NO. S260736

IN THE
SUPREME COURT OF CALIFORNIA

VERA SEROVA,
Plaintiff / Respondent,

v.

SONY MUSIC ENTERTAINMENT *et. al,*
Defendant / Appellant.

Court of Appeal, Second Appellate District, Division 2
Case No. B280526

Los Angeles County Superior Court
Case No. BC548468**,** Hon. Ann I. Jones

BRIEF OF *AMICI CURIAE* UC BERKELEY CENTER FOR CONSUMER LAW & ECONOMIC JUSTICE, TRUTH IN ADVERTISING, INC., PUBLIC COUNSEL, LEGAL AID SOCIETY OF SAN DIEGO, HOUSING & ECONOMIC RIGHTS ADVOCATES, EAST BAY COMMUNITY LAW CENTER, CONSUMERS FOR AUTO RELIABILITY & SAFETY, CONSUMER ACTION, AND BAY AREA LEGAL AID, IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amicus curiae Center for Consumer Law and Economic Justice is a research and advocacy center housed at UC Berkeley School of Law. Through participation as *amicus* in this Court, in the United States Supreme Court, and in major cases around the state and throughout the nation, the Center seeks to develop and enhance protections for consumers and to foster economic justice. The Center appears in this proceeding in support of the regime developed by the California Legislature over more than a century to protect the state's consumers from deceptive advertising, and in opposition to the misuse of the anti-SLAPP statute to try to undermine that regime.

Amicus curiae Truth in Advertising, Inc. (TINA.org) is a nonprofit, nonpartisan consumer advocacy organization whose mission is to combat the systemic and individual harms caused by deceptive marketing. As part of its advocacy efforts, TINA.org investigates deceptive advertising campaigns, files complaints with state and federal regulators regarding false marketing issues, and participates as *amicus curiae* in court cases across the country that pertain to false and deceptive marketing, both at the trial court

[1] This brief was not authored in whole or in part by counsel for a party. No person or entity other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

and the appellate level. TINA.org appears in this case as part of its ongoing efforts to protect consumers from deceptive promotional materials.

Amicus curiae Public Counsel is the nation's largest public interest law firm specializing in delivering pro bono legal services to low-income communities. Through a pro bono model that leverages the talents and dedication of thousands of attorney and law student volunteers, Public Counsel provides free legal assistance to low-income people and addresses systemic poverty and civil rights issues through impact litigation and policy advocacy. The Consumer Rights & Economic Justice Project, one of the oldest projects within Public Counsel, works to advance economic justice by providing legal counsel for, and advocacy on behalf of, low-income individuals and their families, addressing inequalities in bargaining power, opposing those who take advantage of the vulnerable, and holding wrongdoers accountable. We are seeing anti-SLAPP motions from corporations against our low-income clients with greater frequency. We believe it is vital to limit this procedure to matters of real public interest, and not to allow its use to protect corporations from consumer protection claims.

Amicus curiae Legal Aid Society of San Diego (LASSD) represents low-income consumers defrauded by businesses. The clients LASSD represents have very limited financial resources. If those limited funds,

which sometimes are not enough to cover these families' basic needs, are expended on deceptively advertised goods and services, then money needed for food and rent is spent on useless or defective products or services. This is a significant harm that consumer protections laws, like the Unfair Competition Law and Consumers Legal Remedies Act, were designed to avoid. The ruling below turns these statutes, which are to be broadly construed in favor of the consumer, on their proverbial heads.

Amicus curiae Housing and Economic Rights Advocates (HERA) is an Oakland-based legal services and advocacy non-profit whose mission includes the protection of homeownership. HERA's home protection work includes representing homeowners regarding PACE loans, in which the cost of energy improvements is added on to the homeowner's property tax bill. PACE loans often render the property tax burden on the home unaffordable, resulting in foreclosure and outright loss of the home. Recently, PACE administrators have begun to abuse the anti-SLAPP statute in a manner similar to Sony in this case, to defend and deter PACE consumer protection litigation. HERA believes that clarifying the anti-SLAPP statute and preventing abuses that close courthouse doors to consumer remedies is essential to protect the integrity of California's consumer protection laws, including the UCL and the CLRA.

