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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES**

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

Plaintiff,

vs.

SONY MUSIC ENTERTAINMENT, a
Delaware general partnership; JOHN
BRANCA, as Co-Executor of the Estate of
Michael J. Jackson; EDWARD JOSEPH
CASCIO, an individual; JAMES VICTOR
PORTE, an individual; MJJ PRODUCTIONS,
INC., a California Corporation;
ANGELIKSON PRODUCTIONS LLC, a New
York Jersey Limited Liability Company; and
DOES 1 through 50, inclusive,

Defendants.

Case No. BC 548468

**PLAINTIFF VERA SEROVA'S
OPPOSITION TO DEFENDANTS'
SPECIAL MOTIONS TO STRIKE THE
FIRST AMENDED COMPLAINT
PURSUANT TO CALIFORNIA'S ANTI-
SLAPP STATUTE**

Date: June 30, 2016
Time: 11:00 a.m.
Dept.: 308

Case Assigned for All Purposes to
Judge Ann I. Jones

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1 **1. Introduction**

2 Plaintiff Vera Serova asserts Unfair Competition Law (“UCL”) and Consumers Legal
3 Remedies Act (“CLRA”) claims against John Branca as Co-Executor of the Estate of Michael J.
4 Jackson (the “Estate”), Sony Music Entertainment (“Sony”), MJJ Productions, Inc. (“MJJ”), Edward
5 Joseph Cascio, James Victor Porte, and Angelikson Productions LLC (“Angelikson”) for falsely
6 representing that Michael Jackson performed three of the ten songs on Jackson’s posthumous album
7 *Michael*. Defendants filed two special motions to strike Plaintiff’s First Amended Complaint
8 (“FAC”) under the anti-SLAPP statute (the “Motions”).¹ Based on the parties’ stipulation, the Court
9 ordered that these Motions be addressed in phases, with this initial phase limited to the potentially
10 dispositive questions: (1) whether Defendants have satisfied their burden on the first prong of the
11 anti-SLAPP statute (showing Plaintiff’s claims arise from their protected activity); and (2) if so:

12 (a) whether the various representations on which Plaintiff bases her UCL and CLRA claims
13 constitute non-commercial speech and/or are inextricably intertwined with non-commercial
14 speech, such that Plaintiff has failed to allege facts sufficient to constitute a cause of action
under these statutes; and

15 (b) whether the following documents include any statements that a reasonable trier of fact
16 could decide are sufficiently false or misleading to support a claim under the UCL or CLRA,
17 assuming solely for purposes of this determination on the Motions that Michael Jackson did
18 not sing the lead vocals on “Breaking News,” “Monster,” and “Keep Your Head Up”: (i) the
front and back covers of the compact disc (“CD”) music album entitled *Michael*; and (ii) the
video at issue relating to the *Michael* album in which the narrator states “a brand new album
from the greatest artist of all time.”²

19 Defendants cannot prevail on any of these issues. Their alleged misrepresentations do not
20 qualify for anti-SLAPP protection because they are commercial speech about the properties of their
21 own product. Such speech does not satisfy the statute’s “issue of public interest” requirement. Even
22 if it did, Defendants cannot show Plaintiff’s claims fail as a matter of law. Defendants’ alleged
23 misrepresentations constitute commercial speech under the California Supreme Court’s *Kasky v.*
24 *Nike* test and none of the narrow exceptions to *Kasky* apply. Likewise, *Michael*’s cover and video
25 advertisement clearly conveyed to a reasonable consumer that Michael Jackson performed all of the
26 tracks on the album. If an impostor actually performed three of the tracks, those representations were

27 ¹ The Estate, Sony, and MJJ (together the “Jackson Defendants”) filed one Motion and Cascio, Porte
and Angelikson (together the “Angelikson Defendants”) filed the other.

28 ² Joint Stip. and Order re Defs.’ Anti-SLAPP Motions (“Anti-SLAPP Stip.”) ¶ 2, Apr. 18, 2016.

1 indisputably false and misleading.

2 2. Statement of Facts

3 *Michael* is the first posthumous compilation album of previously unreleased tracks by
4 recording artist Michael Jackson.³ Defendants claim that Jackson recorded three of the album's ten
5 songs—"Breaking News," "Monster," and "Keep Your Head Up"—in the basement recording studio
6 of his friends, the Cascio family.⁴ These three songs (along with nine unreleased songs originating
7 from the same source) are known as the "Cascio tracks."⁵ In the lead-up to the release of *Michael*,
8 several Jackson family members publicly disputed that Michael Jackson performed the lead vocals
9 on the Cascio tracks.⁶

10 On November 11, 2010, Howard Weitzman, the attorney for the Estate of Michael J. Jackson
11 (the "Estate"), released a public statement to Jackson's fans on behalf of the Estate addressing the
12 questions that had arisen regarding the authenticity of "Breaking News," "Monster," and "Keep
13 Your Head Up" ("Weitzman's Statement").⁷ Weitzman's Statement relayed numerous findings
14 supporting the authenticity of the tracks, including that six of Jackson's former producers and
15 engineers were invited to listen to *a cappella* versions of the Cascio tracks being considered for
16 inclusion on *Michael* and "all confirmed that the vocal was definitely Michael."⁸

17 On or about December 3, 2010, Sony and the Estate released a video advertisement (the
18 "Video Ad") for *Michael* in which the narrator states "a brand new album from the greatest artist of
19 all time."⁹

20 ³ FAC ¶ 10.

21 ⁴ FAC ¶ 11; Videos Concerning Defs.' Anti-SLAPP Motions ("Lodged Videos"), Video 2 (Oprah
Appearance) at 3:40-4:21, Apr. 18, 2016.

22 ⁵ FAC ¶ 23.

23 ⁶ FAC ¶ 20.

24 ⁷ Anti-SLAPP Stip. ¶ 5.a (stipulating that Exhibit A thereto, an email from Weitzman to Jeff Jampol
for distribution to Michael Jackson fans, is a true and correct copy of the statement alleged at FAC ¶
22); FAC ¶ 22 (alleging that Weitzman released a statement on behalf of the Estate on November 11,
2010 addressing the Cascio tracks' authenticity and describing the statement's content); Anti-SLAPP
25 Stip. Exh. A (Weitzman's Statement).

26 ⁸ Anti-SLAPP Stip., Exh. A (Weitzman's Statement) at 1.

27 ⁹ Anti-SLAPP Stip. ¶ 5.c (stipulating that the videos at www.youtube.com/watch?v=CXWxAuHi_4
and lodged with the court are true and correct copies of the video alleged at FAC ¶ 24); FAC ¶ 24
28 (alleging that Sony, the Estate, and potentially MJJ released a video advertisement for *Michael* on
December 3, 2010 in which the narrator states "a brand new album from the greatest artist of all
time."); Lodged Videos, Video 1 (Video Ad) at 0:23.

1 On December 6, 2010, Defendant Cascio appeared on the Oprah Winfrey Show and claimed
2 that Jackson performed the lead vocals on the Cascio tracks.¹⁰ Cascio's Oprah appearance also
3 featured "exclusive" previews of "Breaking News," "Monster," and "Keep Your Head Up," two
4 shots showcasing *Michael's* cover and repeated announcements of *Michael's* impending December
5 14, 2010 release.¹¹

6 Sony and the Estate released *Michael* on December 14, 2010, approximately eighteen months
7 after Michael Jackson's death.¹² *Michael's* front cover consists primarily of the word "Michael," a
8 portrait of Michael Jackson, and 15 other images of Michael Jackson recollecting his 1979 through
9 1991 recordings.¹³ Its back cover lists *Michael's* ten songs, beneath which it states:

10 This album contains 9 previously unreleased vocal tracks performed by Michael Jackson.
11 These tracks were recently completed using music from the original vocal tracks and music
created by the credited producers.¹⁴

12 This statement refers to nine previously unreleased vocal tracks instead of the ten songs on the
13 album because one of the songs—"The Way You Love Me"—was previously released in 2004.¹⁵

14 Plaintiff purchased a *Michael* CD in California between June 18, 2011 and June 28, 2011
15 based on: (1) the *Michael* CD album's: (a) claim to contain "9 previously unreleased vocal tracks
16 performed by Michael Jackson."; (b) title—*Michael*; and (c) depictions of Jackson; (2) the Video
17 Ad; (3) Cascio's statement on Oprah; and (4) Weitzman's Statement.¹⁶

18
19 ¹⁰ Anti-SLAPP Stip. ¶ 5.d (stipulating that the videos at www.youtube.com/watch?v=uzFR2aga5GE
20 and lodged with the court are true and correct copies of a portion of the December 6, 2010 Oprah
episode where Cascio appeared as a guest as alleged at FAC ¶ 25); FAC ¶ 25 (alleging that Cascio
21 claimed Jackson performed the lead vocals on the Cascio tracks during his Oprah appearance);
Lodged Videos, Video 2 (Oprah Appearance) at 3:40-4:21.

