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12 and Angelikson Productions, LLC

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

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

v.

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

Case No. BC 548468

(Assigned to Hon. Ann I. Jones, Dept. 308)

**DEFENDANTS EDWARD JOSEPH
CASCIO, JAMES VICTOR PORTE, AND
ANGELIKSON PRODUCTIONS, LLC'S
NOTICE OF DEMURRERS AND
DEMURRERS TO FIRST AMENDED
COMPLAINT; MEMORANDUM OF
POINTS AND AUTHORITIES IN SUPPORT
THEREOF; DECLARATION OF JORDAN
SUSMAN IN SUPPORT THEREOF**

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on a date to be decided by the Court in Department 308 of
3 the above-entitled court, located at 600 S. Commonwealth Avenue, Los Angeles, California,
4 defendants Edward Joseph Cascio ("Cascio"), James Victor Porte ("Porte"), and Angelikson
5 Productions, LLC ("Angelikson") (collectively "Angelikson Defendants") will, and hereby do,
6 severally demur to the First Amended Complaint filed by plaintiff Vera Serova on the grounds
7 set forth in the attached Demurrers to the First Amended Complaint incorporated herein by this
8 reference.

9 The Demurrers will be based upon this Notice, the Demurrers to the First Amended
10 Complaint and Memorandum of Points and Authorities attached hereto, upon the pleadings,
11 records and papers on file in this action, and upon such evidence as may be presented at the time
12 of the hearing on the Demurrers.

13
14 Dated: August 29, 2016

FREEDMAN + TAITELMAN, LLP

15
16 By: 

17 Bryan J. Freedman
18 Jordan Susman
19 Attorneys for Defendants
20 Edward Joseph Cascio, James Victor Porte
21 Angelikson Productions, LLC
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1 **DEMURRERS TO THE FIRST AMENDED COMPLAINT**

2 Defendants Edward Joseph Cascio ("Cascio"), James Victor Porte ("Porte"), and
3 Angelikson Productions, LLC ("Angelikson") demur, severally, to the First Amended Complaint
4 ("FAC") filed by plaintiff Vera Serova on each of the following grounds:

5 1. The third cause of action alleged in the FAC fails to allege facts sufficient to state
6 a cause of action against Cascio for Fraud (CCP § 430.10 (e));

7 2. The third cause of action alleged in the FAC fails to allege facts sufficient to state
8 a cause of action against Porte for Fraud (CCP § 430.10 (e));

9 3. The third cause of action alleged in the FAC fails to allege facts sufficient to state
10 a cause of action against Angelikson for Fraud (CCP § 430.10 (e));

11 4. The third cause of action alleged in the FAC fails to allege facts sufficient to state
12 a class action cause of action against Cascio for Fraud (CCP § 430.10 (e));

13 5. The third cause of action alleged in the FAC fails to allege facts sufficient to state
14 a class action cause of action against Porte for Fraud (CCP § 430.10 (e));

15 6. The third cause of action alleged in the FAC fails to allege facts sufficient to state
16 a class action cause of action against Angelikson for Fraud (CCP § 430.10 (e));

17 7. The third alleged cause of action for Fraud alleged in the FAC is uncertain (CCP
18 § 430.10 (f)).

19
20 Dated: August 29, 2016

FREEDMAN + TAITELMAN, LLP

21
22 By: 

Bryan J. Freedman

Jordan Susman

Attorneys for Defendants

Edward Joseph Cascio, James Victor Porte

Angelikson Productions, LLC

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **INTRODUCTION**

4 This action arises from a public controversy surrounding three songs on the
5 posthumously released Michael Jackson album *Michael* (the “Album”), of which plaintiff Vera
6 Serova (“Plaintiff”) claims Jackson does not sing lead vocals. On June 12, 2014, Plaintiff
7 commenced this class action, alleging causes of action against defendants Edward Joseph Cascio
8 (“Cascio”), James Victor Porte (“Porte”), and Angelikson Productions, LLC (“Angelikson”)
9 (collectively the “Angelikson Defendants”) and others for Violation of the Consumer Legal
10 Remedies Act (“CLRA”) and Violation of the Unfair Competition Law (“UCL”). Serova also
11 alleged a Fraud cause of action against the Angelikson Defendants.

