

1 **KATTEN MUCHIN ROSENMAN LLP**

2 ZIA F. MODABBER (SBN 137388)

3 zia.modabber@kattenlaw.com

4 **ANDREW J. DEMKO (SBN 247320)**

5 andrew.demko@kattenlaw.com

6 2029 Century Park East, Suite 2600

7 Los Angeles, CA 90067-3012

8 Telephone: 310.788.4400

9 Facsimile: 310.788.4471

10 **KINSELLA WEITZMAN ISER KUMP &
ALDISERT LLP**

11 **HOWARD WEITZMAN (SBN 38723)**

12 hweitzman@kwikalaw.com

13 **SUANN C. MACISAAC (SBN 205659)**

14 smacisaac@kwikalaw.com

15 808 Wilshire Boulevard, 3rd Floor

16 Santa Monica, California 90401

17 Telephone: 310.566.9800

18 Facsimile: 310.566.9850

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

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

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

26 Plaintiff,

27 v.

28 **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

**DEFENDANTS JOHN BRANCA, AS CO-
EXECUTOR OF THE ESTATE OF
MICHAEL J. JACKSON, SONY MUSIC
ENTERTAINMENT, AND MJJ
PRODUCTIONS, INC.'S REPLY IN
SUPPORT OF THEIR MOTION TO STRIKE
PURSUANT TO CALIFORNIA'S ANTI-
SLAPP STATUTE**

[Cal. Civ. Proc. Code § 425.16]

Date: June 30, 2016

Time: 11:00 a.m.

Dept.: 308

Hearing set by Court on March 30, 2016

Case Assigned for All Purposes to
Hon. Ann I. Jones

TABLE OF CONTENTS

	Page
I. Introduction	1
II. Step One: Plaintiff's Claims Arise From Protected Activity.	1
III. Step Two: Plaintiff Has No Likelihood Of Prevailing On The Merits.	4
A. The UCL and CLRA do not apply because the statements are noncommercial or inextricably intertwined with noncommercial speech.	4
1. Naming Jackson the performer of the Cascio Tracks is a fully protected, noncommercial exercise of the right of self-expression.	5
2. Plaintiff's arguments to the contrary lack merit.	7
3. At the very least, the speech identifying Michael Jackson as the performer of the three Cascio tracks is inextricably intertwined with the protected work.	10
B. The UCL and CLRA do not apply for the additional reason that the statements were not false or misleading.	13
1. The cover of the <i>Michael</i> CD is not likely to deceive a reasonable consumer into believing Michael Jackson performed the lead vocals on the three Cascio tracks.	13
2. The video concerning the <i>Michael</i> album is not likely to deceive.	14
3. Weitzman's letter is not likely to deceive a reasonable consumer.	14
IV. Conclusion.	15

TABLE OF AUTHORITIES

Page(s)

Cases

<i>All One God Faith, Inc. v. Organic & Sustainable Indus. Stds., Inc.</i> , 183 Cal. App. 4th 1186 (2010).....	2
<i>AR Pillow Inc. v. Maxwell Payton, LLC</i> , No. C11-1962RAJ, 2012 WL 6024765 (W.D. Wash. Dec. 4, 2012).....	2
<i>Benson v. Kwikset Corp.</i> , 152 Cal. App. 4th 1254 (2007).....	8
<i>Board of Trustees of State Univ. of N.Y. v. Fox</i> , 492 U.S. 469 (1989)	1, 11
<i>Bolger v. Young Drug Prods. Corp.</i> , 463 U.S. 60 (1983)	4, 5, 6, 7
<i>Cinevision Corp. v. City of Burbank</i> , 745 F.2d 560 (9th Cir.1984).....	7
<i>City of Cincinnati v. Discovery Network, Inc.</i> , 507 U.S. 410 (1993)	10
<i>Colgan v. Leatherman Tool Grp., Inc.</i> , 135 Cal. App. 4th 663 (2006).....	13, 14
<i>Collins v. eMachines, Inc.</i> , 202 Cal. App. 4th 249 (2011).....	13
<i>Hilton v. Hallmark Cards</i> , 599 F.3d 894 (9th Cir. 2010).....	8
<i>Joseph Burstyn, Inc. v. Wilson</i> , 343 U.S. 495 (1952)	7
<i>Kasky v. Nike</i> , 27 Cal. 4th 939 (2002).....	<i>passim</i>
<i>Keimer v. Buena Vista Books, Inc.</i> , 75 Cal. App. 4th 1220 (1999).....	7, 8, 9
<i>Kirby v. Sega of Am., Inc.</i> 144 Cal. App. 4th 47 (2006)	4
<i>Kronemyer v. Internet Movie Data Base, Inc.</i> , 150 Cal. App. 4th 941 (2007).....	3, 6

