

**IN THE  
SUPREME COURT OF CALIFORNIA**

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**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.**

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

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**PLAINTIFF'S REPLY TO DEFEDANT'S ANSWER TO  
PETITION FOR REVIEW**

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Jeremy F. Bollinger [jeremy@mossbollinger.com](mailto:jeremy@mossbollinger.com)

Ari E. Moss [ari@mossbollinger.com](mailto:ari@mossbollinger.com)

Dennis F. Moss [dennis@mossbollinger.com](mailto: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. INTRODUCTION**

A teenager walks into a record store before Christmas 2018 and sees what he believes is the perfect gift for his mom (who already owns three Michael Jackson albums): an album whose cover shows images of Michael Jackson's face next to the word "Michael" and on the flip side states "This album contains 9 previously unreleased vocal tracks performed by Michael Jackson." He buys the album. At the time, the teenager is not aware that three of the album songs are sung by an impersonator, or that there is any controversy as to whether Jackson actually sang the vocals on all of the album's songs.

While the teenager is in the record store, his mom is at a supermarket buying peaches with an "organic" label affixed to them. Mom does not know there is a dispute between the two biggest peach growers in California over the labeling of these peaches as organic. However, mom is led to believe by the label that they are in fact "organic". In actuality, someone in the supply chain stuck "organic" labels on peaches that were not grown organically.

When it is uncovered that three of the album songs are not sung by Michael Jackson, or revealed that the peaches are not organic, the teenager and his mother should be able to bring suits against the music distributor and the supermarket respectively because, as consumers protected by the CLRA, as far as they were concerned, the statements on the album cover and peach label were facts.

According to once-settled law in California, mom and teenager would be able to pursue their claims. Under the express provisions of the CLRA and unfair competition law, the Sony Defendants (who conceded for their anti-SLAPP motion that Jackson did not sing the songs in question) and the supermarket are liable for their misrepresentations to consumers who bought their goods irrespective of what the sellers knew at the time they made the statements, or any controversies about the representations on the products sold. Under the Court of Appeal's ruling in this case, however, both mom and son are without a remedy against the sellers who get to keep their money.

The foregoing makes clear that the Court of Appeal's decision is not a narrow decision with limited application. By proclaiming statements to unwitting consumers that appear on their face to state facts to be "opinions" (Slip Op. 23), the Court of Appeal's decision turns consumer protection in California on its head. It jeopardizes decades of public policy, depriving Californians of a powerful remedy against retailers and distributors who convey misinformation on the products they sell. Under California law, the marketplace is not a medieval bazaar where "buyer beware" is understood; it is a 21st century marketplace where the consumer reigns. The Court of Appeal's decision fails to recognize that evolution.

The Court of Appeal has created a new angle on the "post-truth" era decried by rational observers of the current political landscape by enabling "post-truth" commercial speech to flourish in California. Insulating sellers of goods from liability for

misrepresented facts in the context of a statutory scheme that has, for years, made them strictly liable for such misrepresentations invites nothing but reckless behavior to secure sales.

## **II. DISCUSSION**

### **A. The Court of Appeal's decision exacerbates the split of authority on the applicable standard under the first prong of Section 425.16.**

#### **1. There is a split of authority between *Commonwealth Energy* and the Court of Appeal's decision here.**

The Sony Defendants argue that there is no split of authority under the first prong of Section 425.16 because there is no practical difference between the specific nature of speech and general issues abstracted from it—they claim both formulations accord with the statute. (Pet. Answer 16.) However, this argument directly contradicts *Commonwealth Energy* and the line of cases relying on it, which cautioned against the “synecdoche theory of public issue” and denied anti-SLAPP motions where public interest could be found only in generalities abstracted from the speech. (*Commonwealth Energy v. Investor Data Exchange* (2003) 110 Cal.App.4th 26, 34; *Nagel v. Twin Laboratories, Inc.* (2003) 109 Cal.App.4th 39, 47–48; *All One God Faith, Inc. v. Organic & Sustainable Indus. Standards, Inc.* (2010) 183 Cal.App.4th 1186, 1209; *Dual Diagnosis Treatment Center, Inc. v. Buschel* (2016) 6 Cal.App.5th 1098, 1106; *Rand Res., LLC v. City of Carson* (2016) 247 Cal.App.4th 1080, 1093–1094, review granted Sept. 21, 2016, S235735.) The Sony