12 The CLRA and UCL causes of action were the subject of an anti-SLAPP motion to strike
13 (Code of Civ. Proc. § 425.16) filed by the Angelikson Defendants, which is currently on appeal.
14 Consequently, this Demurrer only concerns the Fraud cause of action.¹

15 As discussed herein, Plaintiff’s Fraud cause of action must fail for at least three
16 independent reasons:

17 **First**, there is no reasonable possibility Plaintiff can satisfy the community of interest
18 requirement for class certification of its Fraud cause of action because common questions of law
19 and fact do *not* predominate. Class treatment is unwarranted because Plaintiff has not and
20 cannot plead or prove that each class member saw the Angelikson Defendants’ purported
21 misrepresentations, or relied on those purported misrepresentations when they decided to
22 purchase the Album.

23 **Second**, the FAC fails to allege sufficient facts to maintain a cause of action for Fraud
24 against the Angelikson Defendants. Plaintiff has not alleged that Porte or Angelikson made *any*
25 misrepresentations, nor has Plaintiff alleged that any of the Angelikson Defendants owed a duty
26 to disclose information to Plaintiff. In addition, Plaintiff cannot allege that she reasonably relied

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28 ¹ See *Varian Med. Sys., Inc. v. Delfino*, 35 Cal. 4th 180, 186 (2005) (an appeal from “the denial of a special motion to strike automatically stays all further trial court proceedings on the merits upon the causes of action affected by the motion”).

1 on the Angelikson Defendants' purported misrepresentations, as she was well aware of the
2 controversy surrounding the Album before she purchased it.

3 **Third**, the Fraud cause of action is hopelessly vague, ambiguous, and unintelligible.
4 Plaintiff has not even tried to explain which purported misrepresentation(s) she relied upon in
5 deciding to purchase the Album, nor has she explained why her reliance was justifiable given the
6 circumstances. Indeed, Plaintiff's purported damages are vague to the point of being non-
7 existent.

8 For all of the reasons set forth below, the Angelikson Defendants' Demurrer must be
9 sustained and, under the circumstances, should be sustained without leave to amend.

10 II.

11 **FACTUAL SUMMARY**

12 For purposes of this Demurrer only, all allegations in the FAC must be accepted as true.
13 Plaintiff alleges that the Angelikson Defendants jointly created, produced, and recorded initial
14 versions of the songs "Breaking News," "Monster," and "Keep Your Head Up" (collectively, the
15 "Cascio Tracks") that appeared on the Album, but Michael Jackson purportedly did not perform
16 lead vocals on those songs. FAC ¶¶ 12, 13. According to the FAC, controversy related to the
17 provenance of the Cascio Tracks has surrounded the Album since its "inception." FAC ¶ 11.

18 Plaintiff alleges that "Cascio and potentially Porte and Angelikson" represented to
19 defendants Sony Music Entertainment ("Sony") and the estate of Michael Jackson ("Estate") that
20 Jackson performed lead vocals on the Cascio Tracks. FAC ¶ 14.

21 Plaintiff further alleges that the Angelikson Defendants "directly or indirectly submitted"
22 the Cascio Tracks to Sony and the Estate for inclusion on the Album. FAC ¶ 16.

23 The Angelikson Defendants purportedly failed to disclose to Sony or the Estate that
24 Jackson did not perform lead vocals on the Cascio Tracks. FAC ¶ 18. According to the FAC,
25 the Angelikson Defendants "owed Sony and the Estate a duty to make such disclosure" because
26 they engaged in transactions concerning the Cascio Tracks. FAC ¶ 18.

27 On December 6, 2014, Cascio purportedly claimed on the Oprah Winfrey Show that
28 Jackson performed lead vocals on the Cascio Tracks. FAC ¶ 25.

1 Plaintiff alleges that in marketing and defending the Album, "Sony, the Estate, Cascio,
2 and potentially other Defendants expressly and implicitly represented" that Jackson performed
3 lead vocals on the all tracks on the Album. FAC ¶ 27.