Amicus curiae the East Bay Community Law Center (EBCLC) is the

largest provider of free legal services in Alameda County and a nationally recognized poverty law clinic. EBCLC's Consumer Law Practice, in particular, provides legal assistance to hundreds of low-income consumers in the East Bay annually who are deceived into purchasing a good or service by false and misleading advertising.

Amicus curiae Consumers for Auto Reliability & Safety (CARS) is a national non-profit auto safety and consumer advocacy organization based in Sacramento. CARS has sponsored multiple laws enacted in California to expand and improve protections for consumers — including individual entrepreneurs, small business owners, and members of the Armed Forces — from false advertising, unfair and deceptive acts and practices, and fraud, CARS actively supported legislation to preserve and protect the free speech rights of public interest organizations and individuals from abusive SLAPP lawsuits.

Amicus curiae Consumer Action is a national non-profit consumer education and advocacy that has protected the interests of low- and moderate-income consumers since 1971. Consumer Action has long supported full disclosure in order that consumers can make informed choices in the purchase of goods and services.

Amicus curiae Bay Area Legal Aid (BayLegal) is the largest provider of free civil legal services to low-income residents of the San

Francisco Bay Area. BayLegal serves more than 60,000 low-income individuals each year through wraparound legal services in housing preservation, domestic violence and sexual assault prevention, economic security, consumer protection, and healthcare access. BayLegal's consumer protection unit assists vulnerable low-income individuals who have been victimized by unscrupulous practices, scams, and false advertising perpetrated by a range of industries that prey on an unsophisticated public, such as debt settlement companies, foreclosure rescue companies, student loan rescue companies, home improvement contractors, and lenders of high-interest loans. BayLegal brings claims under the UCL and the CLRA in order to recover money that its clients have lost to scammers, and to enjoin unfair and deceptive practices and false advertising, in order to protect other California consumers.

INTRODUCTION AND SUMMARY OF ARGUMENT

This is a straightforward case of deceptive advertising. For purposes of the present proceeding, the parties have stipulated that the album *Michael* contains songs sung by someone other than Michael Jackson. The parties do not dispute that the album cover Sony designed contains the statement "This album contains 9 previously unreleased vocal tracks performed by Michael Jackson" (Plaintiff's Opening Brief on the Merits

(POB), at p. 12) and that the promotional video Sony produced includes the claim that *Michael* is "a brand new album from the greatest artist of all time" (POB at p. 14). Nor do the parties argue that either the Unfair Competition Law (UCL) (Bus. & Prof. Code, § 17200) or the Consumer Legal Remedies Act (CLRA) (Civ. Code, § 1770) contains a scienter requirement. As a result, in determining the outcome of the present appeal, this Court may presume that Sony — whether or not it believed that Mr. Jackson sang the contested songs — engaged in misleading or deceptive advertising in violation of the UCL and the CLRA.

Sony has no free speech right to deceive consumers. Neither the First Amendment (U.S. Const., 1st Amend.) nor the Free Speech Clause (Cal. Const., art. I, § 2, subd. (a)) protects false or actually misleading commercial speech. The anti-SLAPP statute (Code Civ. Proc., § 425.16) therefore has no bearing here. Ms. Serova's case is not a "strategic lawsuit against public participation." It is, rather, a straightforward deceptive advertising action brought under California's basic consumer protection statutes. To argue otherwise — to claim that Ms. Serova's lawsuit was brought in order to chill Sony's constitutional rights — disserves both logic and the very real problem of corporate interference with individual and community-based organization's free speech rights that the anti-SLAPP statute was designed to address.

The Legislature crafted the anti-SLAPP statute to prevent precisely the scenario presented by this case: a powerful corporate defendant uses the special motion to strike to escape liability for deceptive advertising. Whatever protection the anti-SLAPP statute provides to artists, it does not provide a get-out-of-jail-free card to forgers — or their production companies.

Resolving the present proceeding does not require delving into the intricacies of the anti-SLAPP statute. Rather, it entails the straightforward application of California's basic consumer protection laws to what is, at its heart, a mine-run case of deceptive advertising.

ARGUMENT

I. SONY ENGAGED IN DECEPTIVE ADVERTISING WHEN IT PROMOTED *MICHAEL* AS A MICHAEL JACKSON ALBUM EVEN THOUGH THREE OF THE SONGS WERE SUNG BY SOMEONE ELSE.