22 ¹¹ Lodged Videos, Video 2 (Oprah Appearance) at 0:01-0:15, 4:21-5:26, 8:39-48.

23 ¹² FAC ¶ 10.

24 ¹³ Anti-SLAPP Stip. ¶ 5.b (stipulating that the photocopies of *Michael's* album cover attached as
Exhibit A to the Jackson Defendants' February 3, 2016 Request for Judicial Notice In Support of
Their Motion to Strike ("RFJN") are authentic); Jackson Defs.' RFJN, Ex. A (Album Cover). For
help identifying all 16 images and their references to Michael Jackson's career, 1979 to 1991
25 recordings, see [http://www.npr.org/sections/therecord/2010/11/08/131177343/a-guide-to-almost-](http://www.npr.org/sections/therecord/2010/11/08/131177343/a-guide-to-almost-every-image-on-the-cover-of-michael-jackson-s-new-album)
[every-image-on-the-cover-of-michael-jackson-s-new-album](http://www.npr.org/sections/therecord/2010/11/08/131177343/a-guide-to-almost-every-image-on-the-cover-of-michael-jackson-s-new-album).

26 ¹⁴ *Id.*

27 ¹⁵ FAC ¶ 27.

28 ¹⁶ FAC ¶¶ 22, 24, 25, 27, 29, 30. The Jackson Defendants argue that Plaintiff's UCL and CLRA
claims are also based on Sony's statement expressing confidence the vocals are Jackson's (Jackson
Def's. Mot. at 2:2, 3:13), however, the parties subsequently stipulated that Plaintiff's UCL and
CLRA claims are not based on that statement. See Anti-SLAPP Stip. ¶ 3.

1 Plaintiff later learned numerous facts strongly suggesting Jackson did not perform the Cascio
2 tracks.¹⁷ Plaintiff asserts fraud claims against the Angelikson Defendants and CLRA and UCL
3 claims against all Defendants. Plaintiff alleges *Michael's* cover, the Video Ad, and Cascio's
4 statement on Oprah were deceptive because Jackson did not perform the lead vocals on "Breaking
5 News," "Monster," and "Keep Your Head Up."¹⁸ Plaintiff alleges Weitzman's Statement was
6 deceptive because, among other things, some of the six Jackson producers and engineers at the
7 listening session **did not** agree the vocals were definitely Jackson's.¹⁹

8 The parties have stipulated (for purposes of the Motions only) that the following documents
9 are authentic: (1) the copies of the front and back covers of the *Michael* CD attached as Exhibit A to
10 the Jackson Defendants' February 3, 2016 Request for Judicial Notice; (2) the copy of Weitzman's
11 Statement attached as Exhibit A to the Anti-SLAPP Stipulation; (3) the copies of the Video Ad on
12 YouTube at www.youtube.com/watch?v=_CXWxAuHi_4 and lodged with the Court; and (4) the
13 copies of Cascio's Oprah appearance on YouTube at www.youtube.com/watch?v=uzFR2aga5GE
14 and lodged with the Court.²⁰

15 3. The Anti-SLAPP Standard

16 "A SLAPP suit—a strategic lawsuit against public participation—seeks to chill or punish a
17 party's exercise of constitutional rights to free speech and to petition the government for redress of
18 grievances. The Legislature enacted ... section 425.16—known as the anti-SLAPP statute—to
19 provide a procedural remedy to dispose of lawsuits that are brought to chill the valid exercise of
20 constitutional rights."²¹ To determine whether a cause of action should be stricken under the anti-
21 SLAPP statute, section 425.16 establishes a two-part test. First, the court must decide whether the
22 defendant has satisfied its burden of showing that the challenged cause of action arose from the
23 defendant's protected activity.²² "If the trial court finds that such a showing has been made, then the
24

25 ¹⁷ See FAC ¶ 32.

26 ¹⁸ FAC ¶ 13.

27 ¹⁹ See FAC ¶ 32.i. Plaintiff suspects discovery will reveal additional misleading aspects of the
statement.

28 ²⁰ Anti-SLAPP Stip. ¶ 5.

²¹ *Rusheen v. Cohen*, 37 Cal. 4th 1048, 1055-1056 (2006).

²² *Copenbarger v. Morris Cerullo World Evangelism*, 215 Cal. App. 4th 1237, 1244 (2013).

1 court must decide whether the plaintiff has demonstrated a probability of prevailing on the
2 challenged cause of action.”²³

3 As noted above, the anti-SLAPP Stipulation and Order limits the questions before the Court
4 in this first phase.²⁴ “All other issues potentially raised by the Motions, including, *inter alia*,
5 Plaintiff’s burden to establish a *prima facie* case (if applicable), whether [Weitzman’s Statement]
6 includes any false or misleading statements, and each Defendant’s responsibility for the various
7 representations on which Plaintiff bases her claims, [are] reserved for one or more subsequent
8 phases, if necessary.”²⁵

9 **4. Plaintiff’s claims do not arise from any protected activity because the challenged**
10 **statements constitute commercial speech about Defendants’ product and therefore do not**
11 **satisfy the “issue of public interest” requirement.**

12 Code of Civil Procedure § 425.16 protects any act “in furtherance of [a] person’s right of
13 petition or free speech under [the] United States Constitution or the California Constitution in
14 connection with a public issue.”²⁶ Where, as here, the challenged speech was not connected with a
15 governmental proceeding, an act in furtherance of a person’s right of petition or free speech under
16 the United States or California Constitution in connection with a public issue includes:

17 (3) any written or oral statement or writing made in a place open to the public or a public
18 forum in connection with an issue of public interest, or (4) any other conduct in furtherance
19 of the exercise of the constitutional right of petition or the constitutional right of free speech
20 in connection with a public issue or an issue of public interest.²⁷

21 For speech to come within these prongs of subdivision 425.16 (e), it must be made “in connection
22 with a public issue or an issue of public interest.”²⁸ Commercial speech about the properties of one’s
23 own product does not satisfy this requirement.

24 In *Nagel v. Twin Laboratories, Inc.*, plaintiff brought UCL and CLRA claims against dietary
25 supplement manufacturer Twin Labs for representing on its website and product labels that the ma
26

27 ²³ *Id.*

28 ²⁴ Anti-SLAPP Stip. ¶ 2.

²⁵ *Id.* ¶ 4.

²⁶ Cal. Code Civ. Proc. § 425.16 (b)(1).

²⁷ Cal. Code Civ. Proc. § 425.16 subds. (e)(3), (e)(4).

²⁸ *Consumer Justice Ctr. v. Trimedica Int’l, Inc.*, 107 Cal. App. 4th 595, 600-01 (2003) (“If ... the
defendant’s alleged acts fall under the third or fourth prongs of subdivision (e), there is an express
‘issue of public interest’ limitation.”).