4 Plaintiff alleges that before she purchased the Album, she "saw each of Defendants'
5 foregoing representations that Jackson performed the lead vocals on [the Cascio Tracks]." FAC
6 ¶ 29. Plaintiff purportedly purchased the Album "[i]n reliance on Defendants' claims that
7 Jackson performed lead vocals on [the Cascio Tracks]." FAC ¶ 30.

8 Plaintiff claims to bring this action on behalf of herself "and a class of similarly-situated
9 persons defined as [a]ll persons who purchased [the Cascio Tracks] in California." FAC ¶ 36.
10 Plaintiff also identifies a subclass of "[a]ll persons who purchased [the Cascio Tracks] in
11 California within three years immediately preceding the filing of this action." FAC ¶ 37.
12 According to Plaintiff, "[t]he class and subclass are ascertainable because they describe a set of
13 common characteristics sufficient to allow members of that group to identify themselves as
14 having a right to recover based on the descriptions." FAC ¶ 44.

15 III.

16 SUMMARY OF APPLICABLE LAW ON DEMURRER

17 "A demurrer admits all material and issuable facts properly pleaded. However, it does
18 not admit contentions, deductions or conclusions of fact or law alleged therein." Daar v. Yellow
19 Cab Co., 67 Cal. 2d 695, 713 (1967). Conclusory allegations made on "information and belief"
20 are without meaning unless supported by specific facts. *See, e.g., Independent Journal*
21 *Newspapers v. United Western Newspapers, Inc.*, 15 Cal. App. 3d 583, 586 (1971). Moreover,
22 "[where] a conclusion is alleged and also the special facts from which the conclusion is drawn, if
23 the special facts are inconsistent with and do not support the conclusion, the former control, and
24 the sufficiency of the complaint is to be determined from the special facts pleaded." C & H
25 Foods Co. v. Hartford Ins. Co., 163 Cal. App. 3d 1055, 1063 (1984). Additionally, "[i]t is both
26 improper and insufficient for a plaintiff to simply plead the evidence by which he hopes to prove
27 such ultimate facts." Careau & Co. v. Security Pacific Business Credit, Inc., 222 Cal. App. 3d
28 1371, 1390 (1990).

1 Finally, in ruling on a demurrer, “[l]eave to amend should be denied where the facts are
2 not in dispute, and the nature of the plaintiff’s claim is clear, but, under the substantive law, no
3 liability exists. Obviously, no amendment would change the result.” Central National Ins. Co. v.
4 California Ins. Guaranty Assoc., 165 Cal. App. 3d 453, 460 (1985). Leave to amend is further
5 properly denied where it does not appear that the complaint can be amended to state a cause of
6 action, *see, e.g.*, Palmer v. West Kern County Water Dist., 193 Cal. App. 2d 41, 46 (1961), or
7 where the party, “is seeking the ‘legally impossible.’” Robinson v. Robinson, 198 Cal. App. 2d
8 193, 197 (1961).

9 IV.

10 **PLAINTIFF HAS FAILED TO ALLEGE FACTS SUFFICIENT TO MAINTAIN A** 11 **CLASS ACTION CAUSE OF ACTION FOR FRAUD**

12 It is well settled that trial courts are permitted to decide the issue of class certification on
13 demurrer. Linder v. Thrifty Oil Co. 23 Cal. 4th 429, 440 (2000) (“nothing prevents a court from
14 weeding out legally meritless suits prior to certification via a defendant’s demurrer or pretrial
15 motion. In fact, it is settled that courts are authorized to do so.”).

16 A trial court may sustain a demurrer to class action allegations where “it concludes as a
17 matter of law that, assuming the truth of the factual allegations in the complaint, there is no
18 reasonable possibility that the requirements for class certification will be satisfied.” Tucker v.
19 Pacific Bell Mobile Services, 208 Cal. App. 4th 201, 211 (2012); *see also*; *see also* Canon
20 U.S.A., Inc. v. Superior Court, 68 Cal. App. 4th 1, 5 (1998) (when the “invalidity of the class
21 allegations is revealed on the face of the complaint, and/or by matters subject to judicial notice,
22 the class issue may be properly disposed of by demurrer or motion to strike . . . In such
23 circumstances, there is no need to incur the expense of an evidentiary hearing or class-related
24 discovery.”).

