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**IN THE
SUPREME COURT OF CALIFORNIA**

**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
Defendant and Appellant.**

**AFTER A DECISION BY THE COURT OF APPEAL
SECOND APPELLATE DISTRICT
CASE NO. B280526**

PETITION FOR REVIEW

Jeremy F. Bollinger jeremy@mossbollinger.com

Ari E. Moss ari@mossbollinger.com

Dennis F. Moss dennis@mossbollinger.com

MOSS BOLLINGER, LLP

15300 Ventura Blvd., Suite 207

Sherman Oaks, CA 91403

Telephone: (310) 982-2984; Facsimile: (818) 963-5954

Attorneys for Respondent
VERA SEROVA

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

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I. ISSUES PRESENTED FOR REVIEW

This case is a putative consumer class action about what purports to be a posthumous album of Michael Jackson's recordings titled *Michael*, released after Jackson's death by Sony Music Entertainment, the estate of Michael Jackson and MJJ Productions, Inc. (collectively, the Sony Defendants). Since *Michael's* inception, the authenticity of three recordings on the album (known as the Cascio recordings) has been widely controversial. Plaintiff Vera Serova alleges that Jackson did not sing on the Cascio recordings and that the Sony Defendants violated the Unfair Competition Law (UCL; Bus. & Prof. Code § 17200 et seq.) and the Consumers Legal Remedies Act (CLRA; Civ. Code § 1750 et seq.) by advertising *Michael* as an album of Michael Jackson's songs on its cover and in a video commercial. The Sony Defendants brought an anti-SLAPP motion under California Code of Civil Procedure, Section 425.16.¹ The trial court denied the motion to the extent Plaintiff's claims were based on the album cover and the video commercial. The Sony Defendants appealed. The Second District Court of Appeal reversed the trial court's order, holding, in contravention of California law, that (1) the Sony Defendants' labelling and advertising of the *Michael* album is protected speech under Section 425.16, and (2) such labelling and advertising is not actionable under the UCL and CLRA because the Sony Defendants lacked personal knowledge of whether Jackson sang

¹ All future references are to the California Code of Civil Procedure, unless indicated otherwise.

on the Cascio recordings at the time they sold the album to Plaintiff, which made their statements an opinion, and their statements directly related to a work of art. Consequently, this petition presents two issues for this Court's review:

1. Do controversial representations about a creative work made by its publisher to prospective buyers constitute speech in connection with an issue of public interest within the meaning of Section 425.16?
2. Is the publisher insulated from liability for misrepresentations under the UCL and CLRA if he lacked personal knowledge that his representations were false?

II. GROUNDS FOR REVIEW

Review on the first issue is required under Rule 8.500(b)(1) to resolve a conflict between appellate decisions in *Rezec v. Sony Pictures Entm't, Inc.* (2004) 116 Cal.App.4th 135 and *Scott v. Metabolife Int'l, Inc.* (2004) 115 Cal.App.4th 404 on the one hand, and the Court of Appeal's decision in this case on the other. This case presents a factual pattern like that of *Rezec* and *Metabolife* where product purveyors spoke about their products to consumers in order to sell those products. In those cases, courts found the anti-SLAPP statute inapplicable because manufacturers' statements about their products did not qualify as protected speech under Section 425.16, notwithstanding the popularity of the products. (*Rezec*, at p. 143; *Metabolife*, at p. 423.) The Court of Appeal here held contrary to that precedent, concluding that the popularity of the album and the controversy about its contents made the Sony Defendants' representations on

the album cover and in the video commercial protected speech. (Slip Op. 15–16.)

More broadly, this case requires the Court to resolve a long-standing disagreement between lower courts as to how expansively or narrowly speech must be viewed when it is analyzed for a “connection with an issue of public interest” under the first prong of the anti-SLAPP statute. The California law has not been uniform on this issue, with one line of appellate decisions focusing on the specific nature of the speech (*Consumer Justice Ctr. v. Trimedica Int'l, Inc.* (2003) 107 Cal.App.4th 595; *Commonwealth Energy v. Investor Data Exchange* (2003) 110 Cal.App.4th 26; *Nagel v. Twin Laboratories, Inc.* (2003) 109 Cal.App.4th 39; *All One God Faith, Inc. v. Organic & Sustainable Indus. Standards, Inc.* (2010) 183 Cal.App.4th 1186; *Dual Diagnosis Treatment Center, Inc. v. Buschel* (2016) 6 Cal.App.5th 1098; *Rand Res., LLC v. City of Carson* (2016) 247 Cal.App.4th 1080) and another line of cases evaluating public interest in general issues abstracted from the speech (*Cross v. Cooper* (2011) 197 Cal.App.4th 357; *Daniel v. Wayans* (2017) 78 Cal.App.5th 367; *Hecimovich v. Encinal Sch. Parent Teacher Org.* (2012) 203 Cal.App.4th 450.) In this case, the Court of Appeal took the latter approach, finding the Sony Defendants’ speech about the music album protected based on the public interest in Michael Jackson and his body of work—topics only tangentially related to the album. (Slip Op. 14–16.) The Court of Appeal did not acknowledge the existence of the standard which required it to focus on the specific nature of the speech and limit its inquiry to

whether speech about the album made by its seller to consumers satisfies the “public interest” requirement of Section 425.16.

Review on the second issue is required to correct the Court of Appeal’s misconstruction of the test for commercial speech set out in *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939 and resolve the conflict the Court of Appeal’s decision created with settled California law holding advertisers strictly liable for false representations they make to consumers. The plain text of the UCL and CLRA has no requirement that the speaker know his speech is false or deceptive, and courts have interpreted these statutes as strict liability laws. (*Cortez v. Purolator Air Filtration Prods. Co.* (2000) 23 Cal.4th 163, 181 [holding that the UCL imposes “strict liability”]; *Mazza v. Am. Honda Motor Co.* (9th Cir. 2012) 666 F.3d 581, 591 [observing the UCL and CLRA “have no scienter requirement”].) Notwithstanding these authorities, the Court of Appeal concluded the Sony Defendants’ representations about their product were opinions not actionable under the UCL and CLRA because the Sony Defendants spoke on an issue of which they lacked personal knowledge. (Slip Op. 19, 21.) The Court of Appeal misconstrued the test for commercial speech this Court adopted in *Kasky, supra*, 27 Cal.4th 939 and held that speech is not commercial unless the speaker has personal knowledge of the facts he speaks about. (Slip Op. 19.) Because the UCL and CLRA apply only to commercial speech (*Rezec, supra*, 116 Cal.App.4th 135, 140), the Court of Appeal’s misinterpretation of *Kasky* effectively imports a scienter element into the UCL and CLRA in contravention of the statutes’ plain

language and interpretation by this Court. Absent review and clarification of the commercial speech standard by this Court, the novel reading of *Kasky* championed by the Court of Appeal will profoundly narrow protections afforded to California consumers, depriving them of statutory remedies for inadvertent and negligent false advertising.

Additionally, the Court of Appeal found the Sony Defendants' statements noncommercial because they were made to consumers amidst a public controversy about the artist's identity and "related directly" to art. (Slip Op. 22, 26–27.) These findings contravene *Kasky* which held that neither public controversy nor relation to matters of public interest confer noncommercial status on speech. (*Kasky, supra*, 27 Cal.4th 939, 964.) The Court of Appeal's holding, making false attribution of creative works noncommercial based on public interest in art, essentially immunizes sales of forged art by every reseller down the line from the original forger.

III. STATEMENT OF THE CASE

For purposes of this appeal, the alleged facts are undisputed. The Sony Defendants purchased the Cascio recordings from individuals Edward Cascio and James Porte (also defendants in this suit, but not parties to this appeal), who told the Sony Defendants that Michael Jackson sang on these recordings prior to his death. (Slip Op. 6.) The Sony Defendants announced their decision to release the Cascio recordings on Michael Jackson's posthumous album titled *Michael*. When the public heard the recordings, a controversy ensued, with multiple

members of Michael Jackson's family and a number of his fans stating publicly and to the Sony Defendants that the singer on the Cascio recordings was not Jackson. (*Ibid.*) In response to the controversy, the Sony Defendants issued a statement to Jackson fan clubs, in which the Sony Defendants claimed that they had conducted an internal investigation which led them to conclude the vocals on the Cascio recordings belonged to Jackson. (*Ibid.*)

The Sony Defendants released the *Michael* album containing 10 songs—the three Cascio recordings and seven undisputed Jackson's recordings—and marketed it as an album by Michael Jackson. (Slip Op. 6–7.) The complaint alleges that the following statements at issue on this appeal were false or misleading in light of the allegation that Jackson does not sing on the three Cascio recordings included on the album:

- (1) The album cover containing the album name "Michael," multiple depictions of Michael Jackson, and a statement on the back of the cover:

"This album contains 9 previously unreleased vocal tracks performed by Michael Jackson"²; and

- (2) The video commercial in which the narrator presents *Michael* as "a brand-new album from the greatest artist of all time."

Neither the album cover, nor the video commercial disclosed to album buyers that Jackson did not sing on three of the album tracks, or that the identity of the singer on three of the

² This statement refers to 9 previously unreleased vocal tracks instead of the 10 songs on the album because one of the undisputed album songs was previously released in 2004.

album tracks was uncertain or controversial at the time of the album release.

In response to the complaint, the Sony Defendants filed an anti-SLAPP motion arguing that their statements on the album cover and in the video commercial constituted speech in connection with an issue of public interest protected by the anti-SLAPP statute, and Plaintiff could not prevail on her UCL and CLRA claims because the statements were noncommercial speech not actionable under these statutes, or, alternatively, not misleading as a matter of law even if Jackson did not sing on the Cascio recordings. (Slip Op. 8.) The Sony Defendants stipulated for purposes of the anti-SLAPP litigation that Jackson did not sing on the Cascio recordings (i.e. they were forgeries) (*ibid.*) and waived Plaintiff's burden to present prima facie evidence in support of her case, as typically required by the anti-SLAPP statute. Thus, the scope of the anti-SLAPP motion was limited to three legal issues:

- (1) Whether the Sony Defendants' statements were speech in connection with an issue of public interest within the meaning of Section 425.16;
- (2) Whether the Sony Defendants' statements were actionable as commercial speech under the UCL and CLRA; and
- (3) Whether the Sony Defendants' statements could mislead a reasonable consumer if the Cascio recordings were forgeries not containing Jackson's vocals.

The trial court found that the statements at issue met the definition of speech in connection with an issue of public interest under the first prong of the anti-SLAPP analysis, but that Plaintiff could prevail on her claims based on the statements at issue because they were commercial and therefore actionable under the UCL and CLRA and were likely to mislead a reasonable consumer. (Slip Op. 9–10.)

