9th Cir. 2012) 697 F.3d 1146.....	22, 23
<i>Cher v. Forum Internat., Ltd.</i> (9th Cir. 1982) 692 F.2d 634.....	4
<i>Consumer Justice Center v. Trimedica Internat., Inc.</i> (2003) 107 Cal.App.4th 595.....	9
<i>Cross v. Cooper</i> (2011) 197 Cal.App.4th 357.....	6
<i>Cross v. Facebook, Inc.</i> (2017) 14 Cal.App.5th 190.....	6
<i>Dex Media West, Inc. v. City of Seattle</i> (9th Cir. 2012) 696 F.3d 952.....	19, 20
<i>DuPont Merck Pharmaceutical Co. v. Super. Ct.</i> (2000) 78 Cal.App.4th 562.....	9

<i>Guglielmi v. Spelling-Goldberg Productions</i> (1979) 25 Cal.3d 860	15
<i>Hall v. Time Warner, Inc.</i> (2007) 153 Cal.App.4th 1337	7
<i>Hilton v. Hallmark Cards</i> (9th Cir. 2009) 599 F.3d 894.....	6
<i>Jackson v. Mayweather</i> (2017) 10 Cal.App.5th 1240	4, 7
<i>Jewett v. Capital One Bank</i> (2003) 113 Cal.App.4th 805.....	9
<i>Kasky v. Nike, Inc.</i> (2002) 27 Cal.4th 939.....	17, 19
<i>Keimer v. Buena Vista Books, Inc.</i> (1999) 75 Cal.App.4th 1220.....	16, 17, 23
<i>L.A. Taxi Cooperative, Inc. v. Independent Taxi Owners Association of Los Angeles</i> (2015) 239 Cal.App.4th 918.....	8
<i>Leslie G. v. Perry & Associates</i> (1996) 43 Cal.App.4th 472.....	26
<i>No Doubt v. Activision Publishing, Inc.</i> (2011) 192 Cal.App.4th 1018.....	6, 9
<i>Rezec v. Sony Pictures Entertainment, Inc.</i> (2004) 116 Cal.App.4th 135.....	19, 21
<i>Stewart v. Rolling Stone LLC</i> (2010) 181 Cal.App.4th 664.....	7, 9, 13
<i>Stutzman v. Armstrong</i> (E.D. Cal., Sept. 10, 2013, No. 2:13-CV-00116- MCE) 2013 WL 4853333.....	7, 19
<i>Tamkin v. CBS Broad., Inc.</i> (2011) 193 Cal.App.4th 133.....	6

<i>White v. City of Sparks</i> (9th Cir. 2007) 500 F.3d 953.....	13
---	----

Statutes

Civ. Proc. Code, § 425.16, subd. (e)(3).....	5, 10
Civ. Proc. Code, § 425.16, subd. (e)(4).....	5, 10
Civ. Proc. Code, § 425.17, subd. (c)	11
Civ. Proc. Code, § 425.17, subd. (d).....	10, 11, 12
Civ. Proc. Code, § 1431.1	26
Bus. & Prof. Code, § 17500.....	2, 17

I. INTRODUCTION.

Appellants submit that the First Amendment absolutely protects them from strict liability under the UCL and CLRA where they *innocently* attributed vocals to Michael Jackson in distributing the *Michael* album.¹ As discussed in their opening brief and below, in other forms of speech or expression there is always some *mens rea* requirement (actual malice for defamation, intent for fraud, etc.) before a speaker can be found liable for simply being wrong. To hold otherwise chills artistic expression to its core. Indeed, the alternative here, as the trial court acknowledged, was for the music to not be published (chilling speech) or to have it be unattributed (which alters its meaning). Consistent with the First Amendment, the Court must protect Appellants' good faith dissemination of creative works and limit Respondent's right to recovery, if any, to those who knowingly misrepresented the authenticity of those works.

For purposes of this appeal, Appellants accept that Jackson did not sing all of the lead vocals on the Cascio Tracks.² But also for purposes of this appeal, and based on their own

¹ Unless otherwise indicated, capitalized terms shall have the same meaning assigned to them in the Appellants' Opening Brief.

² Critically, Appellants did not stipulate or otherwise admit in any way that they knew or should have known that Michael Jackson did not sing those lead vocals. And Serova's own Complaint makes clear that if anyone misrepresented the origin of the vocals, it was the Angelikson Defendants, not Appellants. (CT 1:117 [FAC ¶ 18].)

express pleading admissions, Respondent must accept that Appellants did not know that someone else was the singer.

For these reasons, Serova's claims are barred by the anti-SLAPP statute because the challenged statements were made in the course of promoting and distributing First Amendment-protected art (and constitute part of the art itself), and therefore constitute non-commercial speech beyond reach of the UCL and CLRA.

