

S260736

**IN THE SUPREME COURT OF THE STATE
OF CALIFORNIA**

VERA SEROVA,

Plaintiff / Respondent

vs.

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

Defendant / Appellant

AFTER A DECISION BY THE COURT OF APPEAL
SECOND APPELLATE DISTRICT CASE NO. B280526
APPEAL From the Superior Court of Los Angeles County, Hon. Ann I.
Jones (Los Angeles Super. Ct. Case No. BC548468)

RESPONDENT'S OPENING BRIEF ON THE MERITS

(Service on Attorney General and District Attorney required by
Bus. & Prof. Code §§ 17209, 17536.5)

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I. ISSUE PRESENTED

1. Do representations a seller made about a creative product 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 (Code of Civ. Proc., § 425.16)?
2. For purposes of liability under the Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq.) and the Consumer Legal Remedies Act (Civ. Code, § 1750 et seq.), do the seller's marketing representations constitute commercial speech, and does it matter if the seller lacked personal knowledge that the representations were false? (See *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939.)

II. INTRODUCTION & SUMMARY OF ARGUMENT

This case presents a simple question: did the Legislature intend the anti-SLAPP mechanism to encumber the right of consumers to sue sellers who misrepresent the contents of the products they are selling? The answer is a definitive no. In a sense, this case represents the utmost perversion of anti-SLAPP, a use of the anti-SLAPP motion to stifle the right to petition which, among other things, the anti-SLAPP statute was designed to protect.

This is a textbook false advertising case. The manufacturers and sellers of a music album, Sony Music Entertainment, the estate of Michael Jackson and MJJ Productions, Inc. (collectively, Sony) represented on an album's packaging and in advertisements that the album released for sale

consisted of Michael Jackson's recordings when three of the album's songs (known as the Cascio recordings) were—for purposes of the anti-SLAPP motion at the heart of this appeal—undisputedly sung by a Jackson impersonator. A consumer, Vera Serova, sued. Unlike a typical false advertising lawsuit, this case has been stuck at the pleading stage for four years over an anti-SLAPP motion in which Sony accuses Serova of chilling Sony's purportedly protected right to attribute the album to Jackson even if it contains songs sung by an impersonator. Sony secured a misguided ruling in the Court of Appeal that held (1) its album advertisements were protected by Section 425.16 of the California Code of Civil Procedure (the anti-SLAPP statute) because of an unresolved public controversy over the authenticity of the Cascio recordings; and (2) the advertisements were noncommercial speech not actionable under the California consumer protection laws because the album seller, Sony, advertised the Cascio recordings to consumers as Jackson's songs not knowing whether those advertisements were true or false. The rulings on both prongs are patently absurd and create perilous consequences for California consumers. The decision should be reversed in its entirety.

First, Sony's packaging and advertising statements at issue did not participate in the controversy about the authenticity of the Cascio recordings. The statements describe the content of Sony's product to consumers and, by Sony's own admission, do not speak about the authenticity of the Cascio recordings. The statements' tangential relation to a public controversy is

insufficient to make them protected speech under *All One God Faith, Inc. v. Organic & Sustainable Industry Standards, Inc.* (2010) 183 Cal.App.4th 1186 (*All One God Faith*) because Sony's focus in making the statements was not on the public issue, but on promoting sales of its product. The context of the statements is purely commercial. As recognized by the Court of Appeal (*Serova v. Sony Music Entm't* (2020) 44 Cal.App.5th 103, 122, 126–127 (*Serova II*)), they were made by Sony, the seller, to the consuming audience who was generally unaware of the controversy surrounding the Cascio recordings with the purpose to sell albums. Sony has not presented (and could not present, in light of its admission) any contrary evidence of context. Under this Court's recent decision in *FilmOn.com Inc. v. DoubleVerify Inc.* (2019) 7 Cal.5th 133 (*FilmOn*), such advertisements, even when publicly made, do not participate in public discourse and thus do not have the requisite connection to an issue of public interest within the meaning of the anti-SLAPP statute.

Second, Sony's advertisements fall squarely under the definition of commercial speech formulated by this Court for purposes of applying state laws designed to prevent false advertising and other forms of commercial deception in *Kasky v. Nike, Inc.* (2002) 27 Cal. 4th 939 (*Kasky*). They constitute factual representations made by a seller about the seller's product to an audience of consumers. (*Kasky*, at pp. 960–961.) Contrary to the Court of Appeal's view, Sony's personal knowledge is immaterial to this inquiry because both the Unfair Competition Law (UCL; Bus. & Prof. Code, § 17200 *et seq.*) and the Consumers Legal

Remedies Act (CLRA; Civ. Code, § 1750 *et seq.*) are strict liability statutes that do not include an element of personal knowledge. Consumers generally have no way of telling whether an advertiser has personal knowledge of advertised facts. Conditioning a consumer's right to recover on the advertiser's personal knowledge of the facts represented eviscerates the protections purposefully provided by the Legislature to California consumers under the UCL and CLRA and reverts California consumer protection law to the era of *caveat emptor*. Moreover, the remedial, preventive and deterrent purposes of the UCL and CLRA can only be achieved if product advertisers are held accountable for their misrepresentations of fact regardless of their personal knowledge of the facts they represent. Only when facing the prospect of having to remedy harm caused to consumers, will advertisers be motivated to be careful in their representations about products on packaging and in advertising.

The fact that the product in this case is an expressive work does not change these considerations. Serova's claims do not arise from the expressive content of the work. Rather, the claims target misleading advertisements which falsely represent the source of the work, much like a false label on a counterfeit product. Such factual misrepresentations *about* an expressive product made by a seller to consumers constitute commercial speech under *Kasky*. (See also *Keimer v. Buena Vista Books, Inc.* (1999) 75 Cal.App.4th 1220, 1229–1230 (*Keimer*)). A requirement that sellers of expressive works provide truthful disclosures about the works' content and authorship to the extent needed to avoid consumer

deception does not stifle the flow of expressive speech, it enhances it by conveying truth to consumers about the expressive works, rather than falsehoods.

The number of legal theories raised by Sony and the Court of Appeal below creates an impression that the issues before the Court are novel and highly controversial. In reality, however, Serova only asks this Court to restore the status quo with a conventional ruling that false advertising is actionable.

III. LEGAL STANDARD

“A SLAPP suit—a strategic lawsuit against public participation—seeks to chill or punish a party’s exercise of constitutional rights to free speech and to petition the government for redress of grievances. The Legislature enacted ... section 425.16—known as the anti-SLAPP statute—to provide a procedural remedy to dispose of lawsuits that are brought to chill the valid exercise of constitutional rights.” (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055–1056.)

To determine whether a cause of action should be stricken, the anti-SLAPP statute establishes a two-part test. First, the court must decide whether the defendant has satisfied its burden of showing that the challenged cause of action arose from the defendant's protected activity. (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384.) “If the defendant makes the required showing, the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success.” (*Ibid.*)

This Court reviews the ruling on an anti-SLAPP motion *de novo*. (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1067.)

IV. STATEMENT OF THE CASE

A. Factual Background

This case is a putative consumer class action about what purports to be an album of Michael Jackson's recordings titled *Michael*, released for sale by Sony after Jackson's death.

For purposes of this appeal, the allegations in the operative First Amended Complaint (FAC) are undisputed. (*Serova II, supra*, 44 Cal.App.5th at p. 111 n.3 and accompanying text) Since *Michael's* inception, prior to its release for sale by Sony, the authenticity of three recordings on the album (the Cascio recordings) has been controversial. (CT 1:116 [FAC] ¶ 11.) Sony purchased the Cascio recordings from individuals Edward Cascio and James Porte (also defendants in this suit, but not parties to this appeal), who told Sony that Jackson sang on these recordings prior to his death. (CT 1:116–117 [FAC] ¶¶ 12–16.) Sony subsequently announced that it was going to release the Cascio recordings on the *Michael* album. (CT 1:117 [FAC] ¶¶ 17, 19.)