25 Class actions are permitted “when the question is one of a common or general interest, of
26 many persons, or when the parties are numerous, and it is impracticable to bring them all before
27 the court . . .” Cal. Code Civ. Proc. § 382. “Drawing on the language of Code of Civil
28 Procedure section 382 and federal precedent, we have articulated clear requirements for the

1 certification of a class. The party advocating class treatment must demonstrate the existence of
2 an ascertainable and sufficiently numerous class, a well-defined community of interest, and
3 substantial benefits from certification that render proceeding as a class superior to the
4 alternatives.” Brinker Restaurant Corp. v. Superior Court, 53 Cal. 4th 1004, 1021 (2012). “In
5 turn, the community of interest requirement embodies three factors: (1) predominant common
6 questions of law or fact; (2) class representatives with claims or defenses typical of the class; and
7 (3) class representatives who can adequately represent the class.” Id.

8 Here, the threshold question is whether the FAC adequately presents predominant
9 common questions of law or fact.

10 Commonality as a general rule depends on whether the defendant’s
11 liability can be determined by issues common to all class members:
12 A class may be certified when common questions of law and fact
13 predominate over individualized questions. As a general rule if the
14 defendant’s liability can be determined by facts common to all
15 members of the class, a class will be certified even if the members
must individually prove their damages. . . . [T]o determine whether
common questions of fact predominate the trial court must
examine the issues framed by the pleadings and the law applicable
to the causes of action alleged.

16 Knapp v. AT&T Wireless Services, Inc., 195 Cal. App. 4th 932, 941 (2011).

17 An examination of the FAC demonstrates that there is no reasonable possibility Plaintiff
18 can satisfy the community of interest requirement for class certification of its Fraud cause of
19 action because common questions of law and fact do *not* predominate.

20 First, when analyzing the sufficiency of a cause of action for purposes of demurrer, it is
21 axiomatic that the court consider the truth of all material facts properly pleaded or all ultimate
22 facts alleged, but not contentions, deductions, or factual conclusions. Aubry v. Tri-City Hospital
23 Dist., 2 Cal. 4th 962, 966 – 67 (1992); Lesperance v. North American Aviation, Inc., 217 Cal.
24 App. 2d 336, 343 (1963) (pleadings “must allege facts and not conclusions” in order to withstand
25 demurrer).

26 Here, Plaintiff has alleged that she “saw *each* of Defendants’ . . . public representations
27 that Jackson performed lead vocals on [the Cascio Tracks],” and she purchased the Album “[i]n
28 reliance on Defendants’ claims that Jackson performed lead vocals on [the Cascio Tracks].”

1 FAC ¶¶ 29, 30 (emphasis added). Plaintiff has not and cannot properly allege that all members
2 of the class saw *any* of the Angelikson Defendants' purported representations that Jackson sang
3 lead vocals on the Cascio Tracks. Similarly, Plaintiff has not and cannot allege that all members
4 of the class purchased the Album "in reliance on Defendants' claims."

5 Even if Plaintiff were to make such allegations, which she failed to do in the FAC, they
6 would be wholly conclusory. Plaintiff has no idea whether members of the class – which she
7 describes simply as "[a]ll persons who purchased the Album" (FAC ¶¶ 36, 37) – saw any of
8 Defendants' public representations or relied on the representations they may have seen in
9 deciding to purchase the Cascio Tracks. Plaintiff has asserted no facts to support her claim that
10 members of the class saw the Angelikson Defendants' purported misrepresentations or relied
11 thereon. Accordingly, the Court should sustain the Angelikson Defendants' Demurrer to the
12 class action cause of action for fraud.

13 **Second**, class treatment is unwarranted for Plaintiff's Fraud cause of action because
14 Plaintiff is unable to plead or prove actual reliance by all members of the putative class. *See*
15 *Schermer v. Tatum*, 245 Cal. App. 4th 912, 929 (2016) ("class treatment is unwarranted for
16 plaintiffs' fraud and deceit cause of action because plaintiffs must plead and prove actual
17 reliance"); *Mirkin v. Wasserman*, 5 Cal. 4th 1082, 1095 (1993) (only "*when the same material*
18 *misrepresentations have actually been communicated to each member of a class*, an inference
19 of reliance arises as to the entire class) (emphasis in original). In order to determine whether
20 there was actual reasonable reliance, one needs to look at the conduct of the plaintiff before the
21 representations were made versus after. If the misrepresentation is an "inducing cause of the
22 party's assent," then actual reliance exists. 1 Witkin, Summary of California Law, Contracts
23 (10th Ed.), §300; citing Rest. 2d, Contracts §167.

