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**IN THE
SUPREME COURT OF CALIFORNIA**

**VERA SEROVA,
Plaintiff and Respondent,**

v.

**SONY MUSIC ENTERTAINMENT; JOHN BRANCA, AS CO-
EXECUTOR OF THE ESTATE OF MICHAEL J. JACKSON;
AND MJJ PRODUCTIONS, INC
Defendant and Appellant.**

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

PETITION FOR REVIEW

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I. ISSUES PRESENTED FOR REVIEW

1. Do representations about a creative product made by its seller on the product packaging and in advertisements during an ongoing controversy constitute speech in connection with an issue of public interest within the meaning of the anti-SLAPP statute?
2. Is the seller insulated from liability for misrepresentations under the UCL and CLRA if he lacked personal knowledge that his representations were false?

II. INTRODUCTION

This case, following remand directing the Court of Appeal (COA) to reevaluate its decision in light of *FilmOn.com Inc. v. DoubleVerify Inc.* (2019) 7 Cal.5th 133 (*FilmOn*), is on its second trip to this Court. The petition arises from the failure of the COA to heed the lessons of *FilmOn* and properly apply anti-SLAPP precedent in the context of product labeling and advertising. The initial petition for review that this Court granted laid out an illustrative hypothetical that succinctly crystalizes the problems created by the COA's decision. It is worth restating here.

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

impersonator, or that there is any controversy as to whether Jackson actually sang the vocals on all of the album's songs.

While the teenager is in the record store, his mom is at a supermarket buying peaches labelled "organic." Mom does not know that there is a dispute between the peach wholesaler and a consumer watchdog agency over the labeling of these peaches as "organic." However, mom wants to buy organic produce, and she is led to believe by the label that the peaches are organic. In actuality, someone in the supply chain affixed "organic" labels to peaches that were not grown organically.

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

According to settled law in California, mom and son should be able to pursue their claims. Under the express provisions of the CLRA and unfair competition law, the music distributor and the supermarket are liable for their misrepresentations to consumers who bought their goods irrespective of what the sellers knew at the time they made the false statements, or any controversies about the representations on the products sold. Under the COA's ruling in this case, however, settled law becomes unsettled, and both mom and son are without a remedy against the sellers who get to keep their ill-gotten gains.

Moreover, although for mom and son these misrepresentations are equally misleading and damaging, the son, if he files an action like Petitioner herein, in addition to absorbing the damage, will have to reimburse the music distributor's attorney fees for having the temerity to petition the court for redress. The anti-SLAPP statute will make the teenager pay because, under the COA's published precedent, the music distributor's false advertising "contributed" to the public debate the teenager had no idea existed, and the suit infringes on the music distributor's right to "shape" mom's experience of the fake songs by misattributing them to Jackson.

150 years ago, the California Legislature declared, "For every wrong there is a remedy." (Cal. Civ. Code § 3523.) In this matter, the COA tramples on this doctrine and deprives consumers of the remedy for merchants' deceit enshrined in California's consumer protection laws. The decision punishes the consumers with having to pay the merchant's attorney fees if they so much as *attempt* to seek a remedy—thus, effectively suppressing their basic constitutional right to petition the government for redress of grievances. (U.S. Const. amend. I; Cal. Const. art. I, § 3(a).) It is ironic that the COA's decision, while claiming to be vindicating the First Amendment, in actuality sets a precedent that chills Californians' First Amendment right.

III. FACTUAL AND PROCEDURAL POSTURE

This case is a putative consumer class action about what purports to be an album of Michael Jackson's recordings titled *Michael*, released by Sony Music Entertainment, the estate of

Michael Jackson and MJJ Productions, Inc. (collectively, the Sony Defendants) after Jackson's death.

For purposes of this appeal, the alleged facts are undisputed. Since *Michael's* inception, the authenticity of three recordings on the album (known as the Cascio recordings) has been controversial. The Sony Defendants purchased the Cascio recordings from individuals Edward Cascio and James Porte (also defendants in this suit, but not parties to this appeal), who told the Sony Defendants that Jackson sang on these recordings prior to his death. (Slip Op. 7.) The Sony Defendants subsequently announced their decision to release the Cascio recordings on the *Michael* album. When Jackson's family and fans heard the recordings, a controversy ensued, with multiple members of the family and a number of fans stating publicly and to the Sony Defendants that the singer on the Cascio recordings was not Jackson. (Slip Op. 8.) In response to the controversy, attorney Howard Weitzman issued a statement on behalf of the Sony Defendants to Jackson fan clubs claiming that the Sony Defendants had conducted an internal investigation, which led them to conclude the vocals on the Cascio recordings belonged to Jackson. (*Ibid.*)

The Sony Defendants released the *Michael* album containing 10 songs—the three Cascio recordings and seven undisputed Jackson recordings—and marketed it as an album by Michael Jackson. (Slip Op. 8–9.)

Plaintiff and Petitioner Vera Serova alleges that Jackson did not sing on the Cascio recordings and that the Sony

Defendants violated the Unfair Competition Law (UCL; Bus. & Prof. Code § 17200 et seq.) and the Consumers Legal Remedies Act (CLRA; Civ. Code § 1750 et seq.) by advertising *Michael* as an album of Jackson songs on its cover and in a video commercial. (Slip Op. 2.) The complaint alleges that the following representations were false or misleading in light of the allegation that Jackson does not sing on the three Cascio recordings included on the album:

- (1) The album cover containing the album name “Michael,” multiple depictions of Michael Jackson, and a statement on the back of the cover:

“This album contains 9 previously unreleased vocal tracks performed by Michael Jackson”¹; and

- (2) The video commercial in which the narrator presents *Michael* as “a brand-new album from the greatest artist of all time.”

Neither the album cover nor the video commercial disclosed to album buyers that the identity of the singer on three of the album tracks was uncertain or controversial at the time of the album release.

In response to the complaint, the Sony Defendants filed an anti-SLAPP motion under California Code of Civil Procedure Section 425.16 (the anti-SLAPP statute), arguing that their statements on the album cover and in the video commercial constituted speech in connection with an issue of public interest protected by the anti-SLAPP statute, and Serova could not

¹ The tenth song on the album was previously released in 2004.

prevail on her UCL and CLRA claims because the statements were noncommercial speech not actionable under these statutes, or, alternatively, not misleading as a matter of law even if Jackson did not sing on the Cascio recordings. (Slip Op. 9–10.) The Sony Defendants stipulated for purposes of the anti-SLAPP litigation that Jackson did not sing on the Cascio recordings (i.e. they were forgeries) (Slip Op. 10) and waived Serova’s burden to present prima facie evidence in support of her case. Thus, the scope of the anti-SLAPP motion was limited to three legal issues:

- (1) Whether the Sony Defendants’ statements were speech in connection with an issue of public interest within the meaning of the anti-SLAPP statute;
- (2) Whether the Sony Defendants’ statements were actionable as commercial speech under the UCL and CLRA; and
- (3) Whether the Sony Defendants’ statements could mislead a reasonable consumer if the Cascio recordings were forgeries not containing Jackson’s vocals.

The trial court found the statements at issue met the definition of speech in connection with an issue of public interest under the first prong of the anti-SLAPP analysis but that Serova could prevail on her claims based on the statements at issue because they were commercial and therefore actionable under the UCL and CLRA and were likely to mislead a reasonable consumer. (Slip Op. 9–10.)

The COA affirmed the trial court’s ruling on the first prong, citing Jackson’s celebrity and the public’s interest in the album

and the controversy surrounding it as relevant public issues, and reversed the second part of the ruling, holding that the statements on the album cover and in the video commercial were noncommercial speech under *Kasky* because the content of the statements was noncommercial under the third prong of the *Kasky* test. The COA concluded, in a radical departure from precedent, that the third element of *Kasky*, focusing on the content of the message, required for liability that the speaker have personal knowledge of the facts he spoke about.

Because the Sony Defendants' selling efforts related in part to a publicly disputed issue of which they lacked personal knowledge (which, in the COA's view, made their advertisements an opinion), and their statements were "integral to the artistic significance of the songs themselves," the COA concluded the Sony Defendants' statements were not commercial in character. (Slip Op. 31.) The COA did not reach the question of whether the Sony Defendants' statements could mislead a reasonable consumer.

Serova petitioned the COA for rehearing and argued that the COA misconstrued the third prong of *Kasky* reaching a holding that contradicted the established California law, which imposes strict liability for false advertising. The COA modified its decision with a footnote in which the COA reaffirmed its problematic reading of *Kasky* but did not change the holding or the disposition of the case.²

² In the added footnote, the COA stressed its view that, under *Kasky*, "the *speaker's* knowledge about the content of the speech is the important feature" in answering the question whether the

Serova petitioned this Court for review on both anti-SLAPP prongs. This Court granted review ultimately remanding the case for reconsideration in light of *FilmOn*.

On remand, the COA attempted to rationalize its analysis under the first anti-SLAPP prong with references to *FilmOn*, but reached the same result, concluding the representations about the album to potential and actual buyers on the product packaging and in the video commercial constituted participation in an ongoing public debate about the authenticity of the Cascio recordings. (Slip Op. 18–27.) Because *FilmOn* concerned only the first anti-SLAPP prong, the COA republished its second-prong holding essentially without changes (Slip Op. 5), reiterating that misrepresentations to consumers are not actionable so long as the purveyor of the falsehoods did not have firsthand knowledge of the truth.

IV. GROUNDS FOR REVIEW

A. The Court of Appeal failed to follow *Rand* and *FilmOn* under the first prong of the anti-SLAPP analysis.

Review on the first issue is required under Rule 8.500(b)(1) to reconcile the COA’s published decision with this Court’s recent precedents in *Rand Res., LLC v. City of Carson* (2019) 6 Cal.5th 610 (*Rand*) and *FilmOn*.

speech is commercial. Because the Sony Defendants were not involved in the creation of the Cascio recordings, from the Sony Defendants’ perspective, “their Challenged Statements about the identity of the lead singer were therefore necessarily opinion.” (Slip Op. 34–35 fn.12.)

First, both *Rand* and *FilmOn* unequivocally rejected the so-called “synecdoche theory” of public interest under which defendants attempt to “defin[e] their narrow dispute by its slight reference to a broader public issue.” (*FilmOn, supra*, 7 Cal. 5th at 152 [citing *Commonwealth Energy Corp. v. Investor Data Exchange, Inc.* (2003) 110 Cal.App.4th 26, 34]; *Rand*, 6 Cal.5th at 625.) The COA’s decision resurrects the “synecdoche theory” when it identifies the public issues in this case as (1) whether the singer on the Cascio recordings is in fact Jackson, and (2) the controversy surrounding the Cascio recordings, despite the fact that the challenged advertisements do not speak about either of these issues and relate to them only tangentially. (Slip Op. 19–20.)

Second, the COA’s decision gives short shrift to the context analysis required by *FilmOn*. The decision fails to analyze the purpose of the speech entirely, merely concluding that the factual misrepresentations were “not divorce[d]” from the debate. (Slip Op. 25). It then concludes that the “audience” of consumers demonstrates the advertisements contributed to the debate about the Cascio recordings without any evidence that more than a fraction of consumers even knew the debate existed (Slip Op. 25–26). And it cites “speaker identity” as justifying the speech protection because, in the COA’s opinion, a music seller enjoys the unfettered right to shape consumer’s perception of music by misattributing it to whichever artist he pleases (Slip Op. 26–27, 38–39). This analysis undermines the teachings of *FilmOn*, eliminates the burden of production under the first anti-SLAPP

prong, which the statute places on the defendant (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76), and postulates that a scandal, consumers' interest in knowing the truth about what is advertised to them and the seller's freedom of expression collectively shield misrepresentations and fraud.

The COA paid lip service to *FilmOn* on remand but failed to follow its holdings or perform the careful record-supported analysis of context required by *FilmOn*. As a result, the decision essentially narrows *FilmOn* to its facts and promotes public policy protecting fraud and deceit. It demonstrates that further guidance is needed from this Court on how lower courts should approach the context analysis prescribed by *FilmOn*.

1. Circumventing *Rand* and *FilmOn*, the COA resurrected the misguided “synecdoche theory” of public interest.

In its recent decisions, this Court repeatedly rejected the “synecdoche theory” of public interest, whereby defendants try to “defin[e] their narrow dispute by its slight reference to the broader public issue.” (*FilmOn*, *supra*, 7 Cal.5th at 152.) The Court explained that the focus under the first-prong anti-SLAPP inquiry must be on “the specific nature of the speech,” rather than on any “generalities that might be abstracted from it.” (*Ibid.* [citing *Commonwealth Energy Corp. v. Investor Data Exchange, Inc.* (2003) 110 Cal.App.4th 26, 34]; *see also Rand*, 6 Cal.5th at 625 [“At a sufficiently high level of generalization, any conduct can appear rationally related to a broader issue of public importance. What a court scrutinizing the nature of speech in the anti-SLAPP context must focus on is the speech at hand, rather

than the prospects that such speech may conceivably have indirect consequences for an issue of public concern.”].)