1	<i>L.A. Taxi Cooperative, Inc. v. Indep. Taxi Owners Ass'n of L.A.,</i>	2
2	239 Cal. App. 4th 918 (2015).....	
3	<i>Metcalf v. U-Haul Int'l, Inc.,</i>	4
4	118 Cal. App. 4th 1261 (2004).....	
5	<i>Nagel v. Twin Labs., Inc.,</i>	2, 3, 8
6	109 Cal. App. 4th 39 (2003)	
7	<i>No Doubt v. Activision Publ'g, Inc.,</i>	3
8	192 Cal. App. 4th 1018 (2011).....	
9	<i>Pittsburgh Press Co. v. Human Relations Comm'n,</i>	7
10	413 U.S. 376 (1973)	
11	<i>Rezec v. Sony Pictures Entm't Inc.,</i>	5
12	116 Cal. App. 4th 135 (2004).....	
13	<i>Rice v. Fox Broadcasting Co.,</i>	1, 8
14	330 F.3d 1170 (9th Cir. 2003).....	
15	<i>Riley v. Nat'l Fed'n of the Blind of N.C., Inc.,</i>	11
16	487 U.S. 781 (1988)	
17	<i>Scott v. Metabolife Int'l, Inc.,</i>	2
18	115 Cal. App. 4th 404 (2004).....	
19	<i>Stewart v. Rolling Stone LLC,</i>	2, 3
20	181 Cal. App. 4th 664 (2010).....	
21	<i>Stutzman v. Armstrong,</i>	6, 10, 12
22	No. 13-116, 2013 WL 4853333 (E.D. Cal. Sept. 10, 2013)	
23	<i>Va. Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.,</i>	9
24	452 U.S. 748 (1976)	
25	<i>White v. City of Sparks,</i>	7
26	500 F.3d 953 (9th Cir. 2007).....	
27	<i>Winter v. G.P. Putnam's Sons,</i>	8
28	938 F.2d 1033 (9th Cir. 1991).....	
	<i>Young v. Am. Mini Theatres, Inc.,</i>	7
	427 U.S. 50 (1976)	
	Statutes	
	Cal. Civ. Proc. Code § 425.16(e)	1
	Cal. Civ. Proc. Code § 425.16(e)(4).....	2

1	Cal. Civ. Proc. Code § 425.17(c)	3
2	Cal. Civ. Proc. Code § 425.17(d)	4
3	Other Authorities	
4	Cal. B. Analysis, S.B. 515-Assemb. Comm, 2003-2004 Reg. Sess. (July 1, 2003)	4

5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **I. Introduction**

2 California’s anti-SLAPP statute was intended to prevent this *exact* lawsuit. Through this
3 action and without precedent, Plaintiff wants to extend the UCL and CLRA’s strict liability and
4 relaxed reliance requirements to the Jackson Defendants’ speech attributing authorship to an
5 expressive work.¹ The ramifications of Plaintiff’s theory are profound. Publishers will have to
6 spend enormous resources investigating artistic works to ensure the validity of the asserted
7 authors and performers. If there is a scintilla of doubt, the publishers will not release the work or
8 else risk millions in a consumer class action in California. More troubling, there is nothing to
9 stop a plaintiff who hears something a little off or finds different patterns in an author’s prose or
10 an artist’s brush strokes from simply opining about an alleged misrepresentation, getting past a
11 demurrer or special motion to strike, and exposing artists and publishers to the rigor and expense
12 of class litigation. Plaintiff’s theory has the capacity to chill artistic expression to its core.

13 The UCL and CLRA do not apply to noncommercial speech.² And, contrary to each of
14 Plaintiff’s arguments, because the Cascio tracks derive their meaning from Jackson being the
15 performer, the speech at issue here is noncommercial or, at the least, inextricably intertwined
16 with the works themselves. The Court should therefore grant the anti-SLAPP motion.

17 **II. Step One: Plaintiff’s Claims Arise From Protected Activity.**

18 The Jackson Defendants have met their burden to show that Plaintiff’s claims arise from
19 statements made in connection with an issue of public interest. *See* Cal. Civ. Proc. Code §
20 425.16(e). Plaintiff’s argument to the contrary is based on the false premise that “[c]ommercial
21 speech about the properties of one’s own product does not satisfy this requirement.” *Opp.* at
22 5:19-20. Plaintiff wrongly assumes that the statements at issue constitute commercial speech, an
23 inquiry properly analyzed in “step two” of the anti-SLAPP analysis (as explained below, they are

24 ¹ Plaintiff argues this case as if the Jackson Defendants were selling sneakers (*Kasky*) or
25 Tupperware (*Fox*) and making factual representations about why a consumer should purchase
26 those products. To the contrary, the Jackson Defendants were furthering Michael Jackson’s First
27 Amendment right to self-expression by attributing three posthumously released works to him.

28 ² Even if the speech is noncommercial, it is not as if Plaintiff is without a remedy; fraud is
 an exception to the First Amendment. But it would require scienter, like defamation, slander,
 and other exceptions to First Amendment protection.

1 not commercial speech). Plaintiff's argument also fails because its basic premise is wrong.

2 None of the cases on which Plaintiff relies establishes either (1) that commercial speech
3 is *per se* exempted from the anti-SLAPP statute, or (2) that statements about the properties of a
4 product—regardless of whether those statements are “commercial speech”—may never relate to
5 an issue of public interest. The opposite is true. As the court in *L.A. Taxi Cooperative, Inc. v.*
6 *Independent Taxi Owners Association of Los Angeles* unequivocally recognized, “[c]ommercial
7 speech that involves a matter of public interest . . . may be protected by the anti-SLAPP statute.”
8 239 Cal. App. 4th 918, 927 (2015).³ Moreover, statements about a particular commercial
9 product may qualify for anti-SLAPP protection where the product is a matter of genuine public
10 interest. *Scott v. Metabolife Int’l, Inc.*, 115 Cal. App. 4th 404, 422 (2004); *see also All One God*
11 *Faith, Inc. v. Organic & Sustainable Indus. Stds., Inc.*, 183 Cal. App. 4th 1186, 1207 (2010)
12 (noting that “several recent cases,” including *Nagel* and *Scott* “have concluded that a
13 manufacturer’s advertising statements about a commercial product are not subject to the
14 protection of section 425.16 when the specific nature of the speech . . . do[es] not involve a
15 matter of public interest”) (emphasis added); *Stewart v. Rolling Stone LLC*, 181 Cal. App. 4th
16 664, 678 (2010) (“Plaintiffs have not provided us with any authority for the proposition that
17 commercial speech is categorically disentitled to protection under the anti-SLAPP statute.”).