Defendants essentially advocate for the more encompassing view of speech under the first prong of the anti-SLAPP statute, as they would in a brief on the merits. But this argument does not negate the fact that there is currently a split among the appellate courts on whether this view is proper.

The unsettled status of this issue affected the Court of Appeal's holding under the first prong in this case. The Court repeatedly emphasized the public interest in celebrities and their work as a basis for its holding. (Slip Op. 14–16 [“significant body of case law holds that prominent entertainers and their accomplishments can be the subjects of public interest”; “[p]ublic interest in the life and work of entertainers and other celebrities can create an ‘issue of public interest’ ”; “[i]t is beyond dispute that Michael Jackson was a famous entertainer”; “[f]acts concerning the creation of works of art and entertainment can also be an issue of public interest”; “[t]he representations at issue here concerned the body of work of a well-known artist”).) In support of these propositions, the Court cited authorities which involved speech about celebrities: *No Doubt v. Activision Publishing, Inc.* (2011) 192 Cal.App.4th 1018, 1027 (the speech was a videogame portraying the famous music band); *Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337 (the speech was a TV show about Marlon Brando); *Stewart v. Rolling Stone LLC* (2010) 181 Cal.App.4th 664, 677-78 (the speech was a magazine editorial about the music band). (Slip Op. 15) Here, however, the Sony Defendants' speech was not about a celebrity, but about their product, the *Michael* album. Michael Jackson's celebrity

and his body of work were general topics abstracted from the speech. The Court equated “[t]he part . . . with the greater whole” in direct contradiction to the *Commonwealth Energy* standard. (*Commonwealth Energy, supra*, 110 Cal.App.4th 26, 34.)

**2. *Rezec*, holding contrary to this case, is not meaningfully distinguishable.**

The Court of Appeal held the speech at issue was protected also because of the public interest in the *Michael* album, in contradiction to *Scott v. Metabolife Int’l, Inc.* (2004) 115 Cal.App.4th 404 and *Rezec v. Sony Pictures Entm’t, Inc.* (2004) 116 Cal.App.4th 135, which held that public interest in a product is insufficient to bring the advertiser’s speech about the product within the ambit of Section 425.16. The Sony Defendants try to distinguish *Rezec* based on the facts that Sony Pictures’ statements in *Rezec* were knowingly fraudulent and did not reflect any character or portion of the work. (Pet. Answer 17–18.) The Court of Appeal did not distinguish *Rezec* on either of these grounds and could not have done so convincingly.

The first distinction is immaterial. *Rezec*’s holding under the first prong of the anti-SLAPP analysis does not appear to be based on Sony’s knowledge of falsity of its speech. (*Rezec, supra*, 116 Cal.App.4th 135, 140–141 [concluding the anti-SLAPP statute did not apply because Sony Pictures’ statements were commercial speech].) Of course, if, as the Court of Appeal here concluded, only knowingly fraudulent speech can be commercial, *Rezec* could technically be distinguished on this basis. But such distinction would be improper under the first prong of the anti-SLAPP because scienter is a second-prong issue established by

the plaintiff *after* the determination about the existence of public interest has been made. Thus, scienter may not factor into the first-prong analysis.

The second distinction is nonexistent. Like the false advertisements in *Rezec* which did not reflect any character or portion of the films, the false attribution of the Cascio recordings to Michael Jackson does not reflect any character or portion of the Cascio recordings. Rather, it misrepresents their source.