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1 Under the facts of this case, where different defendants purportedly made numerous
2 misrepresentations about the Album in a variety of fora,² the inquiry into the purported
3 misrepresentations (and which misrepresentation(s) were purportedly relied upon by each
4 member of the class) is inherently individualized. See Tucker, 208 Cal. App. 4th at 222 (if the
5 issue of reliance “would vary from consumer to consumer, the issue is not subject to common
6 proof, and the action is properly not certified as a class action”).

7 In Tucker, the plaintiffs alleged that the defendants “engaged in a common scheme
8 involving false representations and the concealment of material facts in the marketing and sale of
9 [telephone] rate plans to the consuming public.” Tucker, 208 Cal. App. 4th at 220. The court
10 held that reliance was not established on a class-wide basis because the “purported
11 misrepresentations were communicated to class members through a variety of written materials,
12 through the mail, via the Internet, by telephone and in retail stores.” Id. at 224.

13 Here, the purported misrepresentations were made by different defendants in a multitude
14 of fora, including: “advertisements, product labels, product descriptions, promotional
15 appearances, and promotional materials.” FAC ¶ 31. Consequently, the issue of reliance “would
16 vary from consumer to consumer” and not be subject to common proof. See Tucker, 208 Cal.
17 App. 4th at 222. Accordingly, the Fraud cause of action cannot properly be certified as a class
18 action, and the Angelikson Defendants’ Demurrer must be sustained.

19 **Third**, in order to successfully plead a cause of action for Fraud, a plaintiff must allege
20 that its reliance on the purported misrepresentation was reasonable. Seeger v. Odell, 18 Cal. 2d
21 409, 414 (1941); Manderville v. PCG&S Group, Inc., 146 Cal. App. 4th 1486, 1498 n.6 (2007)

22
23 ² See FAC ¶ 14 (Angelikson Defendants purportedly directly or indirectly represented to Sony and the Estate that
24 Jackson performed lead vocals on the Cascio Tracks); FAC ¶ 18 (Angelikson Defendants purportedly failed to
25 disclose to Sony or the Estate that Jackson did not perform lead vocals on the Cascio Tracks); FAC ¶ 21 (Sony
26 stated it has confidence that Jackson performed lead vocals on the Cascio Tracks); FAC ¶ 22 (attorney for the Estate
27 released a statement that various people concluded Jackson performed lead vocals on the Cascio Tracks); FAC ¶ 24
28 (Sony and the Estate released a video ad claiming the Album is from “the greatest artist of all time”); FAC ¶ 25
Cascio claimed on the Oprah Winfrey Show that Jackson performed lead vocals on the Cascio Tracks); FAC ¶ 27
(in marketing and defending the Album, “Sony, the Estate, Cascio and potentially other Defendants . . . represented
that the lead vocals on all tracks on the album were performed by Michael Jackson”); FAC ¶ 27 (the back cover of
the Album represents that it contains nine previously unreleased vocal tracks performed by Jackson); FAC ¶ 31
 (“Defendants represented to the public that Michael Jackson performed lead vocals on [the Cascio Tracks] in
numerous other advertisements, product labels, product descriptions, promotional appearances, and promotional
materials”).

1 (“California authorities refer to the reliance element of a fraud or deceit cause of action as both
2 ‘reasonable reliance’ and ‘justifiable reliance.’”). In assessing whether a party’s reliance was
3 justified, the focus is on the plaintiff’s belief in light of its own knowledge and experience. Gray
4 v. Don Miller & Associates, Inc., 35 Cal. 3d 498, 503 (1984).