18 Accordingly, whether statements are “commercial speech” is irrelevant to the question of
19 whether they were made “in connection with a public issue or an issue of public interest.” Cal.
20 Civ. Proc. Code § 425.16(e)(4). Plaintiff’s authorities stand for the unremarkable proposition
21 that speech about everyday consumer products often does not involve a matter of public interest.

22 That’s not the case here. “The public interest component of section 425.16 . . . (e)(3) and
23 (4) is met when the statement or activity precipitating the claim involved a topic of widespread
24

25 ³ See also *AR Pillow Inc. v. Maxwell Payton, LLC*, No. C11-1962RAJ, 2012 WL 6024765,
26 at *4 (W.D. Wash. Dec. 4, 2012) (analyzing California case law to interpret Washington’s
27 analogous anti-SLAPP statute and recognizing that cases such as *Nagel v. Twin Laboratories,*
28 *Inc.*, 109 Cal. App. 4th 39 (2003) “did not hold that purely commercial speech is exempted or
not covered by the [anti-SLAPP] statute. Rather, they address whether the commercial speech
concerned a matter of public interest to bring the speech within the protection of the statute.”).

1 public interest, and the statement in some manner itself contributes to the public debate.”
2 *Kronemyer v. Internet Movie Data Base, Inc.*, 150 Cal. App. 4th 941, 949 (2007) (quotations and
3 ellipses omitted). Here, there is no question that statements made on the *Michael* album itself, in
4 a video describing the album, and in a letter addressing the public controversy about three of the
5 album’s tracks easily meet this test. Jackson’s popularity alone makes these statements a topic of
6 public interest—his death, only more so. *See No Doubt v. Activision Publ’g, Inc.*, 192 Cal. App.
7 4th 1018, 1027 (2011) (holding that use of rock band No Doubt’s likeness was a matter of public
8 interest “because of the widespread fame No Doubt has achieved”).⁴ Plaintiff does not dispute
9 the widespread interest in Jackson’s posthumously released album, even before questions arose
10 as to whether Jackson performed the Cascio tracks. Nor can Plaintiff dispute that the ensuing
11 controversy regarding the Cascio tracks was public. Indeed, she alleges it. *See* FAC ¶¶ 20, 22,
12 23, 25, 32, 38; *see also* Opp. at 13:15 (admitting that “Weitzman was responding to a public
13 controversy”). The statements at issue here plainly satisfy the public interest requirement.

14 If there were any doubt, the California Legislature obviously intended for the anti-SLAPP
15 statute to apply to actions exactly like this one. In 2004, it enacted Code of Civil Procedure
16 section 425.17, which exempts certain types of speech from the ambit of section 425.16. Under
17 section 425.17, an action may be exempt from the provisions of section 425.16 if it is “brought
18 against a person primarily engaged in the business of selling or leasing goods or services” based
19 on “representations of fact” about the speaker’s products made for the purpose of promoting or
20 securing sales. Cal. Civ. Proc. Code § 425.17(c). Known as the “commercial speech
21 exemption,” this provision is intended to exclude certain types of commercial speech from anti-
22 SLAPP protection; it essentially codified the concerns expressed in *Nagel*, on which Plaintiff
23 relies heavily. *See Metcalf v. U-Haul Int’l, Inc.*, 118 Cal. App. 4th 1261, 1265 (2004).

24 Critically, however, the Legislature explicitly carved out an exception for speech related
25 to music. The commercial speech exemption does not apply to “[a]ny action against any person

26 ⁴ *See also Stewart*, 181 Cal. App. 4th at 677-78 (“[T]here is a public interest which
27 attaches to people who, by their accomplishments, mode of living, professional standing or
28 calling, create a legitimate and widespread attention to their activities.”) (quotations and ellipses
omitted).

1 or entity based upon the creation, dissemination, exhibition, advertisement, or other similar
2 promotion of any dramatic, literary, *musical*, political, or artistic work.” *Id.* § 425.17(d)
3 (emphasis added). Through this provision, the Legislature intended “to preserve the anti-SLAPP
4 motion for the protection of those frequent targets it was intended to protect,” *i.e.*, those engaged
5 in “the creation or promotion of constitutionally protected artistic works and the like.” Cal. B.
6 Analysis, S.B. 515-Assemb. Comm, 2003-2004 Reg. Sess. (July 1, 2003). The statements at
7 issue here fall easily within the scope of speech to which the Legislature intended to extend anti-
8 SLAPP protections: statements about the creation of an artistic work. Because the statements
9 were made in connection with an issue of public interest, section 425.16 applies.

