Kralowec Law

Kralowec Law, P.C.

March 17, 2020

VIA ELECTRONIC UPLOAD AND U.S. MAIL

Honorable Chief Justice and Associate Justices of the
California Supreme Court
350 McAllister Street
San Francisco, California 94102-4797

Re: Amicus Curiae Letter in Support of Petition for Review: *Serova v. Sony Music Entertainment et al.*, Nos. S260736, B280526

Dear Honorable Justices:

Consumer Attorneys of California ("CAOC") respectfully asks the Court to grant the pending petition for review in the above-entitled matter. CAOC is a voluntary nonprofit membership organization of over 3,000 associated consumer attorneys practicing throughout California. The organization was founded in 1962 and its members predominantly represent individuals subjected in a variety of ways to personal injuries, consumer fraud practices, insurance bad faith, antitrust violations, and business-related torts. CAOC has taken a leading role in advancing and protecting the rights of consumers and injured victims in both the courts and in the Legislature.

This Court previously issued a grant and hold in this matter (No. S251822) pending its decision in *FilmOn.com Inc. v. DoubleVerify Inc.* (2019) 7 Cal.5th 133 ("*FilmOn*"). The matter was then transferred to the Court of Appeal, Second Appellate District, Division 2, to reconsider its decision, published at *Serova v. Sony Music Entertainment* (2018) 26 Cal.App.5th 759, in light of this Court's *FilmOn* decision.

The Court of Appeal's subsequent decision, published at 44 Cal.App.5th 103 (2020), upheld its prior decision, thus leaving unresolved several issues which continue to cry out for this Court's broad institutional review and guidance. *See id.* at 109-110 (stating "*FilmOn* did not address the second step of the anti-SLAPP analysis … . Nor did it address the criteria for

identifying commercial and noncommercial speech under the First Amendment. … Thus, we have no reason to reconsider our prior ruling on the second step of the anti-SLAPP procedure, which we reproduce (with minor changes) in part 2 below.").

For four reasons, this case meets the standards for granting review stated in the California Rules of Court, rule 8.500, subdivision (b).

**First**, review "is necessary to secure uniformity of decision" because the Court of Appeal's published opinion creates a conflict with this Court's decisions in *Rand Resources, LLC v. City of Carson* (2019) 6 Cal.5th 610 ("*Rand*") and *FilmOn*. In *FilmOn*, this Court made clear that "the focus of [the] inquiry must be on 'the specific nature of the speech,' rather than on any 'generalities that might be abstracted from it.'" *Id*. at 152, citing *Commonwealth Energy Corp. v. Investor Data Exchange, Inc.* (2003) 110 Cal.App.4th 26, 34; *Rand*, 6 Cal.5th at 910 [same]. The Court of Appeal did not adhere to this Court's clear direction when it focused on the generalities of Michael Jackson's fame and public interest in the artist rather than on the nature of the speech at issue—namely, the specific statements intended to sell albums by making affirmative misrepresentations about their content. If the *Serova* decision is allowed to stand, the confusion this Court sought to resolve in its *Rand* and *FilmOn* precedents will continue. Regardless of how the Court ultimately resolves this issue, broad institutional guidance is desperately needed.

**Second**, review "is necessary to secure uniformity of decision" because the Court of Appeal's published opinion below creates a conflict in published case law regarding whether alleged false, deceptive or misleading statements on the music album "Michael" and in a promotional music video are commercial speech, actionable under California's consumer protection statutes, Business and Professions Code §17200, *et seq.* ("UCL") and the Consumer Legal Remedies Act, Civil Code §1750, *et seq.* ("CLRA"). (Cal. Rules of Court, rule 8.500(b)(1).)

In *Kasky v. Nike, Inc.*, 27 Cal.4th 939 (2002) ("*Kasky*"), this Court adopted a "limited-purpose test" to be used by courts when deciding "whether particular speech may be subjected to laws aimed at preventing false

advertising or other forms of commercial deception.... " *Id*. at 960. The test "requires consideration of three elements: the speaker, the intended audience, and the content of the message. *Id*. Employing this test, this Court found that public statements made by Nike defending its labor practices and working conditions at its factories was commercial speech "that may be regulated to prevent consumer deception." *Id*. at 969.

Following *Kasky*, in *Rezec v. Sony Pictures Ent., Inc*., 116 Cal.App.4th 135, 137 (2004) ("*Rezec*"),[1] the Second Appellate District, Division 1, found that Sony's advertisements "falsely portraying a person as a film critic for a newspaper and attributing to him laudatory reviews about the films" was commercial speech and thus, could be regulated by the UCL and CLRA.

Similarly, in *Scott v. Metabolife Int'l, Inc*., 115 Cal.App.4th 404, 420 (2004) ("*Scott*"), the Third Appellate District found that Metabolife's "advertising of a specific consumer product, on its labels, and to the public, for the purpose of selling that product—is not an issue of public interest (or a public issue)" and thus, could be regulated by the UCL.

In contrast, in the instant case, the Second Appellate District, Division 2, affirmed its prior decision and *reversed* the trial court's order following *Kasky, Rezec*, and *Scott* by "conclud[ing] that the album cover, including statements about the contents of the album, and a promotional video for the album were commercial speech that was subject to regulation under the UCL and the CLRA." *Serova*, 26 Cal.App.5th at 764. By reversing the trial court below, the Second Appellate District, Division 2 maintains a direct conflict from which confusion among the lower courts is likely to follow, given the prevalence of deception and false advertising in consumer sales markets.