1 huang extract in its weight loss product Ripped Fuel was “standardized for 6% ephedrine,” when the
2 ephedrine content actually differed dramatically between lots.²⁹ Twin Labs moved to strike
3 plaintiff’s complaint under CCP § 425.16, but the Court of Appeal found the challenged statements
4 were not protected under the anti-SLAPP statute.³⁰ The court explained:

5 Political speech is at one end of the spectrum and is protected under the First Amendment
6 and section 425.16. We conclude a list of product ingredients on labels and a Web site is at
7 the other end of the spectrum and is not protected speech under section 425.16. Twin Labs
8 has not cited any case to us (and we have discovered none) in which a product label or other
9 form of commercial speech that does nothing more than list the product’s ingredients has
10 received the protection of section 425.16.³¹

11 The Court found Twin Labs’ statements were not made “in connection with a public issue” as that
12 phrase is used in § 425.16 because the challenged list of Ripped Fuel’s ingredients “was not
13 participation in the public dialogue on weight management issues” but rather was “designed to
14 further Twin Labs’ private interest of increasing sales for its products.”³²

15 In *Scott v. Metabolife Int’l, Inc.*, plaintiff brought *inter alia* UCL and false advertising claims
16 against dietary supplement manufacturer Metabolife for misrepresenting the safety and efficacy of
17 its weight loss product Metabolife 356.³³ Metabolife moved to strike plaintiff’s UCL and false
18 advertising claims under § 425.16, but the Court of Appeal denied the motion because Metabolife’s
19 challenged statements did not satisfy § 425.16 (e)’s “issue of public interest” requirement. As the
20 court explained:

21 Here, Scott’s cause of action does not challenge any statements by Metabolife concerning
22 obesity or weight management in general, or the general topic of ephedrine, or statements
23 about other manufacturer’s products. There is nothing in Scott’s complaint that suggests it
24 seeks to address any advertising that provides medical advice to the consuming public.
25 Rather, Scott’s cause of action for false advertising is based on advertising by a manufacturer
26 (Metabolife) about the safety and efficacy of its specific weight loss product (Metabolife
27 356) for the profit-generating purpose of selling that product to the consuming public. This
28 concerns Metabolife’s private interest of increasing sales for its products. This cause of action
does not concern an issue of public interest as that term is used in section 425.16.³⁴

In *Rezec v. Sony Pictures Entertainment, Inc.*, the Second District Court of Appeal addressed

²⁹ *Nagel v. Twin Laboratories, Inc.*, 109 Cal. App. 4th 39, 42-43 (2003).

³⁰ *Id.* at 46-47.

³¹ *Id.* at 47 (internal citations omitted).

³² *Id.* at 47-48.

³³ *Scott v. Metabolife Int’l, Inc.*, 115 Cal. App. 4th 404, 408, 423 (2004).

³⁴ *Id.* at 423.

1 whether movie reviews fabricated and published by Sony Pictures under the name of a made-up
2 critic qualified for protection under the anti-SLAPP statute.³⁵ Citing *Nagel* and the statute, the court
3 stated the rule: “[f]or purposes of the anti-SLAPP statute, if Sony's film advertisements constitute
4 commercial speech, the statute does not apply because the ads did not “further[] ... [Sony's] right of
5 petition or free speech [arising] under the United States or California Constitution in connection with
6 a public issue.”³⁶ The court found that Sony’s challenged speech—forged movie reviews—was
7 commercial under the *Kasky v. Nike* test (discussed below) and that no exceptions to *Kasky*
8 applied.³⁷ Thus the speech was not protected under the anti-SLAPP statute.³⁸ In reaching its
9 conclusion, the court noted that neither the public’s interest in films nor the fake reviews’ wide
10 distribution rendered the ads a matter of public interest.³⁹

11 In *All One God Faith, Inc. v. Organic & Sustainable Indus. Standards, Inc.*, the court found
12 that an organic trade association’s certification of commercial products with its “OASIS Organic”
13 seal did not satisfy the anti-SLAPP statute’s “issue of public interest” requirement.⁴⁰ The court
14 explained:

15 [T]he mere fact that a large number of people may be affected by advertising does not,
16 standing alone, satisfy the public interest requirement. Rather, the inquiry is whether the
17 unprotected advertising speech is inextricably intertwined with protected speech informing
18 the consuming public and furthering political debate on a matter of public interest. In this
19 case, the use of the “OASIS Organic” seal on member products is not activity directed to
20 public discussion of organic standards in general, but is only speech about the contents and
21 quality of the product. ... [I]t is not intertwined with speech about, or contributing to the
22 debate on, the merits of a particular definition of “organic.”⁴¹

23 In *L.A. Taxi Coop., Inc. v. Indep. Taxi Owners Ass’n of Los Angeles*, the Second District
24 Court of Appeal held that taxi cab companies’ advertisements did not concern a matter of public
25 interest under the anti-SLAPP statute because “the subject advertisements did not constitute
26 participation in any public dialogue about public transportation via taxicabs, the taxicab industry, or
27

28 ³⁵ *Rezec v. Sony Pictures Entm’t, Inc.*, 116 Cal. App.4th 135, 137-38 (2004).

³⁶ *Id.* at 140 (citing *Nagel*, 109 Cal. App. 4th 39, 46–51; § 425.16, subd. (b)(1)).

³⁷ *Id.* at 140-144 (citing *Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 960-61 (2002)).

³⁸ *Id.* at 144.

³⁹ *Id.* at 143.

⁴⁰ *All One God Faith, Inc. v. Organic & Sustainable Indus. Standards, Inc.*, 183 Cal. App. 4th 1186, 1205 (2010).

⁴¹ *Id.* at 1209-10 (citations omitted).

1 taxicab licensing and regulation.⁴² Rather, the advertisements on their face were designed to further
2 defendants' private interest in increasing the use of their taxicab services."⁴³ Accordingly, the
3 defendants' speech was "purely commercial" and therefore was not entitled to protection.⁴⁴

4 Under these authorities, commercial speech about the properties of one's product does not
5 concern an "issue of public interest" under the anti-SLAPP statute and therefore does not qualify as
6 protected speech.

7 Defendants contend the "issue of public interest" requirement should be construed broadly to
8 include "any issue in which the public is interested" and any person "in the public eye."⁴⁵ But
9 Defendants' authorities all dealt with the application of the public interest requirement to
10 noncommercial speech (without contravening the holdings of the foregoing commercial speech
11 cases).⁴⁶ Those cases thus held nothing about how the "issue of public interest" requirement should
12 be applied where, as here, a speaker was promoting the sale of its own product.⁴⁷

13 **5. Defendants' challenged speech is commercial under *Kasky v. Nike*.**

14 The U.S. Supreme Court denies First Amendment protection to misleading commercial
15 speech for three reasons: (1) the truth of commercial speech is generally easier to verify than
16 noncommercial speech given commercial speakers' knowledge of their products; (2) commercial
17 speech is harder than noncommercial speech because commercial speakers act from a profit motive;
18 and (3) the government's interest in preventing commercial harms justifies greater regulation of
19 commercial speech than noncommercial speech.⁴⁸ The U.S. Supreme Court has not adopted an all-

21 ⁴² *L.A. Taxi Coop., Inc. v. Indep. Taxi Owners Ass'n of Los Angeles*, 239 Cal. App. 4th 918, 927 (2015).

22 ⁴³ *Id.* at 928-29.

23 ⁴⁴ *Id.*

24 ⁴⁵ Jackson Defs.' Mot. at 5-7; Angelikson Defs.' Mot. at 2-3.

25 ⁴⁶ See *Kronemyer v. Internet Movie Data Base, Inc.*, 150 Cal. App. 4th 941, 948-49 (2007) (IMDb listings were noncommercial speech); *Hilton v. Hallmark Cards*, 599 F.3d 894, 905 n.7 (9th Cir. 2009) (Hallmark card's speech was non-commercial); *Stewart v. Rolling Stone LLC*, 181 Cal. App. 4th 664, 670-74, 684-89 (2010) (Rolling Stone's foldout editorial on "Indie Rock between four pages of Camel cigarette ads that also referenced independent music was non-commercial); *Stutzman v. Armstrong*, No. 2:13-CV-00116-MCE-KJN, 2013 WL 4853333, at *15-19 (E.D. Cal. Sept. 10, 2013).

27 ⁴⁷ See *In re Marriage of Cornejo*, 13 Cal. 4th 381, 388 (1996) ("[C]ases are not authority for propositions not considered.").