10 **III. Step Two: Plaintiff Has No Likelihood Of Prevailing On The Merits.**

11 **A. The UCL and CLRA do not apply because the statements are** 12 **noncommercial or inextricably intertwined with noncommercial speech.**

13 Plaintiff treats this case as if the Jackson Defendants were selling a bag of potato chips or
14 some other mundane product; indeed, she goes so far as to call the title of the album and the
15 cover art “commercial in character”—when both are unquestionably artistic expression. Opp. at
16 10. But whether on the CD case, in a letter, or an online video, the speech about which Plaintiff
17 complains are implied statements that Michael Jackson created the music on the *Michael* album
18 and/or performed the lead vocals on the Cascio tracks. That is what Plaintiff relied on in
19 purchasing *Michael*, and the Court must decide whether that implied message is noncommercial.
20 As discussed below, it is noncommercial because attributing authorship to art is the essence of
21 what the First Amendment protects, the absolute right to self-expression. *See Kirby v. Sega of*
22 *Am., Inc.* 144 Cal. App. 4th 47, 57-58 (2006) (“The freedom of expression protected by the First
23 Amendment exists to . . . *further individual rights of self-expression*. The protections may
24 extend to all forms of expression, including written and spoken words (fact or fiction), *music*,
25 *films*, paintings, and entertainment, *whether or not sold for a profit*.”) (emphases added); *see*
26 *also Bolger v. Young Drug Prods. Corp.*, 463 U.S. 60, 67-68 n.14 (1983) (noting that the speech
27 would likely be noncommercial “in a case where the pamphlet advertises an activity itself
28 protected by the First Amendment”).

1 To determine whether speech is commercial under the First Amendment, California
2 applies the United States Supreme Court's test articulated in *Bolger*. See *Kasky v. Nike*, 27 Cal.
3 4th 939, 945-47 (2002).⁵ In *Bolger*, the Court announced a three-pronged test: First, the court
4 considers whether the speech falls within the core notion of commercial speech. Second, if the
5 speech does more than propose a commercial transaction, the court considers whether (a) the
6 speech is admittedly advertising, (b) the speech references the product, and (c) the speaker has an
7 economic motive. Finally, even if the speech meets those factors, the court then considers
8 whether the speech still receives First Amendment protection because the commercial aspects of
9 it are inextricably intertwined with the noncommercial parts. Naming Jackson the performer of
10 the tracks at issue is noncommercial or at the very least inextricably intertwined with the
11 noncommercial artistic work itself.

12 **1. Naming Jackson the performer of the Cascio Tracks is a fully**
13 **protected, noncommercial exercise of the right of self-expression.**

14 The first step of the analysis is to determine whether the speech fits within the core notion
15 of commercial speech, speech proposing a commercial transaction. *Kasky*, 27 Cal. 4th at 951. It
16 does not, and Plaintiff does not argue that it is "core" commercial speech. Rather, Plaintiff
17 argues that it meets the second prong of the *Bolger* test, namely, that (a) the speech is admittedly
18 advertising, (b) the speech references the product, and (c) the speaker has an economic motive.

19 **a.** The speech is not advertising. Plaintiff claims the speech is "commercial in
20 character [because] it consists of a representation of fact about the speaker's product, made for
21 the purpose of promoting sales of that product." Opp. at 10. She is wrong. Representations
22 about who created and performed an expressive work necessarily do much "more than propose a
23 commercial transaction." *Rezec v. Sony Pictures Entm't Inc.*, 116 Cal. App. 4th 135, 141 (2004).
24 The identity of the performer directly affects the meaning of the expression itself. For example,
25 the lyrics of "Breaking News" repeatedly refer to Michael Jackson by name, including the lines:

26 ⁵ Plaintiff cobbles together a "test" from *Kasky*'s application of the *Bolger* factors to
27 statements about employees who make sneakers, but the Supreme Court has spoken clearly that
28 the *Bolger* test is used in analyzing claims affected by the United States Constitution. This Court
is bound to follow it.

1 “Everybody watching the news on Michael Jackson/They wanna see that I fall cause I’m
2 Michael Jackson.” As explained in the liner notes, the song as a whole refers to the intense
3 media scrutiny that Jackson endured during his lifetime and his belief that the greater his
4 successes, the harder the media worked to destroy him. These lyrics derive their meaning mostly
5 from the representation that the person singing is Michael Jackson. From the audience’s
6 perspective, that meaning would change significantly if the song were performed by another
7 singer or an “imposter.” See *Stutzman v. Armstrong*, No. 13-116, 2013 WL 4853333, at *17
8 (E.D. Cal. Sept. 10, 2013) (“The speech at issue does more than merely propose a commercial
9 transaction, because it describes the contents of the Books, the Books’ classification as a
10 biography, and describes one of the Books’ authors, Lance Armstrong.”). But while consumers
11 cannot rely on the strict liability of the UCL and CLRA to challenge noncommercial
12 representations, they are not without a remedy. They just have to meet the higher burden of
13 proof to which expressive content is entitled (*i.e.*, a consumer may bring a fraud claim, if she can
14 show knowledge of falsity).

15 Like the statements in *Stutzman*, attributing Jackson as the performer describes and, in
16 fact, imparts meaning to the content of the artistic work. If analogized to a book, the CD cover
17 would be a title page, and the back of the CD the book’s table of contents.⁶ A title and a table of
18 contents clearly are not commercial. This factor weighs strongly against commercial speech.

19 **b.** Arguably, these statements refer to a product; although there is a strong argument
20 that they are part of the product because they consist of the *title* of the work of art, the back of
21 the CD (*i.e.*, the table of contents of the art), and implied statements that Jackson performed the
22 vocals (as noted above, giving independent meaning to Jackson’s expression). At best, Plaintiff
23 *barely* meets this *Bolger* factor.

24 **c.** There is also some economic motivation (although it is hard to imagine how the
25 labeling itself is economically motivated). But the Supreme Court has repeatedly cautioned that
26

27 ⁶ See *Kronemyer*, 150 Cal. App. 4th at 947 (2007) (“the listing of credits on respondent’s
28 Web site is informational rather than directed at sales” notwithstanding that there was some
financial benefit).