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[1] In *FilmOn*, this Court "disapprove[d]" *Rezec* "to the extent it is inconsistent with this opinion." 7 Cal.5th at 158, fn.5. In *Serova*, the Court of Appeal cited *Rezec* without mentioning this or explaining how *Rezec* was, or was not, inconsistent with *FilmOn*. 44 Cal.App.5th at 124, 131. *Serova* makes plain that the Court's guidance is needed to clarify the extent to which *Rezec* remains good law. This is important because *Rezec* is one of the few published precedents directly on point.

Not only does the Court of Appeal decision create a conflict in the decisional law, it stands California's consumer protection statutes on their heads. In particular, the Court of Appeal says that "[t]he issue of public interest here is whether Michael Jackson was in fact the singer on the three Disputed Tracks." *Serova*, 44 Cal.App.5th at 119. Employing what appears to be *ipse dixit* logic, the Court of Appeal then goes to great lengths to cloak the alleged fraudulent and deceptive representations on the album cover and the in the accompanying promotional music video in First Amendment protection merely because, according to the Court of Appeal, there was great public interest surrounding the artist, Michael Jackson. *Serova*, 44 Cal.App.5th at 119-120. The Court of Appeal's logic would permit deception and consumer fraud in circumstances when consumers need more legal protection, not less. "Simply stated: labels matter." *Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 328, citing, *inter alia*, *Kasky*, 27 Cal.4th at 969. Regardless of how this Court resolves this issue, by granting review, this Court can settle this extremely important question of law and provide its broad institutional guidance by securing uniformity of decision.

**Third**, whether or not the statements made on a product's packaging and in its promotional materials (here, a music album and music video) can be regulated under the UCL and CLRA is an extremely important issue that affects a large number of California litigants. The Court of Appeal's decision leaves this important question of widespread importance in turmoil. Indeed, the turmoil created by *Serova* and its divergent split from the holdings in *Rezec, Scott* and this Court's *Kasky* decision will undoubtedly spawn inconsistent decisions with some courts following *Rezec, Scott* and *Kasky*, while others follow *Serova.* The Court of Appeal's decision also appears to attempt to expand the reach of First Amendment protection to allow fraud and deception if the subject of the representation, here, Michael Jackson, is generally a matter of public interest. Given the prevalence of fraud and deception in consumer sales throughout this state, and the enormous number of cases currently pending involving California's consumer protection statutes, this Court's broad institutional guidance is desperately needed.

**Fourth**, the newly created scienter requirement created by the *Serova* published decision is directly at odds with the plain text of the UCL and

CLRA as well as this Court's decision in *Cortez v. Purolator Air Filtration Prods. Co.,* 23 Cal.4th 163 (2000) which unequivocally held that the UCL imposes "strict liability." *Id*. at 181. This provides yet another reason for this Court to grant review.

CAOC voices its strong support as amicus for granting the petition for review in the above-referenced matter. The issue presented is of great significance to the Consumer Attorneys. The members of CAOC routinely represent the interests of an exceptionally large number of California citizens who have been harmed by false, deceptive and misleading statements on the packaging of products and in its promotional and marketing materials. The confusion created by the Second Appellate District, Division 2, in *Serova*, and its divergence from this Court's decisions in *FilmOn* and *Rand*, as well as this Court's guidance in *Kasky, Rezec and Scott*, desperately needs broad institutional guidance. Victims of false, deceptive and misleading advertising should not have to depend on a lower court's choice between competing precedents in order to determine whether or not they will be able to obtain relief for the harm they have suffered. When litigants risk potential fee-shifting under the anti-SLAPP statute, the need for very clear guidance from this Court is even more critical, including to CAOC's members and their clients.

Accordingly, CAOC strongly urges this Court to grant review and resolve this issue of widespread importance to California legal jurisprudence.

Sincerely,

Kimberly A. Kralowec
State Bar No. 163158

cc: See attached proof of service

## PROOF OF SERVICE

I, the undersigned, hereby declare under penalty of perjury that the following is true and correct:

I am a citizen of the United States; am over the age of 18 years; am employed by KRALOWEC LAW, P.C., located at 750 Battery Street, Suite 700, San Francisco, California 94111, whose members are members of the State Bar of California and at least one of whose members is a member of the Bar of each Federal District Court within California; am not a party to the within action; and that I caused to be served a true and correct copy of the following documents in the manner indicated below:

1. **AMICUS CURIAE LETTER IN SUPPORT OF PETITION FOR REVIEW; and**
2. **PROOF OF SERVICE.**

- **By Mail**: I placed a true copy of each document listed above in a sealed envelope addressed to each person listed below on this date. I then deposited that same envelope with the U.S. Postal Service on the same day with postage thereon fully prepaid in the ordinary course of business. I am aware that upon motion of a party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after date of deposit for mailing in the affidavit.

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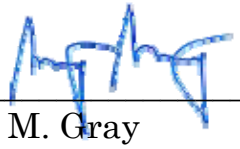
Executed this 17th day of March, 2020 in San Francisco, California.



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