The only material difference between the facts in *Rezec* and in this case is the presence of a public controversy around the Sony Defendants' statements, which resulted from allegations of fraud. The Court of Appeal opined that this controversy made speech protected under Section 425.16 (Slip Op. 16), but this holding begs review: common sense suggests that allegations of fraud should not confer extra protection on the allegedly false speech.<sup>1</sup>

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<sup>1</sup> The Sony Defendants suggest that *Rezec* may have been superseded by Section 425.17 (Pet. Answer 17 fn. 7), but it was not. Section 425.17 makes the anti-SLAPP statute inapplicable to commercial speech but preserves the applicability of the statute if such speech is based on dissemination of artistic works. (Code Civ. Proc. § 425.17(c), (d).) Because *Rezec* concerned speech based on dissemination of films, it remained within the reach of the anti-SLAPP statute, and the court's analysis of the speech under the first prong of the anti-SLAPP framework remains good law.

**B. The Court of Appeal's decision created an ambiguity in California consumer protection law.**

- 1. The Court of Appeal's conclusion that knowledge is required for speech to be commercial was not limited to the facts of this case.**

The Sony Defendants downplay the potential impact of the Court of Appeal's reinterpretation of the *Kasky* test for commercial speech by saying that knowledge was only one of the factors the Court considered. (Pet. Answer 21.) The Court of Appeal indeed considered multiple factors, however it found personal knowledge to be a "critical element," the lack of which made the speech at issue noncommercial. (Slip Op. 21.) The Court distinguished this case from *Kasky*, which found similarly controversial speech about Nike's factories to be commercial, *solely* on the element of personal knowledge. (Slip Op. 22–23.) The Court expressly noted that, in its view, *Kasky* may have been decided differently if it had dealt with matters outside of Nike's personal knowledge. (Slip Op. 23 fn. 7 and accompanying text.)

Under the Court of Appeal's reasoning, an American apparel company that purchases leather jackets from a foreign clothing supplier, puts labels on the jackets and resells them to California consumers under its own brand is not responsible to the consumers if the leather turns out to be faux. A car manufacturer does not have to recall a vehicle model when its advertised navigation system programmed by a contracted software developer, malfunctions. And a grocery store does not have to refund money to consumers who overpaid for peaches

misabeled as organic if this misrepresentation was introduced by the store's fruit supplier.

Despite the Court of Appeal's and the Sony Defendants' superficial attempt to limit the holding to the facts of this case, the reach of this precedent is very broad because the Court's analysis of *Kasky* was not fact-specific. (Slip Op. 20, 22–23.) And this analysis did result in an unqualified conclusion that speech is not commercial and thus not actionable under the UCL and CLRA absent the defendant's personal knowledge—which is the same as to say a defendant may never be held strictly liable under these statutes: the plaintiff must establish scienter. The Court of Appeal certified its decision for publication, clearly meaning to set a precedent as to how *Kasky*'s commercial speech test must be interpreted by future courts.

Even if the decision were unpublished, other courts could borrow its reasoning without citing to the case. Instead, courts can cite to *Kasky* itself, extracting support for this reasoning in *Kasky*'s discussion of the policy for denying protection to false or misleading commercial speech, which, according to *Kasky*, assumes such speech “describe[s] matters within the personal knowledge of the speaker or the person whom the speaker is representing.” (*Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 962.)<sup>2</sup>

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<sup>2</sup> See, e.g., *Bernardo v. Planned Parenthood Fed'n of Am.* (2004) 115 Cal. App. 4th 322, 348 (citing *Kasky* for this proposition). In *Bernardo*, the lack of personal knowledge, although noted by the court, was incidental to the fact that the statement was not susceptible to proof at the time it was made. Additionally, unlike here, the speech was not made in connection with a sale of products or services, and the defendant's website indicated that

As the above-mentioned examples show, this assumption, if construed literally to mean defendant's personal involvement in every step of the production, is too restrictive to adequately protect consumers in today's economy. And *Kasky* does not go so far as to convert this generic assumption underlying the regulation policy into a required element of the test for commercial speech. But evidently, lower courts can do so.