1 economic motivation, *especially for artistic works*, is insufficient to render speech commercial.
2 *See Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952) (that “books, newspapers, and
3 magazines are published and sold for profit does not prevent them from being a form of
4 expression whose liberty is safeguarded by the First Amendment”); *Bolger*, 463 U.S. at 67
5 (“economic motivation in itself is insufficient to characterize a publication as commercial”); *see*
6 *also Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 567-68 (9th Cir.1984) (recognizing that
7 making expressive materials available to the public “further[s] a first amendment interest”);
8 *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 77 (1976) (Powell, J., concurring) (“Our cases
9 reveal . . . that the central concern of the First Amendment . . . is that there be a free flow from
10 creator to audience of whatever message a film or a book might convey. . . . In many instances, .
11 . . it is only the theater owner or the bookseller who can protect this interest.”); *Pittsburgh Press*
12 *Co. v. Human Relations Comm’n*, 413 U.S. 376, 385 (1973) (“If a newspaper’s profit motive
13 were determinative, all aspects of its operations—from the selection of news stories to the choice
14 of editorial position—would be subject to regulation Such a basis for regulation clearly
15 would be incompatible with the First Amendment.”).

16 In sum, barely meeting two *Bolger* factors should not be enough here. The artistic and
17 informational purposes served by the speech overwhelms any commercial attributes.⁷

18 **2. Plaintiff’s arguments to the contrary lack merit.**

19 Plaintiff makes several arguments that are unsupported by logic or any authority. First,
20 she tries to analogize naming Michael Jackson as the performing artist of three expressive works
21 to the speech in *Keimer v. Buena Vista Books, Inc.*, 75 Cal. App. 4th 1220 (1999). The speech at

22
23 ⁷ For example, under Plaintiff’s reasoning, a painting signed and sold by a famous artist
24 would constitute commercial speech. The artist is engaged in the production and sale of a good
25 (the painting) which he intends to be viewed by potential buyers, thus satisfying the first two
26 elements of Plaintiff’s analysis. By signing his name, the artist makes a representation of fact
27 about who painted the painting. And he signs the painting at least in part in reliance on the
28 goodwill he has accumulated as a well-known artist, knowing that he will have a much easier
time selling a signed painting than an unsigned one. Thus, as Plaintiff would have it, the
painting is commercial speech. But such an outcome is at odds with the Constitution. *See White*
v. City of Sparks, 500 F.3d 953, 957 (9th Cir. 2007) (holding that an artist’s paintings “do more
than propose a commercial transaction and therefore are not commercial speech”).

1 issue here is far different and more integral to the protected expression than the speech at issue in
2 *Keimer*, which the publisher *admitted* was an advertisement. *See id.* at 1227.

3 In *Keimer*, the plaintiff complained about speech on the cover of a book that urged
4 consumers to buy it because of the investment returns the authors supposedly generated through
5 the strategies offered in the book. The Court of Appeal correctly concluded that the *only*
6 *purpose* for having that speech on the cover was “to sell books.” *Id.* at 1229-30; *see also Hilton*
7 *v. Hallmark Cards*, 599 F.3d 894, 905 (9th Cir. 2010) (“commercial speech is best understood as
8 speech that merely advertises a product or service *for business purposes*.”) (emphasis added)
9 Here, by contrast, naming Michael Jackson the performing artist of three expressive works is not
10 solely for a business purpose; it provides meaning to those works and furthers his right,
11 posthumously, of self-expression. Both are critical First Amendment values. *Supra* at 6.⁸

12 The Court also recognized that publishers of artistic works, like the Jackson Defendants,
13 should not be held liable for false speech about the works unless they knew or should have
14 known the statements were false.⁹ *Keimer*, 89 Cal. App. 4th at 1229 (“Appellant has alleged that
15 respondents knew or should have known that the advertising statements were false or
16 misleading” and Section 17500 only holds advertisers liable if, “in the exercise of reasonable
17 care, [they] should have known [the ads] were false”); *see also Winter v. G.P. Putnam’s Sons*,
18 938 F.2d 1033 (9th Cir. 1991) (no duty to certify or investigate the accuracy of the books it

19 ⁸ Plaintiff cites to other cases concerning labels and advertising for non-expressive
20 products that have no bearing on this analysis. *Opp.* at 11 (citing *Nagel v. Twin Labs.* (a
21 nutritional supplement) and *Benson v. Kwikset Corp.*, 152 Cal. App. 4th 1254 (2007) (door
22 hardware)). And *Rice v. Fox Broadcasting Co.*, 330 F.3d 1170 (9th Cir. 2003) is distinguishable
23 because, there, the statements on a video jacket did not contribute to the work’s expressive
24 content by advertising the video as never before seen. *Id.* at 1180-81. Thus, the statements did
25 “no more than propose a commercial transaction.” *Id.* at 1181 (quotations omitted).

26 ⁹ Even *Kasky* is premised on the fact that “commercial speech consists of factual
27 statements and that those statements describe matters within the personal knowledge of the
28 speaker or the person whom the speaker is representing.” 24 Cal. 4th at 1008-09 (“The wages
paid to the factories’ employees, the hours they work, the way they are treated, and whether the
environmental conditions under which they work violate local health and safety laws, are all
matters likely to be within the personal knowledge of Nike executives, employees, or
subcontractors. Thus, Nike was in a position to readily verify the truth of any factual assertions it
made on these topics.”). Contrary to *Kasky*, the Jackson Defendants were not in a position to
readily verify whether Michael Jackson performed the Cascio tracks.

1 publishes). Here, because Plaintiff sued the Jackson Defendants under Section 17200 and the
2 CLRA, *see* FAC ¶¶ 45-59, there is no requirement that the publisher defendants “knew or should
3 have known” Michael Jackson did not sing lead vocals on the three Cascio tracks. For these
4 reasons, *Keimer* is inapplicable to this case.