28 ⁴⁸ *Kasky*, 27 Cal. 4th at 953-56.

1 purpose test to distinguish commercial from noncommercial speech, but in *Bolger v. Youngs Drug*
2 *Products Corp.*, it found “strong support” for characterizing informational packets promoting the
3 sale of contraceptives as commercial speech based on three factors: (1) advertising format, (2)
4 product references, and (3) commercial motivation.⁴⁹ *Bolger* declined to hold that all of these
5 factors, or any one of them individually, is necessary to support a commercial speech
6 characterization.⁵⁰ *Bolger* found that statements may qualify as commercial “notwithstanding the
7 fact that they contain discussions of important public issues.”⁵¹

8 *Kasky v. Nike* established the test California courts apply to determine whether a particular
9 statement qualifies as commercial speech that is subject to laws aimed at preventing false
10 advertising.⁵² In *Kasky*, defendant Nike responded to negative publicity concerning working
11 conditions in its factories with press releases, letters to newspapers and university leaders, and
12 advertisements that allegedly misrepresented Nike’s treatment of its workers.”⁵³ Kasky sued Nike
13 for UCL violations based on these public statements.⁵⁴ The trial court sustained Nike’s demurrer on
14 the grounds that Kasky’s claims were barred by the First Amendment and the Court of Appeal
15 affirmed.⁵⁵

16 Drawing on U.S. Supreme Court authority, the California Supreme Court held that to decide
17 whether a statement is commercial speech that may be subjected to false advertising laws, a court
18 should consider: (1) the speaker, (2) the intended audience, and (3) the content of the message,
19 explaining:

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

26 [T]he factual content of the message should be commercial in character. In the context of

27 ⁴⁹ *Id.* at 956-57 (citing *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 64-67 (1983)).

28 ⁵⁰ *Id.* at 957 (citing *Bolger*, 463 U.S. at 67 n.14).

⁵¹ *Id.* at 957 (citing *Bolger*, 463 U.S. at 67-68).

⁵² *Id.* at 939.

⁵³ *Id.* at 947-48.

⁵⁴ *Id.* at 945, 948.

⁵⁵ *Id.* at 948.

1 regulation of false or misleading advertising, this typically means that the speech consists of
2 representations of fact about the business operations, products, or services of the speaker (or
the individual or company that the speaker represents), made for the purpose of promoting
sales of, or other commercial transactions in, the speaker's products or services.⁵⁶

3 Applying this test, the court deemed Nike's statements commercial. Nike qualified as a commercial
4 speaker because it made and sold athletic apparel.⁵⁷ Nike's statements were directed to a commercial
5 audience because they were intended to reach and influence actual and potential purchasers of Nike's
6 products.⁵⁸ And, Nike's statements were representations of fact of a commercial nature because Nike
7 was making factual representations about its own business operations.⁵⁹

8 **A. *Michael's* album cover is commercial speech under *Kasky*.**

9 The three challenged statements on *Michael's* cover—the title, the cover art, and the
10 statement of attribution on the back cover—are each commercial under *Kasky*. The speaker—
11 Sony—was engaged in the production, sale, and distribution of *Michael*.⁶⁰ The intended audience
12 was intended or actual buyers of the album. And the factual content of the message is commercial in
13 character as it consists of a representation of fact about the speaker's product, made for the purpose
14 of promoting sales of that product. As discussed below, the album's imagery, its title, and the
15 express statement of attribution on the back cover all convey that the album consists of songs
16 performed by Michael Jackson. Sony had strong economic incentives to attribute the songs to
17 Jackson. Common sense dictates that *Michael* derived all or nearly all of its value from buyers'
18 belief that Michael Jackson, one of the best-selling musical artists of all time, performed its songs.
19 The sixteen images of Jackson on the album's cover and its name—*Michael*—also strongly suggest
20 that Jackson's purported performance of the songs was the album's primary selling point. As the
21 challenged statements on *Michael's* cover satisfy the three elements of the *Kasky* test, they are
22 commercial.

23 Courts routinely deem factual statements on the packaging of commercial products

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25 ⁵⁶ *Id.* at 960-61.

26 ⁵⁷ *Id.* at 963.

27 ⁵⁸ *Id.*

28 ⁵⁹ *Id.*

⁶⁰ See Jackson Defs.' RFJN, Ex. A (Album Cover) (identifying Sony as the distributor).
Plaintiff contends additional parties are responsible for the content of the album's cover, but the
parties have reserved the question for subsequent phases, if necessary. See Anti-SLAPP Stip. ¶ 4.

1 concerning the products themselves to be commercial speech. In *Keimer v. Buena Vista Books, Inc.*,
2 for example, the Court of Appeal deemed statements of inflated investment returns on the covers of
3 the Beardstown Ladies' book and video investment guides were commercial on three separate
4 grounds.⁶¹ First, plaintiff sufficiently alleged the purpose of the statements about investment returns
5 was to propose a commercial transaction, and this was assumed true on demurrer.⁶² Second, "merely
6 looking at the [challenged covers]" led the court "to the commonsense conclusion that [the covers]
7 were designed with a single purpose in mind, to sell the books. In other words, they appear to
8 propose a commercial transaction."⁶³ Third, the statements were commercial under the *Bolger*
9 factors (*Kasky* had not yet been decided) as the covers were advertisements, they referred to a
10 specific product—the books and videos, and defendants had an obvious economic motive in making
11 the statements as they were in the publishing business.⁶⁴ Similarly, *Nagel v. Twin Labs., Inc.* held the
12 description of ingredients on the label of a nutritional supplement is commercial speech under
13 *Kasky*.⁶⁵ *Benson v. Kwikset Corp.* held "Made in U.S.A" and similar labels on locksets are
14 commercial speech under *Kasky*.⁶⁶ In *Rubin v. Coors Brewing Co.*, both sides agreed and the
15 Supreme Court accepted, that the information on beer labels, including their alcohol content,
16 constitutes commercial speech.⁶⁷ And, in *Rice v. Fox Broad. Co.*, the Ninth Circuit held that
17 statements on a video jacket describing the video's content as never before seen secrets behind
18 magic tricks were commercial speech.⁶⁸

19 The Jackson Defendants argue the statements on the album are not commercial speech
20 because they do not propose a transaction and are not in the form of a traditional advertisement.⁶⁹
21 The Jackson Defendants are wrong on both counts. One, in *Kasky* the California Supreme Court held
22 that "advertising format is by no means essential to characterization as commercial speech."⁷⁰

23 ⁶¹ *Keimer v. Buena Vista Books, Inc.*, 75 Cal. App. 4th 1220, 1228-30 (1999).

24 ⁶² *Id.* at 1229.

24 ⁶³ *Id.* at 1229-30.

25 ⁶⁴ *Id.*

25 ⁶⁵ *Nagel*, 109 Cal. App. 4th at 48-49.

26 ⁶⁶ *Benson v. Kwikset Corp.*, 152 Cal. App. 4th 1254, 1268 (2007).

26 ⁶⁷ *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481 (1995).

27 ⁶⁸ *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1180-81 (9th Cir. 2003)

27 ⁶⁹ Jackson Defs.' Mot. at 11.

28 ⁷⁰ *Kasky*, 27 Cal. 4th at 962.