The COA’s decision, while purporting to avoid the synecdoche theory of public interest, in fact endorses it repeatedly. The decision identifies one of the issues of public interest as “whether Michael Jackson was in fact the singer on the three Disputed Tracks” (Slip Op. 19) and proceeds to conclude that the challenged advertisements related to this issue “directly” because “[a]ccording to Serova’s Complaint,” they “identified Michael Jackson as the singer on the Disputed Tracks, which was the precise focus of the public controversy.” (Slip Op. 23.)

This conclusion is the prime example of the synecdoche theory in application. The advertisements at issue—the album name “Michael,” the images of Jackson on the cover, the statement on the back of the CD, and the video commercial—represent that the lead vocals on all of the album’s tracks were performed by Jackson. (Slip Op. 8.) These representations address what music can be heard by listening to the CD for sale to consumers, and they pertain to the album *as a whole*, not specifically to the three songs subject to controversy.

The COA equates a mundane question—what consumers will hear on a CD—with an issue of public importance—whether Jackson is the singer of the controversial songs, or, even more encompassing, Jackson’s “body of work” (Slip Op. 25, 32), in spite of multiple authorities condemning such reasoning. (*Rand, supra*, 6 Cal. 5th at 624–25 [distinguishing between the subject of speech—who should represent the City in negotiations related to

the stadium construction—and the public issue of whether an NFL stadium should be built; holding “prospects that ... speech may conceivably have indirect consequences for an issue of public concern” are not enough to make the speech protected]; *FilmOn*, *supra*, 7 Cal. 5th at 152 [finding DoubleVerify’s report too tenuously tethered to the issue of children’s exposure to sexually explicit media content]; *All One God Faith, Inc. v. Organic & Sustainable Indus. Standards, Inc.* (2010) 183 Cal.App.4th 1186, 1203–1204 (*All One God Faith*), [holding that placement of the “OASIS Organic” seal on products did not “contribute to a broader debate on the meaning of the term ‘organic’”].)

The COA further endorses the synecdoche theory when it defines another relevant public issue as “[t]he controversy over the identity of the singer on the Disputed Tracks.” (Slip Op. 20.) The album cover and the video commercial did not even mention the controversy, and the COA later admits as much. (Slip Op. 24 [“It is true that the statements on the Album Cover and the Promotional Video did not actually refer to the public debate about the identity of the singer.”].) A supposed connection to the controversy is even more tenuous than the oblique connection to the issue of whether Jackson sang the songs; nothing in the statements even suggests to the consumer audience that a controversy exists.

Such circumvention of the rule clearly set out in *Rand* and *FilmOn* undermines the precedential force of these authorities. It opens the door for future courts to ignore the rule against the synecdoche theory whenever convenient and find *participation*

merely because recipients of the speech *may*, upon hearing it, make conclusions relating to some public debate even where the speech itself neither mentions the debate nor addresses the topic of the debate.

2. The Court of failed to perform the careful analysis of context required under *FilmOn*.

On remand, the COA revised its first-prong analysis to consider the *context* of the speech, as required by *FilmOn*. (*FilmOn*, *supra*, 7 Cal.5th at 149.) However, the COA’s careless approach to the analysis of context essentially limited *FilmOn*’s reach to cases involving private speech and conferred automatic anti-SLAPP protection to misrepresentation in the seller/potential-purchaser context.

The COA failed to analyze the *purpose* of the speech based on facts in the record. For example, the COA did not look at the placement of the speech. The challenged advertisements appeared on product packaging (an album cover) and in a TV commercial—vehicles meant to communicate product information to potential buyers—rather than in a medium suitable for informing the general public of a position on a public issue. The COA also did not look at the timing of the speech—it did not consider that the audience saw the statements on the packaging *at the point of sale* where there was no discussion or information about the public controversy. (*Cf. FilmOn*, *supra*, 7 Cal.5th at 143–144 [noting that the anti-SLAPP statute defines protected conduct by, among other things, its location and timing].) The COA merely concluded that the commercial purpose of the advertisements “does not divorce” them from the debate. (Slip

Op. 25.) The COA did not explain how the purpose of the advertisements *linked* them to the debate, and nothing in the record suggests this link existed. (*See All One God Faith, supra*, 183 Cal. App. 4th at 1204 [“The purpose of the ‘OASIS Organic’ seal is to promote the sale of the product to which it is affixed, not the standard or its elements”])

The COA’s conclusion that the advertisements are not divorced from the debate seems to be rooted in the sole fact that the debate *existed* when these advertisements were released. *FilmOn* held that the mere co-existence of a debate is insufficient to find participation. (*FilmOn, supra*, 7 Cal.5th at 152–153 [finding the defendant’s report discussing FilmOn’s purported copyright infringement did not contribute to then-existing public debate about whether FilmOn’s streaming model infringed copyrights].) The COA’s opinion, however, conveniently ignores *FilmOn* and effectively holds that, at least when statements are public, they automatically participate in the concurrently existing debate and, therefore, deserve anti-SLAPP protection. (Slip Op. 24 [reasoning that the challenged advertisements “certainly showed Appellants’ acceptance of th[e] fact” that Jackson sang on the Cascio recordings, “which communicated Appellants’ position on the issue”].) *FilmOn*, thus, appears to be limited to private speech.

The COA’s apparent conclusion that public speech always participates in a concurrent controversy (*see* Slip Op. 21 [attempting to distinguish other false advertising/labelling cases based on the absence of a controversy]) confers protection on all

public misrepresentation and fraud. The challenged advertisements were a part of the same promotional campaign for the album that started the controversy. The COA's reasoning suggests that the initial misrepresentation in a promotional campaign that triggers a public debate provides an anti-SLAPP shield to every future repetition of the misrepresentation in the sales context. The decision shields false advertisements to a greater extent than uncontroversial truthful advertisements because, per the COA, the seller's deceptive advertisement participates in the public debate about the deceit. Absent reversal, any fraud scandal will transform the related sales pitch, irrespective of context (e.g. time, manner, and audience), into speech on a matter of public interest.

Next, the COA concluded that the *audience* of consumers supports the finding that the challenged advertisements contribute to the debate about the Cascio recordings because consumers are "highly likely to be interested in the identity of the singer" on the Cascio recordings. (Slip Op. 25–26.) This analysis begs the question, are consumers who are interested in knowing whether their milk is really pasteurized, whether their hamburgers are made from beef, whether their cars get 34 miles to a gallon, involved in a public debate because they are "highly likely to be interested" in the truth of what is factually represented to them?

There are no facts in the record that would suggest consumers who saw these advertisements generally knew of the debate. (Nor did the advertisements inform the consumers about

it.) Those consumers who did not know about the debate could not perceive the advertisements as the Sony Defendants' position in the debate. Yet the COA suggests that speech contributes to a coincidental debate if a possibly small portion of the audience that happens to know about the debate is *likely to be* interested in it. Of course, such reasoning shields every misrepresentation to consumers, because it is axiomatic that consumers who consider spending money on a product are interested in the truth about the product.

The COA's conclusions about the purpose and the audience, unsupported by the record, effectively do away with the defendant's burden of production under the first anti-SLAPP prong. (*City of Cotati, supra*, 29 Cal.4th at 76.) After *FilmOn*, it is the defendant's responsibility to establish through the record that the focus of the challenged speech was so significantly tied into making a point in the controversy that it overshadows the acknowledged obvious commercial purpose.

Finally, the COA's analysis of the *speaker* endorses reckless misrepresentation outright by licensing sellers to "shape the experience of ... consumers" (and, not so coincidentally, drive up the price) through false claims about their products. (Slip Op. 26.) The COA does not explain why shaping consumers' experience of music by misrepresenting its performer is worthier of protection than shaping consumers' experience of cosmetic products by misrepresenting that they are organic (*All One Good Faith, supra*, 183 Cal.App.4th at 1193–1194.) Surely, the latter would affect the consumers' perception of the product's health benefits

and matter to them no less than whether the singer of the purchased songs is Jackson. (Slip Op. 26.)³

There is no dispute that the sellers of creative products have a First Amendment right to shape consumers' experience by, for example, choosing which songs to include in an album (or which stories to include in a book) and how to arrange them. But this right cannot extend to misattribution or misinformation about the product on its cover. The First Amendment does not protect false commercial speech. (*Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of NY* (1980) 447 US 557, 563; see also *Keimer v. Buena Vista Books, Inc.* (1999) 75 Cal.App.4th 1220, 1233.)

Essentially, the COA concluded that where there is a controversy, a seller's attempts to sell a product are protected because the sales pitch automatically participates in the

³ Of course, not any statement made by a seller about its product would be unprotected. *FilmOn* recognized that “[s]ome commercially oriented speech will, in fact, merit anti-SLAPP protection.” (*FilmOn, supra*, 7 Cal. 5th at 153). For example, Mr. Weitzman's letter to fan clubs in response to the controversy is clearly protected speech under *FilmOn*. The letter mentioned the controversy, named one of the three controversial songs and expressed the Sony Defendants' position regarding its authenticity—in other words, it spoke about the issue of public interest. The context likewise showed an intent to participate in the debate: the statement was issued in the form of an open letter—a format usually employed for stating a position—and was directed to fan clubs who raised concerns about the authenticity of the songs (and thus also participated in the debate). The COA, however, failed to recognize the clear distinction between a seller's statement of position, like Mr. Weitzman's letter, and product labels and advertising.

controversy. Even more so if he is selling allegedly forged art. Is this really the kind of “continued participation in the matters of public significance” that the anti-SLAPP statute was meant to encourage? (*FilmOn, supra*, 7 Cal. 5th at 151.)

This case highlights tensions that often arise in the anti-SLAPP context in cases involving speech designed to induce sales. On the one hand, there is undeniable interest among certain segments of the public in whether Jackson sang on the controversial recordings; on the other hand, the challenged advertisements were meant to describe the product to consumers and not participate in the debate about the controversial recordings. On the one hand, courts traditionally view labels and advertisements as implicating the seller’s private, rather than public, interest (*All One Good Faith, supra*, 183 Cal.App.4th at 1203–1204; *Scott v. Metabolife Internat., Inc.* (2004) 115 Cal.App.4th 404, 423; *L.A. Taxi Coop., Inc. v. The Indep. Taxi Owners Assn. of Los Angeles* (2015) 239 Cal.App.4th 918, 927–929); on the other hand, these labels and advertisements were released amidst a controversy that attracted public attention. The COA did not exercise due care in considering competing policy considerations raised by this *context* and sacrificed consumer rights to protect deceptive sales practices, thereby upsetting the delicate balance created by the anti-SLAPP statute. As one of the first published decisions that interpret *FilmOn*, absent reversal, this precedent undoubtedly will adversely influence future anti-SLAPP jurisprudence. This Court should step in, correct the imbalance and provide lower courts with a

model approach for analyzing context in cases involving public speech.

B. The Court of Appeal’s reading of *Kasky* contravenes established case law, strips consumers of statutory protections and immunizes sales of art forgeries.

Review on the second issue is required to correct the COA’s continuing misconstruction of the test for commercial speech set out in *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, and resolve the conflict the COA’s decision creates with settled California law holding advertisers liable for inadvertent and negligent false representations they make to consumers.

The text of the UCL and CLRA has no requirement that the speaker definitively know his speech is false or deceptive, and courts have interpreted these statutes as strict liability laws. (*Cortez v. Purolator Air Filtration Prods. Co.* (2000) 23 Cal.4th 163, 181 [holding that the UCL imposes “strict liability”]; *Mazza v. Am. Honda Motor Co.* (9th Cir. 2012) 666 F.3d 581, 591 [observing the UCL and CLRA “have no scienter requirement”].)

Notwithstanding these authorities, the COA concluded the Sony Defendants’ representations about their product were opinions not actionable under the UCL and CLRA because the Sony Defendants spoke on an issue of which they lacked personal knowledge. (Slip Op. 31, 32.) The COA misconstrued the test for commercial speech this Court adopted in *Kasky, supra*, 27 Cal.4th 939, and held that speech is not commercial unless the speaker has personal, not second-hand, knowledge of the facts he speaks about. (Slip Op. 31.) Because the UCL and CLRA apply only to commercial speech (*Rezec v. Sony Pictures Entm’t, Inc.*

(2004) 116 Cal.App.4th 135, 140 [citing *Kasky*, at 953–956, 962, 969–970]), the COA’s misinterpretation of *Kasky* effectively imports the element of personal knowledge into the UCL and CLRA in contravention of the statutes’ plain language and this Court’s statutory construction. Absent review and clarification of the commercial speech standard by this Court, the unprecedented reading of *Kasky* championed by the COA will profoundly narrow protections afforded to California consumers, depriving them of remedies for inadvertent and negligent false advertising.