Under the stipulation governing this proceeding, Sony's promotion of *Michael* plainly violates California's statutes protecting consumers from false and misleading advertising. Sony marketed *Michael* as "a brand new album from the greatest artist of all time," (POB at p. 12) with "9 previously unreleased vocal tracks performed by Michael Jackson"[2] (POB

[2] The tenth track on the album was previously released in 2004. (POB at p.

at p. 14). Because, as the parties have agreed for purposes of this appeal, three of the nine songs were not sung by Michael Jackson (*Serova v. Sony Music Entertainment* (2020) 44 Cal.App.5th 103, 113 (*Serova*)), Sony has made advertising statements that were untrue and misleading and has therefore violated California's basic consumer protection laws.

Sony's statements on the album cover and in the promotional video constitute "advertising statements" under the UCL and CLRA. (*Keimer v. Buena Vista Books, Inc.* (1999) 75 Cal.App.4th 1220, 1227 (*Keimer*) [statements on book covers, video jackets, and other packaging can be considered advertising].) As explained in Section II, *infra*, the statements constitute "commercial speech," which brings them under the purview of the two statutes. (*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"]), disapproved on other grounds by *FilmOn.com Inc. v. DoubleVerify Inc.* (2019) 7 Cal.5th 133.

The statements on the album cover and in the promotional video violate the UCL and CLRA because they are "actually misleading" and have "a capacity, likelihood or tendency to deceive or confuse the public." (*Leoni v. State Bar* (1985) 39 Cal.3d 609, 626; see also *Kasky v. Nike, Inc.*

12, fn. 1.)

(2002) 27 Cal.4th 939, 951 (*Kasky*).) Any reasonable consumer (see *Lavie v. Procter & Gamble Co.* (2003) 105 Cal.App.4th 496, 513) would believe that the statement "This album contains 9 previously unreleased vocal tracks performed by Michael Jackson" means that Michael Jackson sang all nine songs. No reasonable person would interpret the claim "a brand new album from the greatest artist of all time" to mean that only six of the nine new songs were sung by the King of Pop. There can be little doubt that members of the public "are likely to be deceived" by such statements. (*Kasky*, *supra*, 27 Cal.4th at p. 951 [citing *Comm. On Children's Television, Inc. v. Gen. Foods Corp.* (1983) 35 Cal.3d 197, 211].) Further, Sony "passed off" the disputed songs as having been sung by Michael Jackson when they were not (CLRA, Civ. Code, § 1770(a)(1)), misrepresented the source of the album (CLRA, Civ. Code, § 1770(a)(2)), and represented that the album had characteristics it did not have (CLRA, Civ. Code, § 1770(a)(5)).

The fact that Sony's statements could be construed as partially true because *some* of the songs on the album were sung by Michael Jackson does not change the conclusion that the advertising is misleading. Liability under the UCL and CLRA often results from a combination of true and misleading statements. (See *Skinner v. Ken's Foods, Inc.* (2020) 53 Cal.App.5th 938, 949 [salad dressing label claiming it was made with olive

oil was misleading because the dressing was made primarily with vegetable oil]; *Colgan v. Leatherman Tool Grp., Inc.* (2006) 135 Cal.App.4th 663, 682 ["Made in U.S.A." labeling was misleading even though some of the parts were made in the United States because reasonable consumers would not expect foreign manufacturing of any of the products]; *Day v. AT & T Corp.* (1998) 63 Cal.App.4th 325, 332–33 ["A perfectly true statement couched in such a manner that it is likely to mislead or deceive the consumer, such as by failure to disclose other relevant information, is actionable under these sections"].) Similarly, Sony's statements that the album contained new songs by Michael Jackson were partly true, but a reasonable consumer would not expect that a "sound-alike" singer was the lead vocalist on any of the tracks.