When Jackson's family and fans heard the recordings before the album release, a controversy ensued, with multiple members of the family and a number of fans stating publicly and to Sony that the singer on the Cascio recordings was not Jackson. (CT 1:118 [FAC] ¶ 20.) In response to the controversy, attorney Howard Weitzman issued a statement on behalf of Sony to Jackson fan clubs claiming that Sony had conducted an internal

investigation, procured an opinion of forensic musicologists, and concluded the vocals on the Cascio recordings belonged to Jackson. (CT 1:118–119 [FAC] ¶ 22.) Defendant Cascio appeared on Oprah Winfrey’s show where he addressed the controversy and responded to Oprah’s questions about the authenticity of the Cascio recordings with assurances that the vocals on them belonged to Jackson. (CT 1:119 [FAC] ¶ 25.)

Sony released *Michael* containing 10 songs—the three Cascio recordings and seven undisputed Jackson recordings—and marketed it as an album by Michael Jackson. (CT 1:119 [FAC] ¶¶ 26–27.)

The album cover contains the album name “Michael,” and multiple depictions of Michael Jackson. The back of the cover provides a representation of fact, not an opinion: “This album contains 9 previously unreleased vocal tracks performed by Michael Jackson”¹ (CT 1:119 [FAC] ¶ 27, CT 1:144-147; 2:275 at ¶5b [authenticating album cover].))

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

Sony advertised the release of the album with a video commercial in which the narrator presents *Michael* as “a brand-new album from the greatest artist of all time.” (CT 1:119 [FAC] ¶ 24; Videos Concerning Defs. Anti-SLAPP Motions lodged with the trial court, Video 1 at 0:23, authenticated at CT 2:269–70; 2:275 at ¶5c.) 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.

The singer on the Cascio recordings is not Michael Jackson (as stipulated by Sony for purposes of this anti-SLAPP motion during the lower court proceedings further discussed below). (*Serova II, supra*, 44 Cal.App.5th at p. 113.)

Prior to this action, Serova engaged an independent audio expert, Doctor George Papcun, for an independent assessment whether Jackson had performed the lead vocals on the Cascio recordings. Dr. Papcun concluded that it was very likely that Jackson had not sung on the contested recordings. Before filing the lawsuit, Serova’s counsel had Dr. Papcun’s expert report peer reviewed by another well-credentialed independent audio expert. (CT 1:122 [FAC] ¶ 33.)

B. Trial Court Proceedings

Plaintiff and Petitioner Vera Serova commenced this action on June 12, 2014. The operative FAC alleges that Jackson did not sing on the Cascio recordings and that Sony violated the UCL and CLRA by advertising *Michael* as an album of Jackson songs. (*Serova II, supra*, 44 Cal.App.5th at pp. 111–112.) In particular,

the FAC alleged the album cover and video commercial were false or misleading because Jackson does not sing on the three Cascio recordings.²

In response to the complaint, Sony filed an anti-SLAPP motion under California's anti-SLAPP statute, arguing that its 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 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. (*Serova II*, *supra*, 44 Cal.App.5th at p. 113.)

To permit a ruling on the anti-SLAPP motion in advance of discovery, the parties stipulated solely for purposes of the motion, that Michael Jackson did not sing the lead vocals on the Cascio recordings. The parties also stipulated to the authenticity of copies of the album cover and the video commercial. (*Ibid.*)

Thus, the scope of the anti-SLAPP motion was limited to three legal issues:

(1) Whether Sony's statements were speech in connection with an issue of public interest within the meaning of the anti-SLAPP statute;

² The FAC also alleged that Howard Weitzman's statement to fan clubs and defendant Cascio's statement to Oprah were misleading. The trial court found those statements noncommercial (*Serova II*, *supra*, 44 Cal.App.5th at p. 114), and Serova did not appeal that ruling.

(2) Whether Sony's statements were actionable as commercial speech under the UCL and CLRA; and

(3) Whether Sony's statements could mislead a reasonable consumer if the Cascio recordings were forgeries not containing Jackson's vocals.

The trial court, in its pre-*FilmOn* ruling, found the statements on the album cover and in the video commercial met the definition of speech in connection with an issue of public interest under the first prong of the anti-SLAPP analysis. The trial court found that the statements were simply promotional materials that "did not speak to the controversy surrounding the performance [or] address or refute" the allegations concerning the Cascio recordings, but found that the statements nevertheless concerned an issue of public interest because "Michael Jackson's professional standing and accomplishments created legitimate and widespread attention to the release of a new album." (*Ibid.*)

The trial court, however, ruled in Serova's favor, finding that Serova could prevail because the statements were commercial and therefore actionable under the UCL and CLRA. The court rejected Sony's argument that these advertising statements were "inextricably intertwined" with the Cascio recordings themselves under *Riley v. National Federation of Blind* (1988) 487 U.S. 781, 796. The trial court also found the statements on the album cover and in the video commercial were likely to mislead a reasonable consumer. (*Serova II*, at p. 114.)

C. First Decision of the Court of Appeal

Sony challenged the trial court's rulings that: (1) the album cover and the video commercial were commercial speech that may be subject to claims under the UCL and CLRA; and that (2) the representations in those materials were likely to deceive a reasonable consumer.

In the Court of Appeal, Serova argued that the trial court's disposition of the motion on the basis of the second anti-SLAPP prong was correct, and also asserted, as an alternative ground for affirming the trial court decision, that the advertising statements her claims arose from do not constitute speech in connection with an issue of public interest within the meaning of the anti-SLAPP statute.

The Court of Appeal began its first opinion, pre-*FilmOn*, by expressly rejecting Sony's attempt to invoke the Section 425.17, subdivision (d)(2) "artistic work" exception to the commercial speech exemption from the anti-SLAPP statute to justify reversal of the trial court, finding that the exception did not confer blanket anti-SLAPP protection to commercial speech in the form of advertising of music, but instead required the court to evaluate whether the advertising meets the definition of "protected" conduct under section 425.16, subdivision (e). (*Serova v. Sony Music Entm't* (2018) 26 Cal.App.5th 759, 770–771 (*Serova I*).)³

³ This analysis was reiterated in *Serova II*, *supra*, 44 Cal.App.5th at pp. 115–117.

The Court of Appeal then affirmed the trial court ruling under the first anti-SLAPP prong finding that the album cover and the video commercial constituted speech in connection with an issue of public interest because the representations at issue “concerned the body of work of a well-known artist and an album containing his songs that generated significant public attention.” (*Id.* at pp. 772–773.)

As to the second anti-SLAPP prong, the Court of Appeal recognized that the statements on the album cover and in the video commercial “were made in the context of promoting the album” to an audience of “potential purchasers” but reversed the trial court ruling, holding that the statements were noncommercial speech under *Kasky* because Sony lacked the “critical element” of “personal” knowledge of the misrepresented facts. (*Id.* at pp. 775–779.) The Court of Appeal concluded, in a radical departure from precedent, that an advertiser is insulated from liability for the misrepresentations of facts about its products to consumers if the misrepresentations were not based on personal knowledge, reasoning that such misrepresentations of facts are “opinions.” (*Id.* at p. 777.) The Court of Appeal further concluded that Sony’s attribution of the album to Jackson in sales efforts was “integral to the artistic significance of the songs themselves,” and thus was noncommercial. (*Id.* at pp. 765, 779–781.)

The Court of Appeal did not reach the question of whether Sony’s statements could mislead a reasonable consumer.

D. First Petition for Review

Serova petitioned for review challenging the first Court of Appeal decision. This Court granted review on December 12, 2018, deferring further action pending consideration and disposition of *FilmOn*. On May 6, 2019, *FilmOn* was decided. Four months later this Court transferred the case back to the Court of Appeal in light of the decision in *FilmOn*.