Instead of addressing the First Amendment issue head on, Serova opens her brief by misrepresenting the issue on appeal; she claims Appellants assert "a constitutional right to sell forged art falsely advertising it to consumers as the work of a famous artist." (RB at 1.) Of course, Appellants assert no such thing. According to Serova's own Complaint, Appellants conducted a reasonable investigation, and concluded that Michael Jackson sang lead vocals on the Cascio Tracks. Serova alleges that the Angelikson Defendants—not Appellants—"had ***exclusive knowledge***" of whether Jackson sang the lead vocals on the Cascio Tracks and that they "***failed to disclose to Sony or the Estate that Michael Jackson did not perform the lead vocals*** on" the Cascio Tracks. (CT 1:117 [FAC ¶ 18], emphasis added.) Now Serova simply wants to second-guess Appellants' conclusions and have a battle of experts decide what only the Angelikson Defendants and the deceased Michael Jackson could know for sure.

Necessarily for this reason, Serova did not bring a fraud or False Advertising Law (Bus. & Prof. Code, § 17500) claim against

Appellants; those claims would have required her to allege scienter, which she could never do. Instead, she claims Appellants are strictly liable under the UCL and CLRA for statements made in connection with the *Michael* album that Appellants reasonably believed to be true at the time they were made. That is what this case is about and is why the First Amendment protects this speech.

Serova squarely places all the blame on the Angelikson Defendants, and Serova's fraud claim against them will proceed in the trial court regardless of the outcome of this appeal. Serova admits her questionable motive in suing Appellants: she claims that "the Angelikson Defendants—two private individuals and a small entity" are not "likely to be able to pay damages adequately compensating" for the harm she has allegedly suffered. (RB at 56.) For this reason, she asks the Court to hold that her fraud claim against the Angelikson Defendants "provides inadequate remedy" and thus to permit her claims against Appellants to move forward. (*Ibid.*) But Serova's argument that Appellants may have deeper pockets than the Angelikson Defendants is not a basis upon which she may proceed with her claims.

As explained in Appellants' Opening Brief, the trial court erred in partially denying Appellants' anti-SLAPP motion. Serova makes several arguments as to why the trial court was correct. But each one is wrong as a matter of law.

First, at step one of the analysis, Serova argues the first posthumously released album by Michael Jackson is not a matter of public interest. The case law (and common sense) squarely

contradicts that argument. (See, e.g., *Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240, 1254.)

At step two, the trial court erred in finding Serova has a probability of success on the merits of her claims for two reasons. *First*, the statements at issue are protected as non-commercial speech, and thus are not subject to the UCL or CLRA. Serova argues the Album Cover and Announcement Video are commercial speech simply because she concludes they are advertisements (the Album Cover, at least, certainly is not), but ignores the fact that even so, the advertised work is First Amendment protected art. Advertisements are protected as non-commercial speech when they are “merely an adjunct” of protected speech. (*Cher v. Forum Internat., Ltd.* (9th Cir. 1982) 692 F.2d 634, 639.)

Second, the challenged statements are not misleading as a matter of law. Serova alleges only that Jackson did not sing the lead vocals on three out of the album’s ten tracks; even if this were true, which Appellants have stipulated it is only for purposes of this motion, the Album Cover and Announcement Video would not mislead a reasonable consumer to think that Jackson sang every note on all ten tracks, or that the album may not fairly be called a Michael Jackson album.

Appellants respectfully request that this Court reverse the portions of the trial court’s order denying Appellants’ anti-SLAPP motion.

II. ARGUMENT.

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

Under the first prong of the anti-SLAPP analysis, the Court determines whether the claims arise out of at least one of four types of protected activities, and Serova's claims fall into two. (Civ. Proc. Code, § 425.16, subd. (e)(3)–(4)). Further, specific statutory provisions protecting speech related to musical works confirm that identifying Michael Jackson as the performer was in furtherance of protected activity of public interest.

1. The Album Cover and Announcement Video Fall Under Subdivision (e)(3) and Subdivision (e)(4) Of Section 425.16.

The Album Cover and Announcement Video fall under Subdivision (e)(3) because they are “written or oral statement[s] or writing[s] made in a place open to the public or a public forum in connection with an issue of public interest[.]” (Civ. Proc. Code, § 425.16, subd. (e)(3).) They also fall under subdivision (e)(4), a “catchall” provision which dispenses with the public forum requirement and encompasses any speech “in connection with a public issue or an issue of public interest[.]” (Civ. Proc. Code, § 425.16, subd. (e)(4).)

Serova does not challenge the trial court's finding that the challenged statements were made in a public forum, but instead argues the trial court erred in finding that the *Michael* album is an “issue of public interest.” (RB at 20–30.) Settled case law precludes this argument, and the trial court properly found the *Michael* album to be a matter of public interest. (CT 4:896–901.)

An issue of public interest “is any issue in which the public is interested.” (*Tamkin v. CBS Broad., Inc.* (2011) 193 Cal.App.4th 133, 143, quoting *Nygård, Inc. v. Uusi-Kerttula* (2008) 159 Cal.App.4th 1027, 1042.) “Like the SLAPP statute itself, ***the question whether something is an issue of public interest must be ‘construed broadly.’*** (*Cross v. Facebook, Inc.* (2017) 14 Cal.App.5th 190, 199, citations omitted and emphasis added.) As such, the issue need not be “significant” but only “one in which the public takes an interest.” (*Ibid.*, citation omitted.) “[T]hree non-exclusive and sometimes overlapping categories of statements” have qualified for anti-SLAPP protection because they address matters of public interest: (1) statements concerning “a person or entity in the public eye”; (2) speech “that could affect large numbers of people beyond the direct participants”; and (3) statements involving “a topic of widespread public interest.” (*Cross v. Cooper* (2011) 197 Cal.App.4th 357, 373, quotation marks, footnotes and citation omitted.)