The Court of Appeal affirmed the trial court's ruling on the first prong, but reversed the second part of the ruling, holding that the statements at issue were noncommercial speech under *Kasky* because the content of the statements was noncommercial under the third prong of the *Kasky* test. The Court of Appeal concluded that the third element of *Kasky*, focusing on the content of the message, required the speaker's personal knowledge of the facts he spoke about. Because the Sony Defendants were speaking on a publicly disputed issue of which they had no personal knowledge, and their statements were "integral to the artistic significance of the songs themselves," the Court of Appeal concluded the Sony Defendants' statements were not commercial in character. (Slip Op. 3.) The Court of Appeal did not reach the question of whether the Sony Defendants' statements could mislead a reasonable consumer.

Plaintiff petitioned the Court of Appeal for rehearing and argued that the Court misconstrued the third prong of *Kasky*, reaching a holding that contradicted the established California law that imposes strict liability for false advertising. The Court of Appeal modified its decision with a footnote in which the Court

reaffirmed its problematic reading of *Kasky* but did not change the holding or the disposition of the case.³

IV. ARGUMENT

A. The Court of Appeal’s finding that the Sony Defendants’ speech describing the *Michael* album satisfies the “public interest” requirement of Section 425.16 contradicts other appellate courts’ holdings that a seller’s speech about its product directed at consumers does not concern an issue of public interest within the meaning of the anti-SLAPP statute.

When a defendant files an anti-SLAPP motion under Section 425.16, the court must engage in a two-step analysis, where the first step is to decide whether the defendant has satisfied its burden of showing that the challenged cause of action arose from the defendant's protected activity. (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384.)

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).) The speech that is not connected with a governmental proceeding is protected if it was made “in connection with a public issue or an

³ In the added footnote, the Court of Appeal stressed its view that, under *Kasky*, “the *speaker’s* knowledge about the content of the speech is an important feature” in answering the question whether the speech is commercial. Because the Sony Defendants were not involved in the creation of the Cascio recordings, from their perspective, “their challenged statements about the identity of the lead singer were therefore necessarily opinion.” (Order Mod. Op.)

issue of public interest.” (Cal. Code Civ. Proc. § 425.16 subds. (e)(3), (e)(4); *Consumer Justice Ctr. v. Trimedica Int’l, Inc.* (2003) 107 Cal.App.4th 595, 600–01.)

The California Legislature did not define what constitutes “speech in connection with a public issue or an issue of public interest,” leaving this task to courts. This Court predicted early that in the absence of a “bright-line” test, “confusion and disagreement about what issues truly possess ‘public’ significance inevitably will arise, thus delaying resolution of Section 425.16 motions and wasting precious judicial resources.” (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1122.) Indeed, the Court of Appeal’s finding of “public interest” in this case defied standards of analyzing speech under the first prong of Section 425.16 established by other appellate courts.

1. The Court of Appeal’s holding is inconsistent with *Rezec v. Sony Pictures Entm’t*, which held the public’s interest in a product is insufficient to turn advertisements of the product into speech concerning an issue of public interest under Section 425.16.

In *Rezec v. Sony Pictures Entm’t, Inc.* (2004) 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 fictitious critic qualified for protection under the anti-SLAPP statute. (*Id.* at pp. 137–138.) Sony claimed its allegedly misleading film advertisements were protected because they concerned films, which were of interest to the public. The court of appeal rejected this argument holding the public interest in films is insufficient to turn film advertisements into speech in

connection with an issue of public interest under the anti-SLAPP statute. (*Id.* at p. 143.)

Rezec's holding was consistent with *Scott v. Metabolife Int'l, Inc.* (2004) 115 Cal.App.4th 404, which rejected the theory that popularity and the importance of a product to the public makes advertisements of the product speech in connection with an issue of public interest under Section 425.16. (*Id.* at p. 423.) *Rezec* and *Metabolife* are among multiple cases that held, more generally, that a product manufacturer's speech about its product directed at consumers does not concern an issue of public interest. (See, e.g., *Nagel v. Twin Laboratories, Inc.* (2003) 109 Cal.App.4th 39, 47–48 [holding a list of dietary supplement ingredients is designed to further the manufacturer's "private interest of increasing sales of its products"]; *L.A. Taxi Coop., Inc. v. Indep. Taxi Owners Ass'n of Los Angeles* (2015) 239 Cal.App.4th 918, 927–929 [holding that advertisements of taxicab services do not concern an issue of public interest because defendants sought to sell their services].)

The Court of Appeal in the present case held contrary to these authorities, suggesting that the descriptions of the album on its cover and in the video commercial were protected because there was significant public interest in the advertised album. (Slip Op. 15, 16 [stating that "there was significant interest in the release of the posthumous album Michael," and the issue concerned "an album containing his songs that generated significant public attention"].)

The Court of Appeal did not distinguish or otherwise discuss *Rezec* in its first prong analysis. The Court did distinguish *Metabolife* and other false advertising cases based on the presence of a public controversy around the Cascio recordings. (Slip Op. 16.) However, the Court of Appeal failed to consider that the controversy was prompted by the Sony Defendants' announced decision to release the recordings of dubious origin as Michael Jackson's songs. The Court of Appeal's reasoning seems to suggest that a false advertisement which generates a public debate about whether the advertised product quality conforms to the manufacturer's claims is protected by the anti-SLAPP statute to a greater extent than a noncontroversial truthful advertisement. Essentially, under this precedent, the public debate about a consumer issue—which itself constitutes core First Amendment speech—confers protection on the deceptive advertisement which triggered the debate. If this standard is allowed to stand, every fraud-based scandal will transform deceptive speech about the product into a matter of public interest.

In *FilmOn.Com, Inc. v. DoubleVerify, Inc.*, S244157, pending review, this Court will address a related issue of whether the commercial nature of the speech takes a cause of action arising from the speech outside of Section 425.16. Prior to this case, California courts of appeal unanimously answered “yes” to this question in false advertising context where the speech concerned defendants' own products or services. *FilmOn.Com* asks the Court to take that analysis a step further and consider

whether the same principle applies to speech that is made in a commercial context but does not promote defendants' own goods. Meanwhile, the Court of Appeal in this case has disturbed the foundational principle that a product manufacturer's speech about his own products directed at consumers is not protected under Section 425.16.

The Legislature made the anti-SLAPP protection unavailable to most advertisers when it enacted Section 425.17(c) making the statute inapplicable to commercial speech about the speakers' goods or services. However, the Legislature made an exception for manufacturers and distributors of media and artistic products. (Cal. Code Civ. Proc. § 425.17(d)(2) [stating Section 425.17(c) does not apply to "any person or entity based upon the creation, dissemination, exhibition, advertisement, or other similar promotion of any dramatic, literary, musical, political, or artistic work . . ."].) Consequently, both *Rezec* and the Court of Appeal's decision in the present case remain relevant precedents for future false advertising cases involving media or creative works. Yet, they announce irreconcilable standards.

2. The Court of Appeal's finding of "public interest" based on the consideration of generalities abstracted from the speech is contrary to the standard established by other appellate courts requiring examination of "the specific nature of the speech."

In a more general context, the Court of Appeal's decision contributed to the long-standing disagreement between courts' interpretation of how closely the topic of the examined speech must be connected to an issue of public interest.

One line of appellate decisions has established that in analyzing speech under the first prong of Section 425.16, courts must examine “the specific nature of the speech rather than generalities that may be abstracted from it.” (*Commonwealth Energy v. Investor Data Exchange* (2003) 110 Cal.App.4th 26, 34.) This standard originated from *Consumer Justice Ctr. v. Trimedica Int'l, Inc.* (2003) 107 Cal.App.4th 595. In that case, the 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 statements 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 *Commonwealth Energy v. Investor Data Exchange* (2003) 110 Cal.App.4th 26, another case decided the same year, Commonwealth Energy brought claims against a telemarketing firm for misappropriation of trade secrets, unfair business practices and false advertising arising out of telemarketing calls made by the firm to the Commonwealth Energy's shareholders. (*Id.* at pp. 28–30.) The defendant argued that its calls offering investigatory services against investment scams were protected by the anti-SLAPP law. (*Id.* at p. 31.) Relying on *Trimedica*, the court affirmed the denial of the anti-SLAPP motion, finding the defendant's speech was a pitch of its investigatory service rather than a discussion of investment scams generally; and therefore, was not "in connection with an issue of public interest" within the meaning of Section 425.16. (*Id.* at pp. 28, 34.) The court summarized *Trimedica*, concluding that the first prong of the anti-SLAPP analysis requires "examination of the specific nature of the speech rather than the generalities that might be abstracted from it." (*Id.* at p. 34.)

The *Commonwealth Energy* standard has since been applied by California courts of appeal in cases involving both commercial and noncommercial speech. (See, e.g., *Nagel v. Twin Laboratories, Inc.* (2003) 109 Cal.App.4th 39, 47–48 [holding the description of components of the dietary supplement for weight loss is "not participation in the public dialogue on weight management issues"]; *All One God Faith, Inc. v. Organic & Sustainable Indus. Standards, Inc.* (2010) 183 Cal.App.4th 1186, 1205 [holding the trade association's use of the "OASIS Organic"

seal on member products is not directed to public discussion of organic standards in general]; *Dual Diagnosis Treatment Center, Inc. v. Buschel* (2016) 6 Cal.App.5th 1098, 1106 [holding the newsletter editor's allegedly libelous statement about a particular mental health facility operating without a license does not concern the public issue of how mental health facilities generally operate]; *Rand Res., LLC v. City of Carson* (2016) 247 Cal.App.4th 1080, 1093–94, review granted Sept. 21, 2016, S235735 [holding the City's speech about who will be its representative in communications with the NFL team did not concern broader public issues of having the NFL team, stadium, and associated developments in the City of Carson].)

Yet, other courts of appeal, while not expressly disapproving of the *Commonwealth Energy* standard, have held contrary to it. For example, in *Cross v. Cooper* (2011) 197 Cal.App.4th 357, tenants of the house that was put on sale informed a prospective buyer that a registered sex offender lived nearby. (*Id.* at pp. 365–366.) The buyer then cancelled the transaction, and the owner of the house sued the tenants for interfering with the sale. The tenants filed an anti-SLAPP motion arguing that informing the prospective buyers about the sex offender was speech in connection with an issue of public interest. (*Ibid.*) The court of appeal agreed, concluding that “preventing child sexual abuse and protecting children from sexual predators are issues of widespread public interest.” (*Id.* at p. 375.) Just like the newsletter editor in *Buschel* who spoke about a particular mental health facility rather than about how

mental health institutions generally operate, the tenants in *Cross* spoke about a particular sex offender in the neighborhood rather than about general prevention of child sex abuse. Yet, the *Cross* panel abstracted a general topic of public interest from the statement about a specific person and concluded that the statement was protected by section 425.16. (*See also Hecimovich v. Encinal Sch. Parent Teacher Org.* (2012) 203 Cal.App.4th 450, 465–466, 468 [holding parent-teacher organization’s allegedly defamatory statements about a soccer coach’s disciplinary methods and fitness for job were protected because “safety in youth sports” and “problem coaches/problem parents in youth sports” were issues of public interest].)