E. Second Decision of the Court of Appeal

On January 8, 2020, the Court of Appeal issued its second opinion in this matter. The Court of Appeal revised its first-prong analysis to include references to *FilmOn*, but again concluded that Sony's statements on the album cover and in the video commercial constituted protected speech. This time, the Court of Appeal reasoned the speech represented in those sales communications participated in the controversy about the authenticity of the Cascio recordings. (*Serova II, supra*, 44 Cal.App.5th at pp. 117–124.)

The Court of Appeal's second prong analysis under *Kasky* remained the same, doubling down on the notion that misrepresentations of fact in the sales context do not give rise to liability if the speaker did not have firsthand knowledge of the facts. (*Id.* at p. 126.) The Court of Appeal also reiterated its views that misrepresentations of the performer of recordings in the sales context are entitled to full First Amendment protection. (*Id.* at p. 131–132.)

V. ARGUMENT

A. **Serova’s claims do not arise from protected activity because the challenged statements were not made “in connection” with any issue of public interest.**

1. *The FilmOn framework.*

The anti-SLAPP statute protects any act “in furtherance of [a] person’s right of petition or free speech under [the] United States Constitution or the California Constitution in connection with a public issue.” (Code Civ. Proc., § 425.16 subd. (b)(1).) Where, as here, the challenged speech was not connected with a governmental proceeding, to qualify as an act in furtherance of a person’s right of petition or free speech under the United States or California Constitution in connection with a public issue, the moving party (Sony) must show its speech was:

(3) 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, or (4) 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.

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

In *FilmOn*, this Court clarified that the defendant’s burden to show its speech was made “in connection with a public issue or an issue of public interest” under the first prong of the anti-SLAPP framework⁴ requires the defendant not only to identify

⁴ *FilmOn* introduced its framework under subdivision (e)(4) of section 425.16 because the speech at issue there was private and

some public issue implicated by the speech, but also to show that the speech “contributes to—that is, ‘participat[es]’ in or furthers—some public conversation on the issue.” (*FilmOn*, *supra*, 7 Cal.5th at p. 151.) Specifically, a court must evaluate whether the speech was made “in connection with a public issue or an issue of public interest” in two steps. “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... Second, we ask what functional relationship exists between the speech and the public conversation about some matter of public interest.” (*Id.* at p. 149.)

FilmOn noted that a defendant will “virtually always ... succeed in drawing a line—however tenuous—connecting their speech to an abstract issue of public interest.” (*Id.* at p. 150.) But some reference to a subject of public interest is not enough; “the statement must in some manner itself contribute to the public debate.” (*Ibid.*) The second prong of the inquiry is meant to establish whether such contribution exists. The inquiry does not turn on the social utility of the speech at issue, or the degree to

subdivision (e)(3) requiring a public forum did not apply. However, both subdivisions (e)(3) and (e)(4) contain the requirement that the speech be “in connection with an issue of public interest,” and courts traditionally held this requirement to the same standard under both subdivisions. (*Consumer Justice Ctr. v. Trimedica Int’l, Inc.* (2003) 107 Cal.App.4th 595, 600–601 [“If ... the defendant’s alleged acts fall under the third or fourth prongs of subdivision (e), there is an express ‘issue of public interest’ limitation.”].)

which it propelled the conversation in any particular direction; rather, the court must examine “whether the defendant—through public or private speech or conduct—*participated in, or furthered, the discourse that makes an issue one of public interest.*” (*Id.* at pp. 150–151 [italics added].) During this examination, courts must consider not only the content of the speech, but also its *context*—including audience, speaker, and purpose. (*Id.* at pp. 149, 151–152.)

The content and context of Sony’s advertisements (i.e. the album cover and video commercial) demonstrate the statements in these advertisements did not participate in nor further discourse on issues of public interest.

2. The challenged advertisements did not further public discourse about the authenticity of the Cascio recordings.

In two recent decisions, *Rand Resources, LLC v. City of Carson* (2019) 6 Cal.5th 610 (*Rand*) and *FilmOn*, this Court emphasized that a mere attenuated connection of speech to some issue of public interest does not satisfy the first prong of the ant-SLAPP framework. (*Rand*, at p. 625; *FilmOn*, *supra*, 7 Cal.5th at p. 152.) These authorities make clear that the public’s interest in Michael Jackson does not suffice to make Sony’s characterization of its album as a collection of Jackson’s recordings protected speech. Thus, following *FilmOn*, the Court of Appeal focused instead on the connection of the challenged statements to the public controversy over whether Jackson was in fact the singer on the Cascio recordings.

The Court of Appeal twisted the sales misrepresentations to consumers into a “position” on the issue of authenticity and concluded that the advertising statements had the requisite connection to that issue. (*Serova II, supra*, 44 Cal.App.5th at pp. 121–122.)

The Court of Appeal got it wrong. Under *FilmOn*, the advertisements did not participate in or further the public discourse on the issue of authenticity of the Cascio recordings.

a. *The content.* The content of the challenged advertisements informs the audience “of potential purchasers of the album” (*id.* at p. 126) only that *Michael* consists entirely of Michael Jackson’s recordings. The album name “Michael” coupled with multiple depictions of Jackson on the cover communicates that the album contains recordings by Jackson. The description “This album contains 9 previously unreleased vocal tracks performed by Michael Jackson” says only that all nine of the previously unreleased songs included on the album are performed by Jackson. And the video commercial displaying the cover of *Michael* and presenting it as “a brand-new album from the greatest artist of all time” equally only suggests that the album is one comprised exclusively of Jackson recordings. Neither *Michael*’s cover, nor the video commercial single out the three controversial Cascio recordings, discuss allegations that the vocals in them are inauthentic, provide opinions or evidence supporting or disproving the allegations, or address the impact of the controversy. Nothing on the album cover or in the video

commercial even hints to the consumer audience that three of the ten album songs are controversial.

The Court of Appeal agreed that the advertisements do not address the controversy, but merely assert as fact the conclusion that Jackson is the singer on all the songs on the album. (*Serova II, supra*, 44 Cal.App.5th at p. 122.) Nonetheless, the Court found that such sales speech constitutes participation in the controversy because it communicated, by implication, Sony's position on the issue of whether Jackson was in fact the singer on the Cascio recordings. (*Ibid.*)

This conclusion contradicts the established anti-SLAPP standard. For example, in *All One God Faith, supra*, 183 Cal.App.4th 1186, the plaintiff challenged as misleading defendant trade organization OASIS' practice of placing its "OASIS organic" seal certification on personal care products available to consumers in the marketplace. (*Id.* at pp. 1192–1194.) OASIS brought an anti-SLAPP motion and argued that by authorizing manufacturers to place the "OASIS organic" seal on their products OASIS exercised its right to articulate and disseminate its standard and express an opinion on what makes a personal care product "organic." (*Id.* at p. 1202.) The court of appeal rejected OASIS' contentions. The court held that the plaintiff's claims did not arise out of OASIS's articulation of the "OASIS Organic" standard in the abstract, but from authorization of placement of the seal on certain products in the marketplace. (*Ibid.*) The court also held that placement of the seal on commercial products was not *conduct in furtherance of*

OASIS's right to articulate and disseminate its statement of position as to the meaning of the word "organic." (*Id.* at p. 1203.) The application of an "OASIS Organic" seal on a particular product did not contribute to a broader debate on the meaning of the term "organic": the seal, when viewed by a consumer on a particular product, was "merely a representation regarding the product's ingredients and quality." (*Id.* at pp. 1203–1204.) Because the seal did not invite comment from the public, and nothing suggested that the certification process would make the discussion of the standard more robust or help the standard evolve, the court concluded that the purpose of the "OASIS Organic" seal was "to promote the sale of the product to which it is affixed, not the standard or its elements." (*Id.* at p. 1204; *see also Consumer Justice Ctr. v. Trimedica Int'l, Inc.* (2003) 107 Cal.App.4th 595, 601 [defendants' advertisements of a breast enlargement product were not "about the general topic of herbal supplements" but were instead "commercial speech about the specific properties and efficacy of a particular product"].)