5 Here, it would be impossible to determine on a class wide basis, whether each individual
6 class member’s reliance on the Angelikson Defendants’ purported misrepresentations was
7 reasonable. Indeed, the reasonableness of each class member’s reliance would be wholly
8 subjective and based upon each class member’s personalized knowledge and experience.

9 In short, the FAC does not and cannot establish that common questions of law or fact
10 predominate over individual issues regarding the Angelikson Defendants’ purported
11 misrepresentations, and the class members’ purported reliance on those misrepresentations. The
12 Court should therefore sustain the Demurrer.

13 V.

14 **THE FAC FAILS TO ALLEGE FACTS SUFFICIENT TO MAINTAIN A CAUSE OF**
15 **ACTION FOR FRAUD AGAINST THE ANGELIKSON DEFENDANTS**

16 “The elements of fraud, which give rise to the tort action for deceit, are (a)
17 misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity
18 (or ‘scienter’); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e)
19 resulting damage.” Lazar v. Superior Ct., 12 Cal. 4th 631, 638 (1996). “Unlike most pleadings,
20 a cause of action for fraud must be pleaded with specificity.” Lim v. The TV Corp. Int’l., 99
21 Cal. App. 4th 684, 694 (2002). “This particularity necessitates pleading facts which show how,
22 when, where, to whom, by what means the representations were tendered.” Lazar, 12 Cal. 4th at
23 645. “Every element of the cause of action for fraud must be alleged in the proper manner (i.e.,
24 factually and specifically).” Committee on Children’s Television, Inc. v. General Foods Corp.,
25 35 Cal. 3d 197, 216 (1983).

26 Plaintiff has failed to allege sufficient facts showing, how, when, where, to whom, by
27 what means or under what authority the Angelikson Defendants made any alleged
28 misrepresentation to Plaintiff. See Lazar, 12 Cal. 4th at 645. The entirety of Plaintiff’s Fraud

1 cause of action against the Angelikson Defendants boils down to (1) representations purportedly
2 made to Sony and Estate (FAC ¶ 14), (2) the Angelikson Defendants' purported failure to
3 disclose certain information to Sony or the Estate (FAC ¶ 18), and (3) Cascio's purported claim
4 on the Oprah Winfrey Show that Jackson sang on the Cascio Tracks (FAC ¶ 25). None of these
5 allegations could possibly sustain a cause of action for Fraud for numerous reasons.

6 **First**, Plaintiff all but admits that Porte and Angelikson did not make any
7 misrepresentations. According to the black letter of the FAC, "Cascio and *potentially* Porte and
8 Angelikson" represented to the other defendants in this action that Jackson performed lead
9 vocals on the Cascio Tracks. FAC ¶ 14 (emphasis added). Elsewhere, Plaintiff alleges: "In
10 marketing and defending [the Album], Sony, the Estate, Cascio, and *potentially other*
11 *Defendants* expressly and implicitly represented" that Jackson performed lead vocals on the all
12 tracks on the Album. FAC ¶ 27 (emphasis added). Thus, Plaintiff has alleged no facts that could
13 possibly make Porte or Angelikson liable for Fraud, as Plaintiff has not alleged a single
14 misrepresentation made by Porte or Angelikson. The Demurrer must therefore be sustained as to
15 Porte and Angelikson.

16 **Second**, a cause of action for Fraud based upon concealment must allege that the
17 defendant owed the plaintiff a duty to disclose certain information. Prakashpalan v. Engstrom,
18 Lipscomb & Lack, 223 Cal. App. 4th 1105, 1130 (2014). Here, Plaintiff has not alleged the
19 existence of any such duty. On the contrary, according to plain language of the FAC, the
20 Angelikson Defendants only "owed Sony and the Estate a duty" to disclose that Jackson did not
21 sing the lead vocals on the Cascio Tracks. FAC ¶ 18. Consequently, there can be no claim for
22 Fraud based upon concealment against any of the Angelikson Defendants.