In determining whether Sony violated the UCL and CLRA, it is irrelevant whether the company knew if Michael Jackson sang the disputed songs. These statutes contain no scienter requirement. (Bus. & Prof. Code, § 17200; Civ. Code, § 1770; *Podolsky v. First Healthcare Corp.* (1996) 50 Cal.App.4th 632, 647 [violation of the UCL is a "strict liability offense"]; *Mazza v. American Honda Motor Co., Inc.* (9th Cir. 2012) 666 F.3d 581, 591 ["the California laws at issue here [the UCL and the CLRA] have no scienter requirement"].)[3] Additionally, California courts have made clear

[3] The CLRA's exception for bona fide errors (Civ. Code, § 1784) does not

that the "fraudulent" prong of the UCL is distinct from common law fraud, where the victim must demonstrate the perpetrator's knowledge. (*In re Tobacco II Cases* (2009) 46 Cal.4th 298, 312 ["'A [common law] fraudulent deception must be actually false, known to be false by the perpetrator and reasonably relied upon by a victim who incurs damages. None of these elements are required to state a claim for injunctive relief' under the UCL"] [citing *Day v. AT&T Corp*. (1998) 63 Cal.App.4th 325, 332]; see also *State Farm Fire & Casualty Co. v. Superior Court* (1996) 45 Cal.App.4th 1093, 1105 ["[T]he 'fraud' contemplated by section 17200's third prong bears little resemblance to common law fraud or deception. The test is whether the public is likely to be deceived"].) As such, neither the UCL nor the CLRA requires that an advertiser have actual knowledge that the statements are false or misleading. Sony's claims that it did not have actual knowledge whether the songs were sung by Michael Jackson are irrelevant.

In sum, the statements in the promotional video and on the album cover constitute deceptive advertising under the UCL and CLRA. The statements would lead a reasonable consumer to believe that Michael

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apply in this case because Sony has neither admitted an error (outside the context of the anti-SLAPP motion) nor made an attempt to correct it. In any event, the UCL contains no such exception. (*Podolsky*, *supra*, 50 Cal.App.4th at p. 647.)

Jackson sang all of the songs, when — as stipulated for purposes of this anti-SLAPP motion — in fact he sang only six of the nine new tracks. In other words, despite its celebrity subject, this proceeding represents an unremarkable and clear-cut case of misleading advertising.

II. SONY'S PROMOTION OF THE ALBUM CONSTITUTES ACTUALLY MISLEADING COMMERCIAL SPEECH THAT RECEIVES NO PROTECTION UNDER THE FIRST AMENDMENT OR THE CALIFORNIA CONSTITUTION'S FREE SPEECH CLAUSE.

Given the posture of this proceeding, the statements on the album cover and in the promotional video used to promote *Michael* represent false and misleading commercial speech and warrant no protection under the First Amendment to the United States Constitution or Article I, Section 2 of the California Constitution. Under the framework set out by this Court in *Kasky*, *supra*, 27 Cal.4th at p. 959 and by the high court in *Bolger v. Youngs Drug Prod. Corp.* (1983) 463 U.S. 60, 66 (*Bolger*), Sony's statements readily qualify as commercial speech. Because Sony's commercial speech is false and misleading, it merits no protection under either charter.

A. False Or Misleading Commercial Speech Does Not Warrant Protection Under The United States Or California Constitution.

This Court and the United States Supreme Court have both repeatedly affirmed the principle that commercial speech that is false, or

actually or inherently misleading, receives no protection under the First Amendment or the California Free Speech Clause and may be prohibited entirely. (*Peel v. Attorney Registration and Disciplinary Com'n of Illinois* (1990) 496 U.S. 91, 111 (conc. opn. of Marshall, J.) ["States may prohibit actually or inherently misleading commercial speech entirely"]; *Kasky*, *supra*, 27 Cal.4th at p. 959 ["[O]ur state Constitution does not prohibit the imposition of sanctions for misleading commercial advertisements"].)

1. Sony's false and misleading statements are unprotected by the First Amendment.

The high court has made it abundantly clear that there is no protection for false or misleading commercial speech under the First Amendment. (*Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.* (1976) 425 U.S. 748, 771 ["Untruthful speech, commercial or otherwise, has never been protected for its own sake"].) As such, states "may deal effectively with false, deceptive, or misleading sales techniques." (*Bolger*, *supra*, 463 U.S. at p. 69; see also *Zauderer v. Office of Disciplinary Counsel* (1985) 471 U.S. 626, 638 ["The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading"]; *In re R.M.J.* (1982) 455 U.S. 191, 203 ["Misleading advertising may be prohibited entirely"]; *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York* (1980) 447 U.S. 557, 563 ["[T]here can be no constitutional objection to the

suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it"].)