1 Indeed, the court relied on several U.S. Supreme Court cases that deemed speech commercial even
2 though it did not propose a transaction.⁷¹ Two, the album cover statements do propose a transaction,
3 based on *Keimer*, where the court held that comparable statements on book and video covers
4 proposed a transaction—the sale of the item.⁷²

5 In the same vein, citing *Kronemyer v. Internet Movie Data Base, Inc.*, the Jackson
6 Defendants argue that the statements attributing the songs to Jackson are “informational rather than
7 directed at sales” and that “it is hard to imagine how the labeling is economically motivated.”⁷³ In
8 *Kronemyer* the court found the credits for 400,000 movies and television shows on the free website
9 Internet Movie Data Base (IMDb) were “informational rather than directed as sales” and
10 noncommercial speech.⁷⁴ But *Kronemyer* is distinguishable. IMDb does not sell movies. The speech
11 challenged there—IMDb’s movie credits—did not concern any commercial product and consisted of
12 IMDb’s free information available to all Internet users about the products (movies) of others. The
13 speech challenged here, on the *Michael* album cover, was made by the producer and seller of the
14 album for the purpose of selling the album. The Jackson Defendants’ contention that “it is hard to
15 imagine how the labeling is economically motivated” is absurd given Jackson’s popularity. *Michael*
16 would reasonably be expected to sell far more copies if Michael Jackson fans believed all its songs
17 were performed by Michael Jackson rather than an impersonator.⁷⁵

18 **B. The Video Ad is commercial speech under *Kasky*.**

19 The Video Ad is commercial speech under *Kasky*. Even under the Defendants’ incorrect,
20 narrow concept of commercial speech, the Video Ad qualifies because it is a traditional
21 advertisement.⁷⁶ The speakers—Sony and the Estate—were engaged in *Michael*’s production, sale,
22 and distribution. The Video Ad’s intended audience was likely buyers of the album. And the

24 ⁷¹ *Id.* at 956 (citing *Rubin*, 514 U.S. at 481-82 (alcohol content on label); *Ibanez v. Florida Dept. of*
25 *Bus. & Prof’l Regulation, Bd. of Accountancy*, 512 U.S. 136, 142 (1994) (letterhead statements
discussing attorney as CPA and CFP); *Bolger*, 463 U.S. 60, 66-67) (informational pamphlets
discussing contraceptives that did not merely propose a commercial transaction)).

26 ⁷² *Keimer*, 75 Cal. App. 4th at 1229.

27 ⁷³ Jackson Defs.’ Mot. at 11 (citing *Kronemyer*, 150 Cal. App. 4th at 948).

28 ⁷⁴ *Kronemyer*, 150 Cal. App. 4th at 948-49.

⁷⁵ Jackson Defs.’ Mot. at 11.

⁷⁶ See Lodged Videos, Video 1 (Video Ad).

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

3 **C. Weitzman's Statement is commercial speech under *Kasky*.**

4 Weitzman's Statement, including the assertion that six of Jackson's former producers and
5 engineers listened to *a cappella* versions of the Cascio tracks and "all confirmed that the vocal was
6 definitely Michael," is commercial under *Kasky*.⁷⁷ The speaker—the Estate—was engaged in
7 *Michael's* production, sale, and distribution. The intended audience was Michael Jackson fans—
8 likely buyers of the album. And the statement was a factual representation about *Michael* that the
9 Estate had strong economic incentives to make.

10 The Jackson Defendants argue that Weitzman's Statement is not commercial speech because
11 it does not propose a commercial transaction and is not traditional advertising.⁷⁸ But *Kasky* held that
12 traditional advertising format is not a requirement for commercial speech and found that the letters
13 Nike sent to newspaper editors for public distribution in response to an actual public controversy
14 were nonetheless commercial.⁷⁹ Weitzman's Statement is analogous to the Nike letters, since
15 Weitzman was responding to a public controversy threatening the Estate's business interest in selling
16 *Michael*.

17 The Jackson Defendants also argue that Plaintiff cannot prove Weitzman's Statement was
18 economically motivated because: 1) *Michael* was not released for more than a month after it was
19 made, and 2) the statement was made in response to public questions about the identity of the
20 vocalist on the Cascio tracks.⁸⁰ As the producers and sellers of the album, Sony and the Estate had a
21 strong economic incentive to convince Michael Jackson's fans that Jackson sang the lead vocals on
22 the songs on *Michael*. This incentive was present far more than one month before *Michael's* release.
23 The Jackson Defendants needed to generate positive excitement about the imminent new album
24 among potential customers before the release, and that was when the controversy about the Cascio

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26 ⁷⁷ See Anti-SLAPP Stip., Exh. A (Weitzman's Statement).

27 ⁷⁸ Jackson Defs.' Mot. at 9.

28 ⁷⁹ *Kasky*, 27 Cal. 4th at 962-64 ("[A]dvertising format is by no means essential to characterization as commercial speech.")

⁸⁰ Jackson Defs.' Mot. at 9-10.

1 tracks was at its peak. Naturally, their pre-release statements about the bona fides of their album
2 would influence fans' decisions to purchase it upon its release. That public questions prompted
3 Weitzman's Statement is irrelevant. *Kasky* rejected the notion that corporate speech responding to a
4 public controversy is noncommercial: "For purposes of categorizing Nike's speech as commercial or
5 noncommercial, it does not matter that Nike was responding to charges publicly raised by others and
6 was thereby participating in a public debate."⁸¹

7 **D. Cascio's statement on Oprah is commercial speech under *Kasky*.**

8 Cascio's appearance on the Oprah show in the days before the album's release was a
9 promotional activity designed to promote sales. Cascio's statement on Oprah that Jackson performed
10 the lead vocals on the Cascio tracks is commercial under *Kasky*. The speaker—Cascio—was
11 engaged in *Michael's* production. The intended audience included likely purchasers of the album
12 *Michael*. Indeed, the program featured substantial promotion for the album, including "exclusive"
13 previews of "Breaking News," "Monster," and "Keep Your Head Up," repeated announcements of
14 *Michael's* release date, and repeatedly displaying slowly rotating shots of the album's cover with its
15 16 images of Michael Jackson.⁸² And, the factual content of Cascio's message was commercial in
16 character, because, like the other statements claiming Jackson performed the Cascio tracks, the
17 statement is about the origin of the product and is designed to promote sales.

18 **6. No exception to the *Kasky* commercial speech test applies here.**

19 Defendants argue that even if their statements are commercial in the abstract, they should be
20 treated as noncommercial because they are "adjunct or incidental to" or "inextricably intertwined"
21 with the protected musical speech of the Cascio tracks themselves.⁸³ Neither principle applies here.

22 **A. Defendants' challenged speech is not adjunct or incidental to the Cascio tracks.**

23 To the extent necessary to safeguard the ability to truthfully promote protected speech, courts
24 treat *truthful* advertisements for protected expressive works as adjunct or incidental to the protected
25 work, and thus entitled to the same First Amendment status as the advertised work.⁸⁴ This exception

26 ⁸¹ *Kasky*, 27 Cal. 4th at 965-66.

27 ⁸² Lodged Videos, Video 2 (Oprah Appearance) at 0:01-0:15, 4:21-5:26, 8:39-48.

28 ⁸³ Jackson Defs.' Mot. at 8-13; Angelikson Defs.' Mot. at 8-9.

⁸⁴ *Charles v. City of Los Angeles*, 697 F.3d 1146, 1153-56 (9th Cir. 2012).

1 does not apply here because it only protects advertising that accurately reflects the content of a
2 protected work.

3 For example, in *Rezec v. Sony Pictures Entertainment*, a California Court of Appeal decision,
4 Sony Pictures argued that film advertisements containing a fictitious critic's favorable opinions of
5 the films were protected by the First Amendment because the films themselves were protected
6 noncommercial speech.⁸⁵ The court rejected Sony Pictures' position, explaining:

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

9 But in this case, the advertisements did not reflect any character or portion of the films.
10 Rather, they contained a fictitious critic's favorable opinion of the films. As such, the
advertisements constitute commercial speech and are subject to regulation under consumer
protection laws.⁸⁶

11 The court also criticized "Sony's absolutist approach" under which "every film advertisement, no
12 matter how false, would be outside the scope of consumer protection laws," if promotional
13 statements not merely reflecting the content of the films were deemed noncommercial.⁸⁷

14 Likewise, in *Charles v. City of Los Angeles*, the Ninth Circuit vehemently rejected the
15 categorical contention that "truthful advertisements for expressive works are inherently
16 noncommercial speech, because they are accorded the same First Amendment status as the
17 underlying advertised work."⁸⁸ Concerning the adjunct and incidental use exceptions, the court
18 explained:

19 Doctrines extending noncommercial status from a protected work to advertising for that work
20 are justified only to the extent necessary to safeguard the ability to truthfully promote
21 protected speech. ... Appellants' proposed categorical rule would radically enlarge the
22 recognized exceptions to the First Amendment's limited protection for advertising. Such a
23 rule would place truthful advertisements for books, films, video games, topless dancing, and
all other forms of noncommercial expression beyond the reach of commercial speech
regulations. No court has ever suggested that such a broad exception to the commercial
speech doctrine is required, and Appellants have presented no cause for us to so hold.⁸⁹

24 In *Keimer*, the Court of Appeal refused to extend the "adjunct" or "incidental" use exception

25 ⁸⁵ *Rezec*, 116 Cal. App. 4th at 141-42.