In *Daniel v. Wayans* (2017) 78 Cal.App.5th 367, the majority adopted a similarly expansive view of the challenged speech. Defendant Wayans, a film director, was sued for offensive racial remarks he made about Daniel, an extra in his comedy film, on the film set and on Twitter. (*Id.* at pp. 374–375.) Daniel alleged that Wayans referred to him in a demeaning and derogatory manner, using racial slurs, mocking Daniel’s “afro” and comparing him to an African-American cartoon character. (*Ibid.*) The court of appeal found that Wayans’ racially charged statements about Daniel on Twitter were protected because Wayans and his films were popular and advance information about Wayans’ film posted by him on Twitter, including a photo of someone acting in the film, was of interest to the public. (*Id.* at pp. 387–388.) Similar to the City of Carson’s speech in *Rand*, which was about the identity of the City’s representative in the

development project rather than about the development project itself, Wayans' speech in *Daniel* was about the physical appearance of an extra involved in the movie rather than about the movie itself. Yet, the *Daniel* panel forewent the *Commonwealth Energy* standard requiring it to focus on the specific nature of the speech—Wayans' discussion of the actor's appearance—and instead found the speech protected based on the public interest in Wayans' films—a general topic abstracted from the speech.

In the present case, the Court of Appeal similarly departed from of the *Commonwealth Energy* standard. The challenged speech here includes the statement on the back of the album cover saying that “[t]his album contains 9 previously unreleased vocal tracks performed by Michael Jackson”, the album name “Michael,” the album cover image consisting of the depictions of Michael Jackson and the video commercial presenting *Michael* as an album “from the greatest artist of all time.” These statements are representations to potential buyers that the *Michael* album consists of recordings by Michael Jackson. Instead of inquiring whether there was public interest in this information about the *Michael* album conveyed to a consumer, the Court of Appeal found the statements protected based on abstracted generalities, such as the public interest in Jackson as a “famous entertainer” (Slip Op. 14–15), his “body of work” (Slip Op. 16), and “whether or not the lead singer on the [Cascio recordings] was actually Michael Jackson.” (Slip Op. 15–16.) The Court of Appeal did not disapprove of *Commonwealth Energy*, nor attempted to reconcile

it with the Court's broad view of issues that it found bearing on the determination of public interest in this case.

Courts of appeal that have adopted the more expansive view of issues implicated by speech under the first prong of the anti-SLAPP analysis are guided by the legislative directive to construe the statute "broadly." (Cal. Code Civ. Proc. § 425.16(a).) However, this directive does not provide a workable standard because its limits are unclear. Any tortious speech, if sufficiently broadly abstracted, can be linked to some issue of public interest. The lack of guidance from the Legislature or this Court as to how speech must be analyzed under the first prong of Section 425.16 gives lower courts the discretion to construe the speech as expansively or as narrowly as they see fit in a particular case.

This judicial discretion results in great uncertainty for litigants, with especially dire consequences in the anti-SLAPP context. It encourages opportunistic anti-SLAPP litigation by defendants in cases arising from speech on a chance that the trial court or the court of appeal will adopt a sufficiently broad view of the speech to bring it under the first prong of Section 425.16.⁴ Because the filing of an anti-SLAPP motion with its statutory right to appeal typically prolongs the litigation for over a year, such opportunistic litigation substantially increases legal costs for the litigants and courts. On the other hand, uncertainty about

⁴ After the 1997 legislative amendment requiring broad construction of Section 425.16, courts have seen an explosion of anti-SLAPP litigation. (*Grewal v. Jammu* (2011) 191 Cal.App.4th 977, 998–999 [noting a ten-time increase in annual anti-SLAPP motion filings between 1999 and 2009].)

whether their cause of action can be subject to an anti-SLAPP motion deters plaintiffs, who face the risk of owing defendants' attorney fees, from bringing valid causes of action arising from speech. This disproportionately infringes upon people's constitutional right to access courts.

FilmOn.Com, Inc. v. DoubleVerify, Inc., S244157 and *Rand Res., LLC v. City of Carson*, S235735, pending before this Court have already touched on this important issue in their briefing. (OB 24–32, AB 53–57, and RB 26–27 in *FilmOn.com*; AB 22–27 in *Rand*.) However, the focus of review in *FilmOn.Com* is a different issue of whether commercial nature of the speech must be taken into account under the first prong of Section 425.16; and the primary inquiry in *Rand* is whether its cause of action arose from conduct in furtherance of defendants' speech rights. This case, in contrast, presents an opportunity for the Court to squarely address the issue pertinent to every case arising from speech and falling under subdivisions (e)(3) and (e)(4) of Section 425.16: how direct or attenuated the speech's connection to matters of public interest must be under the first prong of the anti-SLAPP statute. The Court's guidance will secure uniformity of appellate decisions on this issue and provide litigants with greater predictability of outcomes in the anti-SLAPP litigation.

The fact pattern here illuminates the tension between the competing approaches of appellate courts, which makes this case a well-suited example for delineating what the law is. On the one hand, there is undeniable interest among certain segments of the public in whether Michael Jackson sang on the controversial

recordings; on the other hand, the nature of the challenged statements was not a participation in the debate on who sang on the controversial recordings, but rather a description of the product to potential buyers. On the one hand, the statements are labels and advertisements that courts traditionally view as implicating the seller's private, rather than public, interest (*Nagel, supra*, 109 Cal.App.4th 39, 47–48; *Rezec, supra*, 116 Cal.App.4th 135, 140–144; *Metabolife, supra*, 115 Cal.App.4th 404, 423; *L.A. Taxi Coop., supra*, 239 Cal.App.4th 918, 927–929); on the other hand, the controversial nature of these advertisements attracted public attention. The choice of the proper standard by this Court will not only determine whether this case was correctly decided but will provide a uniform guideline for future disputes arising from speech that, as speech-based cases often do, raise competing policy considerations.

B. The Court of Appeal's conditioning of commercial status of the speech on the speaker's knowledge and the existence of public interest or debate contravenes *Kasky* and jeopardizes California consumer protection laws.

It is undisputed that both the UCL and CLRA apply only to commercial speech, and noncommercial speech is not actionable under these statutes. (*Rezec, supra*, 116 Cal.App.4th 135, 140.) In assessing whether the challenged statements in this case were commercial, the Court of Appeal applied the test for commercial speech articulated in *Kasky, supra*, 27 Cal.4th 939, that requires examination of the speaker, the intended audience and the content of the message. (*Id.* at p. 960.) The Court of Appeal found

that the speaker and the intended audience of the challenged statements were indicative of commercial speech. (Slip Op. 19.) However, the Court concluded that the content of the challenged statements on the album cover and the video commercial favored finding them noncommercial because they concerned a publicly disputed issue about which the Sony Defendants had no personal knowledge and were directly connected to music that itself enjoyed full First Amendment protection. (Slip Op. 19–20.) Therefore, the Court concluded, the Sony Defendants’ speech was not actionable under the UCL and CLRA, and Plaintiff could not prevail on her claims. (Slip Op. 30.)

1. The Court of Appeal’s finding that speech cannot be commercial absent the speaker’s personal knowledge of the stated facts misconstrues the *Kasky* test for commercial speech and adds a scienter element into the UCL and CLRA contrary to authorities indicating that these are strict liability statutes.

The third element of the *Kasky* test for commercial speech requires that the content of the message be commercial in character. (*Kasky, supra*, 27 Cal.4th 939, 961.) *Kasky* defined a message of commercial character as “representations of fact about the business operations, products, or services of the speaker . . . made for purposes of promoting the sales of . . . the speaker’s products or services.” (*Ibid.*) This definition does not contain on its face a requirement that the speaker has personal knowledge of whether his speech is true. Yet the Court of Appeal concluded that the speaker’s personal knowledge is a critical element of finding the message commercial in character. (Slip Op.

20 [concluding that the speaker's ability to verify the truth of the speech was "important for the court's ruling," 21 [noting that the Sony Defendants' statements "lacked the critical element of personal knowledge under the *Kasky* standard"].) The Court reasoned that lack of personal knowledge of the facts the advertiser speaks about makes the advertiser's statements opinions. (Slip Op. 23.)

The Court of Appeal's decision to look beyond the content of the speech, to the speaker's state of mind, radically departs from the *Kasky* standard. The focus of *Kasky*'s third prong on the *content* of the message was justified by the purpose of the test—to detect speech that can cause "commercial harms." (*Kasky, supra*, 27 Cal.4th 939, 955.) In the false advertising context, this means a determination of whether the message can induce a member of the audience to enter into a commercial transaction. The speaker's state of mind is irrelevant to this determination because it is not known to the audience. The speaker's state of mind factors into assessing the character of the message only to the extent it can be gleaned from the message itself. To that end, *Kasky* requires the message to be a "representation of fact" (opinions are not actionable). Whether a statement is factual or an opinion is judged from the perspective of the audience, not the speaker. (*Baker v. Los Angeles Herald Exam'r* (1986) 42 Cal.3d 254, 260–61.) If the audience understands the message as factual and relies on it accordingly in deciding whether to buy the product, the speech is commercial. Therefore, what matters under the plain language of the *Kasky* test is how the consumer

perceives and understands the message, not what the commercial speaker knew when he uttered it. The Court of Appeal rejected this plain reading of *Kasky* and concluded that while the message may appear a representation of fact from the consumer's perspective, the speaker's lack of knowledge nevertheless makes it an opinion which cannot be commercial speech. (Order Mod. Op.)

The Court of Appeal's incorporation of a knowledge requirement into the *Kasky* test for commercial speech is novel and dramatically narrows the scope of California consumer protection laws, in contradiction to both statutory language and interpretation of the statutes by this Court.

When a speaker has personal knowledge of the facts he speaks about, he knows whether his speech is false. In other words, such knowledge indicates scienter. Because only commercial speech is actionable under the UCL and CLRA, the Court of Appeal's reading of knowledge in the *Kasky* test for commercial speech makes scienter a required element of a false advertising cause of action under the UCL and CLRA. This contradicts the plain language of these statutes and this Court and Ninth Circuit holdings that the UCL and CLRA have no such requirement. (Cal. Bus. & Prof. Code § 17200 [prohibiting any "unlawful, unfair or fraudulent business act or practice"]; Cal. Civ. Code § 1770 [prohibiting 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"]; *Kasky*,

supra, 27 Cal.4th 939, 951 [“to state a claim under . . . the UCL . . . it is necessary only to show that ‘members of the public are likely to be deceived’ ”]; *In re Tobacco II Cases* (2009) 46 Cal.4th 298, 312 [stating 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.”]; *Mazza v. Am. Honda Motor Co.* (9th Cir. 2012) 666 F.3d 581, 591 [observing the UCL and CLRA “have no scienter requirement”].)