Here, like in *All One God Faith*, Serova does not challenge Sony's opinion about whether Jackson performed the Cascio recordings in the abstract, but only the misrepresentations Sony made about *Michael* in the marketplace. Nothing in the record demonstrates that Sony's attribution of *Michael* to Jackson on the album cover and in the video commercial furthered Sony's right to express its position about whether or not Jackson sang on the Cascio recordings. In fact, Sony itself argued in its appellate brief that the challenged statements do not express Sony's

position on this issue. (AOB 39 [“the Announcement Video ... makes no assertion whatsoever about the irresolvable controversy surrounding the performer of all lead vocals on the Cascio Tracks”]; 41 [“The Album Cover does not include any statements about who sang the lead vocals on the Cascio Tracks...”], 43 [“The video does not state that Jackson sang lead vocals on the Cascio Tracks”].) Thus, contrary to the Court of Appeal’s conclusion that the challenged statements “related directly to the issue of public interest” (*Serova II, supra*, 44 Cal.App.5th at p. 121), the opposite is undisputed. It follows that the statements were merely Sony’s representations regarding its product meant to promote sales of the product. (*All One God Faith, supra*, 183 Cal.App.4th at pp. 1203–1204.)

The Court of Appeal quoted the FAC’s allegation that Sony “expressly and impliedly represented that the lead vocals on all of the tracks of the album were performed by Michael Jackson” and concluded the allegation itself established that the claims arose from the protected speech. (*Serova II, supra*, 44 Cal.App.5th at p. 122.) But representing to consumers that the lead vocals on all of the album tracks belong to Jackson is not the same as opining on the issue of whether Jackson or another singer sings on the Cascio recordings (just as labelling a package that contains a variety of dried fruit “organic,” is not the same as opining in a debate between a peach grower whose peaches are in the package and healthy food enthusiasts about whether the peaches supplied by this grower are actually organic).

Contrary to the Court of Appeal’s logic, the mere correlation between the speech and the speaker’s position on an issue of public interest is not enough to find the speech protected. Just like Sony’s representations that *Michael* consists of Jackson’s recordings implicitly “communicated” Sony’s position in the controversy (*ibid.*), OASIS’ certification of a product as “organic” “communicated” OASIS’ position that the “organic” standard should include such products. Likewise, the City of Carson’s appointment of a representative in negotiations about the NFL stadium construction in *Rand* “communicated” that the City is sticking by its position that an NFL stadium should be built. However, such tangential relation falls short of establishing a connection to the issue of public interest within the meaning of the anti-SLAPP statute. (*All One God Faith, supra*, 183 Cal.App.4th at pp. 1203–1204; *Rand, supra*, 6 Cal.5th at p. 624–625.) For the connection to be present, “the focus of the speaker’s conduct should be on public interest.” (*Hecimovich v. Encinal School Parent Teacher Organization* (2012) 203 Cal.App.4th 450, 465 (*Hecimovich*)). Sony’s focus, by its own admission, was not on public interest.

b. The context. Moreover, for the statements to be protected, the context of the advertising speech at issue must support a finding that it furthered the discussion about the authenticity of the Cascio recordings. (*FilmOn, supra*, 7 Cal. 5th at p. 150.)

In *FilmOn*, defendant DoubleVerify’s report marked FilmOn’s streaming website as copyright infringing and

containing adult materials. (*Id.* at p. 141.) DoubleVerify claimed the report was speaking on an issue of widespread public interest because, *inter alia*, FilmOn had been subject to media reports and litigation over its controversial streaming model. (*Id.* at p. 150.) However, this Court concluded that, even though the topic discussed was, broadly speaking, one of public interest, the report did not contribute to the public debate on this topic as evinced by the context in which the report was issued: it was a for-profit confidential report distributed to DoubleVerify’s clients for their business purposes. (*Id.* at pp. 140, 152–53.) The Court stressed that none of these factors—DoubleVerify’s for-profit status, or the confidentiality of the reports, or the use to which its clients put its reports—alone was dispositive, yet their combination warranted the Court’s conclusion that the report did not contribute to the public debate. (*Id.* at p. 153.)

Here, like in *FilmOn*, the advertisements did not contribute to the public debate about the controversial songs. The context of the advertisements was purely commercial.

The **speaker** is commercial—Sony is the manufacturer and seller of the *Michael* album. The Court of Appeal placed weight on the fact that Sony is a seller of *music* as opposed to other types of products, but this fact is of no consequence to the present inquiry. This suit does not take issue with the album’s expressive content (such as music or lyrics), or advertisements, if any existed, including such content, which would be unique to this type of product. Rather, at issue are misrepresentations *about* a product’s content, which, in substance do not differ from a false

description of ingredients on the bottle of a dietary supplement. (See, e.g., *Scott v. Metabolife Internat., Inc.* (2004) 115 Cal.App.4th 404, 408.)

The nature of Sony's product is irrelevant to the issue of whether the advertisements participated in the concurrent controversy. The same issue would arise if a grocery store claimed its mislabeling of conventional peaches as "organic" produce constituted participation in the farmer's dispute with a group of healthy food enthusiasts over whether the peaches were organically grown. For purposes of this inquiry, it is important only that the speaker acted as a seller when it made the challenged representations (as opposed to, for example, as an industry expert stating an *opinion* about the songs' authenticity in *Rolling Stone* magazine or expressing views about peach growing at a farming conference).

The **audience** was an audience of "potential purchasers of the album." (*Serova II, supra*, 44 Cal.App.5th at p. 126.) The placement of the speech on the product packaging and in the video commercial shows, as the Court of Appeal acknowledges, that it was meant to reach potential buyers—consumers. The key characteristic of the *consumer* audience (as opposed to, for example, fans inquiring about a controversy they are aware of) is that consumers use the speech *to make a decision about entering into a commercial transaction*, not to form an opinion in a public debate. That some of the people who are consumers of the album may *also* know about the controversy and, as Jackson fans, be interested in its resolution is merely incidental to the commercial

speech at issue and does not, contrary to the conclusion of the Court of Appeal, transform the advertisements into protected speech. Nor can consumers' general interest in knowing the truth about products advertised to them turn the advertisements into protected speech because, under this logic, all advertising would automatically be protected.

The **purpose** of the speech was to sell a product, not to state a position in the debate. The speech was, in essence, product description conveyed using the marketing vehicles of packaging and a video commercial (rather than tools traditionally used to inform the public of a position on a public issue, like press releases, op-ed pieces, news media or TV shows). These forms unequivocally signal to the audience that the speech invites them into a commercial transaction. Furthermore, the information on the packaging was conveyed to consumers *at the point of sale*, where the consumers were unlikely to learn about the 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 Court of Appeal acknowledged that the context of the statements at issue was sales in its discussion of anti-SLAPP prong two:

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, 119 Cal.Rptr.2d 296, 45 P.3d 243.) And the audience for those representations was potential purchasers of the album. (*Id.* at p. 964, 119 Cal.Rptr.2d 296, 45 P.3d 243.)

(*Serova II*, *supra*, 44 Cal.App.5th at p. 126; see also *id.* at p. 122 where the Court concedes that the purpose of the statements was commercial, to sell albums.)

This context conclusively establishes that the advertisements were made with the sole purpose to sell the product “without being part of any attempt to participate in the larger public discussion.” (*Id.* at p. 140.) Sony has not presented any evidence that would have suggested otherwise.