26 ⁸⁶ *Id.* at 142-43 (citations omitted).

27 ⁸⁷ *Id.* at 142, 144.

28 ⁸⁸ *Charles*, 697 F.3d at 1153-56.

⁸⁹ *Id.* at 1156.

1 to statements made on book and videotape covers that reiterated false statements in the protected
2 books and videotapes.⁹⁰ The falsity of the statements overrode the fact that the statements repeated
3 content from the protected works.

4 Under these authorities, Defendants' statements do not qualify for the adjunct or incidental
5 use exception because they do not accurately reflect *Michael's* content but mislead as to its origin.
6 The Jackson Defendants try to distinguish *Keimer* on the grounds that the misleading promotional
7 statements there repeated false statements from the work itself rather than misrepresenting the
8 work's source.⁹¹ But that makes application of the "adjunct" or "incidental" use exception even less
9 appropriate here than it would have been in *Keimer*. Indeed in *Lacoff v. Buena Vista Pub., Inc.*, a
10 New York state trial court found the promotional materials at issue in *Keimer* were noncommercial
11 under the "adjunct" or "incidental" use exception precisely because they accurately reflected the
12 books themselves.⁹² The court emphasized that the promotional statements would not qualify for
13 protection had they misrepresented the contents of the product being offered (as Defendants'
14 statements do here).⁹³

15 Defendants rely heavily on *Stutzman v. Armstrong*, where an Eastern District of California
16 trial court held that promotional statements on several books' covers, flyleaves, and jackets that
17 effectually reiterated statements in the books themselves were fully protected by the First
18 Amendment.⁹⁴ There, purchasers of books about Lance Armstrong alleged that Armstrong and his
19 publishers misled them by: (1) falsely claiming that Armstrong did not use performance enhancing
20 drugs in the books and other public statements; and (2) representing the books were truthful
21 nonfiction biography on the books' flyleaves, covers, and jackets (when the books falsely denied
22 Armstrong's use of performance enhancing drugs).⁹⁵ Although the court reached its decision under
23 the "inextricably intertwined" rationale (discussed below), the result is arguably consistent with the
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25 ⁹⁰ *Keimer*, 75 Cal. App. 4th at 1231-32.

26 ⁹¹ Jackson Defs.' Mot. at 13 n.8.

27 ⁹² *Lacoff v. Buena Vista Pub., Inc.*, 705 N.Y.S.2d 183, 190 (N.Y. Sup. Ct. 2000).

28 ⁹³ *Id.* at 192 ("Contrary to the cases relied upon by plaintiffs in their brief, the complaint here does not allege that plaintiffs were misled as to the contents of the product or service being offered.")

⁹⁴ *Stutzman*, 2013 WL 4853333 at *1-3, *18-19.

⁹⁵ *Id.* at *1-3.

1 adjunct exception as extended by *Lacoff* (but not California law) because the promotional statements
2 describing the book as a true autobiography effectively reiterated the books' fully protected (albeit
3 false) factual claims that Armstrong did not use performance enhancing drugs. Moreover, subjecting
4 biography publishers to false advertising liability for any incorrect fact in the work itself would
5 effectively prevent publishers from ever advertising works as true or biographical, thus chilling their
6 fully protected speech. In contrast, the alleged misrepresentation here does not simply reiterate a
7 factual claim made by the work itself. Likewise, holding music companies accountable for
8 misrepresenting the performer of a commercially released song does not threaten their ability to
9 truthfully promote their speech.

10 In sum, California law clearly precludes application of the adjunct or incidental use exception
11 here. None of Defendants' non-binding authorities hold or even suggest that extending the doctrine
12 here would be appropriate. Doing so would dramatically expand the doctrine beyond its past
13 applications and its purpose of safeguarding the freedom to truthfully promote protected speech.

14 **B. Defendants' challenged speech is not inextricably intertwined with the Cascio tracks.**

15 Under the relevant cases, there is nothing inextricable about Defendants' commercial
16 statements about Michael Jackson being the lead vocalist on the Cascio tracks and the
17 noncommercial content of the Cascio tracks. Commercial speech is rarely "inextricably intertwined"
18 with protected speech; only if there is legal or practical compulsion to consider the two kinds of
19 speech as inseparable will the principle apply to confer enhanced protection for commercial speech.
20 That principle does not apply here.

21 In *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, the United States Supreme Court addressed
22 whether a state statute requiring charitable fundraisers to tell donors the percentage of funds they
23 collected that historically went to charity was subject to strict scrutiny—the test for restrictions on
24 fully protected speech—or the more deferential standard for restrictions on commercial speech.⁹⁶
25 Assuming, without deciding, that the speech compelled by the statute was commercial in the
26 abstract, the Court held that such speech does not retain "its commercial character when it is
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28 ⁹⁶ *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988).

1 inextricably intertwined with otherwise fully protected speech.”⁹⁷ The Court explained that “in
2 deciding what level of scrutiny to apply to a compelled statement” it needed to assess “the nature of
3 the speech taken as a whole and the effect of the compelled statement thereon.”⁹⁸ Assessing
4 charitable solicitations as a whole, the Court found that the commercial aspects of charitable
5 solicitations are inextricably intertwined with charities’ protected informative and persuasive speech
6 because “without solicitation the flow of such information and advocacy would likely cease.”⁹⁹ The
7 Court concluded:

8 Thus, where, as here, the component parts of a single speech are inextricably intertwined, we
9 cannot parcel out the speech, applying one test to one phrase and another test to another
10 phrase. Such an endeavor would be both artificial and impractical. Therefore, we apply our
11 test for fully protected expression.¹⁰⁰

12 The following year in *Bd. of Trustees of State Univ. of New York v. Fox*, the U.S. Supreme
13 Court made clear that *Riley* was a special case and reiterated that the inextricably intertwined
14 principle was a narrow exception.¹⁰¹ *Fox* dealt with a state university’s attempt, by resolution, to bar
15 on campus Tupperware parties where students sold housewares (commercial speech) and discussed
16 home economics (noncommercial speech).¹⁰² The students challenging the resolution argued that the
17 commercial and noncommercial aspects of the Tupperware parties were inextricably intertwined
18 under *Riley*.¹⁰³ The Court disagreed, explaining:

19 ***[In Riley] of course, the commercial speech (if it was that) was “inextricably intertwined”***
20 ***because the state law required it to be included.*** By contrast, there is nothing whatever
21 “inextricable” about the noncommercial aspects of these presentations. No law of man or of
22 nature makes it impossible to sell housewares without teaching home economics, or to teach
23 home economics without selling housewares. Nothing in the resolution prevents the speaker
24 from conveying, or the audience from hearing, these noncommercial messages, and nothing
25 in the nature of things requires them to be combined with commercial messages.¹⁰⁴

26 Following *Fox*, the California Supreme Court and the Ninth Circuit have rejected similar
27 attempts to characterize commercial and noncommercial speech as inextricably intertwined where
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⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* (citations omitted).

¹⁰⁰ *Id.*

¹⁰¹ *Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 473 (1989).

¹⁰² *Id.*

¹⁰³ *Id.* at 474.

¹⁰⁴ *Id.* (emphasis added).