Moreover, the CLRA expressly provides a defense of bona fide error. (Cal. Civ. Code § 1784.) Defendant has the burden of proof of such bona fide error and must establish not only that he made the error unknowingly, but also that he had used “reasonable procedures adopted to avoid any such error” and made “an appropriate correction, repair or replacement or other remedy of the goods and services” upon receipt of a notice of the violation. (*Ibid.*; CACI No. 4710.) Here, the Sony Defendants have not established any of these elements, and the Court of Appeal put the cart before the horse when it incorporated the knowledge element of this affirmative defense into the plaintiff’s burden. The Court’s conclusion that speech is not actionable without a showing of scienter by the plaintiff renders useless the defense of bona fide error created by the Legislature.

Similarly, the Court of Appeal’s reading of the knowledge requirement in *Kasky*’s commercial speech test imported it into the False Advertising Law, Business & Professions Code Section

17500 (FAL), which equally applies only to commercial speech. (*Rezec, supra*, 116 Cal.App.4th 135, 140.) The result obliterates statutory language which makes negligent misrepresentation actionable under this section. (Bus. & Prof. Code § 17500 [prohibiting statements “which by the exercise of reasonable care should be known, to be untrue or misleading”]; *cf. People v. Superior Court (Olson)* (1979) 96 Cal.App.3d 181, 195 [concluding that imposition of monetary sanctions “for the negligent dissemination of untruthful or misleading advertising does not offend the First Amendment”; noting that “[t]he injury to consumers victimized by false or deceptive advertising is no less when it results from negligence than when knowingly or recklessly made”].)

The Court of Appeal did not reconcile its *Kasky* interpretation making speech nonactionable under the UCL, CLRA and FAL without knowledge with the cited authorities indicating the opposite and did not address this problematic consequence of its holding when Plaintiff brought it to the Court’s attention in the petition for rehearing. The decision resulted in an ambiguity about the existence and scope of strict liability for false advertising and liability for negligent misrepresentations in California.

The Court of Appeal tied its requirement of knowledge with the existence of a public debate about the singer’s identity, concluding that Sony Defendants’ ignorance made their statements on the album cover and in the video commercial a nonactionable opinion in the debate. (Slip Op. 22.) This

conclusion contradicts *Kasky* which made clear that a seller's factual representations about its products do not receive noncommercial status by virtue of the seller responding to a public debate. In *Kasky*, Nike sent out press-releases defending working conditions in its factories in response to a public controversy. (*Kasky, supra*, 27 Cal.4th 939, 947–948.) Nike argued that its allegedly false statements were not commercial because they were a part of “an international media debate on issues of intense public interest.” (*Id.* at p. 964.) The *Kasky* court rejected this argument, stating that it “falsely assumes that speech cannot properly be categorized as commercial speech if it relates to a matter of significant public interest or controversy.” (*Ibid.*) “For purposes of categorizing Nike's speech as commercial or noncommercial, it does not matter that Nike was responding to charges publicly raised by others and was thereby participating in a public debate.” (*Id.* at p. 965–966.) The Court of Appeal's decision seems to suggest that the existence of a public debate matters when the speaker lacks knowledge of the facts he speaks about. (Slip Op. 22.) *Kasky* does not indicate that its holding is conditioned on the speaker's knowledge. If, as *Kasky*'s plain language suggests, the speaker's knowledge is not an element of the test for commercial speech, the Court of Appeal's reliance on the public debate is misplaced. Moreover, consumers who bought the *Michael* album in reliance on its cover and advertising may have been entirely unaware of the existence of any public controversy or debate about three of the recordings on the album. Neither the album cover, nor the video commercial communicated

to the consumers that there was such a debate. Yet, according to the Court of Appeal, the Sony Defendants' First Amendment right to speak falsities justifies deception of these consumers.

The Court of Appeal's reading of the knowledge requirement in the *Kasky* test can have far-reaching ramifications for California consumers' ability to protect their rights. In today's economy, U.S. manufacturers commonly outsource parts of their production overseas, to countries with a cheaper labor force,⁵ as well as order product components from third-party suppliers. Manufacturers ordinarily do not disclose such business arrangements to consumers. The Court of Appeal's decision robs a consumer of the remedy against false advertising by such manufacturers and forces the consumer to identify, and seek remedy against, the (possibly international) party who was personally involved in the production of the component, the quality of which the advertiser misrepresented. (Order Mod. Op. [stating that because the Sony Defendants were not involved in the recording of the controversial songs, their statements describing the *Michael* album are "necessarily opinion"].)

The plain language of *Kasky* does not require the speaker's knowledge of whether his speech is truthful. However, as the

⁵ Manufacturing is reportedly the largest outsourced sector of the U.S. economy with software, hi-tech, pharmaceutical and retail industries at the head of the trend. 27 *US Outsourcing Statistics and Trends* (May 27, 2017), <https://brandongaille.com/26-us-outsourcing-statistics-and-trends/>; *Top Industries That Benefit From Outsource Manufacturing*, <https://baysourceglobal.com/top-industries-benefit-outsource-manufacturing/> (last accessed Sept. 23, 2018).

Court of Appeal's decision demonstrates, *Kasky's* reasoning leaves room for unorthodox interpretations, which have the power to gut California consumer protection laws. This Court should clarify the commercial speech standard to prevent this from happening now or in the future.

2. The Court of Appeal's holding that public interest in knowing the identity of the artist makes attribution of the recordings noncommercial speech contravenes *Kasky* and provides blanket immunity to false attribution of art by resellers.

As an additional ground for its holding, the Court of Appeal concluded that the challenged statements are noncommercial because the public is interested in the identity of the singer for purposes of understanding the art, not merely learning about the product. (Slip Op. 27.) This holding again contradicts *Kasky*, which expressly rejected an analogous argument. (*Kasky, supra*, 27 Cal.4th 939, 964 [stating that it "falsely assumes that speech cannot properly be categorized as commercial speech if it relates to a matter of significant public interest"].) The public interest in the workers' conditions at Nike's factories was also not limited to utilitarian considerations of whether Nike's products are worth buying, but concerned broader issues of the "degree to which domestic companies should be responsible for working conditions in factories located in other countries, or what standards domestic companies ought to observe in such factories, or the merits and effects of economic 'globalization.'" (*Id.* at p. 966.) This Court held that Nike was free to address these issues of public interest without making factual misrepresentations to

consumers about its business operations. (*Id.* at p. 967.)

Similarly, the Sony Defendants were free to discuss their belief that the singer on the Cascio recordings was Jackson without making factual representations to consumers that the *Michael* album consisted of Michael Jackson's songs. As product manufacturers, the Sony Defendants were simply required to make clear to consumers that their statements about the singer's identity were beliefs and not facts. Yet, the Court of Appeal refused to follow *Kasky* and recognize this straightforward distinction between commercial and noncommercial speech. Instead, the Court adopted an "all or nothing" approach, protecting all of the Sony Defendants' statements that concerned the controversial topic at consumers' expense.

As a practical result, this precedent confers noncommercial status and, consequently, blanket immunity on resellers' false attribution of creative works to renowned artists, justifying such immunity by the public interest in understanding art and the controversy resulting from such attribution. It allows any publisher to attribute a manuscript of dubious origin to a classic writer, and any auctioneer to attribute a painting of dubious origin to a famous artist as long as the publisher or the auctioneer were not involved in the creation of the work. (Order Mod. Op. [stating that because the Sony Defendants were not involved in the recording of the controversial songs, their attribution of the songs to Michael Jackson is "necessarily opinion"].) Such blanket immunity does not serve the public interest, but instead disadvantages the public by promoting

dilution of the American cultural heritage through publishers' and sellers' careless attribution of inauthentic works to great masters of the past.

This precedent provides publishers and art auctioneers with a defense of ignorance, discouraging their due diligence and instead putting on the consumer the onus of investigating the authenticity of creative works they wish to buy and enjoy. In the case of music and literature, where the cost of each copy of the consumer product is low, this burden is economically insurmountable for the consumer. Moreover, even if the consumer discovers that a work is inauthentic, she is likely without a remedy because her remedy is only against the forger who is liable for fraud. Yet, publishers do not ordinarily reveal who they license the rights to creative works from, and art auctions do not reveal identities of the owners (nor would care, after this precedent, to obtain the entire chain of title of the work), so it may be impossible for the consumer to identify the forger.

Additionally, the consumer has no way of knowing whether the seller had personal knowledge that the creative work is a forgery. Thus, the fear of losing to an anti-SLAPP motion and being responsible for the seller's substantial attorney fees will always deter the consumer from suing the seller, regardless of whether the seller was involved in the fraud. Indeed, this precedent, in which a Michael Jackson fan was required to pay the record company's attorney fees for an attempt to vindicate her rights and the rights of fellow consumers who relied on the

company's misrepresentations about an inauthentic product, will serve as a cautionary tale. It protects the seller's right to falsely advertise artistic products, at the same time impairing consumers' constitutional right to petition the government for relief when they lose money in dishonest transactions.

When the Legislature enacted the UCL and CLRA, it had a choice to protect consumers who give away money, or sellers who profit from the transaction. It chose as a matter of public policy to protect consumers. It eliminated the notion of "buyer beware" and placed the cost of the seller's mistakes on the seller. By reinterpreting *Kasky*, the Court of Appeal defied the legislative intent and contravened the authorities interpreting these statutes as strict liability laws. The Court then went further and, under the guise of public interest in understanding art, removed from record companies, book publishers and art dealers any responsibility for selling inauthentic works. Absent review, the Court of Appeal's opinion will reinstate the "buyer beware" policy in California and may endanger the health of the state and national art market.

V. CONCLUSION

For the reasons stated, the Court should grant this petition for review.

Dated: October 9, 2018

Respectfully Submitted,

/s/

By: JEREMY F. BOLLINGER
Attorneys for Plaintiff and
Petitioner VERA SEROVA

RULE 14 CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.260(b)(1) of the California Rules of Court, the enclosed brief of Petitioner is produced using 13-point Roman type including footnotes and contains approximately 8,081 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: October 9, 2018

/s/

By: JEREMY F. BOLLINGER
Attorneys for Plaintiff and
Petitioner VERA SEROVA

PROOF OF SERVICE

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 15300 Ventura Boulevard, Suite 207, Sherman Oaks, California 91403.
2. That on October 9, 2018 declarant served the PETITION FOR REVIEW by depositing a true copy thereof in a United States mail box at Sherman Oaks, California in a sealed envelope with postage fully prepaid and addressed to the parties listed on the attached service list.
3. That there is regular communication by mail between the place of mailing and the places so addressed.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 9th day of October 2018 at Sherman Oaks, California.