The *Michael* album—which contains the first posthumously released music from pop superstar Michael Jackson—easily meets this test, as does the controversy surrounding the vocals on the Cascio Tracks. Michael Jackson’s celebrity alone is enough to make his first posthumously released album an issue of public interest. (See, e.g., *Hilton v. Hallmark Cards* (9th Cir. 2009) 599 F.3d 894, 906–908 [holding anti-SLAPP statute applied to claims based on a birthday card featuring the photograph and catchphrase of celebrity Paris Hilton because Hilton’s career and persona were issues of public interest]; *No Doubt v. Activision*

Publishing, Inc. (2011) 192 Cal.App.4th 1018, 1027 [holding that use of rock band No Doubt's likeness was a matter of public interest "because of the widespread fame No Doubt has achieved"]; *Jackson, supra*, 10 Cal.App.5th at p. 1254 [holding "celebrity gossip" can constitute a statement in connection with an issue of public interest for anti-SLAPP purposes "under established case law"]; *Stewart v. Rolling Stone LLC* (2010) 181 Cal.App.4th 664, 677–678 ["[T]here is a public interest which attaches to people who, by their accomplishments, mode of living, professional standing or calling, create a legitimate and widespread attention to their activities."], internal quotations and ellipses omitted; *Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, 1347 ["The public's fascination with Brando and widespread public interest in his personal life made Brando's decisions concerning the distribution of his assets a public issue or an issue of public interest."]; *Stutzman v. Armstrong* (E.D. Cal., Sept. 10, 2013, No. 2:13-CV-00116-MCE) 2013 WL 4853333, at p. 7 [finding cyclist Lance Armstrong's statements concerning whether he used performance enhancing drugs, including in promotional materials for books he had written, met the public interest test].) The statements at issue here plainly satisfy the public interest requirement, as the "public's fascination" with Jackson make the release of his first posthumously-released album a matter of public interest. (See *Hall, supra*, 153 Cal.App.4th at p. 1347.)

Moreover, Serova's Complaint admits that whether Jackson sang lead vocals on the Cascio Tracks is a matter of

public interest; she alleges that, in California alone, thousands of individuals have purchased the Cascio Tracks, identifies numerous high-profile individuals who have publicly offered their opinions on the tracks' authenticity, and alleges that the controversy was discussed in the press and on a segment of "The Oprah Winfrey Show." (CT 1:118–23 [FAC ¶¶ 20, 22, 23, 25, 32, 38].)

Serova argues the Album Cover and Announcement Video do not concern a matter of public interest for only one reason: she claims that "[c]ommercial speech about the properties of one's own product does not satisfy" the public interest requirement. (RB at 21, 24.) She cites no cases expressing such a rule, and the trial court properly rejected this argument.

The trial court found that Serova's claims concern "the authenticity of certain recordings released posthumously and claimed to have been written and recorded by a pop superstar" and that "Michael Jackson's professional standing and accomplishments create legitimate and widespread attention to the release of a new album." (CT 4:897, 901.) As such, the trial court correctly found "distinguishable" the cases upon which Serova relies because they analyzed descriptions of a product's characteristics "that do[] nothing but promote a commercial product or service[.]" (See CT 4:898–99.)

And contrary to Serova's argument, commercial speech is not per se exempted from the anti-SLAPP statute: "[c]ommercial speech that involves a matter of public interest . . . may be protected by the anti-SLAPP statute." (*L.A. Taxi Cooperative*,

Inc. v. Independent Taxi Owners Association of Los Angeles (2015) 239 Cal.App.4th 918, 927; see also *Stewart, supra*, 181 Cal.App.4th at p. 678 [“Plaintiffs have not provided us with any authority for the proposition that commercial speech is categorically disentitled to protection under the anti-SLAPP statute.”]; *No Doubt, supra*, 192 Cal.App.4th at p. 1028 [“cases that center on a contractual dispute are not categorically excluded from the protection of the anti-SLAPP statute”].) Statements about a commercial product may qualify for anti-SLAPP protection where the product is a matter of genuine public interest. (See, e.g., *DuPont Merck Pharmaceutical Co. v. Super. Ct.* (2000) 78 Cal.App.4th 562, 566, as modified (Jan. 25, 2000) [finding “advertising, marketing, and public relations activities” for a prescription medication concerned a matter of public interest due to “the number of persons allegedly affected and the seriousness of the conditions [the drug] treated establish the issue as one of public interest”].) Accordingly, whether the challenged statements are “commercial speech” is irrelevant to the question of whether they were made in connection with an issue of public interest.