That is not to suggest, of course, that Sony could not make any protected statement about the Cascio recordings. This Court recognized that “[s]ome commercially oriented speech will, in fact, merit anti-SLAPP protection.” (*FilmOn*, *supra*, 7 Cal. 5th at p. 153.) For example, Mr. Weitzman’s letter to fan clubs issued in response to the controversy is clearly protected speech under *FilmOn*. The content of this letter explicitly mentioned the controversy, referred to one of the three controversial songs by name and expressed Sony’s position about its authenticity, thus the requisite relation to the issue of public interest was present. (CT 1:118 [FAC] ¶ 22; 2:279-280⁵.) The context in which Mr. Weitzman’s statement was issued shows an intent to participate in the public debate: the statement was issued in the form of an open letter directed to fan clubs who expressed concerns over the

⁵ The parties stipulated that this November 11, 2010 email was a true a correct copy of Howard Weitzman’s statement meant for distribution to Michael Jackson fans alleged at FAC ¶ 22. (CT 2:275 ¶ 5(a).)

authenticity of the songs, in response to those concerns (as opposed to packaging design or a video commercial directed at unsuspecting consumers). Similarly, defendant Cascio's statement to Oprah Winfrey that Michael Jackson sang on the Cascio recordings is protected speech. The content of the statement supports this finding: Cascio addressed the controversy head-on by speaking about the three controversial recordings. (CT 1:119 [FAC] ¶ 25; Videos Concerning Defs.' Anti-SLAPP Motions lodged with the trial court, Video 2 at 3:40-4:21, Apr. 18, 2016, authenticated at CT 2:275 at ¶ 5d.) The location element of context also supports this finding because Cascio made the statement on a TV talk show in response to Oprah's specific request to address the public controversy. Both communications were made in the commercial context of pre-release promotion. What distinguishes the challenged advertisements from these protected statements is that the advertisements are pure sales speech that was not intended to address the controversy, nor addressed it.

That the advertisements here were public, unlike the private confidential report in *FilmOn*, is of no consequence. *FilmOn* indicated that the public nature of the speech does not make it protected; rather, it is important "whether a defendant—through *public or private* speech or conduct—participated in, or furthered, the discourse that makes an issue one of public interest." (*Id.* at p. 151, italics added.) The context of the speech here was essentially the same as in *FilmOn*: a commercial speaker was conveying to its customers information about a

product the customers had bought or were contemplating buying. Sony, when its selling hat was on, did not participate in a public debate any more than DoubleVerify did. That Sony's potential purchaser base was wider than DoubleVerify's and Sony conveyed the information to that base via public channels, rather than in a private manner, is a distinction that does not make a difference. In neither case is the speech meant to make a statement in the debate or at all focused on public interest. (*Hecimovich, supra*, 203 Cal.App.4th at p. 465.)

c. *The burden of proof.* Crucially, Sony has not met and cannot meet its burden of proof. The burden to show how defendant's speech "contributed to public discussion or resolution" of the identified public issue under the first anti-SLAPP prong is on the defendant. (*Wilson v. Cable News Network, Inc.* (2019) 7 Cal.5th 871, 900.) It was up to Sony to submit evidence of context establishing that the focus of the challenged advertisements was so significantly tied into making a point in the controversy that it overshadowed the obvious commercial purpose.

Sony has submitted no such evidence. Moreover, Sony could not have submitted any because, as cited above, Sony has admitted in its opening brief in the Court of Appeal that its statements on the album cover and in the video commercial were **not** making a point in the controversy. (AOB 39, 41, 43.)

B. Sony’s advertisements are actionable as commercial speech under *Kasky v. Nike*.

With the Court of Appeal’s prong one analysis erroneous, reversal is warranted. However, this Court’s review should not end with prong one. The Court of Appeal’s interpretation of *Kasky* within the second anti-SLAPP prong is patently wrong and creates harmful ramifications for Californians far outside of the anti-SLAPP context. It essentially undoes the protections of the UCL and CLRA envisioned by the Legislature, rolling California’s consumer laws back to the era of *caveat emptor*. For this reason, the prong two part of the Court of Appeal’s holding warrants an independent reversal or abrogation.

1. *The Kasky test for commercial speech.*

This Court established the test to determine whether a particular statement qualifies as commercial speech that is subject to laws aimed at preventing false advertising in *Kasky, supra*, 27 Cal.4th 939. In that case, defendant Nike responded to negative publicity concerning working conditions in its factories with press releases, letters to newspapers and university leaders, and advertisements that allegedly misrepresented Nike’s treatment of its workers. (*Id.* at pp. 947–948.) Kasky sued Nike for UCL violations based on these public statements. (*Id.* at pp. 945, 948.) The trial court sustained Nike’s demurrer on the grounds that Kasky’s claims were barred by the First Amendment and the court of appeal affirmed. (*Id.* at p. 948.)

Drawing on U.S. Supreme Court authority and indicia of commercial speech articulated in *Bolger v. Youngs Drug Products*

Corp. (1983) 463 U.S. 60, 66–67 (*Bolger*), this Court held that to decide whether a statement is commercial speech that may be subjected to false advertising laws, a court should consider: (1) the speaker, (2) the intended audience, and (3) the content of the message, explaining:

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

[T]he factual content of the message should be commercial in character. In the context of regulation of false or misleading advertising, this typically means that the speech consists of representations of fact about the business operations, products, or services of the speaker (or the individual or company that the speaker represents), made for the purpose of promoting sales of, or other commercial transactions in, the speaker's products or services.

(*Id.* at pp. 960–961.)⁶

⁶ The Legislature embraced this definition in its enactment of the exception to anti-SLAPP in Code of Civil Procedure, section 425.17 (c), an exception this Court characterized as the “exemption for commercial speech” and the “commercial speech exemption.” (*Simpson Strong-Tie Co. Inc. v. Gore* (2010) 49 Cal.4th 12, *passim*.)

Applying this test, the Court deemed Nike's statements commercial. Nike qualified as a commercial speaker because it made and sold athletic apparel. (*Id.* at p. 963.) Nike's statements were directed to a commercial audience because they were intended to reach and influence actual and potential purchasers of Nike's products. (*Ibid.*) And Nike's statements were representations of fact of a commercial nature because Nike was making factual representations about its own business operations. (*Ibid.*)

2. *The statements on Michael's cover are commercial under Kasky.*

The three challenged statements on *Michael's* cover—the title, the cover image, and the statement of attribution of the vocals on the back cover—are each commercial under *Kasky*. The speaker—Sony—is engaged in the production, sale, and distribution of *Michael*. The intended audience is prospective buyers of the album. And the factual content of the message is commercial in character as it consists of a representation of fact about Sony's product, made for the purpose of promoting sales of that product. The album's imagery, its title, and the express statement of attribution of vocal tracks on the back cover all convey that the album consists of songs vocally performed by Jackson. Sony had strong economic incentives to attribute the songs to Jackson. Common sense dictates that *Michael* derived all or nearly all of its value from buyers' belief that Michael Jackson, one of the best-selling musical artists of all time, sang its songs. The multiple images of Jackson on the album's cover

and its name—*Michael*—also strongly suggest that Jackson’s purported performance of the songs was the album’s primary selling point. As the challenged statements on *Michael*’s cover satisfy the three elements of the *Kasky* test, they are commercial.

California courts routinely deem factual statements on the packaging and labels of commercial products concerning the products themselves to be commercial speech. (See *Keimer, supra*, 75 Cal.App.4th 1220, 1228–1230 [drawing “commonsense conclusion” that statements about inflated investment returns on the covers of investment books “were designed with a single purpose in mind, to sell the books” and thus were commercial]; *Nagel v. Twin Laboratories, Inc.*, 109 Cal.App.4th 39, 48–49 [holding the description of ingredients on the label of a nutritional supplement was commercial speech]; *Benson v. Kwikset Corp.* (2007) 152 Cal.App.4th 1254, 1268 (*Benson*) [holding “Made in U.S.A.” and similar labels on locksets were commercial speech].)