By elevating this assumption into law, the Court of Appeal's decision created an ambiguity as to whether personal knowledge is a required element under the UCL and CLRA. As a practical consequence, the decision has given lower courts latitude to selectively dismiss strict liability and negligence claims cognizable under the UCL and the CLRA where scienter is not alleged whenever a court feels that the case is not worth its time.

## **2. The decision erased the legal difference between facts and opinions.**

The Sony Defendants argue their speech was properly characterized as noncommercial because they not only lacked personal knowledge of the singer's identity but had "no means of verifying" it, and the controversy was "irresolvable." (Pet. Answer 19–20, 22.) The Court of Appeal adopted this reasoning, concluding that the statements at issue were opinions. (Slip Op. 23 [suggesting that lack of actual knowledge meant the Sony Defendants had to rely on the information available to them,

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the statement reflected its "position" (i.e. was an opinion). (*Id.* at pp. 348, 350.)

which made their statements opinions]; Order Mod. Op. [same].) This reasoning improperly conflates the Sony Defendants' failure to verify the truth of their statements with the proposition that these statements are not susceptible to verification, which would indicate they are opinions. (*Rezec, supra*, 116 Cal.App.4th 135, 146–147.) The identity of the singer was a verifiable fact known to defendants Cascio and Porte, as well as to Jason Malachi, the alleged real singer on the Cascio recordings. (CT 1:120 [FAC ¶ 32a].) That the Sony Defendants failed to obtain knowledge of this fact and resolve the controversy does not make it “irresolvable.”

Even assuming that the Sony Defendants in their position at the time had no practical means to verify the singer's identity, it is hard to see the logic in the Court's conclusion that this makes their statements an opinion. An unqualified attribution of controversial recordings to a singer in the absence of knowledge of whether he sings on them and any means to verify this fact falls under the definition of negligence, not opinion.

And regardless of whether the Sony Defendants had no practical means of verifying the truth of their statement or simply did a poor job of it, the problem remains the same: The album cover gives a consumer no clues that the attribution of the album to Jackson is the manufacturer's opinion.



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

(CT 1:147; 2:275 at ¶5b [authenticating album cover].) Not only is the identity of a song's vocalist an obviously factual question in the mind of an average consumer, but record companies typically know such facts because they advance money for and oversee the recording process. Nothing on this cover tells the consumer that this was not the case here.

Similarly, a consumer has no way of knowing that the label stating "Leather" on a jacket, the advertisement of a new car navigation system or the "Organic" sticker on peaches at the grocery store are opinions, and that the consumer will have no recourse against the seller if the seller's statements turn out to be false.

The new standard for characterizing speech to potential buyers of a product as an opinion introduced by the Court of Appeal is inconsistent with the traditional distinction between facts and opinions which turns on the language and context of the message as they are perceived by the audience. (*Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 260–61.) The new standard converts the consumer's right to recover from a false advertiser into a gamble: did this advertiser know what he was talking about, or not?

### **3. Liability of a publisher for false attribution of a creative work does not create constitutional infirmities.**

The Sony Defendants argue that the Court of Appeal's decision is carefully crafted to protect their First Amendment rights from remedies chilling creative speech, such as withholding music from release (Pet. Answer 9), selling it without attribution (*ibid.*), compelling a disclosure of the controversy to consumers (*ibid.*), or compelling the Sony Defendants to present views with which they do not agree (Pet. Answer 24). But a false advertising lawsuit seeks none of these extraordinary remedies.