Serova’s authorities stand only for the unremarkable proposition that speech about everyday consumer products often does not involve a matter of public interest—nothing more. (See, e.g., *Consumer Justice Center v. Trimedica Internat., Inc.* (2003) 107 Cal.App.4th 595, 600 [finding “purely commercial speech” could fall under the anti-SLAPP statute if it “concerns a matter of public interest”]; *Jewett v. Capital One Bank* (2003) 113

Cal.App.4th 805, 814 [finding the commercial speech at issue did not concern a matter of public interest because it was “specifically directed to a target audience of consumers with the **sole purpose** of inducing them to enter into credit agreements with respondents”], as modified on denial of reh’g (Dec. 22, 2003), emphasis added; see also *All One God Faith, Inc. v. Organic & Sustainable Industry Standards, Inc.* (2010) 183 Cal.App.4th 1186, 1207 [“a manufacturer’s advertising statements about a commercial product are not subject to the protection of section 425.16 **when the specific nature of the speech . . . do[es] not involve a matter of public interest**”], emphasis added.)

The trial court thus correctly held that Appellants meet their burden under step one of the anti-SLAPP analysis: the Album Cover and Announcement Video were statements made in public fora about an issue of public interest, thus are protected speech under Code of Civil Procedure section 425.16, subdivision (e)(3) and (e)(4).

2. Specific Statutory Provisions Protecting Speech Related To Music Confirm That Identifying Michael Jackson As The Performer Was In Furtherance Of Protected Activity Of Public Interest.

The Legislature has enacted a provision specifically instructing that commercial speech “based upon the creation, dissemination, exhibition, **advertisement, or other similar promotion of any . . . musical . . . work**” may warrant anti-SLAPP production. (Civ. Proc. Code, § 425.17, subd. (d), emphasis added.) Serova does not substantively address this

important provision. (See RB at 28–29.) Instead, she offers only a confused and formalistic argument that subdivision (d) of section 425.17 is irrelevant because she did not expressly invoke subdivision (c) of that provision. Her argument runs as follows: Subdivision (c) of section 425.17 **exempts** some commercial speech from the ambit of section 425.16. (Civ. Proc. Code, § 425.17, subd. (c).) Subdivision (d) of section 425.16 creates an **exception** to the exemption, stating that speech based on the “promotion of any . . . musical . . . work” may be covered by the anti-SLAPP statute. (Civ. Proc. Code, § 425.17, subd. (d).) Serova argues that she never directly argued the commercial speech exemption of subdivision (c) applies here, and thus the exception to the exemption in subdivision (d) cannot apply. This is pure sophistry.

Serova’s only argument on Step One both below and here is that the challenged statements are commercial speech. (CT 1:289–307; 4:785–787; RB at 20–30.) The fact that she did not say the magic words of subdivision (c)—which provides, exactly as Serova argues, that some commercial speech does not warrant anti-SLAPP protection—is of no moment. Indeed, taken to its logical conclusion, Serova’s argument would completely undermine subdivision (d)’s instruction that promotion of musical works may be eligible for anti-SLAPP protection, because a plaintiff could avoid its application simply by omitting any citation to subdivision (c) in her papers. This is not the law, and the Legislature’s intent in subdivision (d) is both obvious and controlling.

The trial court therefore properly recognized that subdivision (d) is essentially dispositive of step one of the anti-SLAPP analysis, insofar as it evinces the Legislature's intent to ensure that commercial speech "based upon the creation, dissemination, exhibition, advertisement, or other similar promotion of any . . . musical . . . work" is eligible for anti-SLAPP protection. (Civ. Proc. Code, § 425.17, subd. (d); CT 4:900.)

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

Serova cannot sustain her burden at step two of the anti-SLAPP analysis either because the UCL and CLRA apply only to commercial speech, and the speech Serova challenges here is noncommercial, protected speech (or sufficiently adjunct to or inextricably intertwined with protected speech so as to be protected as well). Further, the Album Cover and Announcement Video were not misleading as a matter of law.

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

The parties agree that the UCL and the CLRA govern only commercial speech. (See RB at 30.) The parties also agree that the expressive content of the album itself is protected, non-commercial speech. (See RB at 35.) Serova argues—and the trial court held—that her claims are viable because the Album Cover and Announcement Video are commercial speech. This finding was erroneous, as both the Album Cover and the Announcement

Video are protected under the First Amendment as non-commercial speech, or as intertwined with the non-commercial speech of the album itself.

a. The Album Cover Is Not Commercial Speech Or Is Sufficiently Intertwined With The Album To Warrant Protection As Non-Commercial Speech.

As discussed in Appellants' Opening Brief (at 32–34), the Album Cover is not commercial speech because it does far “more than propose a commercial transaction”; it is part and parcel of the artistic expression. (*Stewart, supra*, 181 Cal.App.4th at p. 685 [“If speech is not ‘purely commercial’—that is, if it does more than propose a commercial transaction—then it is entitled to full First Amendment protection.”]; see *White v. City of Sparks* (9th Cir. 2007) 500 F.3d 953, 956 [holding that an artist’s sale of his paintings “do more than propose a commercial transaction and therefore are not commercial speech”].)