The first step of an inquiry evaluating commercial speech is whether the speech is false or actually or inherently misleading; if so, there is no protection. (*People ex rel. Gascon v. HomeAdvisor, Inc.* (2020) 49 Cal.App.5th 1073, 1085 ["Once it is determined that commercial speech is inherently likely to deceive, our inquiry ends because there is no First Amendment interest at stake"]; see also *Kasky*, *supra*, 27 Cal.4th at p. 952 ["At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading"].)

Courts have stressed the importance of protecting consumers from false or misleading statements in advertising — even when those advertisements promote artistic works. (*Keimer*, *supra*, 75 Cal.App.4th 1220, 1232 [highlighting the "importance of distinguishing between truthful and false promotions, with constitutional protection inuring to the former, but not to the latter"]; see also *Rogers v. Grimaldi* (2d Cir. 1989) 875 F.2d 994, 999 [Lanham Act applies to artistic works, such as titles, when the "title explicitly misleads as to the source or the content of the work" so as to "protect the public against flagrant deception"]; *Toho Co.,*

Ltd. v. William Morrow and Co., Inc. (C.D. Cal. 1998) 33 F.Supp.2d 1206, 1212 [First Amendment did not protect book title that was likely to mislead consumers in Lanham Act action].) The fact that a work itself is protected speech does not mean that advertisements for that work — especially deceptive advertisements — are automatically protected. If the rule were otherwise, then "every film [or music or art] advertisement, no matter how false, would be outside the scope of consumer protection laws." (*Rezec*, *supra*, 116 Cal.App.4th at p. 142.)

Because, for purposes of this appeal, Sony's speech on the album cover and in the promotional video is false and actually misleading, that speech merits no First Amendment protection. The statements that the album includes nine new songs by Michael Jackson are untrue. Sony has no First Amendment right to make false or misleading statements in promoting *Michael*. There is, therefore, no First Amendment defense to Serova's deceptive advertising claims.

2. Sony's false and misleading statements are unprotected by the California Free Speech Clause.

This Court has determined that false or misleading commercial speech is also not entitled to protection under the California Constitution. (*Kasky*, *supra*, 27 Cal.4th at p. 959 ["[O]ur state Constitution does not prohibit the imposition of sanctions for misleading commercial advertisements"]; *In re Morse* (1995) 11 Cal.4th 184, 200 ["[W]e see no

reason why … misleading advertisements would be protected commercial speech under the California Constitution"].) As this Court has explained, allowing the imposition of sanctions for misleading advertising is "consistent with the text of the state constitutional provision, which makes anyone who 'abuse[s]' the right of freedom of speech 'responsible' for the misconduct." (*Kasky*, *supra*, 27 Cal.4th at p. 959; Cal. Const., art. I, § 2, subd. (a).)

As a result, Article I, section 2 of the California Constitution does not protect Sony's false and misleading commercial speech. The misleading statements on the cover of *Michael* and in the promotional video are subject to the constraints of the UCL and CLRA.

B. Sony's Statements On The Album Cover And In The Promotional Video Constitute Commercial Speech.

The statements on the album cover and in the video promoting *Michael* are commercial speech, just like any other statement on the packaging of a product. (*Keimer*, *supra*, Cal.App.4th at p. 1227 [statements on a book jacket and promotional video cover constituted misleading commercial speech].) The fact that the product at issue is an album does not change the nature of the speech promoting its sale. (*Id.*; see also *Rezec*, *supra*, 116 Cal.App.4th at p. 143 [statements in film advertisements that a nonexistent critic had approved of the films were misleading commercial speech].)

The statements constitute commercial speech under both the First Amendment and the Free Speech Clause. Although this Court and the high court may take slightly different approaches, the United States and California constitutions do not impose "different boundaries between the categories of commercial and noncommercial speech." (*Kasky*, *supra*, 27 Cal.4th at p. 959.)