Additionally, the COA found the statements noncommercial because they were made to consumers amidst a public controversy about the artist’s identity and “related directly” to art. (Slip Op. 31, 38–39.) These findings contravene *Kasky* which held that neither public controversy nor relation to matters of public interest confer *noncommercial* status on speech. (*Kasky*, *supra*, 27 Cal.4th at 964.) The COA’s holding, making false attribution of creative works noncommercial based on public interest in art, essentially immunizes sales of forged art by every reseller down the line from the original forger.

1. The Court of Appeal’s concocted conversion of unequivocal factual representations into “opinions” is a death knell to consumer protection in California.

In evaluating whether speech is commercial for purposes of applying state laws designed to prevent false advertising, California courts use the test for commercial speech articulated in *Kasky*, *supra*, 27 Cal.4th 939, that requires examination of the speaker, the intended audience and the content of the message. (*Id.* at 960.) The third element of the test requires that the

content of the message be commercial in character. (*Id.* at 961.) *Kasky* defined a message of commercial character as “*representations of fact* about the business operations, products, or services of the speaker . . . made for purposes of promoting the sales of . . . the speaker’s products or services.” (*Ibid.* [emphasis added].) This definition does not contain on its face a requirement that the speaker has personal knowledge of whether his speech is true.

Here, the representations at issue are “representations of fact about a product”, not an opinion. The United States Supreme Court explained the difference in a hypothetical it employed that is similar to the context here:

“A company’s CEO states: ‘The TVs we manufacture have the highest resolution available on the market.’ Or, alternatively, the CEO transforms that factual statement into one of opinion: ‘I *believe*’ (or ‘I think’) ‘the TVs we manufacture have the highest resolution available on the market.’ The first version would be an untrue statement of fact if a competitor had introduced a higher resolution TV a month before—even assuming the CEO had not yet learned of the new product. The CEO’s assertion, after all, is not mere puffery, but a determinate, verifiable statement about her company’s TVs; and the CEO, however innocently, got the facts wrong. But in the same set of circumstances, the second version would remain true. Just as she said, the CEO really did believe, when she made the statement, that her company’s TVs had the sharpest picture around. And

although a plaintiff could later prove that opinion erroneous, the words ‘I believe’ themselves admitted that possibility, thus precluding liability for an untrue statement of fact.”

(*Omnicare, Inc. v. Laborers Dist. Council Const. Industry* (2015) 575 U.S. 175, 183-184 (*Omnicare*).)

Yet, in applying *Kasky*, the COA erroneously concluded that the speaker’s lack of personal knowledge transforms false representations of facts into opinions. (Slip Op. 31–34 [concluding that the speaker’s ability to verify the truth of the speech was “important for the court’s ruling”], 33 [noting that the Sony Defendants’ statements “lacked the critical element of personal knowledge under the *Kasky* standard”].)

The COA’s decision to look beyond the content of the speech to the speaker’s state of mind radically departs from *Kasky*. *Kasky*’s focus on the *content* of the message is justified by the purpose of the test—to detect speech that can cause “commercial harms.” (*Kasky, supra*, 27 Cal.4th at 955.) In the false advertising context, this means a determination of whether the message can induce a member of the audience to enter into a commercial transaction. The speaker’s state of mind is irrelevant to this determination because it is not known to the audience. The speaker’s state of mind factors into assessing the character of the message only to the extent it can be gleaned from the message itself. To that end, *Kasky* requires the message to be a “representation of fact” (opinions are not actionable).

Whether a statement is factual or an opinion is judged from the perspective of the audience, not the speaker. (*Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 260–61.) If the audience understands the message as factual and relies on it accordingly in deciding whether to buy a product, the speech is commercial. Therefore, what matters under the plain language of the *Kasky* test is how the consumer perceives and understands the message, not what the commercial speaker knew firsthand when he uttered it. (See *Omnicare*, *supra*, 575 U.S. at 183-184, 187.)

The COA rejected this plain reading of *Kasky* and concluded, contrary to the United States Supreme Court’s view in *Omnicare*, that while the message may appear a representation of fact from the consumer’s perspective, if the speaker lacks personal knowledge about whether his speech is true, from his perspective it is “necessarily opinion” for which there is no remedy. (Slip Op. 34 fn. 12.)

The problem with such interpretation is that consumers have no way of knowing whether what appears to be factual product information to them is actually a fact—on which they can safely rely and be protected by the CLRA and UCL—or the seller’s opinion, which will be nonactionable if false. For example, the album cover in this case gave the consumer no clues that attribution of the entire album to Michael Jackson is the seller’s opinion. Like the TV manufacturer in *Omnicare*, the Sony Defendants stated unequivocal facts on the album cover.



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

(CT 1:147; 2:275 at ¶5b [authenticating album cover].)

The COA's new standard making the advertisement a fact or an opinion depending on the advertiser's personal knowledge converts consumers' right to recover into a gamble: did this advertiser know what he was talking about, or not.

2. The Court of Appeal's decision contradicts authorities interpreting the UCL and CLRA as strict liability statutes.

The COA's incorporation of a personal knowledge requirement into the *Kasky* test for commercial speech contradicts both plain language of the UCL and CLRA and the binding precedent of this Court, creating a review-worthy conflict.

Because only commercial speech is actionable under the UCL and CLRA, the COA's reading of personal knowledge into the *Kasky* test for commercial speech makes scienter (and even more narrowly, *personal, first-hand* knowledge) a required element of a false advertising cause of action under the UCL and CLRA. This contradicts the plain language of these statutes and this Court and Ninth Circuit holdings that the UCL and CLRA have no such requirement. (Cal. Bus. & Prof. Code § 17200 [prohibiting any "unlawful, unfair or fraudulent business act or practice"]; Cal. Civ. Code § 1770 [prohibiting certain "unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer"]; *Kasky, supra*, 27 Cal.4th at 951 ["to state a claim

under . . . the UCL . . . it is necessary only to show that ‘members of the public are likely to be deceived’”]; *In re Tobacco II Cases* (2009) 46 Cal.4th 298, 312 [stating that the UCL does not require a showing that the deception was “known to be false by the perpetrator,” which “reflects the UCL’s focus on the defendant’s conduct . . . in service of the statute’s larger purpose of protecting the general public against unscrupulous business practices.”]; *Mazza, supra*, 666 F.3d at 591.)

Moreover, the CLRA expressly provides a defense of bona fide error. (Cal. Civ. Code § 1784.) Defendant has the burden of proof of such bona fide error and must establish not only that he made the error unknowingly, but also that he had used “reasonable procedures adopted to avoid any such error” and made “an appropriate correction, repair or replacement or other remedy of the goods and services” upon receipt of a notice of the violation. (*Ibid.*; CACI No. 4710.) Here, the Sony Defendants have not established any of these elements, and the COA put the cart before the horse when it made the personal knowledge element of this affirmative defense the plaintiff’s burden. The COA’s conclusion that speech is not actionable without the plaintiff’s showing of personal knowledge renders the defense of bona fide error surplusage that the Legislature could not have intended.

Similarly, the COA’s reading of the knowledge requirement in *Kasky*’s commercial speech test would necessarily bring the element of personal knowledge into the False Advertising Law, Business & Professions Code §17500 (FAL), which similarly

applies to commercial speech. (*Rezec, supra*, 116 Cal.App.4th at 140.) This result obliterates statutory language, which makes negligent misrepresentation actionable. (Bus. & Prof. Code §17500 [prohibiting statements “which by the exercise of reasonable care should be known, to be untrue or misleading”]; *People v. Superior Court (Olson)* (1979) 96 Cal.App.3d 181, 195 [concluding that imposition of monetary sanctions “for the negligent dissemination of untruthful or misleading advertising does not offend the First Amendment”; noting that “[t]he injury to consumers victimized by false or deceptive advertising is no less when it results from negligence than when knowingly or recklessly made”].)

The COA did not reconcile its *Kasky* interpretation making speech nonactionable under the UCL, CLRA and FAL without personal knowledge with the cited authorities and the letter of the law. The decision results in a conflict that needs to be eliminated regarding the existence and scope of strict liability for false advertising and liability for negligent misrepresentation in California.

The COA tied its requirement of personal knowledge with the existence of a public debate about the singer’s identity, concluding that the Sony Defendants’ ignorance made their statements on the album cover and in the video commercial a nonactionable opinion in the debate. (Slip Op. 32–34.) This conclusion contradicts *Kasky*, which makes clear that a seller’s factual representations about its products do not receive noncommercial status by virtue of the seller responding to a

public debate. In *Kasky*, Nike sent out press-releases defending conditions in its factories in response to a public controversy. (*Kasky, supra*, 27 Cal.4th at 947–948.) Nike argued that its allegedly false statements were not commercial because they were a part of “an international media debate on issues of intense public interest.” (*Id.* at 964.) The *Kasky* court rejected this argument, stating that it “falsely assumes that speech cannot properly be categorized as commercial speech if it relates to a matter of significant public interest or controversy.” (*Ibid.*)

“For purposes of categorizing Nike’s speech as commercial or noncommercial, *it does not matter that Nike was responding to charges publicly raised by others and was thereby participating in a public debate.*” (*Id.* at 965–966 [emphasis added].)

The COA’s decision holds that ignorance is bliss (or at least a defense), finding the existence of a public debate makes commercial speech non-commercial when the speaker lacks knowledge of the facts he speaks about. (Slip Op. 34.) This view is contrary to *Kasky* which does not indicate directly or by rational implication that its holding is conditioned on the speaker’s personal knowledge.

If, as *Kasky*’s plain language suggests, the speaker’s knowledge is not an element of the test for commercial speech, the COA’s reliance on the public debate is misplaced. Moreover, inevitably many consumers who bought the *Michael* album in reliance on its advertising were unaware of the existence of any public controversy or debate about three of the recordings on the album. Neither the album cover, nor the video commercial

communicated to consumers that there was such a debate. Yet, according to the COA, the Sony Defendants' purported First Amendment right to speak falsehoods justifies deception of these consumers.

3. The COA's reading of *Kasky* deprives consumers of statutorily provided remedies for inadvertent and negligent false advertising.

The COA's holding was in no way limited to the facts of the case. The COA expressly noted that, in its view, *Kasky* might have been decided differently if it had dealt with matters outside of Nike's personal knowledge. (Slip Op. 34 fn. 11 and accompanying text.) Such novel reading of *Kasky* has far-reaching ramifications for California consumers' ability to protect their rights.

In today's economy, U.S. manufacturers commonly outsource parts of their production overseas to countries with a cheaper labor force, as well as order product components from third-party suppliers. The COA's decision robs a consumer of a remedy against false advertising by such manufacturers and forces the consumer to identify, and seek remedies against, the party who was personally involved in the production of the component, the quality of which the advertiser misrepresented. (Slip Op. 34 fn. 12 [stating that because the Sony Defendants were not present at the recording of the controversial songs, their statements describing the *Michael* album are "necessarily opinion"].)

No one in the supply chain can now be held liable for their misrepresentations to consumers unless they were, to borrow

from *Hamilton*, “in the room where it happened.” An American apparel company that purchases leather jackets from a foreign clothing supplier, puts labels on the jackets and resells them to California consumers under its own brand is not responsible to the consumers if the leather turns out to be faux. A car manufacturer does not have to recall a vehicle model when its advertised navigation system programmed by a contracted software developer, malfunctions. And a grocery store does not have to refund money to consumers who overpaid for peaches mislabeled as organic if the misrepresentation was introduced by the store’s supplier.

The plain language of *Kasky* does not require the speaker’s knowledge of whether his speech is truthful. However, as the COA’s decision demonstrates, *Kasky*’s reasoning leaves room for unorthodox interpretations which have the power to gut California consumer protection laws. This Court should clear the misunderstanding and clarify the commercial speech standard to prevent this from happening now or in the future.

4. The COA’s holding that public interest in knowing who the artist is makes false attribution of art nonactionable, contravenes *Kasky* and provides blanket immunity to sales of forged art.

As an additional ground for its holding, the COA concluded that the challenged statements are noncommercial because the public is interested in the identity of the singer for purposes of understanding the art, not merely learning about the product. (Slip Op. 38–39.) This holding further contradicts *Kasky*, which expressly rejected an analogous argument. (*Kasky, supra*, 27

Cal.4th at 964 [stating that it “falsely assumes that speech cannot properly be categorized as commercial speech if it relates to a matter of significant public interest”].) The public interest in conditions at Nike’s factories was not limited to utilitarian considerations of whether Nike’s products are worth buying, but concerned broader issues of the “degree to which domestic companies should be responsible for working conditions in factories located in other countries, or what standards domestic companies ought to observe in such factories, or the merits and effects of economic ‘globalization.’” (*Id.* at 966.)