In response, Serova argues that the Album Cover is commercial speech because she concludes it is “not a part of the album’s expressive work.” (RB at 35–36.) She cites no case law in support of this extraordinary proposition. Indeed, in a footnote, Serova refers to an article that dissects and analyzes the cover art within the context of Michael Jackson lore (see RB at 14, fn. 6); this only confirms how expressive the Album Cover actually is. It would surely surprise recording artists to learn that the titles and cover art featured on their albums are not expressive; indeed, were that the case, electronic music services

such as iTunes or Spotify would not bother including album art along with the music. But of course they do, because the album covers are part of the expressive works,³ and when a consumer purchases or streams an album, the consumer expects to also receive the expressive content on its cover. Similarly, even though the title is simple (“*Michael*”), it is expressive. While it identifies the artist, it does so in an expressive manner using only his first name, and in a particular font and manner, much like a fine artist’s personal signature on the corner of a painting.

None of Serova’s arguments claiming the Album Cover lacks any expressive content withstand scrutiny.

She begins by arguing that the Album Cover is commercial because it is “dictated by the need to make the album appealing” to consumers. (RB at 35.) This argument runs headlong into settled case law unequivocally establishing that “[t]he First Amendment is not limited to those who publish without charge. . . . [T]he activity . . . does not lose its constitutional protection because it is undertaken for profit. . . . The fact that respondents sought to profit from the production and exhibition of a film . . . is not constitutionally significant.” (*Guglielmi v. Spelling-Goldberg Productions* (1979) 25 Cal.3d 860, 868–869; see also *Bolger v.*

³ Consider iconic covers such as the Beatles’ *Abbey Road*, or the Velvet Underground & Nico’s album featuring Andy Warhol’s banana print. It is implausible to suggest these are not expressive works. Similarly, famous titles such as the Beatles’ *Sgt. Pepper’s Lonely Hearts Club Band*, Elton John’s *Goodbye Yellow Brick Road* and the Red Hot Chili Peppers’ *Blood Sugar Sex Magik* are undeniably expressive.

Youngs Drug Products Corp. (1983) 463 U.S. 60, 67 “[A]n economic motivation ... would clearly be insufficient by itself to turn the materials [in question] into commercial speech.”.) The fact that the Album Cover may have helped drive sales of the album is irrelevant to the commercial speech analysis.

Serova next argues that the Album Cover is not part of the expressive work because it was designed by persons other than Michael Jackson himself. (RB at 35.) But an artist’s work is often created along with a team of collaborators. By Serova’s reasoning, the set for a large stadium concert is not expressive unless the performer personally designed it, and the art on an album’s cover is not expressive unless the performer personally drew it. The fact that Jackson predeceased the album’s release does not mean that its packaging and title had “nothing to do with” artistic expression, as Serova claims. (RB at 35.) To the contrary, the highly decorative album cover and the title *Michael* have no meaning if they are not considered within the context of the album itself, and thus are part of the expressive content.

Last, Serova disingenuously claims that this lawsuit does not burden the expressive rights of the visual artist who created the Album Cover because that artist could have sold the artwork separately from the album. (RB at 35.) But limiting the how or where the art may be expressed is necessarily a burden. A pamphleteer is burdened by a requirement that her materials may only be distributed on line and not from a soapbox on the street. And a graffiti artist is burdened if she may only display her works indoors. Context matters. The context of the Album

Cover is as a part of the expressive work that forms the album as a whole. And it is precisely that expressive work that Serova challenges under the UCL and CLRA—statutes that apply only to commercial speech.

None of Serova’s cited authorities are on point. She argues that “factual representations about defendants’ own products or services directed at consumers” is commercial speech, but relies in all but one instance upon cases where the “product” was a consumer good and not an expressive work. (RB at 31–34 (citing cases analyzing statements about athletic apparel, locks, a nutritional supplement intended to enlarge breasts, beer, and the provision of legal services].) Such cases have no bearing on the issue of whether speech *on the cover of a musical album* is commercial, because unlike the products at issue in those cases, the *Michael* album itself is protected, non-commercial speech.

The closest Serova comes to apposite authority is her citation to *Keimer v. Buena Vista Books, Inc.* (1999) 75 Cal.App.4th 1220, which held that advertisements on a book’s cover were commercial speech. But that case only illuminates the correctness of Appellants’ position. In *Keimer*, a financial investment club published a book promising, on its cover and within, a specific rate of return over a specific number of years. (*Id.* at p. 1224.) These promises were later found to be fraudulently made, because “the investment club’s rates of return were far below the 23.4 percent proclaimed in the advertisement.” (*Id.* at p. 1225.) The plaintiff sued the book’s

publishers, alleging the rate of return advertised on the cover was verifiably false. But the case is distinguishable.

To begin, the plaintiff in *Keimer* sued under California's False Advertising Law (Bus. & Prof. Code, § 17500), which includes a scienter component. Furthermore, the plaintiff alleged that the publisher "knew or should have known that the advertising statements" regarding the rate of return were false. (*Keimer, supra*, 75 Cal.App.4th. at p. 1233.) The claims in *Keimer*, thus, did not give rise to the policy concerns at issue here, namely the severe chilling effect that would be wrought upon art purveyors by imposing ***strict liability*** for statements concerning the expressive content.