Sony relied below on the U.S. Supreme Court’s definition of “pure commercial speech” as speech that “does no more than propose a commercial transaction” (*Bolger, supra*, 463 U.S. at p. 66) and argued statements on *Michael*’s cover do more than propose a commercial transaction because they are informational in nature. (AOB 34–35.) However, the U.S. Supreme Court’s standard for commercial speech was never narrowly limited to “pure” commercial speech discussed in *Bolger*. The U.S. Supreme Court routinely treats informational statements about the speaker’s own products and services as commercial, consistently

with the test later formulated by *Kasky*. In *Bolger* itself, the Court held informational pamphlets promoting the sale of contraceptives were commercial, notwithstanding that they were more than proposals to engage in commercial transactions and contained discussions of important public issues. (*Bolger, supra*, 463 U.S. at pp. 66–68.) In *Peel v. Attorney Registration and Disciplinary Com'n of Illinois* (1990) 496 U.S. 91, 99–100 (*Peel*), the Court analyzed statements on an attorney’s letterhead relaying the attorney’s professional qualifications as commercial speech; and in *Rubin v. Coors Brewing Co.* (1995) 514 U.S. 476, 481 (*Rubin*), the Court accepted that information on beer labels, including their alcohol content, was commercial speech. That *Michael’s* cover statements convey information about the album to consumers does not preclude them from being commercial—it is a part of what *makes* them commercial.

Sony also contended that attribution of the Cascio recordings to Jackson “imparts meaning to the songs because it is a message from the artist.” (AOB 34, 37.) The Court of Appeal similarly concluded that the identity of the artist is “an important component of understanding the art itself” and, based on this factor, distinguished the case from *Benson*, *Peel* and *Rubin*. (*Serova II, supra*, 44 Cal.App.5th at pp. 130–132.) But this argument makes no sense if Jackson is not the singer of these songs, as Sony stipulated for this stage of the proceedings. If the artist’s identity is falsely represented, no constitutionally significant meaning is imparted to the songs by the misrepresentation. The falsehood merely imparts a lie boosting

market value in a sales context. Moreover, the Court of Appeal’s logic results in obviously bad policy. If the attribution of a work of art were deemed noncommercial speech whenever the seller has no personal knowledge whether the work is authentic, then willful ignorance and avoidance of provenance investigation would insulate sellers from liability for selling forgeries. Sellers of forged artwork could pawn off forgeries as originals without exposure if this Court were to adopt the reasoning of the Court of Appeal. (*Id.*, at pp. 130–132.)

Sony also argued in the Court of Appeal that the public controversy around the Cascio recordings centered on whether the songs should be included in the canon of Jackson’s work, and not on economic matters. (AOB 35.) This is irrelevant because Sony’s statements on *Michael’s* cover did not participate in the controversy, as discussed in Section V.A; rather, they described the contents of the product to the audience of its potential buyers. Moreover, *even if* the statements participated in the controversy, it would not preclude them from being commercial: *Kasky* makes clear that a seller’s factual representations about its products do not receive noncommercial status by virtue of the seller responding to a controversy. 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 p. 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 pp. 965–966 [emphasis added]; *see also Bolger, supra*, 463 U.S. at pp. 66–68 [finding pamphlets commercial notwithstanding that they discussed important public issues].)

The Court of Appeal’s attempt to immunize Sony from liability based on the purported relation of Sony’s statements to the controversy plainly runs against the teachings of *Kasky*. (*Serova II, supra*, 44 Cal.App.5th at pp. 131–132.) And, as a matter of policy, the debate about whether a product is deceptively advertised should not prevent recovery by buyers from sellers for the allegedly deceptive advertisements and labels. Otherwise, the purveyors of products would be incentivized to lie and would never be incentivized to correct their misrepresentations, endlessly causing damage to an ever-increasing pool of unsuspecting consumers.

3. The statement in the video commercial is commercial under Kasky.

The statement in the video commercial describing *Michael* as “a brand-new album from the greatest artist of all time” is also commercial under *Kasky*. The speaker—Sony—was engaged in *Michael*’s production, sale, and distribution. The video commercial’s intended audience was potential buyers of the album. And the statement consists of factual representations

about the source, content and nature of the speakers' product—*Michael*—made to promote sales of the product. The Court of Appeal did not cite a single case that would transform a traditional form of advertising, such as the video commercial, into noncommercial speech.

4. Sony's lack of personal knowledge about whether Jackson sings on the Cascio recordings does not turn the challenged statements into noncommercial speech.

The Court of Appeal concluded that speech is noncommercial under *Kasky* if the defendant lacks personal knowledge about the facts the defendant is speaking about because this makes the defendant's message not commercial in character. This position writes into the UCL and CLRA an exception to liability that does not appear in those laws. Had the Legislature intended to provide a defense based on a lack of firsthand knowledge of the truth, it surely knew how to do so.

The Court of Appeal relied on *Kasky's* reference that Nike could “readily verify” the truth of its factual assertions (*Kasky, supra*, 27 Cal.4th at p. 963) and *Kasky's* discussion of the policy for denying protection to false commercial speech, which “assumes that commercial speech consists of factual statements and that those statements describe matters within the personal knowledge of the speaker or the person whom the speaker is representing.” (*Id.* at p. 962.)

However, *Kasky's* ultimate definition of a message of commercial character for liability purposes under the CLRA and UCL does not contain the requirement of personal knowledge.

(*Id.* at p. 961 [defining commercial content 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”], emphasis added.) Nor can the requirement of personal knowledge be read into *Kasky*’s definition and the relevant statutes by implication.

Indeed, the focus of *Kasky*’s third element on the character of the message was justified by the purpose of the test—to detect speech that can cause “commercial harms.” (*Id.* at p. 955.) In the false advertising context, this means a determination of whether the allegedly misleading 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” (representations of opinions are not actionable).

Whether a statement is factual or an opinion is ordinarily judged from the perspective of the audience, not the speaker. (*Baker v. Los Angeles Herald Exam’r* (1986) 42 Cal.3d 254, 260–61.) If the intended audience understands the message as factual and relies on it as a fact in deciding whether to buy the 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 when he uttered it.

This logic comports with a recent U.S. Supreme Court comment on the difference between facts and opinions in *Omnicare, Inc. v. Laborers Dist. Council Const. Industry* (2015) 575 U.S. 175. The Court employed a hypothetical that is similar to the context here to show that personal knowledge is immaterial to the determination of whether a statement is factual; rather focusing on the wording conveyed *to consumers*:

“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.”

(*Id.* at pp. 183–184.)

Thus, a requirement of personal knowledge cannot reasonably be read into the *Kasky* test. Further, it would conflict with the plain language and established interpretation of the

UCL, CLRA and the False Advertising Law, Business & Professions Code, §17500 (FAL).

Because only commercial speech is actionable under the UCL, CLRA and FAL (*Rezec v. Sony Pictures Entm't, Inc.* (2004) 116 Cal.App.4th 135, 142), if such speech requires personal knowledge, this requirement will automatically be imported into these statutes. Essentially, a defendant will never be liable for false advertising under any of these statutes unless he misleads consumers with personal, firsthand, knowledge that he is speaking untruth. That elevates the standard of liability under these statutes higher than the standard of fraud (which requires scienter, but not necessarily *firsthand* knowledge). This also contradicts the plain language of these statutes and this and lower courts' holdings that these statutes have no scienter requirement. (Bus. & Prof. Code, § 17200 [prohibiting any "unlawful, unfair or fraudulent business act or practice"]; 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"]; Bus. & Prof. Code, §17500 [prohibiting statements "which by the exercise of reasonable care *should be* known, to be untrue or misleading", emphasis added]; *Kasky, supra*, 27 Cal.4th at p. 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.”]; *People v. Superior Court (Olson)* (1979) 96 Cal.App.3d 181, 195 [concluding, in the context of the FAL, 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”].)