The *Kasky* court held that Nike was free to address these issues of public interest without making factual misrepresentations to consumers about its business operations. (*Id.* at 967.) Similarly, the Sony Defendants were free to discuss their belief that the singer on the Cascio recordings was Jackson without making factual representations to consumers that the *Michael* album consisted of Michael Jackson’s songs. As product manufacturers, the Sony Defendants had a choice to run the risk that their factual representations were false and actionable, or, as the United States Supreme Court in *Omnicare* suggested, make clear to consumers that their statements about the singer’s identity were beliefs and not facts.

The COA refused to follow *Kasky* and recognize this straightforward distinction between commercial and noncommercial speech. Instead, the COA adopted an “all or nothing” approach, protecting the Sony Defendants’ advertisements at the expense of consumers.

As a practical result, absent reversal, the COA opinion confers noncommercial status and, consequently, blanket immunity on sellers' false attribution of creative works to renowned artists justifying such immunity by the public interest in understanding art and the controversy resulting from such attribution. It allows any publisher to attribute a manuscript of dubious origin to a classic writer, and any auctioneer to attribute a painting of dubious origin to a famous artist as long as the publisher or the auctioneer were not involved in the creation of the work. (Slip Op. 34 fn. 12.) Such immunity does not serve "consumer's interest in the free flow of commercial information." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.* (1976) 425 U.S. 748, 763.

The COA provides publishers and art auctioneers with a defense of ignorance, discouraging their due diligence and instead putting on the consumer the onus of establishing the authenticity of creative works they buy. In the case of music and literature, where the cost of the consumer product is low, this burden shifting is economically nonsensical.

Moreover, even if the consumer discovers that a work is inauthentic, she is likely without a remedy because her remedy would only be against the forger. The prospect that consumers could ever track down the original source of misrepresented information is a burden they should not have to bear.

Additionally, consumers have no way of knowing whether the seller had "personal knowledge" of the misrepresentation. That being the case, the fear of being on the wrong end of an anti-

SLAPP motion and being responsible for the seller's substantial attorney fees will necessarily deter consumers from suing the seller.

When the Legislature enacted the UCL and CLRA, it had a choice to protect consumers who give away money, or sellers who profit from transactions. It chose as a matter of public policy to protect consumers. It severely constricted, if not eliminated, the notion of "buyer beware" and placed the cost of the seller's mistakes on the seller. By reinterpreting *Kasky*, the COA defied the legislative intent and contravened the authorities interpreting these statutes as strict liability laws. The Court then went further and, under the guise of public interest in understanding art, removed from record companies, book publishers and art dealers any responsibility for selling inauthentic works. Absent review, the COA's opinion will resurrect "buyer beware" in California and endanger the benefits to the health and welfare of Californians that truth in advertising laws provide through deterrence.

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V. CONCLUSION

The issues presented here arise regardless of whether the falsity of the seller's representations is admitted or yet to be proven. But where, as here, the product is partly a forgery by stipulation, the COA's holdings immunizing its sales simply defy reason. This Court should grant review and prevent the deleterious impact of the COA's reasoning on Californians.

Dated: February 17, 2020

Respectfully Submitted,

/s/
By: JEREMY F. BOLLINGER
Attorneys for Plaintiff and
Petitioner VERA SEROVA

RULE 14 CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.260(b)(1) of the California Rules of Court, the enclosed brief of Petitioner is produced using 13-point Roman type including footnotes and contains approximately 8,041 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: February 17, 2020

/s/_____

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Petitioner VERA SEROVA

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

COURT OF APPEAL – SECOND DIST.

SECOND APPELLATE DISTRICT

FILED

ELECTRONICALLY

Jan 08, 2020

DIVISION TWO

VERA SEROVA,

Plaintiff and Respondent,

v.

SONY MUSIC ENTERTAINMENT

et al.,

Defendants and Appellants.

B280526

DANIEL P. POTTER, Clerk

J. Hatter

Deputy Clerk

(Los Angeles County
Super. Ct. No. BC548468)

APPEAL from an order of the Superior Court of Los Angeles County. Ann I. Jones, Judge. Affirmed in part and reversed in part with directions.

Katten Muchin Rosenman, Zia F. Modabber, Andrew J. Demko, Charlotte S. Wasserstein, Leah E. A. Solomon; Kinsella Weitzman Iser Kump & Aldisert, Howard Weitzman and Suann C. Macisaac for Defendants and Appellants.

Moss Bollinger, Jeremy F. Bollinger, Ari E. Moss and Dennis F. Moss for Plaintiff and Respondent.

Defendants and appellants Sony Music Entertainment (Sony), John Branca, as co-executor of the estate of Michael J. Jackson (the Estate), and MJJ Productions, Inc. (collectively Appellants) appealed from an order of the superior court partially denying their motion to strike under the anti-SLAPP statute. (Code Civ. Proc., § 425.16.)¹ We previously issued an opinion in this case holding that the claims of plaintiff and respondent Vera Serova (Serova) against Appellants should be struck under section 425.16. (*Serova v. Sony Music Entertainment* (2018) 26 Cal.App.5th 759 (*Serova I.*) Our Supreme Court granted review and subsequently transferred the case back to this court for reconsideration in light of the Supreme Court’s decision in *FilmOn.com Inc. v. Double Verify Inc.* (2019) 7 Cal.5th 133 (*FilmOn*).

The case concerns allegations that Appellants misleadingly marketed a posthumous Michael Jackson album entitled simply “Michael.” Serova claims that the album cover and a promotional video wrongly represented that Jackson was the lead singer on each of the 10 vocal tracks on the album, when in fact he was not the lead singer on three of those tracks. Serova alleged claims under the Unfair Competition Law (UCL; Bus.& Prof. Code, § 17200 et seq.) and the Consumers Legal Remedies Act (CLRA; Civ. Code, § 1750 et seq.). Serova also brought a fraud claim against defendants Edward Joseph Cascio, James Victor Porte,

¹ Subsequent undesignated statutory references are to the Code of Civil Procedure. “SLAPP” is an acronym for “[s]trategic lawsuit against public participation.” (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1109, fn. 1.)

and Cascio’s production company, Angelikson Productions, LLC (collectively, the Cascio Defendants), alleging that those defendants knowingly misrepresented to Appellants that Jackson was the lead singer on the three tracks at issue (the Disputed Tracks).²

Our prior opinion held that: (1) Serova’s claims against Appellants arose from conduct furthering Appellants’ right of free speech “in connection with a public issue” under section 425.16, subdivision (e)(3) and (4); and (2) Serova did not show a probability that her claims under the UCL and the CLRA would succeed because the claims concern noncommercial speech that is not actionable under those statutes.

Upon reconsideration of these holdings in light of *FilmOn*, we conclude that our original opinion was correct. Consequently, we largely adopt that opinion, except that we have revised the discussion of the first step of the anti-SLAPP procedure in part 1 below to take account of the *FilmOn* decision and its application to the circumstances of this case.

FilmOn concerned only the first step of the anti-SLAPP analysis, i.e., whether particular claims arise from conduct that the anti-SLAPP statute protects. Specifically, *FilmOn* considered “whether the commercial nature of a defendant’s speech is relevant in determining whether that speech merits protection” under section 425.16, subdivision (e)(4). (*FilmOn, supra*, 7 Cal.5th at p. 140.) The court concluded that the context of a statement—including “the identity of the speaker, the audience, and the purpose of the speech” —is “relevant, though not dispositive, in analyzing whether the statement was made ‘in

² The Cascio Defendants are not parties to this appeal.

furtherance of free speech ‘in connection with’ a public issue.”
(*Ibid.*, quoting § 425.16, subd. (e)(4).)

As we explained in our prior opinion, the representations that Serova challenges—that Michael Jackson was the lead singer on the three Disputed Tracks—did not simply promote sale of the album, but also stated a position on a disputed issue of public interest. Before the album was released, certain Jackson family members and others publicly claimed that Jackson was not the lead singer on the Disputed Tracks. Appellants disputed this claim. An attorney acting for the Estate released a public statement outlining the steps Appellants had taken to verify the authenticity of the tracks by consulting with experts and persons who were familiar with Jackson’s voice and recordings.

Thus, the identity of the artist on the three Disputed Tracks was a controversial issue of interest to Michael Jackson fans and others who care about his musical legacy. By identifying the singer on the Disputed Tracks as Michael Jackson, Appellants’ challenged statements made a direct claim about the controversy itself. The statements were made publicly to an audience—potential purchasers of the album—that was likely to have an interest in the identity of the singer. And, although Appellants’ ultimate goal was presumably to sell albums by marketing songs sung by Michael Jackson, that goal did not make the controversy over the identity of the artist any less real or important to those who cared about the issue. The challenged statements furthered Appellants’ position on the controversy by articulating a consistent and unqualified belief in the identity of the artist. Appellants’ challenged statements were therefore sufficiently connected to an issue of public interest to warrant anti-SLAPP protection.

Our Supreme Court’s decision in *FilmOn* did not address the second step of the anti-SLAPP analysis, which concerns the merits of a plaintiff’s claims. Nor did it address the criteria for identifying commercial and noncommercial speech under the First Amendment. That issue was the focus of our prior ruling that the speech that Serova challenges was outside the scope of the consumer protection laws on which her claims are based. 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.

BACKGROUND

1. *The Anti-SLAPP Procedure*

Section 425.16 provides for a “special motion to strike” when a plaintiff asserts claims against a person “arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue.” (§ 425.16, subd. (b)(1).) Such claims must be stricken “unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.” (*Ibid.*)

Thus, ruling on an anti-SLAPP motion involves a two-step procedure. First, the moving defendant must show that the challenged claims arise from protected activity. (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 396 (*Baral*); *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056.) Second, if the defendant makes such a showing, the “burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated.” (*Baral*, at p. 396.) Without resolving evidentiary conflicts, the court determines

“whether the plaintiff’s showing, if accepted by the trier of fact, would be sufficient to sustain a favorable judgment.” (*Ibid.*)

Section 425.16, subdivision (e) defines the categories of acts that are in “‘furtherance of a person’s right of petition or free speech.’” Those categories include “any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest,” and “any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.” (§ 425.16, subd. (e)(3) & (4).)

In 2003 the Legislature enacted section 425.17 to curb “a disturbing abuse of Section 425.16 . . . which has undermined the exercise of the constitutional rights of freedom of speech and petition for the redress of grievances, contrary to the purpose and intent of Section 425.16.” (§ 425.17, subd. (a).) Section 425.17 seeks to accomplish that goal by expressly excluding several categories of claims from the scope of section 425.16.

Section 425.17, subdivision (c) establishes such an exclusion for claims concerning some commercial speech. That subdivision provides that section 425.16 does not apply to “any cause of action brought against a person primarily engaged in the business of selling or leasing goods or services” if certain conditions exist, including that: (1) the statement at issue “consists of representations of fact about that person’s or a business competitor’s business operations, goods, or services” that was made to promote commercial transactions or was made “in the course of delivering the person’s goods or services”; and (2) the intended audience is an actual or potential customer or a

person likely to influence a customer. (§ 425.17, subd. (c)(1) & (2).)

Section 425.17 contains certain specifically defined exceptions. One of those exceptions states that the commercial speech provision in section 425.17, subdivision (c) does not apply to “[a]ny action against any person or entity based upon the creation, dissemination, exhibition, advertisement, or other similar promotion of any dramatic, literary, musical, political, or artistic work.” (§ 425.17, subd. (d)(2).)

2. *Serova’s Allegations*³

The album “Michael” was released on or about December 14, 2010, about 18 months after Michael Jackson’s death. Sony released the album in conjunction with the Estate.

The album contained 10 songs. Serova alleges that the three songs on the Disputed Tracks—“Breaking News,” “Monster,” and “Keep Your Head Up” (the Songs)—have been controversial “[s]ince *Michael’s* inception.”

Serova claims that the Cascio Defendants recorded the initial versions of the Disputed Tracks and had “exclusive knowledge” that the lead vocals for the Songs were actually performed by a singer other than Michael Jackson. Serova alleges that Cascio then falsely represented to Appellants that Michael Jackson was the singer.

³ As explained below, the trial court ruled on Appellant’s anti-SLAPP motion based upon the allegations in Serova’s first amended complaint (Complaint) and a stipulation that established certain background facts for purposes of the motion only. Thus, the relevant facts are primarily those alleged in the Complaint.

Prior to “Michael’s” release, various members of Michael Jackson’s family and others familiar with his recordings disputed whether he was the lead singer on the Disputed Tracks. In response to those concerns, Sony and the Estate (through Attorney Howard Weitzman) both publicly issued statements confirming their belief that Jackson was the singer.