Next, as discussed in Appellants' Opening Brief (at 38–39), a hallmark of commercial speech is its verifiability. (*Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 955, as modified (May 22, 2002); *Bernardo v. Planned Parenthood Federation of America* (2004) 115 Cal.App.4th 322, 348 [advertisement not commercial speech where it does not involve "readily verifiable factual assertions" but instead matters of "genuine . . . debate"].) The rate of return at issue in *Keimer* was quintessentially verifiable. In contrast, here, Appellants could not actually verify whether Jackson sung the lead vocals on the Cascio Tracks. Serova criticizes Appellants' efforts to do so, but because of Jackson's death, there was no objectively verifiable way to be certain. And the Angelikson Defendants—the only others in a position besides Jackson to have personal knowledge—***represented to Appellants that it was in fact Jackson.***

Serova admits this, but puzzlingly claims that because the information was known “at least to the Angelikson Defendants” it was “objectively verifiable” *by Appellants*. (RB at 37.) But Serova admits the Angelikson Defendants represented that the vocals were Jackson’s, and to this day continue to do so. Specifically Serova asserts that the Angelikson Defendants “failed to disclose to Sony or the Estate that Michael Jackson did not perform the lead vocals on” the Cascio Tracks and that the Angelikson Defendants “owed Sony and the Estate a duty to make such disclosure[.]” (CT 1:117 [FAC ¶ 18].) She also alleges that the Angelikson Defendants “had exclusive knowledge” of whether Jackson sang the lead vocals on the Cascio Tracks. (*Ibid.*) In sum, unlike the rate of return at issue in *Keimer*—a math calculation—whether Michael sang the lead vocals on the Cascio Tracks was impossible for Appellants to definitively verify.⁴

Serova’s laundry list of things she claims, with the benefit of hindsight, that Appellants could have done to verify the authenticity of the tracks (RB at 38) largely parallels what Appellants actually did; they hired musicologists to provide

⁴ Serova attempts to convert the issue of who sang the lead vocals on the Cascio Tracks into something verifiable by claiming that “Appellants were in a better position than album buyers to verify” the lead singer. (RB at 38.) That is not the test. The distributor of an expressive work or a commercial product may be in a better position than consumers to discover information about the work or the product. But the fact remains that Appellants had no way to verify the identity of the lead singer with certainty.

expert forensic advice, and questioned those with knowledge of the tracks (CT 1:118–19 [FAC ¶¶ 21–22]). And unlike the allegations in *Keimer*, which included the allegation that the publisher knew the advertised rate of return was false when the book was released, Serova does not and cannot allege the same is true for Appellants on *Michael's* release date with respect to the authenticity of the tracks. As such, the Album Cover was not commercial speech. (Cf. *Kasky, supra*, 27 Cal.4th at p. 348 [holding Nike's advertising statements were commercial speech because "Nike was in a position to readily verify the truth of any factual assertions it made"].)

Moreover, even if the statements on the Album Cover are not pure non-commercial speech, they warrant First Amendment protection because they are adjunct to or inextricably intertwined with the album's noncommercial, expressive elements. (See *Rezec v. Sony Pictures Entertainment, Inc.* (2004) 116 Cal.App.4th 135, 142, as modified (Feb. 26, 2004) ["just as the films are noncommercial speech, so is an advertisement reflecting their content"]; *Stutzman, supra*, 2013 WL 4853333, at pp. 17–19.)

Serova admits that *Stutzman* is directly on point, but claims it "misapplied the 'inextricably intertwined' doctrine[.]" (RB at 46.) *Stutzman* relied upon *Dex Media West, Inc. v. City of Seattle* (9th Cir. 2012) 696 F.3d 952, where the Ninth Circuit held a phone book's advertisements were inextricably intertwined with its directory listings because the advertisements were the only way the phone book was monetized; and to remove the

advertising would effectively prevent the distribution of the phone books. (RB at 46.) Faced with the reasoning in *Stutzman*, Serova argues that the Album Cover is not inextricably intertwined with the expressive album content because “they could have been removed or replaced with truthful advertisements without burdening the” dissemination of the works themselves. (*Ibid.*) In so arguing, Serova misunderstands the doctrine.

To be sure, the Supreme Court has held that non-commercial speech is inextricably intertwined with commercial speech only where “[n]o law of man or of nature makes it impossible” to separate the two. (*Board of Trustees of State University of New York v. Fox* (1989) 492 U.S. 469, 474.) *Dex Media* applied that holding to find, in essence, that a law of man did make it impossible to separate the advertisements in the phone book from the listings, because the “phone book companies depend economically upon advertisements to pay for the directories.” (*Dex Media West, Inc.*, *supra*, 696 F.3d at p. 963.) The same is true here—Appellants’ ability to sell the album depends upon the ability to identify it as being from Michael Jackson. Serova’s suggestion that Appellants could have “acknowledge[d] uncertainty about the singer’s identity on the album cover” drags the First Amendment into dangerous territory indeed, because “[w]e must not permit juries to dissect the creative process in order to determine what was necessary to achieve the final product and what was not, and to impose liability . . . for that portion deemed unnecessary.” (*Brodeur v.*

Atlas Entertainment, Inc. (2016) 248 Cal.App.4th 665, 675, citation and internal quotation marks omitted.)