1 there was no legal or practical compulsion to combine them. In *Kasky* Nike argued that the
2 commercial elements in its allegedly deceptive speech (factual representations about its labor
3 practices) were inextricably intertwined with noncommercial elements (expressions of opinion about
4 economic globalization).¹⁰⁵ The California Supreme Court disagreed because: “No law required
5 Nike to combine factual representations about its own labor practices with expressions of opinion
6 about economic globalization, nor was it impossible for Nike to address those subjects
7 separately.”¹⁰⁶ Similarly, in *United States v. Schiff*, the Ninth Circuit found the expressive and
8 political portions of the book *The Federal Mafia* were not inextricably intertwined with its deceptive
9 commercial elements because the author could “relate his long history with the IRS and explain his
10 unorthodox tax theories without simultaneously urging his readers to buy his products.”¹⁰⁷

11 Under these authorities, Defendants’ statements naming Jackson as the performer of the
12 Cascio tracks are not inextricably intertwined with the protected expressive elements of the Cascio
13 tracks because no law of man or nature required Defendants to combine the Cascio tracks with
14 representations that Michael Jackson performed those tracks: Defendants were free to sell the Cascio
15 tracks without claiming that Michael Jackson performed them.

16 In contrast, in *Dex Media W., Inc. v. City of Seattle*, the Ninth Circuit found yellow pages
17 phone directories’ commercial elements (paid advertisements) were inextricably intertwined with
18 their noncommercial elements (telephone listings and community information) for purposes of
19 deciding which First Amendment standard of review governed a Seattle ordinance that imposed
20 substantial conditions and costs on the distribution of yellow pages.¹⁰⁸ The court began by readily
21 finding yellow pages, considered as a whole (since the ordinance regulated them as a whole), are
22 noncommercial under the *Bolger* factors.¹⁰⁹ As an additional reason, the court deemed phonebooks’
23 commercial and noncommercial elements inextricably intertwined because economic reality
24 generally compels phone book publishers to publish advertisements to sustain phonebooks’

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26 ¹⁰⁵ *Kasky*, 27 Cal. 4th at 966-67.

27 ¹⁰⁶ *Id.* at 967.

28 ¹⁰⁷ *United States v. Schiff*, 379 F.3d 621, 627, 629 (9th Cir. 2004).

¹⁰⁸ *Dex Media W., Inc. v. City of Seattle*, 696 F.3d 952, 953, 962-65 (9th Cir. 2012).

¹⁰⁹ *Id.* at 957-59.

1 noncommercial elements.¹¹⁰ In support of its conclusion, the court found there was no significant
2 distinction between yellow pages, on the one hand, and newspapers and other mixed speech
3 publications entitled to full First Amendment Protection, on the other.¹¹¹

4 Defendants cite two cases concerning laws restricting the sale of expressive goods and
5 services, *White v. City of Sparks* and *Anderson v. City of Hermosa Beach*. In those cases, the sale of
6 expressive goods and services was intertwined with the expressive content of the goods or services
7 themselves, and therefore entitled to the same degree of First Amendment protection as the
8 expressive goods or services.¹¹² This ensures that expressive goods and services are not indirectly
9 burdened by restrictions on their sale.

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

19 Defendants dispute this straightforward application of the inextricably intertwined analysis
20 based primarily on the Eastern District of California case *Stutzman v. Armstrong*.¹¹³ *Stutzman* found
21 statements on books' covers, flyleaves, and jackets characterizing the books as nonfiction (even
22 though they contained false statements about Armstrong's use of performance enhancing drugs)
23 were inextricably intertwined with the books' noncommercial contents.¹¹⁴ Although the court's

24 ¹¹⁰ *Id.* at 963.

25 ¹¹¹ *Id.* at 963.

26 ¹¹² See *White v. City of Sparks*, 500 F.3d 953, 954-57 (9th Cir. 2007) (finding paintings and their sale
protected speech); *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1062-63 (9th Cir. 2010)
(finding tattoos and their sale protected speech).

27 ¹¹³ Jackson Defs.' Mot. at 11-13 (citing *Stutzman*, 2013 WL 4853333 at *18); Angelikon Defs.' Mot
at 8-9 (same).

28 ¹¹⁴ *Stutzman*, 2013 WL 4853333 at *18.

1 reasoning supporting its inextricably intertwined analysis is not explicit, the court noted that
2 economic realities compel book publishers to advertise and found it “nearly impossible to separate
3 the promotional materials for the Books from the Books themselves.”¹¹⁵

4 Again, Stutzman is readily distinguishable on its facts. The advertising there accurately
5 reiterated facts asserted in the books themselves so it was more difficult to separate the books from
6 the promotional materials. In addition, holding publishers liable for any factual inaccuracy in
7 nonfiction books would preclude marketing any book as “true” or as a “biography,” chilling speech.
8 Accordingly, it was arguably appropriate for the court to consider the reality that publishers are
9 dependent on advertising to survive.

10 In contrast, holding music companies responsible for misrepresenting the performer of a
11 commercially released song does not prevent music companies from truthfully advertising their
12 works. Defendants had every right to sell the Cascio tracks without misrepresenting the performer.
13 Defendants complain that demanding perfect accuracy about whether Jackson performed a particular
14 song would result in Jackson’s posthumous music never being released because they cannot know
15 with certainty whether Jackson performed the tracks.¹¹⁶ But Defendants are not required to prove
16 with certainty that Jackson performed the tracks to avoid liability. Rather, it is Plaintiff’s burden to
17 prove that Jackson did not perform the tracks by a preponderance of the evidence. (*i.e.* more likely
18 than not). Furthermore, while Defendants contend it would be nearly impossible to publish an album
19 without identifying the performer, they provide no explanation for why a seller could not simply
20 acknowledge its uncertainty on the album.¹¹⁷ Regardless, this case concerns the sale of an album that
21 was all about identifying and relying on the popularity of the performer.

22 Defendants also argue that the right to attribute an expressive works to its author or
23 performer is fundamental to the right of expression.¹¹⁸ This is doubtlessly correct, just as Defendants
24 have the right to advertise their expressive works. But just as the right to advertise does not include
25 the right to advertise *falsely*, the right of attribution does not include the right to make *false*

26 ¹¹⁵ *Id.*

27 ¹¹⁶ Jackson Defs.’ Mot. at 11, 13.

28 ¹¹⁷ *Id.* at 13.

¹¹⁸ *Id.* at 10.

1 attributions. The Jackson Defendants’ related argument that musical expression is inextricably
2 intertwined with the performer’s identity because it draws meaning from it makes no sense where
3 the performer’s claimed identity is a lie (as Plaintiff alleges here).¹¹⁹

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

9 **7. If Michael Jackson did not perform the lead vocals on the Cascio tracks, *Michael’s* cover**
10 **and the Video Ad were sufficiently misleading to support UCL and CLRA claims.**

11 The UCL prohibits any “unlawful, unfair or fraudulent business act or practice.”¹²⁰ The
12 CLRA prohibits certain “unfair methods of competition and unfair or deceptive acts or practices
13 undertaken by any person in a transaction intended to result or which results in the sale or lease of
14 goods or services to any consumer, including, *inter alia*: “[p]assing off goods ... as those of
15 another”; “[m]isrepresenting the source ... of goods”; “[m]isrepresenting the affiliation, connection,
16 or association with ... another; and [r]epresenting that goods ... have ... characteristics ... which
17 they do not have.”¹²¹

18 Under both the UCL and CLRA, conduct is considered deceptive or misleading if the
19 conduct is likely to deceive a reasonable consumer.¹²² A “reasonable consumer” is defined as an
20 ordinary member of the consuming public who acts reasonably under all the circumstances.¹²³ “The
21 primary evidence in a false advertising case is the advertising itself.”¹²⁴ Indeed, “California courts
22 have expressly rejected the ‘view that a plaintiff must produce a consumer survey or similar extrinsic
23 evidence to prevail on a claim that the public is likely to be misled by a representation.’”¹²⁵

24 ¹¹⁹ *Id.* at 13.

25 ¹²⁰ Cal. Bus. & Prof. Code § 17200.

26 ¹²¹ Cal. Civ. Code § 1770, subds. (a)(1)-(3), (5).

27 ¹²² *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008); *Consumer Advocates v.*
28 *Echostar Satellite Corp.*, 113 Cal. App. 4th 1351, 1360 (2003).