23 **Third**, Plaintiff has failed to allege with specificity that she relied on any
24 misrepresentation made by any of the Angelikson Defendants in deciding to purchase the Cascio
25 Tracks. Instead, Plaintiff has amorphously alleged that "[i]n reliance on defendants' claims that
26 Jackson performed lead vocals on [the Cascio Tracks]," she purchased the Album. FAC ¶ 30.
27 Contrary to the pleading requirements of a cause of action for Fraud, Plaintiff does not say *which*
28 *defendant* or *which claim* that Jackson performed lead vocals on the Cascio Tracks. See Lazar,

1 12 Cal. 4th at 645 (fraud cause of action “necessitates pleading facts which show how, when,
2 where, to whom, by what means the representations were tendered”). Accordingly, the Court
3 should sustain the Demurrer.

4 **Fourth**, as discussed above, a plaintiff must allege that its reliance on the purported
5 misrepresentation was reasonable in order to successfully plead a cause of action for Fraud.
6 Manderville, 146 Cal. App. 4th at 1498. Under California law, “a party plaintiff’s misguided
7 belief or guileless action in relying on a statement on which no reasonable person would rely is
8 not justifiable reliance.” Kruse v. Bank of America, 202 Cal. App. 3d 38, 54 (1988). “[W]hether
9 a party’s reliance was justified may be decided as a matter of law if reasonable minds can come
10 to only one conclusion based on the facts.” Alliance Mortgage Co. v. Rothwell, 10 Cal. 4th
11 1226, 1239 (1995).

12 Here, Plaintiff’s purported reliance on the Angelikson Defendants’ purported
13 misrepresentation(s) was unreasonable under the circumstances. The FAC expressly states that
14 “controversy has surrounded” the Cascio Tracks since the Album’s “inception.” FAC ¶ 11.
15 Even before the Album’s release “numerous people familiar with Michael Jackson’s voice
16 disputed the authenticity of [the Cascio Tracks],” including: Jackson’s mother, Jackson’s son,
17 Jackson’s daughter, three of Jackson’s nephews, two of Jackson’s brothers, one of Jackson’s
18 former producer, and one other former producer. FAC ¶ 20. Even after an attorney for the
19 Estate released a statement concerning the authenticity of the Cascio Tracks, “record producer
20 Cory Rooney and Jackson’s nephew Taryll Jackson claimed they attended the listening session
21 with six former Jackson producers and engineers and the majority of those mentioned did not, at
22 this time, agree that Jackson performed lead vocals on the Cascio Tracks.” FAC ¶ 23. With her
23 eyes wide open, Plaintiff therefore chose to buy to an item of disputed provenance. She cannot
24 be permitted to profit from her choice.

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1 VI.

2 **THE FRAUD CAUSE OF ACTION IS VAGUE, AMBIGUOUS, UNCERTAIN AND**
3 **UNINTELLIGIBLE**

4 “It is settled law that a pleading must allege facts and not conclusions, and that material
5 facts must be alleged directly and not by way of recital. Also, in pleading, the essential facts
6 upon which a determination of the controversy depends should be stated with clearness and
7 precision so that nothing is left to surmise. Those recitals, references to, or allegations of
8 material facts which are left to surmise are subject to special demurrer for uncertainty.” Ankeny
9 v. Lockheed Missiles & Space Co., 88 Cal. App. 3d 531, 537 (1979); accord Metzenbaum v.
10 Metzenbaum, 86 Cal. App. 2d 750, 753 (1948) (“A plaintiff is required to set forth in his
11 complaint the essential facts of his case with reasonable precision and with sufficient clarity and
12 particularity that the defendant may be apprised of the nature, source and extent of his cause of
13 action.”).

14 Furthermore, “[w]hile upon a general demurrer a complaint will be liberally construed
15 with a view to substantial justice, yet such a rule should not be so applied as to allow an
16 unmeritorious cause of action to be veiled by a subterfuge of loose and equivocal statements.”
17 Risco v. Reuss, 45 Cal. App. 2d 243, 245 (1941).