In sum, even if the Album Cover statements identifying Jackson as the performer are deemed commercial speech (which they are not), they are inextricably intertwined with the album's expressive content and are not actionable under the UCL or CLRA.

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

As for the Announcement Video, the only portion Serova challenges is its truthful description of the album as being "from" Michael Jackson. The Announcement Video makes no assertion whatsoever about the irresolvable controversy surrounding the performer of all lead vocals on the Cascio Tracks. It is thus protected, noncommercial speech. (See *Rezec, supra*, 116 Cal.App.4th at pp. 137–138, 142 [analyzing whether the defendant's speech was commercial by honing in on the allegedly false statement within the trailer upon which the claims were based, and noting that had the statement at issue been mere descriptions of the protected work, "such as . . . photographs of actors in the films," it would have been non-commercial speech subject to anti-SLAPP protection]; *Bernardo, supra*, 115 Cal.App.4th at p. 348.)

Serova argues that the Announcement Video is nonetheless commercial speech simply because it is an advertisement. But

she relies upon cases that merely disavow any **categorical** rule that all advertisements for expressive content are themselves non-commercial speech. (RB at 39–40.) In *Charles*, the Ninth Circuit held that a billboard advertising a television show was commercial speech. (*Charles v. City of Los Angeles* (9th Cir. 2012) 697 F.3d 1146, 1152, 1157.) While rejecting the appellants’ proposed brightline rule that “truthful advertisements for expressive works are **inherently** noncommercial speech (*id.* at p. 1153, emphasis added), the Court explained that “[c]ertain advertisements for noncommercial works might include both an invitation to participate in a commercial transaction as well as some amount of noncommercial expression entitled to heightened First Amendment protection.” (*Id.* at p. 1152.) That is exactly what the Announcement Video is; while it invites the viewer to participate in a commercial transaction (*i.e.*, to purchase the album) it also provides truthful information about the album (*i.e.*, that it is “from” Jackson) within the context of the highly expressive imagery and soundtrack of the video.

Serova argues that *Rezec*, *Keimer* and *Charles* stand for the notion that untruthful advertisements can never be protected, non-commercial speech. Even leaving aside whether the Announcement Video’s statement that the album is “from” Jackson is truthful (which it is), Serova did not and cannot allege it was **knowingly** untruthful. This distinguishes all three cases. In *Rezec*, one of the defendant’s employees knew that the challenged statement in a film advertisement was false, and that knowledge was imputed to the defendant. (*Rezec, supra*, 116

Cal.App.4th at p. 137.) In *Keimer*, as discussed *supra*, the plaintiff sued under the False Advertising Law (which contains a scienter component) and alleged that the defendants knew or should have known that their marketing statements were false when made. (*Keimer, supra*, 75 Cal.App.4th at p. 1224.) And in *Charles*, the issue of falsity did not arise, because the billboard at issue was undeniably truthful insofar as it simply depicted the hosts of a television show. (*Charles, supra*, 697 F.3d at p. 1150.) None of these cases held that advertisements believed to be truthful when disseminated lose their constitutional protection if facts unknown to the defendant subsequently come to light that prove the advertisements to be false. The First Amendment was not implicated because there is an exception for fraud, which would apply in all three of the above cases, but **does not** apply to Appellants here. (See *Stutzman, supra*, 2013 WL 4853333, at p. 18 [“the economic reality in this age of technology is that publishing companies and authors must promote the books they publish and write in order to sell them, if publishing houses are to continue to operate and books are to continue to be sold in paper and hard copies”].)

2. Alternatively, Serova Has No Probability of Success on the Merits Because The Album Cover And Announcement Video Were Not Misleading As A Matter Of Law.

Serova did not allege that Jackson had nothing to do with the Cascio Tracks; she bases her lawsuit only on the allegation that he did not sing the lead vocals. (CT 1:116–23 [FAC ¶¶ 13,

14, 18, 23, 29, 30, 32, 33].)⁵ Neither the Album Cover nor the Announcement Video would have deceived any reasonable consumer into thinking that Jackson sang the lead vocals on the Cascio Tracks.

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

There is nothing on the front of the *Michael* CD that identifies the lead vocalist in any of the songs. The title and artwork say nothing about who wrote, produced, or performed the individual songs. To be sure, the images on the front cover suggest that Jackson's art is embodied in the album as a whole, but they do not imply that Jackson sang lead vocals on every song. Serova disagrees, arguing that "the album cover and video ad communicate to consumers Jackson's role *as the lead singer* on these tracks." (RB at 55, emphasis added.)

The only information on the Album Cover concerning the vocals is the following, which appears on the back cover in very small print: "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.*" (CT 1:119 [FAC ¶ 27]; CT 1:144–49; 4:894, emphasis added.) This language informs consumers that the tracks are not

⁵ While she for the first time claims in her Respondent's Brief that she brings her claims based on an allegation that Jackson had no "involvement in the Cascio Tracks in any way," the Complaint does not contain this allegation. (See RB at 54, fn. 13.)

instrumental, that Michael Jackson “performed” them and that they were completed by persons other than those who had originally recorded them. It does not state or imply that Michael Jackson sang the lead vocals on all of the tracks on the album.