In his statement (the Weitzman Statement), Weitzman explained that many persons who were familiar with Jackson’s work had confirmed that he was the lead singer on the Disputed Tracks, including former producers, engineers, performers, and directors who had worked with Jackson. He stated that the Estate and Sony had also retained forensic musicologists who examined the Disputed Tracks and concluded that the lead singer was actually Jackson. He also stated that he had spoken to the singer whom some persons had “wrongfully alleged was a ‘soundalike’ singer that was hired to sing” on the Disputed Tracks, and that the singer had denied any involvement with the project. Weitzman explained that, “given the overwhelming objective evidence resulting from the exhaustive investigations,” Sony decided to include the Disputed Tracks on the album “because they believed, without reservation, that the lead vocal[s] on all of those tracks were sung by Michael Jackson.”

The album cover for “Michael” (Album Cover) included a statement that “‘[t]his album contains 9 previously unreleased vocal tracks performed by Michael Jackson.’”⁴ A video released before the album (the Promotional Video) described “Michael” as “‘a brand new album from the greatest artist of all time.’” While

⁴ One of the tracks on the album had been previously recorded.

appearing on the *Oprah Winfrey* show, Cascio also stated that Jackson performed the lead vocals on the Disputed Tracks.

The Complaint alleges that the lead singer on the Disputed Tracks actually sounds like the “soundalike” singer mentioned in the Weitzman Statement. Serova claims she discovered evidence indicating that the lead singer on the Disputed Tracks was not Michael Jackson. Among other things, she claims that:

(1) Cascio did not produce any “demos, outtakes, alternate takes, and multi-track recordings” when requested; (2) Jackson never mentioned that he had recorded the Songs; (3) the Songs did not appear on a list of ongoing or planned projects found in Michael Jackson’s house after his death; and (4) various persons that the Weitzman Statement said had confirmed that the lead singer on the Disputed Tracks was Jackson in fact had doubts about that conclusion.

Serova also hired an audio expert who prepared a report concluding that Michael Jackson “very likely did not sing” the lead vocals on the Disputed Tracks. The report was peer-reviewed by another expert who concluded that the study’s “methodologies and conclusions were reasonable.”

The Complaint alleges claims against all defendants under the CLRA and UCL, and asserts a fraud claim against the Cascio Defendants only. The Complaint claims that thousands of putative class members purchased “Michael” and lost “money or property” as a result of the alleged misleading representations.

3. *Appellants’ Anti-SLAPP Motion*

Appellants and the Cascio Defendants filed motions to strike under section 425.16. Appellants argued that Serova’s claims arose from protected speech under prong one of the anti-SLAPP procedure. With respect to prong two, Appellants argued

that Serova could not succeed on her claims against them because their challenged statements about the identity of the lead singer on the Disputed Tracks were noncommercial speech as a matter of law and no reasonable consumer could find the statements misleading.

To permit a ruling on the anti-SLAPP motions in advance of discovery, the parties stipulated that, “solely for purposes of this determination on the Motions,” Michael Jackson did not sing the lead vocals on the three Disputed Tracks (the Stipulation). The parties also stipulated to the authenticity of copies of the Weitzman Statement, the Album Cover, and the Promotional Video.

The trial court granted the defendants’ motions with respect to allegations concerning the Weitzman Statement and Cascio’s statement on the *Oprah Winfrey* show, but denied the motions with respect to allegations concerning statements on the Album Cover and in the Promotional Video.

Under prong one of the anti-SLAPP procedure, the trial court ruled that all the statements addressed in the defendants’ motions arose from conduct in furtherance of the defendants’ right of free speech concerning an issue of public interest. The court concluded that the Weitzman Statement was “made in a public forum about a matter of public interest.” The court reasoned that the Weitzman Statement “responded to a matter of public concern, i.e., the authenticity of certain recordings released posthumously and claimed to have been written and recorded by a pop superstar.” Similarly, the court concluded that Cascio’s statement on the *Oprah Winfrey* show addressed “the same controversy.”

In contrast, the trial court concluded that the Album Cover and the Promotional Video were simply promotional materials that “did not speak to the controversy surrounding the performance [or] address or refute” the allegations concerning the Disputed Tracks. The court nevertheless found that statements on the Album Cover and in the Promotional Video arose from protected conduct because “Michael Jackson’s professional standing and accomplishments created legitimate and widespread attention to the release of a new album.”

With respect to prong two, the trial court found that the Weitzman Statement and Cascio’s statements on the *Oprah Winfrey* show were noncommercial speech. The court concluded that those statements were not made to promote or sell the album, but addressed “a controversy regarding the veracity of the claims surrounding the release of the album.”

However, the court concluded that the challenged statements on the Album Cover and in the Promotional Video were advertisements constituting commercial speech. The court rejected the defendants’ argument that this speech was “inextricably intertwined” with the Songs themselves under *Riley v. National Federation of Blind* (1988) 487 U.S. 781, 796 (*Riley*). The court reasoned that “[n]othing in this case prevented Defendants from giving the album a different title and look or from electing not to attest to the authenticity of the recordings on the cover or in a commercial.”

The court also found that, assuming (pursuant to the parties’ Stipulation) that Michael Jackson was not actually the lead singer on the Disputed Tracks, both the Album Cover and the Promotional Video were likely to deceive a reasonable consumer. The court concluded that images of Michael Jackson

and the challenged statements on the Album Cover, along with the lack of any attribution to others, conveyed the message that Jackson was the lead singer on the Disputed Tracks. The court also concluded that a reasonable consumer would believe that Michael Jackson was the “artist” referenced in the statement on the Promotional Video that “Michael” was “‘a brand new album from the greatest artist of all time.’”

DISCUSSION

Appellants challenge the trial court’s rulings that: (1) the Promotional Video and the Album Cover were commercial speech that may be subject to claims under the UCL and CLRA; and (2) the representations in those materials were likely to deceive a reasonable consumer. Serova argues that those rulings were correct, and also asserts as an alternative ground for affirmance that her claims do not “arise from” protected free speech activity under prong one of the anti-SLAPP procedure. (See *Klem v. Access Ins. Co.* (2017) 17 Cal.App.5th 595, 609 [“A prevailing party on an anti-SLAPP motion need not file a cross-appeal to preserve his disagreement with the trial court’s reasoning”].)⁵

We apply a de novo standard of review to the trial court’s rulings on the anti-SLAPP motion. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3.)

⁵ Serova did not appeal from the trial court’s ruling granting the defendants’ anti-SLAPP motion with respect to the Weitzman e-mail and Cascio’s statement during the *Oprah Winfrey* interview. Thus, the only claims at issue in this appeal concern the representations in the Promotional Video and the Album Cover (the Challenged Statements).

1. Serova’s Claims Concerning the Promotional Video and the Album Cover Arise from Appellants’ Right of Free Speech Under the United States and California Constitutions

Appellants claim the trial court correctly concluded that Serova’s claims arose from protected speech concerning an issue of public interest, but also suggest that we need not reach that issue. Appellants argue that the Legislature’s decision to create an exception for the marketing of musical works under section 425.17, subdivision (d)(2) shows a legislative intent that such speech “is eligible for anti-SLAPP protection,” which is “essentially dispositive of step one of the anti-SLAPP analysis.” We first consider that argument.

a. *The significance of the Legislature’s exclusion of music advertisements from the scope of section 425.17*

As mentioned, section 425.17, subdivision (d)(2) provides that the “creation, dissemination, exhibition, advertisement, or other similar promotion of any dramatic, literary, musical, political, or artistic work” is outside the scope of the commercial speech provision in section 425.17, subdivision (c). The exception in section 425.17, subdivision (d)(2) certainly means that the promotion of a musical work is not included within the categories of conduct that the Legislature specifically stated were not subject to anti-SLAPP relief. However, the Legislature’s decision to *exclude* the advertising of musical works from section 425.17 does not mean that it also intended to afford anti-SLAPP protection to such conduct in every circumstance, regardless of the requirements of section 425.16.

Such a conclusion would be inconsistent with the Legislature's stated intent. The Legislature specifically stated that it enacted section 425.17 to curb *abuses* of the anti-SLAPP law that were "contrary to the purpose and intent of Section 425.16." (§ 425.17, subd. (a).) That statement suggests that our Legislature was concerned that the courts were granting too broad a reading to what constitutes "protected" conduct under section 425.16, subdivision (e). Appellants' argument, if accepted, would commit that very same sin because it would require courts to treat the types of speech delineated in section 425.17, subdivision (d)(2) as subject to the anti-SLAPP law without any showing that such speech meets the definition of "protected" conduct under section 425.16, subdivision (e).

The interpretation that Appellants suggest would also be inconsistent with the definitions of protected conduct under section 425.16. Section 425.16, subdivision (e)(3) and (4) each require that protected conduct must have some connection to a "public issue" or an "issue of public interest." Appellants' interpretation of section 425.17, subdivision (d)(2) ignores that requirement. For example, an action challenging an advertisement falsely claiming that a musical album contains a particular song would be an action "based upon the . . . advertisement" of a musical work. (§ 425.17, subd. (d)(2).) Appellants do not provide any reason to believe that the Legislature intended to provide automatic anti-SLAPP protection to such a mundane commercial misrepresentation simply because the statement was made in connection with the advertisement of a musical work.

Ignoring the public interest requirement in defining the conduct that is protected under section 425.16, subdivision (e)(3)

and (4) would also be directly contrary to our Supreme Court’s opinion in *FilmOn*. As discussed further below, the court in *FilmOn* confirmed the need for a party moving for anti-SLAPP relief to show a relationship between the challenged speech “and the public conversation about some matter of public interest.” (*FilmOn*, *supra*, 7 Cal.5th at pp. 149–150.)⁶

The court in *Dyer v. Childress* (2007) 147 Cal.App.4th 1273 rejected an argument similar to the one that Appellants make here. After reviewing the legislative history concerning section

⁶ The court in *FilmOn* addressed the scope of section 425.17, subdivision (c) in rejecting the argument that, in identifying protected conduct, the commercial context of a challenged statement was relevant only under that section. (*FilmOn*, *supra*, 7 Cal.5th at pp. 146–149.) Although the court did not consider the significance of the exclusion in section 425.17, subdivision (d)(2), its analysis is consistent with our understanding of that subdivision. The court explained that not all commercial speech is included within the anti-SLAPP exemption that section 425.17, subdivision (c) defines. For commercial speech not included in that subdivision, “[l]ike all other statements that do not fall within the scope of an exemption, such statements are *eligible* for anti-SLAPP protection under section 425.16.” (*FilmOn*, at p. 148, italics added.) The court did not suggest that commercial statements not included in section 425.17 are *automatically* entitled to anti-SLAPP protection under section 425.16. Indeed, the court clearly held that the context of such statements must be considered to determine if they are sufficiently connected to an issue of public interest to warrant protection under section 425.16, subdivision (e)(4). (*FilmOn*, at p. 148.) Similarly, conduct excluded from section 425.17, subdivision (c) under section 425.17, subdivision (d)(2) is not automatically entitled to anti-SLAPP protection without any consideration of context.

425.17, subdivision (d)(2), the court rejected the defendant’s claim that “by expressly exempting motion pictures from the anti-SLAPP limitations imposed in section 425.17, subdivisions (b) and (c), the Legislature acknowledged that motion pictures are more deserving of protection than other forms of expression not enumerated.” (*Dyer*, at pp. 1283–1284.) The court concluded that “[t]he exclusion of motion pictures from the exemptions to the limitations set forth in section 425.17, subdivisions (b) and (c) means only that anti-SLAPP motions remain available to defendants who are creators and distributors of motion pictures [¶] The exception of section 425.17, subdivision (d)(2) *does not eliminate the need to show significant public interest in the conduct at the heart of the plaintiff’s complaint* or expand the scope of the anti-SLAPP law to provide protection to motion picture defendants in every context.” (*Dyer*, at p. 1284.)

Similarly, the exception of section 425.17, subdivision (d)(2) does not provide anti-SLAPP protection to sellers of music in every context. At most, the Legislature’s exclusion of the promotion of “dramatic, literary, musical, political, or artistic work” from the scope of commercial activity covered by section 425.17, subdivision (c) means that courts should be particularly sensitive to the constitutional free speech aspects of such work in analyzing whether particular statements or conduct are protected under section 425.16.⁷

⁷ For example, as discussed below, in this case the identity of the singer on the Disputed Tracks greatly affects the artistic significance of the music on those tracks. The music is of course constitutionally protected expression. In analyzing context under section 425.16, it is appropriate to consider the relationship

We therefore consider whether Appellants' Challenged Statements were made "in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e).) In so doing, we pay particular attention to the context of those statements as instructed by the court in *FilmOn*.

b. *The challenged promotional statements in this case*

In *FilmOn* our Supreme Court held that, "within the framework of section 425.16, subdivision (e)(4), a court must consider the context as well [as] the content of a statement in determining whether that statement furthers the exercise of constitutional speech rights in connection with a matter of public interest." (*FilmOn, supra*, 7 Cal.5th at p. 149.)⁸ That case concerned alleged disparaging statements about the Web-based entertainment programming distributed by the plaintiff, FilmOn.com Inc. (FilmOn.com). The defendant, DoubleVerify Inc. (DoubleVerify), provided confidential reports to its paying clients classifying FilmOn.com Web sites under categories of sites that engage in copyright infringement and contain "adult content." (*Id.* at pp. 140–142.) The court held that these reports

between the Challenged Statements promoting "Michael" and the expressive content of the album itself.