/s/

By: Lea Garbe

SERVICE LIST

Clerk, California Court of Appeal
Second District Court of Appeal
Ronald Reagan State Building
300 S Spring St B-228
Los Angeles, CA 90013

Clerk, LA Superior Court
111 North Hill St.
Los Angeles, CA 90012

Office of the Attorney General
300 South Spring Street
Los Angeles, CA 90013-1230

Los Angeles County
District Attorney's Office
211 West Temple St., Suite 1200
Los Angeles, CA 90012

Via Federal Express

Attorney for Respondents and
Defendants:

ZIA F. MODABBER
ANDREW J. DEMKO
CHARLOTTE S. WASSERSTEIN
**KATTEN MUCHIN
ROSENMAN LLP**
2029 Century Park E., Suite 2600
Los Angeles, California 90067

HOWARD WEITZMAN
SUANN C. MACISAAC
**KINSELLA WEITZMAN ISER
KUMP & ALDISERT LLP**
808 Wilshire Blvd., 3rd Floor
Santa Monica, California 90401

Via TrueFiling Electronic Service

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

COURT OF APPEAL – SECOND DIST.

FILED

Aug 28, 2018

JOSEPH A. LANE, Clerk

OCarbone Deputy Clerk

VERA SEROVA,

Plaintiff and Respondent,

v.

SONY MUSIC ENTERTAINMENT
et al.,

Defendants and Appellants.

B280526

(Los Angeles County
Super. Ct. No. BC548468)

APPEAL from an order of the Superior Court of
Los Angeles County. Ann I. Jones, Judge. Affirmed in part and
reversed in part.

Katten Muchin Rosenman, Zia F. Modabber, Andrew J.
Demko, Charlotte S. Wasserstein; Kinsella Weitzman Iser Kump
& Aldisert, Howard Weitzman and Suann C. Macisaac for
Defendants and Appellants.

Moss Bollinger, Ari E. Moss and Jeremy F. Bollinger for
Plaintiff and Respondent.

Defendants and appellants Sony Music Entertainment (Sony), John Branca, as co-executor of the estate of Michael J. Jackson (the Estate), and MJJ Productions, Inc. (collectively Appellants) appeal from an order of the superior court partially denying their motion to strike under the anti-SLAPP statute. (Code Civ. Proc., § 425.16.)¹ Plaintiff and respondent Vera Serova (Serova) filed this putative class action against Appellants and other defendants for marketing a posthumous Michael Jackson album entitled simply *Michael*. Serova claims that the album cover and a promotional video misleadingly represented that Jackson was the lead singer on each of the 10 vocal tracks on the album, when in fact he was not the lead singer on three of those tracks.

Serova alleged claims under the Unfair Competition Law (UCL; Bus. & Prof. Code, § 17200 et seq.) and the Consumers Legal Remedies Act (CLRA; Civ. Code, § 1750 et seq.). Serova also brought a fraud claim against defendants Edward Joseph Cascio, James Victor Porte, and Cascio's production company, Angelikson Productions, LLC (collectively, the Cascio Defendants), alleging that those defendants knowingly misrepresented to Appellants that Jackson was the lead singer on the three tracks at issue (the Disputed Tracks).²

¹ Subsequent undesignated statutory references are to the Code of Civil Procedure. "SLAPP" is an acronym for "[s]trategic lawsuit against public participation." (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1109, fn. 1.)

² The Cascio Defendants are not parties to this appeal.

Appellants brought an anti-SLAPP motion, which the trial court granted in part but denied with respect to the two communications at issue in this appeal. The trial court concluded that the album cover, including statements about the contents of the album, and a promotional video for the album were commercial speech that was subject to regulation under the UCL and the CLRA.

We reverse this portion of the trial court's order. We conclude that the challenged representation—that Michael Jackson was the lead singer on the three Disputed Tracks—did not simply promote sale of the album, but also stated a position on a disputed issue of public interest. Before the album was released, certain Jackson family members and others publicly claimed that Jackson was not the lead singer on the Disputed Tracks. Appellants disputed this claim. An attorney acting for the Estate released a public statement outlining the steps Appellants had taken to verify the authenticity of the tracks by consulting with experts and persons who were familiar with Jackson's voice and recordings.

Thus, the identity of the artist on the three Disputed Tracks was a controversial issue of interest to Michael Jackson fans and others who care about his musical legacy. The identity of the lead singer was also integral to the artistic significance of the songs themselves. Under these circumstances, Appellants' statements about the identity of the artist were not simply commercial speech but were subject to full First Amendment protection. They are therefore outside the scope of an actionable unfair competition or consumer protection claim in this case.

BACKGROUND

1. *The Anti-SLAPP Procedure*

Section 425.16 provides for a “special motion to strike” when a plaintiff asserts claims against a person “arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue.” (§ 425.16, subd. (b)(1).) Such claims must be stricken “unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.” (*Ibid.*)

Thus, ruling on an anti-SLAPP motion involves a two-step procedure. First, the moving defendant must show that the challenged claims arise from protected activity. (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 396; *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056.) Second, if the defendant makes such a showing, the “burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated.” (*Baral*, at p. 396.) Without resolving evidentiary conflicts, the court determines “whether the plaintiff’s showing, if accepted by the trier of fact, would be sufficient to sustain a favorable judgment.” (*Ibid.*)

Section 425.16, subdivision (e) defines the categories of acts that are in “‘furtherance of a person’s right of petition or free speech.’” Those categories include “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,” and “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.” (§ 425.16, subd. (e)(3) & (4).)

In 2003 the Legislature enacted section 425.17 to curb “a disturbing abuse of Section 425.16 . . . which has undermined the exercise of the constitutional rights of freedom of speech and petition for the redress of grievances, contrary to the purpose and intent of Section 425.16.” (§ 425.17, subd. (a).) Section 425.17 seeks to accomplish that goal by expressly excluding several categories of claims from the scope of section 425.16.

Section 425.17, subdivision (c) establishes such an exclusion for claims concerning commercial speech. That subdivision provides that section 425.16 does not apply to “any cause of action brought against a person primarily engaged in the business of selling or leasing goods or services” if certain conditions exist, including that: (1) the statement at issue “consists of representations of fact about that person’s or a business competitor’s business operations, goods, or services” that was made to promote commercial transactions or was made “in the course of delivering the person’s goods or services;” and (2) the intended audience is an actual or potential customer or a person likely to influence a customer. (§ 425.17, subd. (c)(1) & (2).)

Section 425.17 contains certain specifically defined exceptions. One of those exceptions states that the commercial speech provision in section 425.17, subdivision (c) does not apply to “[a]ny action against any person or entity based upon the creation, dissemination, exhibition, advertisement, or other similar promotion of any dramatic, literary, musical, political, or artistic work.” (§ 425.17, subd. (d)(2).)

2. *Serova's Allegations*³

The album *Michael* was released on or about December 14, 2010, about 18 months after Michael Jackson's death. Sony released the album in conjunction with the Estate.

The album contained 10 songs. Serova alleges that the three songs on the Disputed Tracks—"Breaking News," "Monster," and "Keep Your Head Up" (the Songs)—have been controversial "[s]ince *Michael's* inception."

Serova claims that the Cascio Defendants recorded the initial versions of the Disputed Tracks and had "exclusive knowledge" that the lead vocals for the Songs were actually performed by a singer other than Michael Jackson. Serova alleges that Cascio then falsely represented to Appellants that Michael Jackson was the singer.

Prior to *Michael's* release, various members of Michael Jackson's family and others familiar with his recordings disputed whether he was the lead singer on the Disputed Tracks. In response to those concerns, Sony and the Estate (through Attorney Howard Weitzman) both publicly issued statements confirming their belief that Jackson was the singer.

In his statement (the Weitzman Statement), Weitzman explained that many persons who were familiar with Jackson's work had confirmed that he was the lead singer on the Disputed

³ As explained below, the trial court ruled on Appellant's anti-SLAPP motion based upon the allegations in Serova's First Amended Complaint (Complaint) and a stipulation that established certain background facts for purposes of the motion only. Thus, the relevant facts are primarily those alleged in the Complaint.

Tracks, including former producers, engineers, performers, and directors who had worked with Jackson. He stated that the Estate and Sony had also retained forensic musicologists who examined the Disputed Tracks and concluded that the lead singer was actually Jackson. He also stated that he had spoken to the singer whom some persons had “wrongfully alleged was a ‘soundalike’ singer that was hired to sing” on the Disputed Tracks, and that the singer had denied any involvement with the project. Weitzman explained that, “given the overwhelming objective evidence resulting from the exhaustive investigations,” Sony decided to include the Disputed Tracks on the album “because they believed, without reservation, that the lead vocal[s] on all of those tracks were sung by Michael Jackson.”

The album cover for *Michael* (Album Cover) included a statement that “[t]his album contains 9 previously unreleased vocal tracks performed by Michael Jackson.”⁴ A video released before the album (the Promotional Video) described *Michael* as “‘a brand new album from the greatest artist of all time.’” While appearing on the Oprah Winfrey show, Cascio also stated that Jackson performed the lead vocals on the Disputed Tracks.

The Complaint alleges that the lead singer on the Disputed Tracks actually sounds like the “soundalike” singer mentioned in the Weitzman Statement. Serova claims she discovered evidence indicating that the lead singer on the Disputed Tracks was not Michael Jackson. Among other things, she claims that:

(1) Cascio did not produce any “demos, outtakes, alternate takes,

⁴ One of the tracks on the album had been previously recorded.

and multi-track recordings” when requested; (2) Jackson never mentioned that he had recorded the Songs; (3) the Songs did not appear on a list of ongoing or planned projects found in Michael Jackson’s house after his death; and (4) various persons that the Weitzman Statement said had confirmed that the lead singer on the Disputed Tracks was Jackson in fact had doubts about that conclusion.

Serova also hired an audio expert who prepared a report concluding that Michael Jackson “very likely did not sing” the lead vocals on the Disputed Tracks. The report was peer-reviewed by another expert who concluded that the study’s “methodologies and conclusions were reasonable.”

The Complaint alleges claims against all defendants under the CLRA and UCL, and asserts a fraud claim against the Cascio Defendants only. The Complaint claims that thousands of putative class members purchased *Michael* and lost “money or property” as a result of the alleged misleading representations.

3. Appellants’ Anti-SLAPP Motion

Appellants and the Cascio Defendants filed motions to strike under section 425.16. Appellants argued that Serova’s claims arose from protected speech under prong one of the anti-SLAPP procedure. With respect to prong two, Appellants argued that Serova could not succeed on her claims against them because their challenged statements about the identity of the lead singer on the Disputed Tracks were noncommercial speech as a matter of law and no reasonable consumer could find the statements misleading.

To permit a ruling on the anti-SLAPP motions in advance of discovery, the parties stipulated that, “solely for purposes of this determination on the Motions,” Michael Jackson did not sing the lead vocals on the three Disputed Tracks (the Stipulation).

The parties also stipulated to the authenticity of copies of the Weitzman Statement, the Album Cover, and the Promotional Video.

The trial court granted the defendants' motions with respect to allegations concerning the Weitzman Statement and Cascio's statement on the Oprah Winfrey show, but denied the motions with respect to allegations concerning statements on the Album Cover and in the Promotional Video.