Serova argues this language is a “partial representation” that triggered a “duty to disclose” the lead vocalist on the songs. (RB at 49–50.) The only case she cites for this proposition does not address partial representations at all, let alone in any analogous context. (RB at 49, citing *Collins v. eMachines, Inc.* (2011) 202 Cal.App.4th 249, as modified (Dec. 28, 2011).) The doctrine is inapplicable in any event, because nothing on the Album Cover partially discloses the lead vocalist on the album’s tracks. And the Album Cover would not have misled a reasonable consumer into believing that Jackson sang the lead vocals on every track; thus Serova’s UCL and CLRA claims arising out of the Album Cover fail as a matter of law.

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

Similarly, Serova cannot base viable UCL or CLRA claims on the Announcement Video, because it contains no false or misleading content. The only statement in the video concerned the album as a whole, dubbing it: “a brand new album from the greatest artist of all time.” (See CT 1:119 [FAC ¶ 24]; Lodged

CD, Video 1 at 0min 23sec.) The video does not state that Jackson sang lead vocals on the Cascio Tracks.⁶

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

C. Public Policy Support A Reversal Of The Trial Court's Order.

As discussed in Appellants' Opening Brief (at 46–48), public policy supports a reversal of the portions of the trial court's order denying Appellants' anti-SLAPP motion because Serova's theory of strict liability against appellants would chill distribution of artistic expression. Serova tries to wave away these concerns and argues public policy favors affirming the trial court's ruling for reasons that are unavailing.

Serova argues that her pending fraud claim against the Angelikson Defendants is an "inadequate remedy" because Appellants have deeper pockets than the Angelikson Defendants. (RB at 56.) It goes without saying that the financial condition of the other defendants is irrelevant to the viability of Serova's claim against Appellants. (See *Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 490 [affirming judgment for the defendant where the lawsuit was "an artificial scheme designed

⁶ The phrase "from" Michael Jackson also cannot reasonably be interpreted literally. Michael Jackson had died, and the album necessarily did not come "from" him.

not to fairly assess culpability but to reach into the deepest pocket”]; Civ. Code, § 1431.1 [identifying problem where “private defendants are perceived to have substantial financial resources . . . and have thus been included in lawsuits even though there was little or no basis for finding them at fault”].)

Serova also argues that she “seeks to enjoin the Angelikson’s ongoing distribution of the Cascio Tracks under Michael Jackson’s name,” and that any injunction she might obtain would be ineffective if they did not enjoin Appellants as a party to the action. (RB at 56.) But the fact that all the remedies Serova wants may not be available from the Angelikson Defendants does not comprise a legal basis to hold Appellants liable.

Third, Serova argues no chilling effect is likely to occur as a result of this case because “a quick survey of Sony Music’s releases shows no chilling effect” as of yet. (RB at 58.) Aside from the fact that Serova has no factual basis whatsoever for this assertion, this argument misses the point. A chilling effect would necessarily occur if unknowing distributors of art were exposed to strict liability should the authenticity of the art ever come in to question. And, even if Serova could establish that no chilling effect at Sony has yet occurred, that effect would occur only if and when this Court were to affirm the trial court’s order—not simply because Serova filed her Complaint.

D. Serova Has Withdrawn Her Motion To Dismiss This Appeal.

Serova has withdrawn her motion to dismiss this appeal, which argued that the trial court's order was not appealable because further proceedings were supposedly due to take place on the anti-SLAPP motion. (RB at 19.) Serova states that she has withdrawn the motion because Appellants have stated that if this appeal is resolved in Serova's favor, they will not prosecute their anti-SLAPP motion further. (*Ibid.*) But Appellants made that statement in a filing in the trial court on March 17, 2017. (Opp. to Mot. to Dismiss at 6; AA 1:430.) It is thus unclear why Serova wasted this Court's and Appellants' resources by filing her motion to dismiss four months later, on July 24, 2017. In any event, Serova has withdrawn the motion to dismiss, and thus concedes that the appeal should be heard on the merits.


III. CONCLUSION.

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

Respectfully submitted,

Dated: May 29, 2018

KATTEN MUCHIN ROSENMAN
LLP

By: 

Zia F. Modabber

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

KINSELLA WEITZMAN ISER
KUMP & ALDISERT LLP

By:  / by ZFM

Howard Weitzman
Attorneys for Appellants Sony
Music Entertainment, John
Branca, as Co-Executor of the
Estate of Michael J. Jackson,
and MJJ Productions, Inc.

WORD COUNT CERTIFICATION

The undersigned counsel for Appellants certifies pursuant to rule 8.204(c)(1) of the California Rules of Court that the word count for this document using Microsoft Word is 7,026 words, including footnotes but excluding the tables and this certificate, and certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Los Angeles, California, on May 29, 2018.

KATTEN MUCHIN ROSENMAN
LLP

By: 

Zia F. Modabber

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