⁸ *FilmOn* concerned the definition of protected conduct under section 425.16, subdivision (e)(4). (*FilmOn, supra*, 7 Cal.5th at pp. 139–140.) However, the requirement that a statement be "in connection with an issue of public interest" is also present in subdivision (e)(3). (§ 425.16, subd. (e)(3).) The court's analysis of the importance of context in determining whether such a connection exists therefore appears equally applicable to section 425.16, subdivision (e)(3).

were not “‘in connection with’” an issue of public interest. (*Id.* at p. 154.) In doing so, the court relied on the context of the reports, which it characterized as “two well-funded for-profit entities engaged in a private dispute over one’s characterization—in a confidential report—of the other’s business practices.” (*Ibid.*)

Before reaching this conclusion, the court explained the appropriate process for determining whether challenged speech has a sufficient connection to a public issue to warrant anti-SLAPP protection. “First, we ask what ‘public issue or . . . issue of public interest’ the speech in question implicates—a question we answer by looking to the content of the speech. (§ 425.16, subd. (e)(4).) Second, we ask what functional relationship exists between the speech and the public conversation about some matter of public interest. It is at the latter stage that context proves useful.” (*FilmOn, supra*, 7 Cal.5th at pp. 149–150.) Context includes the identity of the speaker, the audience, and the purpose of the speech. (*Id.* at pp. 142–143, 145.)

In analyzing the relationship between the challenged speech and the issue of public interest, it is “‘not enough that the statement refer to a subject of widespread public interest; the statement must in some manner itself contribute to the public debate.” (*FilmOn, supra*, 7 Cal.5th at p. 150.) A defendant has contributed to the public debate if he or she “participated in, or furthered, the discourse that makes an issue one of public interest.” (*Id.* at p. 151.)

i. *The issue of public interest*

FilmOn did not announce any change in the approach that courts should take to identifying issues of public interest. On the contrary, the court said that the Courts of Appeal have “ably distilled the characteristics of a ‘public issue or an issue of public

interest’ ” for purposes of section 425.16, subdivision (e)(4). (*FilmOn, supra*, 7 Cal.5th at p. 149.) In particular, the court cited with approval the definition of an issue of public interest in *Rivero v. American Federation of State, County, and Municipal Employees, AFL-CIO* (2003) 105 Cal.App.4th 913, 919–924 (*Rivero*), and in *Weinberg v. Feisel* (2003) 110 Cal.App.4th 1122, 1132–1133 (*Weinberg*).

In *Rivero*, the court surveyed a number of cases and identified three common elements in statements that concerned an issue of public interest. The statements concerned either: (1) a person or entity “in the public eye”; (2) conduct that “could directly affect a large number of people beyond the direct participants”; or (3) a “topic of widespread, public interest.” (*Rivero, supra*, 105 Cal.App.4th at p. 924.) In *Weinberg*, the court offered additional analysis consistent with the categories in *Rivero*. Among other things, the court explained that public interest “does not equate with mere curiosity” and that a matter of public interest should be of concern to a substantial number of people rather than just to a “relatively small, specific audience.” (*Weinberg, supra*, 110 Cal.App.4th at p. 1132.) In addition, a “person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people.” (*Id.* at pp. 1132–1133.)

The issue of public interest here is whether Michael Jackson was in fact the singer on the three Disputed Tracks. It is beyond dispute that Michael Jackson was a famous entertainer who was very much “in the public eye.” (*Rivero, supra*, 105 Cal.App.4th at p. 924.) As the court stated in *Stewart v. Rolling Stone LLC* (2010) 181 Cal.App.4th 664 (*Stewart*), “ “there is a public interest which attaches to people who, by their

accomplishments, mode of living, professional standing or calling, create a legitimate and widespread attention to their activities.” ’ ’ (*Id.* at pp. 677–678, quoting *Eastwood v. Superior Court* (1983) 149 Cal.App.3d 409, 422; see *No Doubt v. Activision Publishing, Inc.* (2011) 192 Cal.App.4th 1018, 1027 [video game distributor’s use of band members’ likenesses in a video game was a “matter of public interest because of the widespread fame” of the band]; *Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, 1347 [Marlon Brando’s decisions concerning the distribution of his assets was an issue of public interest].)

Moreover, the question whether Michael Jackson was the singer on the Disputed Tracks did not simply concern some trivial fact about his life, but related to his artistic legacy. Facts concerning the creation of works of art and entertainment can themselves be issues of public interest. For example, in *Kronemyer v. Internet Movie Database Inc.* (2007) 150 Cal.App.4th 941, the plaintiff challenged the omission of his name from the credits listed for the movie *My Big Fat Greek Wedding* on a widely visited Web site. (*Id.* at p. 944.) The court concluded that the movie “was a topic of widespread public interest,” and the Web site was a public forum. (*Id.* at pp. 949–950.) Accordingly, the plaintiff’s action challenging the listings was “within the ambit of section 425.16, subdivision (e)(3) and (4).” (*Id.* at p. 950; see *Tamkin v. CBS Broadcasting, Inc.* (2011) 193 Cal.App.4th 133, 143–144 [there was a “public interest in the writing, casting and broadcasting” of a television episode for purposes of the anti-SLAPP statute].)

The controversy over the identity of the singer on the Disputed Tracks was also of widespread interest among Michael Jackson fans. (See *Rivero, supra*, 105 Cal.App.4th at p. 924;

Weinberg, supra, 110 Cal.App.4th at p. 1132.) The Complaint alleges that, “[b]efore *Michael’s* release, numerous people familiar with Michael Jackson’s voice disputed the authenticity” of the Disputed Tracks. As discussed above, Sony and the Estate released public statements in response, including the detailed Weitzman Statement. Serova further alleges that, “[s]ince *Michael’s* inception, controversy has surrounded three of the album’s ten songs.”

This public controversy distinguishes this case from cases that Serova cites concerning allegedly misleading descriptions of a particular commercial product or service. (See *Consumer Justice Center v. Trimedica International, Inc.* (2003) 107 Cal.App.4th 595, 599, 601 [claims about a pill for breast enlargement]; *Nagel v. Twin Laboratories, Inc.* (2003) 109 Cal.App.4th 39, 43–46 [list of ingredients on labels for nutritional and dietary supplements]; *Scott v. Metabolife Internat., Inc.* (2004) 115 Cal.App.4th 404, 423 [claims about the safety and efficacy of a particular weight loss product]; *L.A. Taxi Cooperative, Inc. v. The Independent Taxi Owners Assn. of Los Angeles* (2015) 239 Cal.App.4th 918, 921, 927–928 [alleged misleading advertisements concerning contact information for companies providing taxi services]; *Jewett v. Capital One Bank* (2003) 113 Cal.App.4th 805, 814–816 [alleged false statements in credit card solicitations].)

The representations at issue here concerned the body of work of a well-known artist and an album containing his songs that generated significant public attention. We therefore conclude that the issue was one of “public interest” for purposes of section 425.16, subdivision (e)(3) and (4).

ii. ***The relationship between the Challenged Statements and the public debate***

As discussed above, the court in *FilmOn* explained that courts considering whether challenged speech concerned an issue of public interest should analyze not only the nature of the issue but also the *connection* between the issue and the speech. In the latter analysis, the context of the speech—the speaker, audience and purpose—are important.

We discussed the context of the Challenged Statements at some length in our prior opinion in analyzing whether those statements can be categorized as actionable commercial speech for purposes of the second step of the anti-SLAPP procedure. (*Serova I, supra*, 26 Cal.App.5th at pp. 775–781.) Much of that analysis is also relevant to the connection between the statements that Serova challenges and the issue of public interest for purposes of the first step in the anti-SLAPP analysis.

As we previously explained (and reiterate below), the speaker and the audience for the Challenged Statements suggest a commercial purpose.⁹ Appellants are sellers of the album, and the audience for the statements was potential purchasers.

However, the court in *FilmOn* explained that “[w]hether speech has a commercial or promotional aspect is not dispositive’ of whether it is made in connection with an issue of public interest.” (*FilmOn, supra*, 7 Cal.5th at p. 154, quoting *Industrial Waste & Debris Service, Inc. v. Murphy* (2016) 4 Cal.App.5th

⁹ However, we also hold that the *content* of the statements shows that they were not merely commercial speech for purposes of determining whether Serova has shown a probability of success on her consumer protection claims under the second step of the anti-SLAPP analysis.

1135, 1150.) The court stated unequivocally that “[s]ome commercially oriented speech will, in fact, merit anti-SLAPP protection.” (*FilmOn*, at p. 153.) The proper analysis focuses on the same “contextual cues” that show a statement “to be ‘commercial’ in nature—whether it was private or public, to whom it was said, and for what purpose.” (*Id.* at p. 148.) The ultimate question is whether the “wedding of content and context” shows that the statement “contributes to or furthers the public conversation on an issue of public interest.” (*Id.* at p. 154.)

Analysis of the content and context of the Challenged Statements here shows that they merit anti-SLAPP protection.

(a) Content

The content of the Challenged Statements related directly to the issue of public interest. According to Serova’s Complaint, the statements identified Michael Jackson as the singer on the Disputed Tracks, which was the precise focus of the public controversy. Thus, the statements at issue here were not just tangentially connected to the issue of public interest through a creative generalization of their subject matter (what the court in *FilmOn* characterized as the “‘synecdoche theory’ of public interest”). (*FilmOn*, *supra*, 7 Cal.5th at p. 152; see *Commonwealth Energy Corp. v. Investor Data Exchange, Inc.* (2003) 110 Cal.App.4th 26, 34 [“The part is not synonymous with the whole. Selling an herbal breast enlargement product is not a disquisition on alternative medicine”].)

In her supplemental brief, Serova disputes that there was *any* connection between the Challenged Statements and the issue of public interest, claiming that the statements did not refer to the identity of the singer on the Disputed Tracks at all. She argues that the Challenged Statements “do not reference the

three controversial songs and do not suggest to the audience that these three songs are somehow special.”

Serova’s argument ignores her own allegations, which she may not do. Her complaint alleges that the Challenged Statements are among those that “expressly and impliedly represented that the lead vocals on all of the tracks of the album were performed by Michael Jackson.” Indeed, absent such an allegation of deceptive conduct, Serova would not have any basis for a consumer protection claim concerning the Challenged Statements.

The question in the first step of the anti-SLAPP analysis is whether the *claims* at issue arise from protected conduct. (§ 425.16, subd. (b)(1); *Baral, supra*, 1 Cal.5th at p. 396.) A plaintiff’s complaint of course defines his or her claims, and can itself show that the claims arise from protected conduct. (See *Bel Air Internet, LLC v. Morales* (2018) 20 Cal.App.5th 924, 936–937.) Serova cannot contradict her own allegations in arguing that the Challenged Statements did not identify the singer on the Disputed Tracks as Michael Jackson. (*Ibid.*)

It is true that the statements on the Album Cover and the Promotional Video did not actually refer to the public debate about the identity of the singer. And, unlike the Weitzman Statement, they did not offer any argument in support of the conclusion that Michael Jackson was the singer. They simply asserted the conclusion as fact. But they certainly showed Appellants’ acceptance of that fact, which communicated Appellants’ position on the issue. As Serova acknowledges, a statement “need not necessarily reference the debate to participate in it.” Whether couched as argument or fact, the

Challenged Statements expressed a position on the question whether Michael Jackson was the singer on the Disputed Tracks.

Serova also argues that “nothing about Jackson’s persona, life or career is communicated by the advertisements” at issue. This assumes that the content of Jackson’s body of work is irrelevant to those interested in his life and career. The assumption is unreasonable on its face, and belied in any event by Serova’s own allegations, which acknowledge the public controversy over the identity of the singer.

(b) Context

As discussed above, the commercial purpose of the Challenged Statements—to sell albums—does not itself determine whether they contributed to the public debate. It certainly reflects that Appellants had a commercial interest in the debate, but it does not divorce the statements from that debate. Appellants had the same commercial interest in defending their claims about the identity of the singer in the Weitzman Statement, which Serova does not dispute was protected speech. The purpose of the Challenged Statements is essentially a neutral consideration in determining whether the statements were protected conduct.