Under prong one of the anti-SLAPP procedure, the trial court ruled that all the statements addressed in the defendants' motions arose from conduct in furtherance of the defendants' right of free speech concerning an issue of public interest. The court concluded that the Weitzman Statement was "made in a public forum about a matter of public interest." The court reasoned that the Weitzman Statement "responded to a matter of public concern, i.e., the authenticity of certain recordings released posthumously and claimed to have been written and recorded by a pop superstar." Similarly, the court concluded that Cascio's statement on the Oprah Winfrey show addressed "the same controversy."

In contrast, the trial court concluded that the Album Cover and the Promotional Video were simply promotional materials that "did not speak to the controversy surrounding the performance [or] address or refute" the allegations concerning the Disputed Tracks. The court nevertheless found that statements on the Album Cover and in the Promotional Video arose from protected conduct because "Michael Jackson's professional standing and accomplishments created legitimate and widespread attention to the release of a new album."

With respect to prong two, the trial court found that the Weitzman Statement and Cascio's statements on the Oprah

Winfrey show were noncommercial speech. The court concluded that those statements were not made to promote or sell the album, but addressed “a controversy regarding the veracity of the claims surrounding the release of the album.”

However, the court concluded that the challenged statements on the Album Cover and in the Promotional Video were advertisements constituting commercial speech. The court rejected the defendants’ argument that this speech was “inextricably intertwined” with the Songs themselves under *Riley v. Nat’l Fed’n of Blind* (1988) 487 U.S. 781, 796 (*Riley*). The court reasoned that “[n]othing in this case prevented Defendants from giving the album a different title and look or from electing not to attest to the authenticity of the recordings on the cover or in a commercial.”

The court also found that, assuming (pursuant to the parties’ Stipulation) that Michael Jackson was not actually the lead singer on the Disputed Tracks, both the Album Cover and the Promotional Video were likely to deceive a reasonable consumer. The court concluded that images of Michael Jackson and the challenged statements on the Album Cover, along with the lack of any attribution to others, conveyed the message that Jackson was the lead singer on the Disputed Tracks. The court also concluded that a reasonable consumer would believe that Michael Jackson was the “artist” referenced in the statement on the Promotional Video that *Michael* was “ ‘a brand new album from the greatest artist of all time.’ ”

DISCUSSION

Appellants challenge the trial court’s rulings that: (1) the Promotional Video and the Album Cover were commercial speech that may be subject to claims under the UCL and CLRA; and

(2) the representations in those materials were likely to deceive a reasonable consumer. Serova argues that those rulings were correct, and also asserts as an alternative ground for affirmance that her claims do not “arise from” protected free speech activity under prong one of the anti-SLAPP procedure. (See *Klem v. Access Ins. Co.* (2017) 17 Cal.App.5th 595, 609 [“A prevailing party on an anti-SLAPP motion need not file a cross-appeal to preserve his disagreement with the trial court’s reasoning”].)⁵

We apply a de novo standard of review to the trial court’s rulings on the anti-SLAPP motion. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3.)

1. *Serova’s Claims Concerning the Promotional Video and the Album Cover Arise from Appellants’ Right of Free Speech Under the United States and California Constitutions*

Appellants claim the trial court correctly concluded that their challenged conduct arose from protected speech concerning an issue of public interest, but also suggest that we need not reach that issue. Appellants argue that the Legislature’s decision to create an exception for the marketing of musical works under section 425.17, subdivision (d)(2) shows a legislative intent that such speech “is eligible for anti-SLAPP protection,” which is

⁵ Serova did not appeal from the trial court’s ruling granting the defendants’ anti-SLAPP motion with respect to the Weitzman e-mail and Cascio’s statement during the Oprah Winfrey interview. Thus, the only claims at issue in this appeal concern the representations in the Promotional Video and the Album Cover.

“essentially dispositive of step one of the anti-SLAPP analysis.”

We first consider that argument.

a. *The significance of the Legislature’s exclusion of music advertisements from the scope of section 425.17*

As mentioned, section 425.17, subdivision (d)(2) provides that the “creation, dissemination, exhibition, advertisement, or other similar promotion of any dramatic, literary, musical, political, or artistic work” is outside the scope of the commercial speech provision in section 425.17, subdivision (c). The exception in section 425.17, subdivision (d)(2) certainly means that the promotion of a musical work is not included within the categories of conduct that the Legislature specifically stated were not subject to anti-SLAPP relief. However, the Legislature’s decision to *exclude* the advertising of musical works from section 425.17 does not mean that it also intended to afford anti-SLAPP protection to such conduct in every circumstance, regardless of the requirements of section 425.16.

Such a conclusion would be inconsistent with the Legislature’s stated intent. The Legislature specifically stated that it enacted section 425.17 to curb *abuses* of the anti-SLAPP law that were “contrary to the purpose and intent of Section 425.16.” (§ 425.17, subd. (a).) That statement suggests that our Legislature was concerned that the courts were granting too broad a reading to what constitutes “protected” conduct under section 425.16, subdivision (e). Appellants’ argument, if accepted, would commit that very same sin because it would require courts to treat the types of speech delineated in section 425.17, subdivision (d)(2) as subject to the anti-SLAPP law without any showing that such speech meets the definition of “protected” conduct under section 425.16, subdivision (e).

The interpretation that Appellants suggest would also be inconsistent with the definitions of protected conduct under section 425.16. Section 425.16, subdivision (e)(3) and (4) each require that protected conduct must have some connection to a “public issue” or an “issue of public interest.” Appellants’ interpretation of section 425.17, subdivision (d)(2) ignores that requirement. For example, an action challenging an advertisement falsely claiming that a musical album contains a particular song would be an action “based upon the . . . advertisement” of a musical work. (§ 425.17, subd. (d)(2).) Appellants do not provide any reason to believe that the Legislature intended to provide automatic anti-SLAPP protection to such a mundane commercial misrepresentation simply because the statement was made in connection with the advertisement of a musical work. (Cf. *Rezec v. Sony Pictures Entertainment, Inc.* (2004) 116 Cal.App.4th 135, 143–144 (*Rezec*) [advertisement referring to a purported movie endorsement by a fictional music critic did not concern an issue of public interest just “because the public is interested in films”].)

The court in *Dyer v. Childress* (2007) 147 Cal.App.4th 1273 rejected a similar argument. After reviewing the legislative history concerning section 425.17, subdivision (d)(2), the court rejected the defendant’s claim that “by expressly exempting motion pictures from the anti-SLAPP limitations imposed in section 425.17, subdivisions (b) and (c), the Legislature acknowledged that motion pictures are more deserving of protection than other forms of expression not enumerated.” (*Id.* at pp. 1283–1284.) The court concluded that “[t]he exclusion of motion pictures from the exemptions to the limitations set forth in section 425.17, subdivisions (b) and (c) means only that anti-SLAPP motions remain available to defendants who are creators

and distributors of motion pictures [¶] The exception of section 425.17, subdivision (d)(2) *does not eliminate the need to show significant public interest in the conduct at the heart of the plaintiff's complaint* or expand the scope of the anti-SLAPP law to provide protection to motion picture defendants in every context.” (*Id.* at p. 1284.)

Similarly, the exception of section 425.17, subdivision (d)(2) does not provide anti-SLAPP protection to sellers of music in every context. We therefore must consider whether Appellants’ challenged statements were made “in connection with a public issue or an issue of public interest.” (§ 425.16, subd. (e).)

b. *The challenged promotional statements in this case*

Serova claims that Appellants’ statements about the identity of the lead singer on the Disputed Tracks were simply claims about the contents of a commercial product that Appellants offered for sale. We disagree that the representation at issue was so limited. Serova’s own allegations describe the public controversy concerning the Disputed Tracks. Moreover, a significant body of case law holds that prominent entertainers and their accomplishments can be the subjects of public interest for purposes of the anti-SLAPP statute.

The Complaint alleges that, “[b]efore *Michael’s* release, numerous people familiar with Michael Jackson’s voice disputed the authenticity” of the Disputed Tracks. As discussed above, Sony and the Estate released public statements in response, including the detailed Weitzman Statement. Serova further alleges that, “[s]ince *Michael’s* inception, controversy has surrounded three of the album’s ten songs.”

Public interest in the life and work of entertainers and other celebrities can create an “issue of public interest” for

purposes of section 425.16, subdivision (e). “ “[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.” ’ ” (*Stewart v. Rolling Stone LLC* (2010) 181 Cal.App.4th 664, 677–678 (*Stewart*), quoting *Eastwood v. Superior Court* (1983) 149 Cal.App.3d 409, 422; see also *No Doubt v. Activision Publishing, Inc.* (2011) 192 Cal.App.4th 1018, 1027 [video game distributor’s use of band members’ likenesses in a video game was a “matter of public interest because of the widespread fame” of the band]; *Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, 1347 [Marlon Brando’s decisions concerning the distribution of his assets was an issue of public interest].) It is beyond dispute that Michael Jackson was a famous entertainer.

Facts concerning the creation of works of art and entertainment can also be an issue of public interest for purposes of the anti-SLAPP statute. For example, in *Kronemyer v. Internet Movie Database Inc.* (2007) 150 Cal.App.4th 941, the plaintiff challenged the omission of his name from the credits listed for the movie “My Big Fat Greek Wedding” on a widely visited website. (*Id.* at p. 944.) The court concluded that the movie “was a topic of widespread public interest,” and the website was a public forum. (*Id.* at pp. 949–950.) Accordingly, the plaintiff’s action challenging the listings was “within the ambit of section 425.16, subdivision (e)(3) and (4).” (*Id.* at p. 950; see also *Tamkin v. CBS Broadcasting, Inc.* (2011) 193 Cal.App.4th 133, 143–144 [there was a “public interest in the writing, casting and broadcasting” of a television episode for purposes of the anti-SLAPP statute].)

Similarly, here, there was significant interest in the release of the posthumous album *Michael*. Whether or not the lead singer on the Disputed Tracks was actually Michael Jackson was

therefore also a matter of significant public interest, as confirmed by Serova's own allegations.

This public controversy distinguishes this case from cases that Serova cites concerning allegedly misleading descriptions of a particular commercial product or service. (See *Consumer Justice Center v. Trimedica International, Inc.* (2003) 107 Cal.App.4th 595, 599, 601 [claims about a pill for breast enlargement]; *Nagel v. Twin Laboratories, Inc.* (2003) 109 Cal.App.4th 39, 43–46 [list of ingredients on labels for nutritional and dietary supplements]; *Scott v. Metabolife Internat., Inc.* (2004) 115 Cal.App.4th 404, 423 [claims about the safety and efficacy of a particular weight loss product]; *L.A. Taxi Cooperative, Inc. v. The Independent Taxi Owners Assn. of Los Angeles* (2015) 239 Cal.App.4th 918, 921, 927–928 [alleged misleading advertisements concerning contact information for companies providing taxi services]; *Jewett v. Capital One Bank* (2003) 113 Cal.App.4th 805, 814–816 [alleged false statements in credit card solicitations].)

The representations at issue here concerned the body of work of a well-known artist and an album containing his songs that generated significant public attention. We therefore conclude that the issue was one of “public interest” for purposes of section 425.16, subdivision (e)(3) and (4).