¹²³ *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 510 (2003).

¹²⁴ *Brockey v. Moore*, 107 Cal. App. 4th 86, 100 (2003).

¹²⁵ *Mullins v. Premier Nutrition Corp.*, No. 13-CV-01271-RS, 2016 WL 1534784, at *14 (N.D. Cal.
Apr. 15, 2016) (quoting *Consumer Advocates*, 113 Cal. App. 4th at 1360).

1 California courts, however, recognize that whether a business practice is deceptive will usually be a
2 question of fact reserved for the jury.¹²⁶ Defendants cannot meet their heavy burden of showing no
3 reasonable trier of fact would find the statements likely to deceive a reasonable consumer because
4 their actions were designed to and did lead consumers to believe Michael Jackson sang the songs at
5 issue and thus were plainly misleading if Jackson did not sing them.

6 **A. If Jackson did not perform the lead vocals on the Cascio tracks, *Michael's* cover was**
7 **likely to deceive a reasonable consumer.**

8 In analyzing whether product packaging is misleading, courts consider the packaging as a
9 whole rather than examining each allegedly misleading statement in isolation.¹²⁷ Moreover, under
10 California law, a duty to disclose arises “when the defendant makes partial representations that are
11 misleading because some other material fact has not been disclosed.”¹²⁸ Plaintiff alleges *Michael's*
12 cover is false and misleading under the UCL and CLRA based on: (1) its claim to contain “9
13 previously unreleased vocal tracks performed by Michael Jackson.”; (2) the album’s title—*Michael*;
14 and (3) the album’s cover art.¹²⁹ Assuming Jackson did not perform the lead vocals on the Cascio
15 tracks (pursuant to the parties’ stipulation), these statements, taken together, indisputably render
16 *Michael's* cover misleading as a whole.

17 The statement on *Michael's* back cover attributing the album’s nine “previously unreleased”
18 tracks to Jackson amounts to a claim that Jackson performed the three Cascio tracks because they are

19
20 ¹²⁶ See e.g., *Linear Technology Corp. v. Applied Materials, Inc.*, 152 Cal.App.4th 115, 134–35
21 (2007) (“Whether a practice is deceptive, fraudulent, or unfair is generally a question of fact which
22 requires ‘consideration and weighing of evidence from both sides’ and which usually cannot be made
23 on demurrer.”); *Asis Internet Servs. v. Subscriberbase Inc.*, No. 09–3503 SC, 2010 WL 1267763, at
24 *2 (N.D. Cal. Apr. 1, 2010) (collecting cases).

25 ¹²⁷ *Williams v. Gerber Prods. Co.*, 552 F.3d at 939 n.3 (while claim on packaging that fruit snacks
26 were “nutritious” might constitute puffery standing on its own, it was actionable under the UCL and
27 CLRA because it “contributed to the deceptive context of the packaging as a whole”); *Lima v.*
28 *Gateway, Inc.*, 710 F.Supp.2d 1000, 1007 (C.D. Cal. 2010) (“[S]tatements...cannot be considered in
isolation because they contribute to the deceptive context of the advertising as a whole.”); see also
Lavie v. Procter & Gamble Co., 105 Cal. App. 4th 496, 509 (2003) (quoting *Donaldson v. Read*
Magazine, 333 U.S. 178, 189 (1948) (“Advertisements as a whole may be completely misleading
although every sentence separately considered is literally true.”)).

¹²⁸ *Collins v. eMachines, Inc.*, 202 Cal. App. 4th 249, 255 (2011) (citing *LiMandri v. Judkins*, 52
Cal. App. 4th 326, 336 (1997); *Falk v. General Motors Corp.*, 496 F.Supp.2d 1088, 1094–1095
(N.D. Cal. 2007)).

¹²⁹ See FAC ¶ 27; Jackson Defs. RFJN, Ex. A (Album Cover).

1 among the album's 9 previously unreleased songs.¹³⁰ Thus, if Jackson did not perform the Cascio
2 tracks, this statement is false. *Michael's* title and its cover art reflecting 16 separate images of
3 Michael Jackson were also likely to lead a reasonable consumer to believe that Michael Jackson
4 performed the songs on the album. The title and art were intended to communicate this message to
5 consumers because nothing else on the front of the album indicates who performed *Michael*—a key
6 factor for virtually all consumers purchasing major artists' albums. The only other statement on the
7 album attributing it to Jackson is the language on the back confirming Jackson performed the 9
8 previously unreleased songs on the album. At a minimum, if Michael Jackson did not perform all of
9 the songs on the album, the title and cover art were sufficient to trigger a duty to disclose that fact.
10 As *Michael's* title and cover art unambiguously indicate that Jackson sang the lead vocals on all the
11 songs on the album and nothing on the album's packaging suggests otherwise, these representations
12 are sufficiently misleading to support UCL and CLRA claims if Jackson did not perform the Cascio
13 tracks. If Jackson did not perform the Cascio tracks, *Michael's* packaging, taken as a whole, was
14 likely to deceive a reasonable consumer (and doubtless actually did mislead purchasers).

15 **B. If Jackson did not perform the lead vocals on the Cascio tracks, the Video Ad was likely**
16 **to deceive a reasonable consumer.**

17 The Video Ad states: "a brand new album from the greatest artist of all time."¹³¹ Its images
18 of Jackson make clear that Michael Jackson is the referenced "artist."¹³² Absent a contrary
19 disclosure, a reasonable consumer would understand this to mean that Jackson sang the lead vocals
20 on all of the songs on the album. Defendants contend this statement is not misleading because
21 Jackson performed at least seven of the album's ten songs.¹³³ But *Colgan v. Leatherman Tool Grp.,*
22 *Inc.* squarely rejected this argument.¹³⁴ There, Leatherman argued to the Second District Court of
23 Appeal that, even though a significant portion of the parts of its products were manufactured abroad,
24 Judge Victoria Chaney erred in finding its "Made in U.S.A." labels and advertising deceptive on
25 summary judgment because "the products were designed, engineered, assembled, and finished in the

26 ¹³⁰ See FAC ¶ 27 ("The Way You Love Me" ... was previously released in 2004.")

27 ¹³¹ Lodged Videos, Video 1 (Video Ad) at 0:23.

28 ¹³² *Id.*

¹³³ Jackson Defs.' Mot. at 14-15.

¹³⁴ *Colgan v. Leatherman Tool Grp., Inc.*, 135 Cal. App. 4th 663 (2006).

United States.”¹³⁵ The Court of Appeal agreed that Leatherman’s representations were deceptive as a matter of law because a reasonable consumer of Leatherman’s products with the “Made in U.S.A.” representation would not expect that a significant portion of the various parts of the products were manufactured abroad.¹³⁶ Just as a reasonable consumer would not expect a significant portion of a product labeled “Made in U.S.A.” to be manufactured abroad, a reasonable consumer would not expect three of ten songs on an album advertised to be “from” Michael Jackson to be performed by an impersonator. Defendants also attempt to analogize the alleged deception here to the established practice of artists such as Jackson, the Beatles, and Nirvana releasing albums featuring guest vocalists under their own names.¹³⁷ This case is not about a guest vocalist, but an undisclosed impersonator. As evinced by the infamous fraud of Milli Vanilli, releasing songs performed by an impersonator drastically departs from consumers’ reasonable expectations. Moreover, *Michael’s* legitimate guest vocalists—Akon, 50 Cent, and Lenny Kravitz—are disclosed on the album’s back cover.¹³⁸

8. Conclusion

California courts consistently have rejected attempts like Defendants’ to immunize deceptive business practices by claiming constitutional protection for them. Deceiving consumers isn’t protected activity. The anti-SLAPP statute does not apply here and, even if it did, if Jackson did not perform the Cascio tracks then Defendants’ representations were deceptive and are subject to the UCL and CLRA.

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Respectfully Submitted,

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¹³⁵ *Id.* at 681-684.

¹³⁶ *Id.* at 682-83.

¹³⁷ Jackson Defs.’ Mot. at 15.

¹³⁸ See Jackson Defs. RFJN, Ex. A (Album Cover).