1. The statements constitute commercial speech under the First Amendment.

The statements at issue are commercial speech according to the standards set out by the U.S. Supreme Court. (*Bolger*, *supra*, 463 U.S. at p. 67.) In *Bolger* itself — a case that involved pamphlets advertising contraceptives — the high court found relevant the following factors in determining that the pamphlets constituted commercial speech: first, the pamphlets were "conceded to be advertisements"; second, the pamphlets contained "reference to a specific product"; and, third, the advertiser had an "economic motivation" for mailing the pamphlets. (*Id*. at pp. 66-67.) The "combination of *all* these characteristics" led to the conclusion that the relevant statements comprised commercial speech. (*Id*. at p. 67.)

In the present case, the particular characteristics of the statements on Sony's album cover and in the promotional video demonstrate their commercial nature. First, sales-oriented statements on book covers, video jackets, and other packaging can readily be considered commercial

advertisements. (See *Keimer*, *supra*, (1999) 75 Cal.App.4th at p. 1227 [finding no First Amendment protection for misleading statements that appeared on a book jacket and promotional video cover and were conceded to be commercial advertisements].) Misleading statements in advertisements that seek to sell a work of art, such as a film, are no less "commercial" than misleading ads for other products. (See *Rezec*, *supra*, 116 Cal.App.4th at p. 143 [holding that statements in film advertisements constituted misleading commercial speech].) In this case, the challenged statements that appear on the album cover and in the promotional video are plainly designed to promote sales of *Michael*.

Second, the album cover and promotional video also obviously "reference … a specific product," which supports the idea that those materials are commercial speech. (*Bolger*, *supra*, 463 U.S. at p. 66.) The statements on the *Michael* album cover and in the video solely reference that one specific album, with the object of promoting its sale.

Third, Sony clearly has an economic motivation for including the statements on the album cover and in the promotional video. (*Bolger*, *supra*, 463 U.S. at p. 66.) Sony's statements promoting *Michael* are "intended to lead to commercial transactions, which in turn assumes that the speaker and the target audience are persons who will engage in those transactions, or their agents or intermediaries." (*Kasky*, *supra*, 27 Cal.4th at

p. 961.) The purpose of Sony's statements is to encourage people to buy the album and to make money from those sales, "for what other reason would it have for publishing [it]?" (*Keimer*, *supra*, 75 Cal.App.4th at p. 1229 [book publisher had an economic motivation for printing the statements on the book jacket]; *Rezec*, *supra*, 116 Cal.App.4th at p. 143 [film advertiser had an economic motivation for falsely advertising that a nonexistent critic had approved of the films].) Selling music is Sony Music's *raison d'être*. The statements on the album cover and in the promotional video are intended to encourage sales of the album. Sony's motivation for the statements is economic.

Under the First Amendment, the statements on the album cover and promotional video constitute commercial speech.

2. The statements constitute commercial speech under the California Free Speech Clause.

The method of determining whether speech is commercial under the California Constitution is slightly different, but the outcome here is the same. The decision whether particular speech may be subjected to "laws aimed at preventing false advertising or other forms of commercial deception" (*Kasky*, *supra*, 27 Cal.4th at p. 960) turns on three elements: the speaker, the intended audience, and the content of the message. (*Ibid*.)

Application of the *Kasky* test establishes that the speech at issue in this case is commercial. First, as in "typical commercial speech cases," the

speaker here is a corporation that is "engaged in commerce—that is, generally, the production, distribution, or sale of goods or services." (*Kasky*, *supra*, 27 Cal.4th at p. 960.) Sony distributes and markets music as one of its many corporate activities. The first factor thus weighs in favor of Sony's speech being categorized as commercial.

Second, the "intended audience" is the "actual or potential buyers or customers of the speaker's goods or services" (*Kasky*, *supra*, 27 Cal.4th at p. 960) — in this case, the actual or potential buyers of *Michael*. Both the album cover and the promotional video target potential purchasers of the album, with the aim of encouraging them to buy it. Sony's audience here is the actual or potential buyers of the album — another signal that its statements constitute commercial speech.

Third, the content of Sony's message is "commercial in character." (*Kasky*, *supra*, 27 Cal. 4th at p. 960.) Sony's speech "consists of representations of fact about the … products … 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." (*Ibid*.) Sony's statements that the "album contains 9 previously unreleased vocal tracks performed by Michael Jackson" and that *Michael* is "a brand new album from the greatest artist of all time" are meant to entice consumers to purchase the album. This factor, in

combination with the other two, demonstrates that Sony's speech is commercial.