**2. The Challenged Statements Were
Noncommercial Speech Outside the Scope of
Serova's Consumer Protection Claims**

Appellants argue that Serova cannot show a probability of success on her UCL and CLRA claims under prong two of the anti-SLAPP analysis because those statutes only apply to commercial speech. They claim that their challenged statements about the lead singer on the Disputed Tracks were not

commercial speech, or, if they were, that those statements were inextricably intertwined with the protected contents of the Songs themselves.

Appellants argue that the consumer protection claims that Serova asserts against them apply only to commercial speech. A number of cases support that assertion. (See *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 952 (*Kasky*) [identifying criteria for determining whether speech may constitutionally be regulated as commercial speech under California's false advertising laws]; *Rezec, supra*, 116 Cal.App.4th at p. 140 [California's consumer protection laws, like the unfair competition law, govern only commercial speech]; *Keimer v. Buena Vista Books, Inc.* (1999) 75 Cal.App.4th 1220, 1231 (*Keimer*) [Bus. & Prof. Code, §§ 17200 et seq. and 17500 et seq. do not "seek to restrict noncommercial speech in any manner"]; *O'Connor v. Superior Court* (1986) 177 Cal.App.3d 1013, 1019.) Serova does not dispute this. Moreover, she did not argue below and does not argue on appeal that Appellants' challenged statements are actionable even if they are noncommercial speech. Thus, if Appellant's challenged statements are noncommercial speech Serova's claims against them must be stricken.

a. Identifying commercial speech

Restrictions on purely commercial speech are subject to a lesser level of scrutiny than are " 'other constitutionally safeguarded forms of expression.' " (*Kasky, supra*, 27 Cal.4th at p. 952, quoting *Bolger v. Youngs Drug Products Corp.* (1983) 463 U.S. 60, 64–65 (*Bolger*).) Moreover, "commercial speech that is false or misleading is not entitled to First Amendment protection and 'may be prohibited entirely.' " (*Kasky*, at p. 953, quoting *In re R.M.J.* (1982) 455 U.S. 191, 203.)

The United States Supreme Court first held that commercial speech is entitled to some constitutional protection in *Bigelow v. Virginia* (1975) 421 U.S. 809. In *Bigelow*, the court rejected the proposition that “advertising, as such, was entitled to no First Amendment protection.” (*Id.* at p. 825.) Following that decision, courts have had to grapple with the distinction between expressive activities that are merely commercial in nature and those that are subject to more stringent First Amendment protection.

In *Bolger, supra*, the court held that materials distributed by a manufacturer of contraceptives, including both promotional flyers and informational pamphlets about contraceptives, were commercial speech. (463 U.S. at pp. 62, 66–68.) Most of the mailings at issue fell “within the core notion of commercial speech—‘speech which does “no more than propose a commercial transaction.” ’” (*Id.* at p. 66, quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council* (1976) 425 U.S. 748, 762 (*Virginia Pharmacy*)). However, the informational pamphlets required further analysis. The court identified three factors indicating that the pamphlets were commercial speech: (1) the pamphlets were “conceded to be advertisements”; (2) they referred to a specific product; and (3) the defendant had an economic motivation for mailing them. (*Bolger*, at pp. 66–67.) The court stated that none of these factors alone was sufficient to show that the speech was commercial, but “[t]he combination of all these characteristics . . . provides strong support” for the decision that the informational pamphlets were commercial speech. (*Id.* at p. 67.)

In *Kasky, supra*, 27 Cal.4th 939, our Supreme Court considered the factors the court identified in *Bolger, supra*, 463 U.S. 60, along with other relevant United States Supreme Court

precedent and crafted a “limited-purpose” test for identifying commercial speech. The test applies when, as here, “*a court must decide whether particular speech may be subjected to laws aimed at preventing false advertising or other forms of commercial deception.*” (*Kasky*, at p. 960.) The court directed that a court faced with such a decision should consider “three elements: the speaker, the intended audience, and the content of the message.” (*Ibid.*)

The court in *Kasky* applied those factors to the allegations that the defendant, Nike, made false statements about labor practices in its own business operations. (27 Cal.4th at pp. 969–970.) The court held that these alleged statements constituted commercial speech that was actionable under California’s consumer protection laws. (*Ibid.*)

b. Appellants’ challenged statements

Applying the three-factor test for identifying commercial speech described in *Kasky*, we conclude that Appellants’ challenged representations were noncommercial speech.

The first two factors—the speaker and the intended audience—both suggest a commercial purpose. Appellants were “engaged in commerce” in making representations on the Album Cover and on the Promotional Video to sell the album. (*Kasky*, *supra*, 27 Cal.4th at p. 963.) And the audience for those representations was potential purchasers of the album. (*Id.* at p. 964.)

However, the third factor—the *content* of the challenged speech—shows that the speech at issue here is critically different from the type of speech that may be regulated as purely commercial speech under *Kasky*. That is so for two reasons. First, Appellants’ challenged statements concerned a publicly disputed issue about which they had no personal knowledge.

Second, the statements were directly connected to music that itself enjoyed full protection under the First Amendment.

i. *Personal knowledge*

The court in *Kasky* explained that, “at least in relation to regulations aimed at protecting consumers from false and misleading promotional practices, commercial speech must consist of factual representations about the business operations, products, or services of the speaker (or the individual or company on whose behalf the speaker is speaking), made for the purpose of promoting sales of, or other commercial transactions in, the speaker’s products or services.” (27 Cal.4th at p. 962.) This requirement relates directly to the reasons for denying First Amendment protection to false or misleading commercial speech. As the court explained, the United States Supreme Court “has stated that false or misleading commercial speech may be prohibited because the truth of commercial speech is ‘more easily verifiable by its disseminator’ and because commercial speech, being motivated by the desire for economic profit, is less likely than noncommercial speech to be chilled by proper regulation.” (*Ibid.*, quoting *Virginia Pharmacy, supra*, 425 U.S. at p. 772, fn. 24.)

These factors were important for the court’s ruling. The court in *Kasky* ascribed great significance to the fact that, “[i]n describing its own labor policies, and the practices and working conditions in factories where its products are made, Nike was making factual representations about *its own business operations*.” (27 Cal.4th at p. 963, italics added.) The court concluded that “Nike was in a position to readily verify the truth of any factual assertions it made on these topics,” and that commercial regulation was “unlikely to deter Nike from speaking truthfully or at all about the conditions in its factories.” (*Ibid.*)

Here, Appellants' representations about the identity of the lead singer on the Disputed Tracks did not concern their own business operations or a fact of which they had personal knowledge. Serova alleges that the Cascio Defendants, not Appellants, "jointly created, produced, and recorded the initial versions" of the Disputed Tracks. She claims that the "lead vocals on these songs were performed by another singer under the direction, and with the knowledge, cooperation, participation, and substantial assistance of the Cascio Defendants." And she further alleges that the Cascio Defendants had "*exclusive knowledge* of the fact that Jackson did not perform the songs." (Italics added.)⁶

As discussed above, Appellants' challenged statements in the Promotional Video and on the Album Cover concerned an issue of public interest and debate—whether the three songs on the Disputed Tracks should be included in Michael Jackson's body of work. Appellants did not record the songs and, according to Serova's allegations, were themselves deceived about the identity of the singer. Appellants' statements therefore lacked the critical element of personal knowledge under the *Kasky* standard.

⁶ As mentioned above, the parties stipulated below for purposes of the anti-SLAPP motions that Michael Jackson did not sing the lead vocals on the three Disputed Tracks. Accordingly, for purposes of their appeal, Appellants state that they accept "that Jackson did not sing the lead vocals" on the Disputed Tracks. However, Appellants did not stipulate that they *knew* the identity of the singer.

As the trial court correctly concluded, Appellants' statements directly addressing the public controversy about the identity of the singer—including the Weitzman Statement—were noncommercial. The challenged statements on the Album Cover and the Promotional Video also staked out a position in that controversy by identifying the singer as Michael Jackson. The fact that those statements were made in the context of promoting the album does not change their constitutional significance.

Economic motivation is only one of the factors, insufficient in itself, that may indicate that speech is commercial. (*Bolger*, *supra*, 463 U.S. at p. 67.) As our Supreme Court explained in *Kasky*, whether speech is commercial or noncommercial should take account of the *reasons* for affording commercial speech less constitutional protection. (27 Cal.4th at pp. 958, 965.) The court in *Kasky* recognized that the speech at issue in that case—Nike's statements about labor practices in the factories that manufactured its products—addressed an issue of public interest. The reason that Nike's speech could be subject to regulation under the state's unfair competition and false advertising laws was that it concerned facts about Nike's own business operations, which were “‘more easily verifiable’” and “‘less likely to be chilled by proper regulation’” than other speech about the publicly-debated issue of international labor practices. (*Id.* at pp. 965, 967, quoting *Virginia Pharmacy*, *supra*, 425 U.S. at p. 772, fn. 24.) The court cautioned that it did not purport to decide whether speech should be considered commercial if all of the factors that the court identified—including the element of

personal knowledge about one's own business operations—were not present. (*Kasky*, at p. 964.)⁷

The absence of the element of personal knowledge is highly significant here. Because Appellants lacked actual knowledge of the identity of the lead singer on the Disputed Tracks, they could only draw a conclusion about that issue from their own research and the available evidence. Under these circumstances, Appellant's representations about the identity of the singer amounted to a statement of opinion rather than fact. (Cf. *Bernardo v. Planned Parenthood Federation of America* (2004) 115 Cal.App.4th 322, 348 [statements of opinion on Planned Parenthood's website concerning scientific research about abortion and breast cancer were not commercial speech].)

The lack of personal knowledge here also means that Appellants' challenged statements do not fit the definition of speech that is "less likely to be chilled by proper regulation." (*Kasky, supra*, 27 Cal.4th at p. 965, quoting *Virginia Pharmacy, supra*, 425 U.S. at p. 772, fn. 24.) The "regulation" at issue here is the UCL and the CLRA. Serova could obtain relief under these consumer protection statutes without proof of intentional or willful conduct. (See *Kasky*, at pp. 980–981 (dis. opn. of

⁷ For example, the court might well have reached a different conclusion in *Kasky* if the statements at issue concerned the labor practices of an independent commercial supplier who simply sold products to Nike for resale. The court specifically noted that Nike had entered into a memorandum of understanding assuming responsibility for its subcontractors' compliance with local labor laws. (*Kasky, supra*, 27 Cal.4th at p. 947.)