5 Second, Plaintiff tries to equate Mr. Weitzman’s statement about the Estate’s
6 investigation to the speech in *Kasky*. The California Supreme Court concluded Nike’s speech in
7 that case was commercial because it was sent directly to purchasers of Nike products, namely
8 university presidents and athletic directors, was intended solely to influence consumers to
9 purchase Nike products, and was commercial in nature because it concerned factual
10 representations about how Nike products are made. 24 Cal. 4th at 1008-09. That’s not the case
11 here. Mr. Weitzman’s statements simply reported the results of the Estate’s investigation into
12 allegations that Michael Jackson did not perform the Cascio tracks. In other words, it was not a
13 statement of fact about how the album *Michael* was made; rather, it was reporting the results of a
14 factual investigation into the authenticity of an artistic work. *See* Joint Stipulation & [Proposed]
15 Order re Defs.’ Anti-SLAPP Mots. (“Joint Stipulation”), Ex. A.

16 Finally, Plaintiff’s misguided conclusion that the speech here is “commercial” goes
17 against each of the three justifications for affording commercial speech less protection than
18 noncommercial speech. *See* Opp. at 8:14-19 (citing *Kasky*, 27 Cal. 4th at 953-56). The first is
19 that commercial speech is easily verifiable. *See Va. Bd. of Pharm. v. Va. Citizens Consumer*
20 *Council, Inc.*, 452 U.S. 748, 771 n.24 (1976) (commercial speech should get less protection
21 because it typically involves a corporation disseminating information about a “product or service
22 that [it] provides and presumably knows more about than anyone else”). This is not at all true in
23 this case. It is impossible for nearly *anyone*, and certainly none of the Jackson Defendants, to
24 easily verify that Jackson performed the Cascio tracks. Jackson himself cannot speak to the
25 issue, and the only others present during the recording sessions vouched for his vocals.

26 The second justification is that commercial speech deserves less protection because it is
27 less susceptible to being chilled as commercial speakers have strong economic motivations
28 behind their speech. *See id.* Plaintiff posits that a musical work could be sold without

1 identifying the musician, or that the seller could promote the work by divulging their doubts
2 about the identity of the work's creator.¹⁰ But this too would chill creative expression and
3 dissemination. As set forth above, the creator's identity gives meaning to the work itself.
4 Moreover, it is likely very few artists would be willing to create expressive works for public
5 consumption without receiving credit for their creations, and even fewer publishers would
6 disseminate the works where even an utterly meritless claim could be made about authenticity.

7 As to the third rationale for affording less protection to commercial speech—that
8 commercial speech gives rise to commercial harms which, according to the Court, justifies more
9 intensive regulation, *see City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 42 n.21
10 (1993)—it begs the question of what harm is at stake in this litigation. It is undisputed that seven
11 of the ten songs on the *Michael* album were performed by Michael Jackson. Plaintiff's UCL and
12 CLRA claims are based entirely on statements made on the album cover and in a video that
13 relate to the album *as a whole*, and to the statement by Weitzman, which explicitly
14 acknowledged the public dispute surrounding the three Cascio tracks and actually said that it will
15 be up to the fans to decide whether it is Michael Jackson performing. *See* Joint Stipulation, Ex.
16 A. To the extent Plaintiff could even claim real harm, it is not sufficient to justify regulation of
17 authorship and to chill the freedom of self-expression protected by the First Amendment.

18 **3. At the very least, the speech identifying Michael Jackson as the**
19 **performer of the three Cascio tracks is inextricably intertwined with**
20 **the protected work.**

21 The Jackson Defendants explained how even promotional statements regarding the
22 authorship and performance of three expressive works are intertwined with the works
23 themselves. *See Stutzman*, 2013 WL 4853333 at *19 (“[T]he economic reality in this age of
24 technology is that publishing companies and authors must promote the books they publish and
25 write in order to sell them.”). And as explained above, attributing Michael Jackson as the
26 performer furthers the First Amendment's protection of the right of self-expression. *Supra* at 6.
27 That First Amendment right would be chilled significantly if the Jackson Defendants had to have

28 ¹⁰ Indeed, the existence of a public debate on the issue effectively divulged that the issue
was in question.

1 *certainty* that Jackson performed every note, especially where no certainty can be had. That is
2 why Plaintiff's arguments for why the speech at issue is not inextricably intertwined ring so
3 hollow; each poorly reasoned argument demonstrates why the First Amendment protects the
4 speech at issue here.

5 1. Plaintiff argues that the speech was not inextricably intertwined because there was
6 "no law of man or nature [that] required Defendants to combine the Cascio tracks with
7 representations that Michael Jackson performed on those tracks." Opp. at 19. Even assuming
8 that is the proper test, Plaintiff is wrong. As a practical and economic matter, it would be nearly
9 impossible to disseminate a music album without in any way identifying the creator or performer
10 of the work, as Plaintiff appears to suggest. See Opp. at 19:14-15. If the UCL and CLRA's strict
11 liability were to apply to author attribution, record labels and music publishers would be left with
12 the unpalatable choice either to not release any art for which there is a scintilla of doubt about the
13 author or performer's identity, or release the art and risk class-wide liability. Plaintiff's
14 arguments thus have the effect of chilling the dissemination of expressive speech—exactly what
15 the First Amendment seeks to avoid. See *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S.
16 781, 796 (1988) ("Regulation of solicitation must be undertaken with due regard for the reality
17 that solicitation is characteristically intertwined with informative and perhaps persuasive speech,
18 and for the reality that without solicitation the flow of such information and advocacy would
19 likely cease.") (internal quotations and ellipses omitted).