18 The FAC is a wasteland of uncertain and unsubstantiated allegations. As discussed
19 herein, Plaintiff has based her Fraud cause of action on more than one half dozen purported
20 misrepresentations made by an equal number of defendants. See FAC ¶¶ 14, 18, 21, 22, 24, 25,
21 27, 31. Plaintiff, however, has not explained which of these purported misrepresentations, or
22 which defendant, she relied upon in deciding to purchase the Album. Nor has Plaintiff explained
23 why her reliance on each particular misrepresentation and each particular defendant was
24 reasonable. And finally, Plaintiff’s damages remain uncertain, because she knew that she was
25 purchasing a “controversy.” FAC ¶ 11. See Risco v. Reuss, 45 Cal. App. 2d 243, 245 (1941)
26 (“While upon a general demurrer a complaint will be liberally construed with a view to
27 substantial justice, yet such a rule should not be so applied as to allow an unmeritorious cause of
28 action to be veiled by a subterfuge of loose and equivocal statements.”). Accordingly, the entire

1 FAC fails for a lack of certainty and intelligibility.

2 VII.

3 **THE DEMURRER SHOULD BE SUSTAINED WITHOUT LEAVE TO AMEND**

4 A ruling sustaining a demurrer without leave to amend is appropriate when an
5 amendment would serve no useful purpose, for example, when the facts alleged in the original
6 complaint cannot give rise to a cause of action. See Mercury Casualty Co. v. Superior Ct., 179
7 Cal. App. 3d 1027, 1035 (1986). Furthermore, leave to amend is not warranted where the only
8 way a party can avoid the defects of a prior complaint is to omit facts that rendered the prior
9 complaint defective or allege new fact inconsistent with the prior pleadings. See Owens v. Kings
10 Supermarket, 198 Cal. App. 3d 379, 383-84 (1988). “The burden of proving [a] reasonable
11 possibility [of a curative amendment] is squarely on the plaintiff.” Blank v. Kirwan, 39 Cal. 3d
12 311, 318 (1985).

13 In addition, on demurrer, the burden is on the plaintiff, “to demonstrate the manner in
14 which his complaint might be amended.” City of Atascadero v. Merrill Lynch, Pierce, Fenner &
15 Smith, 68 Cal. App. 4th 445, 459-60 (1998). Where a plaintiff fails to meet this burden, it is not
16 an abuse of discretion to sustain a demurrer without leave to amend. See Diablo Beacon Printing
17 & Publishing Co. v. Concord, 229 Cal. App. 2d 505, 509 (1964).

18 The FAC is not defective merely for failure to state facts. Rather, the FAC is defective in
19 that, *based on the facts alleged, no liability can exist*. Because the proposed class includes
20 every person who bought the Album in California – whether or not they saw any of the
21 Angelikson Defendants’ purported misrepresentations – the class members would not necessarily
22 be the victims of any fraud. Consequently, the deficiencies within the FAC are *not curable*, and
23 any attempt to amend the FAC would be fruitless or would result in a sham pleading. Therefore,
24 in sustaining the Angelikson Defendants’ Demurrer, it would be appropriate for this Court to do
25 so without leave to amend.

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VIII.

CONCLUSION

For each of the foregoing reasons, this Court should sustain the Angelikson Defendants' Demurrer to the FAC without leave to amend.

Dated: August 29, 2016

FREEDMAN + TAITELMAN, LLP

By: 

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Jordan Susman

Attorneys for Defendants

Edward Joseph Cascio, James Victor Porte

Angelikson Productions, LLC

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2 **PROOF OF SERVICE**

3 **STATE OF CALIFORNIA**]
4 **COUNTY OF LOS ANGELES**] ss.

5 I am employed in the County of Los Angeles, State of California. I am over the age of
6 18 and not a party to the within action; my business address is 1901 Avenue of the Stars, Suite
500, Los Angeles, California 90067.

7 On August 29, 2016, I served the foregoing document(s) described as: **DEFENDANTS**
8 **EDWARD JOSEPH CASCIO, JAMES VICTOR PORTE, AND ANGELIKSON**
9 **PRODUCTIONS, LLC'S NOTICE OF DEMURRERS AND DEMURRERS TO FIRST**
10 **AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN**
11 **SUPPORT THEREOF; DECLARATION OF JORDAN SUSMAN IN SUPPORT**
12 **THEREOF** on the interested parties as follows:

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27 and correct copy of the document on counsel of record listed to receive transmissions
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☒ **State.** I declare under penalty of perjury under the laws of the State of California that the
above is true and correct.

1 Executed on **August 29, 2016**, at Los Angeles, California.

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Cortni' A. Davis

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