Moreover, the CLRA provides a defense of bona fide error. (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.) The addition of the personal knowledge requirement into the commercial speech test renders this defense obsolete. Errors made without personal knowledge would not be actionable regardless of whether the defendant adopted error avoidance procedures or offered remedies to consumers. The Court of Appeal’s knowledge requirement creates a burden of proof for plaintiffs in the section 1784 context contrary to the plain language of the statute, which makes “bona fide error” an affirmative defense.

The Court of Appeal, in adopting a personal knowledge requirement, has usurped the Legislature's prerogative to amend the relevant consumer protection laws.

Aside from the clear conflict it creates with the statutory and case law, the personal knowledge requirement is unworkable from a policy standpoint. To begin with, it provides no bright line for courts. When can a legal entity be considered to have "personal knowledge" of the fact or practice? When can it be imputed with personal knowledge of its suppliers' or subcontractors' practices? In *Kasky*, Nike was not talking about its own business operations; it was talking about subcontractors' factories, but it 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.) *Kasky* is silent as to what that "assumption of responsibility" looks like. Would an ordinary indemnification clause suffice? Would language in Sony's contract with defendants Cascio and Porte suffice? (The Court of Appeal seemed to assume it would not without allowing Serova to discover, and make informed allegations about, the contract.) The notion of "personal knowledge," especially when applied to non-natural persons and based on abstract concepts like "an assumption of responsibility", is so vague that it is bound to produce endless litigation.

Even more importantly, the consumer in many cases has no way to tell whether the seller had personal knowledge of the facts presented in an advertisement. Some songs are recorded with a

record label executive present in the studio and observing the recording, while others are purchased post-recording from an independent producer. Some clothing items may be produced at the apparel manufacturer's own factories, while others are purchased by the manufacturer from third-party suppliers and relabeled. The contract between the manufacturer and the supplier may or may not have a sufficient "assumption of responsibility" clause like Nike's contract with its subcontractors in *Kasky*. Such specifics of the seller's business are not known to an average consumer. Upon seeing the advertisement, given the Court of Appeal opinion, a consumer would have to guess whether the advertiser's speech is commercial and who would be the appropriate party to sue if the advertisement is false. The buyer would become responsible for investigating every advertisement. California consumer protection statutes were enacted to abolish that responsibility and create new rights and remedies that had not been available during the *caveat emptor*, or "buyer beware," era of the common law. (*Nationwide Biweekly Admin., Inc. v. Superior Court of Alameda Cty.* (2020) 9 Cal.5th 279, 322 (*Nationwide Biweekly*)). The Court of Appeal's decision, absent reversal, essentially undoes the consumer protections of the UCL and CLRA, returning Californians to *caveat emptor*.

Both the CLRA and the UCL are remedial statutes meant to "protect consumers against unfair and deceptive business practices" and "return money obtained through an unfair business practice to those persons in interest from whom the property was taken." (Civ. Code, § 1760; *Kasky, supra*, 27 Cal.4th

at p. 950; *Broughton v. Cigna Healthplans of California* (1999) 21 Cal.4th 1066, 1099.) If, out of the entire distribution chain, only the initial supplier with personal knowledge of the issue is held accountable, and all subsequent distributors and sellers are allowed to keep money received on account of the unfair practice or deceit, the consumer may never be made whole and thereby loses the protection of the law. He who takes the benefit must bear the burden. (Civ. Code, § 3521.) The initial supplier, who may receive five cents on a dollar of the retail price paid by the consumer, may simply not have enough resources to refund the entire retail price of the product to all affected consumers. This is unfair to both the consumers and the initial supplier who is forced to pay more than he had benefited. Not to mention, economically unfeasible: should a microchip manufacturer be burdened with repairing and replacing all computers where its defective chip happened to be installed? If a car navigation system is faulty, should the software developer who programmed it for the automaker be tasked with recalling the cars?

Furthermore, “the primary objective of the [UCL] is preventive, . . . to protect consumers from unfair or deceptive business practices and advertising.” (*Nationwide Biweekly, supra*, 9 Cal.5th at p. 326.) If, out of the entire distribution chain, only the initial supplier with personal knowledge is held liable for misrepresentations, prevention becomes impossible. The subsequent resellers (be it the computer manufacturer or the automaker from the previous example, or Sony in this case) can perpetually advertise and sell the product deceptively, sending an

endless line of damaged consumers to collect from the initial supplier with personal knowledge (the chip manufacturer, the software developer, the forger of the recordings) who is drowned in litigation and powerless to stop the deceptive advertising campaign it does not control.

Finally, the Court of Appeal's decision destroys the deterrent effect of the UCL and CLRA by providing a "get out of jail free card" to sellers so long as they lack firsthand knowledge. Absent reversal, the Court of Appeal decision invites recklessness in advertising and product labelling.

Importantly, *Kasky* does not augur such absurd outcomes because it did not require personal knowledge of the *speaker*. Rather, it noted that commercial speech describes matters "within the personal knowledge of the speaker *or the person whom the speaker is representing*." (*Kasky, supra*, 27 Cal.4th at p. 962, italics added.) To the consumer who knows nothing of the business relationship between the product manufacturer and its suppliers, subcontractors and outsourcers, the manufacturer/seller who falsely advertises the product to consumers and attaches its name to the product, under California law *represents* all those in the supply chain responsible for the initial misrepresentation.

Here, Sony's challenged statements unequivocally represent to consumers that *Michael* contained ten recordings of performances by Michael Jackson. In determining whether these representations are commercial, their factual character, not Sony's reasons for making them must be the focus of the inquiry.

Ultimately, consumers bought Sony's product, and they were harmed by Sony. They may not know, nor should care, who in Sony's supply chain introduced the misrepresentations first. Sony represents its suppliers in transactions with consumers, and that is enough to treat Sony's advertisements as commercial speech.

C. Prohibition on false advertising of expressive works does not conflict with the First Amendment.

Sony urged that a record company can never be sufficiently certain about the source of posthumous music and, were this lawsuit allowed to proceed, the record company would be forced to withhold such music from release, sell it without attribution, or present views with which it disagrees. The Court of Appeal concluded that this would impermissibly chill the sale of musical works or regulate the expression of a point of view on a public controversy. (*Serova II, supra*, 44 Cal.App.5th at pp. 129–130.) Such conclusion is unsubstantiated.

First, the CLRA and UCL do not burden Sony's right to distribute musical works—including the Cascio recordings—with truthful attribution. The statutes prohibit only *deceptive* attribution in the sales context—a regulation narrowly tailored to prevent consumer deceit. Sony is free to distribute the Cascio recordings separately or together with Jackson's songs, as long as Sony attributes the Cascio recordings to the singer who actually sings them.

Second, the statutes do not compel Sony to express views with which Sony disagrees (or any *views* at all); they compel only

factual and truthful statements about the product in the narrow context of product advertising.

The Court of Appeal relied on the U.S. Supreme Court’s decision in *National Institute of Family & Life Advocates v. Becerra* (2018) 138 S.Ct. 2361 (*Life Advocates*), which held that a California law requiring notices in health care clinics concerning available health care services, including abortion, likely violated the First Amendment. The Supreme Court declined to recognize an exception to strict scrutiny review under the First Amendment for “professional speech,” noting that compelled disclosures are permitted only in the context of professionals’ “commercial advertising” concerning “‘purely factual and uncontroversial information about the terms under which . . . services will be available.’” (*Id.* at p. 2372.) By compelling a particular disclosure, the law at issue amounted to an impermissible “content-based regulation of speech.” (*Id.* at p. 2370–2371.) The Court of Appeal concluded that, by compelling disclosure of the controversy over the Cascio recordings, the UCL and CLRA would likewise require Sony to present views in its marketing materials with which Sony does not agree. (*Serova II, supra*, 44 Cal.App.5th at p. 129.)