20 The authorities Plaintiff cites to argue otherwise are easily distinguishable. Plaintiff cites
21 cases in which a speaker sought to sprinkle noncommercial speech in with commercial speech in
22 an effort to have all the speech be deemed noncommercial. For instance, in *Kasky*, Nike
23 included speech about its opinion of economic globalization when refuting direct claims about its
24 labor practices. The California Supreme Court held that there was no requirement for Nike to
25 speak about both subjects in the same publication, "nor was it impossible for Nike to address
26 those subjects separately." 27 Cal. 4th at 966-67. Similarly, in *Board of Trustees of State*
27 *University of New York v. Fox*, 492 U.S. 469, 473 (1989), the Court made a similar conclusion
28 regarding "Tupperware parties" where salesmen discussed home economics while engaging in

1 commercial speech concerning the products. The Court found there was nothing that required
2 the salesman to combine the two messages. *Id.* Here, by contrast, it would be impossible to
3 discuss and distribute Michael Jackson's music without saying it was *Michael Jackson's* music.
4 The Jackson Defendants did not sprinkle in noncommercial elements to try to turn their
5 commercial speech into noncommercial speech; to the contrary, they simply described the art
6 they believed Michael Jackson produced. And there was no way to separate that speech from the
7 artistic work itself without the work losing its meaning.

8 **3.** Plaintiff cannot distinguish *Stutzman*. Plaintiff correctly noted that the court in
9 *Stutzman* found that "holding publishers liable for any factual inaccuracy . . . would preclude
10 marketing any book as 'true' or as a 'biography,' chilling speech." Opp. at 21. Plaintiff then
11 claims that book publishers are different from music publishers because music publishers could
12 "acknowledge uncertainty." *Id.* Plaintiff's argument makes no sense because she provides no
13 explanation for why book publishers also could not "acknowledge uncertainty" with respect to
14 "true" or "biography" stories. Moreover, the problem with acknowledging uncertainty is that it
15 changes the meaning of the expression in both cases. Just as a book would have different
16 meaning if it were fiction versus nonfiction, so too would a Michael Jackson song have different
17 meaning if it were attributed to someone else or even suggested that someone else performed it.
18 Contrary to Plaintiff's nonsensical effort to distinguish *Stutzman*, it is directly analogous to this
19 case. The Court should follow its reasoning.

20 **4.** Finally, Plaintiff acknowledges that it is a "fundamental" First Amendment right
21 to attribute an expressive work to an author. Opp. at 21:22-24. Yet, Plaintiff simultaneously
22 claims this fundamental right constitutes advertising and is therefore deserving of *less* First
23 Amendment protection. See Opp. at 21:24-22:1. In other words, according to Plaintiff, there is
24 no way for the Jackson Defendants to exercise their fundamental right to attribute authorship
25 unless they do so with one hundred percent accuracy, a result that effectively vitiates any First
26 Amendment protection at all. Because the expressive work cannot be separated from the artist
27 who created it, the Jackson Defendants' speech is, at the last, inextricably intertwined with the
28 work itself. See *Stutzman*, 2013 WL 4853333 at *18-19.

1 **B. The UCL and CLRA do not apply for the additional reason that the**
2 **statements were not false or misleading.**

3 Plaintiffs have not met their burden to show that they can prevail on their UCL and
4 CLRA claims for the additional reason that the statements on which those claims are based are
5 not false or misleading as a matter of law. In analyzing whether a statement is false or
6 misleading under the UCL and CLRA, the inquiry focuses on whether the statement at issue is
7 “‘likely to mislead a reasonable consumer’” *Colgan v. Leatherman Tool Grp., Inc.*, 135
8 Cal. App. 4th 663, 680 (2006). Neither the CD cover, the video, nor Weitzman’s letter is likely
9 to mislead a reasonable consumer; they are thus not deceptive as a matter of law.

10 **1. The cover of the *Michael* CD is not likely to deceive a reasonable**
11 **consumer into believing Michael Jackson performed the lead vocals**
12 **on the three Cascio tracks.**

13 As Plaintiff concedes, there is nothing on the front of the *Michael* CD that identifies the
14 vocalist of any of the songs. The title and artwork say nothing about who wrote, produced, or
15 performed each song on the CD. To be sure, the images on the front cover suggest that Jackson
16 was responsible for the music as a whole—but the cover artwork and title alone do not imply that
17 Jackson sang every part of every song.

18 Nor do the artwork and title establish a duty to disclose who sang each song. A failure to
19 disclose may only support a CLRA or UCL claim “when the defendant makes partial
20 representations that are misleading because some other material fact has not been disclosed.”
21 *Collins v. eMachines, Inc.*, 202 Cal. App. 4th 249, 255 (2011).¹¹ The front of the CD does not
22 contain any partial representations about who performed the vocal on “Monster,” “Keep Your
23 Head Up,” and “Breaking News” and, thus, does not give rise to a duty of disclosure.

24 Indeed, the only information anywhere on the CD case concerning the creation of the
25 music is the following, which appears on the back cover in very small gold print:

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

¹¹ Although *Collins* identifies three other circumstance that may give rise to a duty of disclosure, Plaintiff does not rely on any of these.