As discussed in the petition (Pet. 35), to avoid liability, the Sony Defendants only needed to indicate that their attribution of the Cascio recordings to Jackson was an opinion (e.g., "Tracks 3, 5 and 7 are believed to be sung by Michael Jackson"). Such disclosure neither forces the Sony Defendants to express views with which they do not agree, nor burdens the distribution of the Cascio recordings. It makes the album cover as a whole not misleading, allowing the Sony Defendants to use the cover image and title of their choice. It accurately reflects the Sony Defendants' position argued before the court (that they did not know who the singer was but believed it was Jackson), at the same time alerting consumers of the risk that the singer on these recordings may be someone else. It is constitutionally permissible and recommended by the United States Supreme Court. (*In re R.M.J.* (1982) 455 U.S. 191, 203 ["the remedy [to false or misleading advertising] in the first instance is not necessarily a prohibition but preferably a requirement of disclaimers or

explanation.”].)<sup>3</sup> But when the Sony Defendants chose to state as a fact that the singer on the Cascio recordings was Michael Jackson, they assumed the risk of liability should the songs turn out to be forgeries because California law imposes strict liability for false advertising.

Because the regulation of misleading advertising in this case does not burden the creation or distribution of music, this case does not raise any constitutional concerns beyond those implicated in typical regulation of false commercial speech. Instead of striking a sensible balance between consumer rights and the Sony Defendants’ First Amendment right, the Court of Appeal’s decision simply causes confusion and undermines California consumer protection laws.

#### **4. The decision effectively immunizes sales of art forgeries.**

Finally, the Sony Defendants’ dismissal of the consequences of this precedent defies reason. (Pet. Answer 26.) There can be no question but that absent reversal, the Court of Appeal’s decision will result in immunity for false attribution of art by resellers. The Court of Appeal held that lack of personal involvement in the creation of the work immunizes the seller’s false attribution of the work. (Order Mod. Op.) Art dealers and publishers are never involved in the creation of the work, and

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<sup>3</sup> Product manufacturers routinely provide such disclosures. For example, statement “May contain traces of nuts” on the list of food ingredients allows the food distributor to avoid liability for harm to consumers when the distributor is not entirely sure that its assessment of the product’s ingredients is accurate.

thus always lack personal knowledge. Their means to verify the authorship are not unlike those of the Sony Defendants. Under this precedent, such art dealers and publishers can continue selling copies of a forged work or other works by the same forger with immunity based on the lack of personal knowledge of the forgery and the existence of a controversy between the forger and the previous buyers.

The facts of this case illustrate the problem. Plaintiff can continue the fraud case against defendants Cascio and Porte seeking damages for the class for past misrepresentations.<sup>4</sup> However, Cascio and Porte are not the ones selling the *Michael* album. They have not spoken about the Cascio recordings since 2010 and are not actively perpetuating the harm. It is the Sony Defendants who have continued selling the Cascio recordings misrepresenting them to consumers as Michael Jackson songs for the past eight years and will continue to do so to generations of

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<sup>4</sup> Respondent's Brief on appeal noted that it was unclear whether defendants Cascio and Porte alone could pay damages compensating for the loss consumers incurred in reliance on the misrepresentations. (RB 56.) The Sony Defendants twist these words presenting them as an "admission" that Plaintiff sued them "because of deeper pockets." (Pet. Answer 8 fn. 3.) It is not the depth of the Sony Defendants' pockets that matters, but that they, as the publisher, appropriated the bulk of revenues from the forged songs, which Cascio and Porte may not be able to replace. There is nothing untoward in Plaintiff's expectation that consumers receive a full refund for their loss from all responsible parties—to the contrary, that is the very purpose of consumer class actions.

new unwitting consumers. The Court of Appeal's decision prevents Plaintiff from enjoining these continued misrepresentations, effectively immunizing the Sony Defendants well into the future.

### **III. CONCLUSION**

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

Dated: November 7, 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 3,587 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: November 7, 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 November 7, 2018 declarant served PLAINTIFF'S REPLY TO DEFENDANT'S OPPOSITION TO 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 7<sup>th</sup> day of November 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

BRYAN FREEDMAN  
SEAN HARDY  
JORDAN SUSMAN  
**FREEDMAN & TAITELMAN,  
LLP**  
1901 Avenue of the Stars, Suite  
500  
Los Angeles, CA 90067

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