On the other hand, the identity of the speaker and the audience both support the conclusion that the Challenged Statements contributed to the “public conversation” on an issue of public interest. (*FilmOn*, *supra*, 7 Cal.5th at p. 154.) Unlike the speech at issue in *FilmOn*, the Challenged Statements here were *public*. The Album Cover and the Promotional Video were available to those who were interested. And the audience for those statements—persons who might buy the album—was also an audience that was highly likely to be interested in the identity

of the singer on the Disputed Tracks. The relevant point here is not, as Serova argues, whether the Challenged Statements reached *everyone* who was interested in the controversy over the identity of the singer. The point is that Appellants made the statements publicly to a sizeable audience that was likely to be interested in the issue.

There is another important fact concerning the identity of the speakers here. Appellants were not sellers of a typical consumer product; they were sellers of a product (music) that is itself subject to First Amendment protection. In explaining that the identity of the speaker matters in analyzing context, the court in *FilmOn* cited as an example the identity of the defendants in *San Diegans for Open Government v. San Diego State University Research Foundation* (2017) 13 Cal.App.5th 76 (*San Diegans*). (*FilmOn*, *supra*, 7 Cal.5th at p. 145.) In *San Diegans*, the plaintiff claimed that contracts for collaborative news reporting between a defendant, inewsource, and a public radio and television station, KPBS, violated prohibitions on self-dealing and gifts of public funds. (*San Diegans*, at p. 103.) In holding that the claims arose from protected speech activity, the court observed that “the fact these contracts are for gathering and delivering news stories and not some other purpose matters.” (*Id.* at p. 105.) The court explained that inewsource “is not a construction company. It is in the news reporting business, and the contracts [the plaintiff] challenges shape the way inewsource and KPBS gather, produce, and report the news.” (*Id.* at p. 106.)

Similarly, the challenged conduct in this case helped shape the experience of the music that consumers purchased. There is no dispute that the identity of the singer on the Disputed Tracks affected the musical experience for many listeners; indeed, the

basis for Serova’s Complaint is that whether the singer was Michael Jackson mattered to consumers.

Moreover, in *FilmOn*, the court instructed that courts should undertake the analysis of context mindful of the anti-SLAPP statute’s purpose to “encourage continued participation in matters of public significance.” (*FilmOn*, *supra*, 7 Cal.5th at p. 154, quoting § 425.16, subd. (a).) Giving too much weight to the commercial context of the Challenged Statements here risks unduly curtailing protected expression. Without anti-SLAPP protection for their statements on the Album Cover and Promotional Video, Appellants might simply have decided not to sell the Disputed Tracks at all. Others in their situation might similarly decide not to include songs or other artistic works with disputed provenance in a collection offered for sale rather than either (1) risk the expense of consumer litigation, or (2) dilute their marketing by acknowledging doubts about the provenance of the work that they do not share. That result would discourage, rather than encourage, protected speech.

We therefore conclude that, consistent with the analysis and holding in *FilmOn*, Appellants’ Challenged Statements on the Album Cover and the Promotional Video were protected speech under section 425.16, subdivision (e)(3) and (4).

2. The Challenged Statements Were Noncommercial Speech Outside the Scope of Serova’s Consumer Protection Claims

Appellants argue that Serova cannot show a probability of success on her UCL and CLRA claims under prong two of the anti-SLAPP analysis because those statutes apply only to commercial speech. They claim that their Challenged Statements about the lead singer on the Disputed Tracks were

not commercial speech, or, if they were, that those statements were inextricably intertwined with the protected contents of the Songs themselves.

Appellants argue that the consumer protection claims that Serova asserts against them apply only to commercial speech. A number of cases support that assertion. (See *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 952 (*Kasky*) [identifying criteria for determining whether speech may constitutionally be regulated as commercial speech under California’s false advertising laws]; *Rezec v. Sony Pictures Entertainment, Inc.* (2004) 116 Cal.App.4th 135, 140 (*Rezec*) [California’s consumer protection laws, like the unfair competition law, govern only *commercial* speech]; *Keimer v. Buena Vista Books, Inc.* (1999) 75 Cal.App.4th 1220, 1231 (*Keimer*) [Bus. & Prof. Code, §§ 17200 et seq. and 17500 et seq. do not “seek to restrict noncommercial speech in any manner”]; *O’Connor v. Superior Court* (1986) 177 Cal.App.3d 1013, 1019.) Serova does not dispute this. Moreover, she did not argue below and does not argue on appeal that Appellants’ Challenged Statements are actionable even if they are noncommercial speech. Thus, if Appellant’s Challenged Statements are noncommercial speech, Serova’s claims against them must be stricken.

a. *Identifying commercial speech*

Restrictions on purely commercial speech are subject to a lesser level of scrutiny than are “‘other constitutionally safeguarded forms of expression.’” (*Kasky, supra*, 27 Cal.4th at p. 952, quoting *Bolger v. Youngs Drug Products Corp.* (1983) 463 U.S. 60, 64–65 (*Bolger*)). Moreover, “commercial speech that is false or misleading is not entitled to First Amendment protection

and ‘may be prohibited entirely.’” (*Kasky*, at p. 953, quoting *In re R. M. J.* (1982) 455 U.S. 191, 203.)

The United States Supreme Court first held that commercial speech is entitled to some constitutional protection in *Bigelow v. Virginia* (1975) 421 U.S. 809. In *Bigelow*, the court rejected the proposition that “advertising, as such, was entitled to no First Amendment protection.” (*Id.* at p. 825.) Following that decision, courts have had to grapple with the distinction between expressive activities that are merely commercial in nature and those that are subject to more stringent First Amendment protection.

In *Bolger*, the court held that materials distributed by a manufacturer of contraceptives, including both promotional flyers and informational pamphlets about contraceptives, were commercial speech. (*Bolger, supra*, 463 U.S. at pp. 62, 66–68.) Most of the mailings at issue fell “within the core notion of commercial speech—‘speech which does “no more than propose a commercial transaction.” ’” (*Id.* at p. 66, quoting *Va. Pharmacy Bd. v. Va. Consumer Council* (1976) 425 U.S. 748, 762 (*Virginia Pharmacy*)). However, the informational pamphlets required further analysis. The court identified three factors indicating that the pamphlets were commercial speech: (1) the pamphlets were “conceded to be advertisements”; (2) they referred to a specific product; and (3) the defendant had an economic motivation for mailing them. (*Bolger*, at pp. 66–67.) The court stated that none of these factors alone was sufficient to show that the speech was commercial, but “[t]he combination of *all* these characteristics . . . provides strong support” for the decision that the informational pamphlets were commercial speech. (*Id.* at p. 67.)

In *Kasky, supra*, 27 Cal.4th 939, our Supreme Court considered the factors the court identified in *Bolger, supra*, 463 U.S. 60, along with other relevant United States Supreme Court precedent and crafted a “limited-purpose” test for identifying commercial speech. The test applies when, as here, “*a court must decide whether particular speech may be subjected to laws aimed at preventing false advertising or other forms of commercial deception.*” (*Kasky*, at p. 960.) The court directed that a court faced with such a decision should consider “three elements: the speaker, the intended audience, and the content of the message.” (*Ibid.*)

The court in *Kasky* applied those factors to the allegations that the defendant, Nike, made false statements about labor practices in its own business operations. (*Kasky, supra*, 27 Cal.4th at pp. 969–970.) The court held that these alleged statements constituted commercial speech that was actionable under California’s consumer protection laws. (*Ibid.*)

b. Appellants’ Challenged Statements

Applying the three-factor test for identifying commercial speech described in *Kasky*, we conclude that Appellants’ challenged representations were noncommercial speech.

As discussed above, the first two factors—the speaker and the intended audience—both suggest a commercial purpose. Appellants were “engaged in commerce” in making representations on the Album Cover and on the Promotional Video to sell the album. (*Kasky, supra*, 27 Cal.4th at p. 963.) And the audience for those representations was potential purchasers of the album. (*Id.* at p. 964.)

However, the third factor—the *content* of the challenged speech—shows that the speech at issue here is critically different

from the type of speech that may be regulated as purely commercial speech under *Kasky*. That is so for two reasons. First, Appellants' Challenged Statements concerned a publicly disputed issue about which they had no personal knowledge. Second, the statements were directly connected to music that itself enjoyed full protection under the First Amendment.

i. *Personal knowledge*

The court in *Kasky* explained that, “at least in relation to regulations aimed at protecting consumers from false and misleading promotional practices, commercial speech must consist of factual representations about the business operations, products, or services of the speaker (or the individual or company on whose behalf the speaker is speaking), made for the purpose of promoting sales of, or other commercial transactions in, the speaker’s products or services.” (*Kasky, supra*, 27 Cal.4th at p. 962.) This requirement relates directly to the reasons for denying First Amendment protection to false or misleading commercial speech. As the court explained, the United States Supreme Court “has stated that false or misleading commercial speech may be prohibited because the truth of commercial speech is ‘more easily verifiable by its disseminator’ and because commercial speech, being motivated by the desire for economic profit, is less likely than noncommercial speech to be chilled by proper regulation.” (*Ibid.*, quoting *Virginia Pharmacy, supra*, 425 U.S. at p. 772, fn. 24.)

These factors were important for the court’s ruling. The court in *Kasky* ascribed great significance to the fact that, “[i]n describing its own labor policies, and the practices and working conditions in factories where its products are made, Nike was making factual representations about *its own business*

operations.” (*Kasky, supra*, 27 Cal.4th at p. 963, italics added.) The court concluded that “Nike was in a position to readily verify the truth of any factual assertions it made on these topics,” and that commercial regulation was “unlikely to deter Nike from speaking truthfully or at all about the conditions in its factories.” (*Ibid.*)

Here, Appellants’ representations about the identity of the lead singer on the Disputed Tracks did not concern their own business operations or a fact of which they had personal knowledge. Serova alleges that the Cascio Defendants, not Appellants, “jointly created, produced, and recorded the initial versions” of the Disputed Tracks. She claims that the “lead vocals on these songs were performed by another singer under the direction, and with the knowledge, cooperation, participation, and substantial assistance of the Cascio Defendants.” And she further alleges that the Cascio Defendants had “*exclusive knowledge* of the fact that Jackson did not perform the songs.” (Italics added.)¹⁰

As discussed above, Appellants’ Challenged Statements in the Promotional Video and on the Album Cover concerned an issue of public interest and debate—whether the three Songs on the Disputed Tracks should be included in Michael Jackson’s body of work. Appellants did not record the Songs and, according

¹⁰ As mentioned above, the parties stipulated below for purposes of the anti-SLAPP motions that Michael Jackson did not sing the lead vocals on the three Disputed Tracks. Accordingly, for purposes of their appeal, Appellants state that they accept “that Jackson did not sing the lead vocals” on the Disputed Tracks. However, Appellants did not stipulate that they *knew* the identity of the singer.

to Serova’s allegations, were themselves deceived about the identity of the singer. Appellants’ statements therefore lacked the critical element of personal knowledge under the *Kasky* standard.

As the trial court correctly concluded, Appellants’ statements directly addressing the public controversy about the identity of the singer—including the Weitzman Statement—were noncommercial. The Challenged Statements on the Album Cover and the Promotional Video also staked out a position in that controversy by identifying the singer as Michael Jackson. The fact that those statements were made in the context of promoting the album does not change their constitutional significance.

Economic motivation is only one of the factors, insufficient in itself, that may indicate that speech is commercial. (*Bolger, supra*, 463 U.S. at p. 67.) As our Supreme Court explained in *Kasky*, whether speech is commercial or noncommercial should take account of the *reasons* for affording commercial speech less constitutional protection. (*Kasky, supra*, 27 Cal.4th at pp. 958, 965.) The court in *Kasky* recognized that the speech at issue in that case—Nike’s statements about labor practices in the factories that manufactured its products—addressed an issue of public interest. The reason that Nike’s speech could be subject to regulation under the state’s unfair competition and false advertising laws was that it concerned facts about Nike’s own business operations, which were “ ‘more easily verifiable’ ” and “ ‘less likely to be chilled by proper regulation’ ” than other speech about the publicly debated issue of international labor practices. (*Id.* at pp. 965, 967, quoting *Virginia Pharmacy, supra*, 425 U.S. at p. 772, fn. 24.) The court cautioned that it did not purport to decide whether speech should be considered

commercial if all of the factors that the court identified—including the element of personal knowledge about one’s own business operations—were not present. (*Kasky*, at p. 964.)¹¹

The absence of the element of personal knowledge is highly significant here. Because Appellants lacked actual knowledge of the identity of the lead singer on the Disputed Tracks, they could only draw a conclusion about that issue from their own research and the available evidence. Under these circumstances, Appellant’s representations about the identity of the singer amounted to a statement of opinion rather than fact.¹² (Cf.