1 RJN, Ex. A. This statement does not specify which songs contain vocal tracks performed by
2 Jackson. What it does make clear is that at least one song does not contain any “previously
3 unreleased vocal tracks performed by Michael Jackson” and that the album incorporates music
4 created by other people. It would therefore be unreasonable for a consumer to assume based on
5 this statement that Jackson sang every lead vocal track on the *Michael* album. Because the cover
6 and title of the *Michael* album are not likely to mislead a reasonable consumer about who sang
7 the lead vocals on the Cascio tracks, they cannot support Plaintiff’s UCL and CLRA claims.

8 **2. The video concerning the *Michael* album is not likely to deceive.**

9 The video concerning *Michael* says nothing about the album’s contents. It does not
10 specify how many songs there are, the names of the songs, or who performed them. All the
11 video says is that *Michael* is “a brand new album from the greatest artist of all time.” Lodged
12 Videos, Video 1 at 0:23. This is insufficient to mislead a reasonable consumer to believe that
13 Jackson sang the lead vocals on “Breaking News,” “Monster,” and “Keep Your Head Up.” The
14 law Plaintiff relies on to argue otherwise is limited to its facts and, thus not controlling here. The
15 fact that reasonable consumers would expect a product labeled “Made in the U.S.A.” to consist
16 of American-manufactured parts, *see Colgan*, 135 Cal. App. 4th at 680, establishes nothing about
17 consumer expectations about a music album described as being “from” a deceased artist.¹² For
18 the reasons set forth above and in the Jackson Defendants’ motion, it was not likely to deceive a
19 reasonable consumer and, therefore, it cannot support Plaintiff’s UCL and CLRA claims.

20 **3. Weitzman’s letter is not likely to deceive a reasonable consumer.**

21 The letter from Mr. Weitzman is not likely to mislead a reasonable consumer for the
22 simple reason that it is substantially true. As Plaintiff admits, the letter explicitly “address[es]
23 the questions that had arisen regarding the authenticity of ‘Breaking News,’ ‘Monster,’ and
24 ‘Keep Your Head Up,’” FAC ¶ 22, and acknowledged that “the authenticity of Michael’s vocals
25 on the Cascio tracks [had been] questioned,” Joint Stipulation, Ex. A. The letter goes on to
26 describe the investigation the Estate conducted and identifies twelve different people, including

27 ¹² Consumers viewing the video could have no reasonable expectations about how many
28 songs would be included nor how many of those would be performed by Jackson. Thus, the fact
that the album’s guest vocalists were disclosed *on the album’s back cover* is immaterial to
whether *the video* was independently likely to deceive a reasonable consumer.

1 two forensic musicologists, who confirmed Jackson performed the vocals. *See id.* The letter
2 concludes by acknowledging that “there still seem to be concerns being expressed in some
3 quarters about the authenticity of the lead vocals” and that “ultimately, Michael’s fans will be the
4 judges of these songs.” *Id.* Because the letter explicitly discloses the existence of competing
5 opinions about whether Jackson sang the lead vocals on the Cascio tracks, no reasonable
6 consumer could be misled. The *only* aspect of Weitzman’s statement that Plaintiff alleges can
7 support her UCL and CLRA claims is Weitzman’s representation in the letter that six of
8 Jackson’s former producers and engineers who participated in a listening session confirmed that
9 the vocals were Jackson’s.¹³ *See* FAC ¶ 22. That perhaps eight people, including two experts,
10 instead of twelve opined that Jackson performed the Cascio tracks cannot establish that a
11 reasonable consumer would be misled by Weitzman’s letter—especially because he expressly
12 acknowledged the controversy and that others believed the vocals were not Jackson’s.
13 Accordingly, Weitzman’s letter cannot support a UCL or CLRA claim.

14 **IV. Conclusion**

15 For all of the foregoing reasons and those set forth in the Jackson Defendants’ motion,
16 the Court should strike Plaintiff’s UCL and CLRA claims against the Jackson Defendants.

17 DATED: June 16, 2016

KATTEN MUCHIN ROSENMAN LLP

18 By: Zia F. Modabber
19 Zia F. Modabber
Attorneys for the Jackson Defendants

20 DATED: June 16, 2016

KINSELLA WEITZMAN ISER KUMP &
ALDISERT LLP

21 By: Howard Weitzman
22 Howard Weitzman
Attorneys for the Jackson Defendants

23
24
25
26 ¹³ Plaintiff alleges only that the six former producers and engineers did not agree *at the*
27 *listening session* that Jackson performed the lead vocals on the Cascio tracks. *See* FAC ¶ 23.
28 But Weitzman never represented when or where the former producers and engineers confirmed
Jackson’s vocals, only that they did so after participating in the listening session. *See* Joint
Stipulation & [Proposed] Order re Defs.’ Anti-SLAPP Mots., Ex. A.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PROOF OF SERVICE

I declare that I am over the age of eighteen (18) and not a party to this action. My business address is 2029 Century Park East, Suite 2600, Los Angeles, California 90067.

On June 16, 2016, I served a true copy of the document described as:

**DEFENDANTS JOHN BRANCA, AS CO-EXECUTOR OF THE ESTATE OF
MICHAEL J. JACKSON, SONY MUSIC ENTERTAINMENT, AND MJJ
PRODUCTIONS, INC.'S REPLY IN SUPPORT OF THEIR MOTION TO STRIKE
PURSUANT TO CALIFORNIA'S ANTI-SLAPP STATUTE**

in this action by transmitting the document(s) to Case Anywhere pursuant to the terms of the Court's Order.

(X) (BY CASE ANYWHERE/E-MAIL) I caused the above document(s) to be electronically served on counsel of record by using www.caseanywhere.com and the e-mail addresses maintained on the Service List of www.caseanywhere.com for this case.

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

Executed on June 16, 2016 at Los Angeles, California.



Laura Vargas