The Court of Appeal’s attempt to analogize to *Life Advocates* is unavailing. The statute in *Life Advocates* compelled clinics to put up notices informing women of the places where they could get free or low-cost abortions, and some clinics disagreed with the propriety of such notices. By compelling clinics to put up the notices, the statute essentially compelled the clinics

to express the statutorily prescribed view on the appropriateness of abortions—an issue that was not a question of fact and on which different views could have equal merit. In contrast, the CLRA and UCL do not compel expression of any particular view—they compel truth in advertising. What that truth is in each particular case is determined by the trier of fact and not by defendant’s (or plaintiff’s, or the Legislature’s) subjective views. The narrow requirement that Sony corrects misleading factual advertisement—if and when the advertisement is positively adjudged misleading by the trier of fact—does not compel Sony to express *views* with which it disagrees. Unlike the question of appropriateness of abortions, the question of whether Michael Jackson sang certain songs is susceptible to a “true” or “false” answer, and once the trier of fact gives that answer, there is no room for “views” under the law. (*Life Advocates, supra*, 138 S.Ct. at p. 2376 [noting that it does not “question the legality of . . . purely factual and uncontroversial disclosures about commercial products”].)

The Court of Appeal apparently reasoned that Sony should not be forced to litigate even meritorious consumer claims because the mere prospect of liability could compel Sony, in the absence of personal knowledge at the time of the release, to make preventive disclosures contrary to Sony’s views. (*Serova II, supra*, 44 Cal.App.5th at p. 129.) But no such controversial disclosures are necessary. What Sony could have disclosed here, if it wanted to protect itself from the risk of liability for a mistaken conclusion, was simply its lack of knowledge. Sony could have

made clear that its attribution of the Cascio recordings to Jackson was a belief and not a fact (e.g., “Tracks 3, 5 and 7 are believed to be sung by Michael Jackson”).

Such limited disclosure would not have forced Sony to express views with which it disagreed, nor would it have burdened the distribution of the Cascio recordings. It would have made the album cover as a whole not misleading and accurately reflected Sony’s position argued now before the court (that it did not know who the singer was but believed it was Jackson), at the same time alerting consumers of the risk that the singer on these recordings may be someone else. It is constitutionally permissible and recommended by the U.S. Supreme Court. (*In re R.M.J.* (1982) 455 U.S. 191, 203 [“the remedy [to false or misleading advertising] in the first instance is not necessarily a prohibition but preferably a requirement of disclaimers or explanation.”].)

Product distributors routinely provide such disclosures. For example, the statement “May contain traces of nuts” on the list of food ingredients allows the food distributor to avoid liability for harm to consumers when the distributor is not entirely sure that its assessment of the product’s ingredients is accurate.

It is no less reasonable for consumers to expect such disclosures in the attribution of art. The value of an artwork is almost entirely determined by the name of the artist attached to it. A painting by Picasso fetches millions of dollars, while a painting by a Picasso copyist may be worth ten thousand times less. Similarly, a song by Michael Jackson brings millions of dollars to the record label, while a song by a Michael Jackson

impersonator may bring ten thousand times less. (The sales models are different: in the world of visual art, one buyer pays a lot for the exclusive ownership of the original, while in the world of music, many consumers pay a little each for the non-exclusive ownership of reproductions. But the resulting tally is the same: the work fetches substantially higher revenue for the seller when it is attributed to a famous talented artist than when it is attributed to a copyist.) In light of this enormous effect of attribution on the value of the work, public policy begs that the seller is tasked with the utmost diligence in ascertaining the authorship and, to the extent a reasonable doubt remains, should disclose that doubt to the buyer if the seller wants to eliminate any risk of liability for a mistaken conclusion. The work may bring in lower revenue when a doubt is attached to it, but this difference merely reflects an organic reduction in worth caused by the uncertainty about authenticity of the work. The First Amendment guarantees art sellers a right to distribute such dubious works, but not a right to boost their worth by misrepresenting their origin or concealing its uncertainty.

Importantly, the release of music—the protected activity itself—is not burdened by this rule. The record label can release even dubious material without fear of liability so long as it allows consumers to make an informed decision based on the truthfully disclosed uncertainty.

Sony recognized the existence of uncertainty in the attribution of the Cascio recordings when it conducted a listening session and hired forensic experts to evaluate the

recordings. It also acknowledged via Howard Weitzman's letter that – even though Sony chose to subjectively believe the songs were authentic – Sony's efforts could not eliminate the existence of uncertainty and “ultimately, Michael's fans will be the judges of these songs.” (CT 2:279-280) But then Sony chose not to disclose the existence of uncertainty to consumers in advertising, and by making this choice assumed the risk of liability should its subjective belief turn out to be wrong and the advertising turn out to be false.

Holding that Sony is immune from liability regardless of whether it spoke truths or falsehoods and framed them to buyers as facts or opinions would turn the order of the California art market on its head. It would discourage sellers' diligence and encourage reckless sales of forgeries based on nothing but sellers' unsubstantiated “views” that the works they peddle are authentic.

VI. CONCLUSION

In *FilmOn*, this Court made clear that a mere tenuous, incidental or remote relationship of the speech to issues of public interest is insufficient to merit protection under the anti-SLAPP statute. Rather, the speech must *participate* in the public discourse, and such participation must be evident from both the content and the context of the speech. *FilmOn* compels the conclusion that Sony's statements on *Michael's* cover and in the video commercial are not protected speech as they evidently do nothing but sell the product to consumers, and nothing about their content, the speaker, the audience or the purpose lends

itself to an implication that Sony was addressing the public controversy.

Independent of the above issue, it is extremely important that this Court address the misguided holding of the Court of Appeal based on an untenable misinterpretation of *Kasky* that, if not reversed, will usurp legislative prerogative and insulate manufacturers and sellers of goods from liability for misrepresentations simply because they did not have firsthand knowledge of the facts represented. In the context of sales, California law protects consumers from such misrepresentations irrespective of “personal knowledge” of the person or entity responsible for the misrepresentations. Given the nature of commerce in the 21st Century, numerous are the circumstances where manufacturers and sellers lack firsthand knowledge of each fact they represent as truth. Consumers should not be made to suffer for the seller’s lack of knowledge. California law does not countenance immunity from responsibility for such misrepresentations. Nothing in the law makes a “representation of fact” an opinion for purposes of liability under the UCL and CLRA simply because the purveyor of the factual statements could not be sure of their truth.

For the reasons discussed, this Court should prevent Sony’s attempts to hide behind a controversy resulting from its own wrongdoing, or behind its supposed ignorance of the wrongdoing, and uphold California’s consumer protection laws to their fullest extent. The Court should overturn the decision of the Court of

Appeal in its entirety, leaving none of it binding or citable for any purpose pursuant to California Rules of Court, rule 8.1115(e)(3).

Dated: July 6, 2020

Respectfully Submitted,

/s/ Dennis F. Moss

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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 Appellant is produced using 13-point Century Schoolbook type including footnotes and contains approximately 12,470 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: July 6, 2020

/s/ Dennis F. Moss

Dennis F. Moss

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 July 6, 2020 declarant served **RESPONDENT'S OPENING BRIEF ON THE MERITS** by VIA TRUEFILING to:
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Bryan Freedman, bfreedman@ftllp.com
3. That on July 6, 2020, declarant served **RESPONDENT'S OPENING BRIEF ON THE MERITS** via FEDERAL EXPRESS to:
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Attorney General, State of California
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Los Angeles, CA 90012

I declare under penalty of perjury that the foregoing is true and correct. Executed this 6th day of July, 2020 at Sherman Oaks, California.

/s/ Lea Garbe

Lea Garbe

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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ENTERTAINMENT**

Case Number: **S260736**

Lower Court Case Number: **B280526**

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