¹¹ For example, the court might well have reached a different conclusion in *Kasky* if the statements at issue concerned the labor practices of an independent commercial supplier who simply sold products to Nike for resale. The court specifically noted that Nike had entered into a memorandum of understanding assuming responsibility for its subcontractors’ compliance with local labor laws. (*Kasky, supra*, 27 Cal.4th at p. 947.)

¹² In her petition for rehearing following our prior opinion, Serova argued that Appellants’ Challenged Statements on the Album Cover and in the Promotional Video were statements of fact, not opinion, because consumers would have understood them to be factual assertions about the identity of the lead singer of the songs in the album. This argument misunderstands the issue. The question here is not whether Appellants have a defense to Serova’s claims because their Challenged Statements were truthful assertions of opinion rather than alleged false statements of fact. In that context, focus on the listener’s understanding is appropriate. (See, e.g., *Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 260–261 [applying a “‘totality of the circumstances’” test in a libel action to

Bernardo v. Planned Parenthood Federation of America (2004) 115 Cal.App.4th 322, 348 [statements of opinion on Planned Parenthood’s Web site concerning scientific research about abortion and breast cancer were not commercial speech].)

The lack of personal knowledge here also means that Appellants’ Challenged Statements do not fit the definition of speech that is “less likely to be chilled by proper regulation.” (*Kasky, supra*, 27 Cal.4th at p. 965, quoting *Virginia Pharmacy, supra*, 425 U.S. at p. 772, fn. 24.) The “regulation” at issue here is the UCL and the CLRA. Serova could obtain relief under these consumer protection statutes without proof of intentional or willful conduct. (See *Kasky*, at pp. 980–981 (dis. opn. of Brown, J.); *Podolsky v. First Healthcare Corp.* (1996) 50 Cal.App.4th 632, 647 [violation of the UCL is a “strict liability offense”].)¹³ Thus, to avoid possible liability for a mistaken

determine whether a statement was one of fact or opinion].) Rather, the question here is whether Appellants’ challenged speech was commercial. Under the court’s analysis in *Kasky*, the *speaker’s* knowledge about the content of the speech is the important feature in answering that question. Nike’s challenged speech in that case concerned its own business operations, which were within its personal knowledge. (*Kasky, supra*, 27 Cal.4th at p. 963.) That is not the case here, as Appellants were not involved in the initial recordings of the Disputed Tracks. From Appellants’ perspective, their Challenged Statements about the identity of the lead singer were therefore necessarily opinion.

¹³ The CLRA does provide for a good faith defense to an action for damages, but the defense requires proof of “appropriate correction, repair or replacement or other remedy of the goods and services.” (See Civ. Code, §§ 1782, subds. (b) & (c), 1784.) In

judgment about the lead singer on the Disputed Tracks, Appellants would have needed to either: (1) provide disclaimers about the singer's identity in its marketing materials; or (2) omit the Disputed Tracks from the album.¹⁴

The chilling effect of the second option is obvious. But the first option also has First Amendment implications. The United States Supreme Court has emphasized the potentially problematic nature of regulations that compel speech, even in a commercial context. In *National Institute of Family & Life Advocates v. Becerra* (2018) ___ U.S. ___ [201 L.Ed.2d 835] (*Life Advocates*), the court held that a California law requiring notices in health care clinics concerning available health care services, including abortion, likely violated the First Amendment. The court declined to recognize an exception to strict scrutiny review under the First Amendment for "professional speech," noting that the court has permitted compelled disclosures only in the context of professionals' "commercial advertising" concerning "purely factual and uncontroversial information about the terms under

contrast to the consumer claims asserted against Appellants, Serova's fraud claim against the Cascio Defendants of course does include a scienter element. That claim is still pending in the trial court.

¹⁴ The record illustrates this dilemma. During oral argument, the trial court suggested that Appellants could have avoided legal challenge by leaving the Songs at issue off the album entirely. The trial court's written ruling also observes that Appellants could have given the album "a different title and look" or elected "not to attest to the authenticity of the recordings on the cover or in a commercial."

which . . . services will be available.’ ” (201 L.Ed.2d at p. 848.) By compelling a particular disclosure, the law at issue amounted to an impermissible “content-based regulation of speech.” (201 L.Ed.2d at p. 846.)¹⁵

By compelling disclosure of the controversy over the Disputed Tracks to avoid liability, the UCL and CLRA would, in effect, require Appellants to present views in their marketing materials with which they do not agree.¹⁶ The possibility that

¹⁵ That the court’s reasoning in *Life Advocates* has implications beyond just professional disclosures is shown by Justice Breyer’s dissent, which cautions that “the majority’s view, if taken literally, could radically change prior law, perhaps placing much securities law or consumer protection law at constitutional risk, depending on how broadly its exceptions are interpreted.” (*Life Advocates, supra*, 201 L.Ed.2d at p. 857 (dis. opn. of Breyer, J.)) The majority countered by stating that it does not “question the legality of . . . purely *factual and uncontroversial* disclosures about commercial products.” (201 L.Ed.2d at p. 852, italics added.) Here, any compelled disclosure would not be “uncontroversial”; Serova herself alleges that “controversy has surrounded” the three Disputed Tracks. Nor would it be “purely factual” from Appellants’ perspective, as they had no personal knowledge of the facts.

¹⁶ In her supplemental brief following transfer from the Supreme Court, Serova suggests another alternative. She argues that Appellants could have simply disclosed their “lack of certainty” about the identity of the singer, for example by stating that the “lead vocals are *believed* to be by Michael Jackson.’ ” This alternative still has the effect of compelling speech that is not “purely factual and uncontroversial.” (*Life Advocates, supra*, 201 L.Ed.2d at p. 852.) Such a statement implies the existence of real controversy or doubt about the identity of the singer even

applying these unfair competition and consumer protection laws to Appellants' speech would have the effect of chilling the content of that speech—whether by preventing the sale of particular musical works or by regulating the expression of a point of view on a public controversy about those works—is a further reason to conclude that the speech at issue was noncommercial.

ii. *The relationship between the Challenged Statements and the art that they promoted*

Appellants' statements in the Promotional Video and on the Album Cover described and promoted the album, of which the Disputed Tracks were a part. The music on the album itself is entitled to full protection under the First Amendment. (*Stewart, supra*, 181 Cal.App.4th at p. 682.) The Challenged Statements therefore related directly to a piece of art that has independent significance under the First Amendment.

The identity of a singer, composer, or artist can be an important component of understanding the art itself. No one could reasonably dispute that knowing whether a piece of music was composed by Johann Sebastian Bach or a picture was painted by Leonardo Da Vinci informs the historical

though Appellants might not believe that any reasonable doubt exists.

understanding of the work.¹⁷ Similarly, although the art at issue is contemporary and in a different genre, whether Michael Jackson was actually the lead singer of the songs on the Disputed Tracks certainly affects the listener's understanding of their significance. Thus, the marketing statements at issue here are unlike the purely factual product or service descriptions constituting commercial speech in cases that *Serova* cites. (See *Benson v. Kwikset Corp.* (2007) 152 Cal.App.4th 1254, 1268 [representation that products were manufactured in the United States]; *Peel v. Attorney Disciplinary Comm'n of Ill.* (1990) 496 U.S. 91, 99–100 [advertisement concerning attorney's certification as an expert]; *Rubin v. Coors Brewing Co.* (1995) 514 U.S. 476, 481 [descriptions of alcohol content on beer labels].)

We do not suggest that the Challenged Statements here are noncommercial speech *only* because they promoted an art work. We agree with the court in *Rezec, supra*, 116 Cal.App.4th 135, that advertising is not necessarily excluded from the category of commercial speech simply because it promotes a product that is

¹⁷ While these examples are only illustrative, they are not purely hypothetical. (See Dutter & Nikkhah, *Bach works were written by his second wife, claims academic*, *The Telegraph* (Apr. 23, 2006) <<http://www.telegraph.co.uk/news/uknews/1516423/Bach-works-were-written-by-his-second-wife-claims-academic.html>> [as of Dec. 16, 2019], archived at <<https://perma.cc/6M7P-2EY9>>; Sayej, *Artistic License? Experts doubt Leonardo da Vinci painted \$450m Salvator Mundi*, *The Guardian* (Nov. 20, 2017) <<https://www.theguardian.com/artanddesign/2017/nov/20/artistic-license-experts-doubt-leonardo-da-vinci-painted-450m-salvator-mundi>> [as of Dec. 16, 2019], archived at <perma.cc/K66L-J3H8>.)

itself subject to full First Amendment protection. In *Rezec*, the court held that film advertisements that featured fictional endorsements from a nonexistent critic was commercial speech. The court rejected the “absolutist approach” that “because the films themselves are noncommercial speech, so are the advertisements.” (*Id.* at p. 142.)¹⁸

Such an approach would ascribe full First Amendment significance to any commercial representation about a piece of art, no matter how mundane or willfully misleading. For example, returning to the hypothetical advertisement mentioned above, there is no apparent reason why a statement falsely stating that a particular song is included in an album should be subject to full First Amendment protection simply because the statement promotes the sale of music.¹⁹ However, where, as here, a challenged statement in an advertisement relates to a

¹⁸ In *Keimer*, the court concluded that advertisements repeating “verifiably false or misleading” statements about investment returns contained in a book were commercial speech despite the fully protected status of the books themselves under the First Amendment. (*Keimer, supra*, 75 Cal.App.4th at p. 1231.) The statements at issue here were not “verifiably false” based upon the information available to Appellants, so we need not consider this holding.

¹⁹ Thus, we do not accept Appellants’ suggestion that an advertisement promoting a particular piece of art is *necessarily* “inextricably intertwined” with the First Amendment content of the art itself simply because it makes a representation about the identity of the artist. (See *Riley, supra*, 487 U.S. at p. 796.) The distinguishing features here are that: (1) the identity of the artist was itself an issue of public discussion and interest; and (2) Appellants had no personal knowledge of the issue.

public controversy about the identity of an artist responsible for a particular work, and the advertiser has no personal knowledge of the artist's identity, it is appropriate to take account of the First Amendment significance of the work itself in assessing whether the content of the statement was purely commercial.

This conclusion is consistent with the flexible approach that the United States Supreme Court has adopted for identifying commercial speech. In *Bolger*, the court explained that no single factor that it identified as a marker of commercial speech is sufficient in itself to classify particular speech as commercial, nor must each factor “necessarily be present in order for speech to be commercial.” (*Bolger, supra*, 463 U.S. at p. 67, fn. 14.) The court concluded that the presence of all three factors in that case “provides strong support” for the conclusion that the informational pamphlets at issue were commercial. (*Id.* at p. 67.) However, citing a prior opinion involving the advertising of religious books, the court also cautioned that “a different conclusion may be appropriate in a case where the pamphlet advertises an activity itself protected by the First Amendment.” (*Id.* at p. 67, fn. 14.)

That is the situation here. The Challenged Statements in the Promotional Video and on the Album Cover concerned music that is “itself protected by the First Amendment.” (*Bolger, supra*, 463 U.S. at p. 67, fn. 14.) While not itself dispositive, the fact that the Challenged Statements promoted a piece of art is appropriate to consider in assessing the *content* of the speech under the *Kasky* guidelines. (*Kasky, supra*, 27 Cal.4th at p. 961.)

3. *Conclusion*

Appellant's Challenged Statements on the Album Cover and in the Promotional Video were noncommercial speech outside the scope of the consumer protection claims that Serova asserts against Appellants. As a matter of law Serova therefore cannot show a likelihood that she will prevail on her claims under prong two of the anti-SLAPP procedure, and her claims against Appellants must be stricken. We therefore need not reach the issue of whether the Challenged Statements would be misleading to a reasonable consumer.

We emphasize that this holding is based on the record in this case and the issues that have been appealed. The Cascio Defendants have not appealed, and our holding therefore does not reach any portion of the trial court's order with respect to them. Nor do we purport to decide whether statements in another context concerning the marketing of creative works might constitute commercial speech.

DISPOSITION

The trial court's order is affirmed in part and reversed in part. The portions of the Complaint alleging claims against Appellants are ordered stricken. In all other respects the trial court's order is affirmed. Appellants are entitled to their costs on appeal.

CERTIFIED FOR PUBLICATION.

LUI, P. J.

We concur:

CHAVEZ, J.

HOFFSTADT, J.

PROOF OF SERVICE

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 15300 Ventura Boulevard, Suite 207, Sherman Oaks, California 91403.
2. That on February 18, 2020 declarant served the PETITION FOR REVIEW by depositing a true copy thereof in a United States mail box at Sherman Oaks, California in a sealed envelope with postage fully prepaid and addressed to the parties listed on the attached service list.
3. That there is regular communication by mail between the place of mailing and the places so addressed.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 18th day of February 2020 at Sherman Oaks, California.

/s/

By: Lea Garbe

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