Brown, J.; *Podolsky v. First Healthcare Corp.* (1996) 50 Cal.App.4th 632, 647 [violation of the UCL is a “strict liability offense”].⁸ Thus, to avoid possible liability for a mistaken judgment about the lead singer on the Disputed Tracks, Appellants would have needed to either: (1) provide disclaimers about the singer’s identity in its marketing materials; or (2) omit the Disputed Tracks from the album.⁹

The chilling effect of the second option is obvious. But the first option also has First Amendment implications. The United States Supreme Court recently emphasized the potentially problematic nature of regulations that compel speech, even in a commercial context. In *Nat’l Inst. of Family & Life Advocates v. Becerra* (2018) ___ U.S. ___, 201 L.Ed.2d 835 (*Life Advocates*), the court held that a California law requiring notices in health care clinics concerning available health care services, including

⁸ The CLRA does provide for a good faith defense to an action for damages, but the defense requires proof of “appropriate correction, repair or replacement or other remedy of the goods and services.” (See Civ. Code, §§ 1782, subds. (b) & (c), and 1784.) In contrast to the consumer claims asserted against Appellants, Serova’s fraud claim against the Cascio Defendants of course does include a scienter element. That claim is still pending in the trial court.

⁹ The record illustrates this dilemma. During oral argument, the trial court suggested that Appellants could have avoided legal challenge by leaving the songs at issue off of the album entirely. The trial court’s written ruling also observes that Appellants could have given the album “a different title and look” or elected “not to attest to the authenticity of the recordings on the cover or in a commercial.”

abortion, likely violated the First Amendment. The court declined to recognize an exception to strict scrutiny review under the First Amendment for “professional speech,” noting that the court has permitted compelled disclosures only in the context of professionals’ “commercial advertising” concerning “‘purely factual and uncontroversial information about the terms under which . . . services will be available.’” (*Id.* at p. 848.) By compelling a particular disclosure, the law at issue amounted to an impermissible “content-based regulation of speech.” (*Id.* at p. 846.)¹⁰

By compelling disclosure of the controversy over the Disputed Tracks to avoid liability, the UCL and CLRA would, in effect, require Appellants to present views in their marketing materials with which they do not agree. The possibility that applying these unfair competition and consumer protection laws

¹⁰ That the court’s reasoning in *Life Advocates* has implications beyond just professional disclosures is shown by Justice Breyer’s dissent, which cautions that “the majority’s view, if taken literally, could radically change prior law, perhaps placing much securities law or consumer protection law at constitutional risk, depending on how broadly its exceptions are interpreted.” (*Life Advocates, supra*, 201 L.Ed.2d at p. 857, dis. opn. of Breyer, J.) The majority countered by stating that it does not “question the legality of . . . purely *factual and uncontroversial* disclosures about commercial products.” (*Id.* at p. 852, italics added.) Here, any compelled disclosure would not be “uncontroversial”; Serova herself alleges that “controversy has surrounded” the three Disputed Tracks. Nor would it be “purely factual” from Appellants’ perspective, as they had no personal knowledge of the facts.

to Appellants' speech would have the effect of chilling the content of that speech—whether by preventing the sale of particular musical works or by regulating the expression of a point of view on a public controversy about those works—is a further reason to conclude that the speech at issue was noncommercial.

ii. ***The relationship between the challenged statements and the art that they promoted***

Appellants' statements in the Promotional Video and on the Album Cover described and promoted the album, of which the Disputed Tracks were a part. The music on the album itself is entitled to full protection under the First Amendment. (*Stewart, supra*, 181 Cal.App.4th at p. 682.) The challenged statements therefore related directly to a piece of art that has independent significance under the First Amendment.

The identity of a singer, composer, or artist can be an important component of understanding the art itself. No one could reasonably dispute that knowing whether a piece of music was composed by Johann Sebastian Bach or a picture was painted by Leonardo Da Vinci informs the historical understanding of the

work.¹¹ Similarly, although the art at issue is contemporary and in a different genre, whether Michael Jackson was actually the lead singer of the songs on the Disputed Tracks certainly affects the listener's understanding of their significance. Thus, the marketing statements at issue here are unlike the purely factual product or service descriptions constituting commercial speech in cases that *Serova* cites. (See *Benson v. Kwikset Corp.* (2007) 152 Cal.App.4th 1254, 1268 [representation that products were manufactured in the United States]; *Peel v. Atty. Registration & Disciplinary Comm'n* (1990) 496 U.S. 91, 99–100 [advertisement concerning attorney's certification as an expert]; *Rubin v. Coors Brewing Co.* (1995) 514 U.S. 476, 481 [descriptions of alcohol content on beer labels].)

We do not suggest that the challenged statements here are noncommercial speech *only* because they promoted an art work. We agree with the court in *Rezec, supra*, 116 Cal.App.4th 135, that advertising is not necessarily excluded from the category of commercial speech simply because it promotes a product that is

¹¹ While these examples are only illustrative, they are not purely hypothetical. (See Dutter & Nikkhah, *Bach works were written by his second wife, claims academic*, The Telegraph (Apr. 23, 2006) <<http://www.telegraph.co.uk/news/uknews/1516423/Bach-works-were-written-by-his-second-wife-claims-academic.html>> [as of Aug. 23, 2018]; Sayej, *Artistic License? Experts doubt Leonardo da Vinci painted \$450m Salvator Mundi*, The Guardian (Nov. 20, 2017) <<https://www.theguardian.com/artanddesign/2017/nov/20/artistic-license-experts-doubt-leonardo-da-vinci-painted-450m-salvator-mundi>> [as of Aug. 23, 2018].)

itself subject to full First Amendment protection. In *Rezec*, the court held that film advertisements that featured fictional endorsements from a nonexistent critic was commercial speech. The court rejected the “absolutist approach” that “because the films themselves are noncommercial speech, so are the advertisements.” (*Id.* at p. 142.)¹²

Such an approach would ascribe full First Amendment significance to any commercial representation about a piece of art, no matter how mundane or willfully misleading. For example, returning to the hypothetical advertisement mentioned above, there is no apparent reason why a statement falsely stating that a particular song is included in an album should be subject to full First Amendment protection simply because the statement promotes the sale of music.¹³ However, where, as

¹² In *Keimer, supra*, the court concluded that advertisements repeating “verifiably false or misleading” statements about investment returns contained in a book were commercial speech despite the fully protected status of the books themselves under the First Amendment. (75 Cal.App.4th at p. 1231.) The statements at issue here were not “verifiably false” based upon the information available to Appellants, so we need not consider this holding.

¹³ Thus, we do not accept Appellants’ suggestion that an advertisement promoting a particular piece of art is *necessarily* “inextricably intertwined” with the First Amendment content of the art itself simply because it makes a representation about the identity of the artist. (See *Riley, supra*, 487 U.S. at p. 796.) The distinguishing features here are that: (1) the identity of the artist was itself an issue of public discussion and interest; and (2) Appellants had no personal knowledge of the issue.

here, a challenged statement in an advertisement relates to a public controversy about the identity of an artist responsible for a particular work, and the advertiser has no personal knowledge of the artist's identity, it is appropriate to take account of the First Amendment significance of the work itself in assessing whether the content of the statement was purely commercial.

This conclusion is consistent with the flexible approach that the United States Supreme Court has adopted for identifying commercial speech. In *Bolger, supra*, the court explained that no single factor that it identified as a marker of commercial speech is sufficient in itself to classify particular speech as commercial, nor must each factor “necessarily be present in order for speech to be commercial.” (463 U.S. at pp. 66–67 and fn. 14.) The court concluded that the presence of all three factors in that case “provides strong support” for the conclusion that the informational pamphlets at issue were commercial. (*Id.* at p. 67.) However, citing a prior opinion involving the advertising of religious books, the court also cautioned that “a different conclusion may be appropriate in a case where the pamphlet advertises an activity itself protected by the First Amendment.” (*Id.* at p. 67, fn. 14.)

That is the situation here. The challenged statements in the Promotional Video and on the Album Cover concerned music that is “itself protected by the First Amendment.” (*Bolger, supra*, 463 U.S. at p. 67, fn. 14.) While not itself dispositive, the fact that the challenged statements promoted a piece of art is appropriate to consider in assessing the *content* of the speech under the *Kasky* guidelines. (*Kasky, supra*, 27 Cal.4th at p. 961.)

3. Conclusion

Appellant's challenged statements on the Album Cover and in the Promotional Video were noncommercial speech outside the

scope of the consumer protection claims that Serova asserts against Appellants. As a matter of law Serova therefore cannot show a likelihood that she will prevail on her claims under prong two of the anti-SLAPP procedure, and her claims against Appellants must be stricken. We therefore need not reach the issue of whether the challenged statements would be misleading to a reasonable consumer.

We emphasize that this holding is based on the record in this case and the issues that have been appealed. The Cascio Defendants have not appealed, and our holding therefore does not reach any portion of the trial court's order with respect to them. Nor do we purport to decide whether statements in another context concerning the marketing of creative works might constitute commercial speech.

DISPOSITION

The trial court's order is affirmed in part and reversed in part. The portions of the Complaint alleging claims against Appellants are ordered stricken. In all other respects the trial court's order is affirmed. Appellants are entitled to their costs on appeal.

CERTIFIED FOR PUBLICATION.

LUI, P. J.

We concur:

CHAVEZ, J.

HOFFSTADT, J.

CERTIFIED FOR PUBLICATION
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

VERA SEROVA,

Plaintiff and Respondent,

v.

SONY MUSIC ENTERTAINMENT
et al.,

Defendants and Appellants.

B280526

(Los Angeles County
Super. Ct. No. BC548468)

**ORDER MODIFYING OPINION
AND DENYING REHEARING
[NO CHANGE IN JUDGMENT]**

COURT OF APPEAL - SECOND DIST.

FILED

SEP 13 2018

JOSEPH A. LANE Clerk

Deputy Clerk

THE COURT:

It is ordered that the opinion filed herein on August 28, 2018, be modified as follows:

On page 23, first full paragraph, after the third sentence ending “statement of opinion rather than fact,” add as footnote 8 the following footnote, which will require renumbering of all subsequent footnotes:

[Fn. 8:] In her petition for rehearing, Serova argues that Appellants’ challenged statements on the Album Cover and in the Promotional Video were statements of fact, not opinion, because consumers would have understood them to be factual assertions about the identity of the lead singer of the songs in the album.

This argument misunderstands the issue. The question here is not whether Appellants have a defense to Serova's claims because their challenged statements were truthful assertions of opinion rather than alleged false statements of fact. In that context, focus on the listener's understanding is appropriate. (See, e.g., *Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 260–261 [applying a “‘totality of the circumstances’” test in a libel action to determine whether a statement was one of fact or opinion].) Rather, the question here is whether Appellants' challenged speech was commercial. Under the court's analysis in *Kasky*, the *speaker's* knowledge about the content of the speech is the important feature in answering that question. Nike's challenged speech in that case concerned its own business operations which were within its personal knowledge. (*Kasky*, *supra*, 27 Cal.4th at p. 963.) That is not the case here, as Appellants were not involved in the initial recordings of the Disputed Tracks. From Appellants' perspective, their challenged statements about the identity of the lead singer were therefore necessarily opinion. [End of fn. 8.]

There is no change in the judgment.

Serova's petition for rehearing is denied.



LUI, P. J.



CHAVEZ, J.



HOFFSTADT, J.