3. Sony's knowledge of the source of the songs is irrelevant to the inquiry into whether its speech is commercial.

The court of appeal concluded that Sony's speech was not "commercial in character" because Sony did not record the songs but obtained them from another producer, and therefore did not have "personal knowledge" about the songs' origins (*Serova*, *supra*, 44 Cal.App.5th at p. 127); however, actual knowledge of falsity is not an element of the determination whether speech is commercial. As noted above, under the relevant standards, Sony's speech clearly is "commercial in character."

Nor should it be otherwise. Although this Court observed in *Kasky* that the accuracy of a company's public statements is likely to be known to that company's employees (*Kasky*, *supra*, 27 Cal. 4th at p. 963), it did not create a requirement that such knowledge be proved before a company may be held liable. That is not surprising. Since the Unfair Competition Law, at issue both in *Kasky* and the present case, contains no scienter requirement (see *Podolsky v. First Healthcare Corp.*, *supra*, 50 Cal.App.4th at p. 647), to find such a mandate would fundamentally weaken false advertising law.

Instead, what this Court noted in *Kasky* was simply that companies are in a better position than consumers to assess the validity of their public

statements. (*Kasky*, *supra*, 27 Cal. 4th at p. 963 [Nike's statements were about "matters likely to be within the personal knowledge of Nike executives, employees, or subcontractors"]; see also *Virginia State Bd. of Pharmacy*, *supra*, 425 U.S. at p. 772, n.24 ["[t]he truth of commercial speech ... may be more easily verifiable by its disseminator"].) The Court of Appeal's holding to the contrary — that "the speech at issue here is critically different from the type of speech that may be regulated as purely commercial speech under *Kasky*" because the statements "concerned a publicly disputed issue about which they had no personal knowledge" (*Serova*, *supra*, 44 Cal.App.5th at p. 126) — has no basis in the precedent of either this Court or the United States Supreme Court. When a potential issue is identified to a company, it is the company's responsibility to investigate the problem. That is how consumers are protected from deceptive advertising: by placing the responsibility on the commercial speaker to tell the truth.

Sony's statements were designed to encourage consumers to buy *Michael*. Under *Kasky*, *Bolger* and their progeny, those statements constitute commercial speech. And for purposes of this appeal, they constitute false and actually misleading commercial speech that is not entitled to constitutional protection.

III. THE ANTI-SLAPP STATUTE SHOULD NOT BE INTERPRETED TO ELIMINATE OR REDUCE CONSUMERS' ABILITY TO SEEK REDRESS FOR DECEPTIVE ADVERTISING.

Because Sony's speech is commercial and, for purposes of this appeal, actually misleading, the anti-SLAPP statute should not apply in this case. The anti-SLAPP statute does not make a constitutional dilemma out of every mine-run deceptive advertising case. Indeed, the statute's text, structure, and legislative history make clear that anti-SLAPP motions should play little if any role in actions brought under California's deceptive advertising laws.

The fact that an advertiser makes statements on a subject of popular appeal does not transform its statements into protected speech on a matter of "public interest." (See *Rezec*, *supra*, (2004) 116 Cal.App.4th at p. 144 [holding, for anti-SLAPP purposes, that misleading commercial speech is not protected just because it references a public issue]; see also *Bolger*, *supra*, 463 U.S. at p. 68 ["Advertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues"].) If the law were otherwise, every false advertising case brought against a prominent company or involving a well-known product would be subject to anti-SLAPP procedures.

The Legislature enacted the anti-SLAPP statute to encourage

individuals and nonprofit organizations to continue to participate in matters of public significance. (Code Civ. Proc., § 425.16; *USA Waste of California, Inc. v. City of Irwindale* (2010) 184 Cal.App.4th 53, 66 [the anti-SLAPP statute was meant to "protect nonprofit corporations and common citizens from large corporate entities"].) A corporation's false or misleading statements about its products do not advance the public interest. It would pervert the text, structure and purpose of the anti-SLAPP statute to allow it to shield commercial companies engaged in deceptive advertising from liability under the state's consumer protection laws.

A. False And Misleading Commercial Speech Does Not Constitute A Matter Of Public Interest Under The Anti-SLAPP Statute.

The anti-SLAPP statute affords no protection to false or misleading commercial speech, which is unprotected by the First Amendment and the California Constitution. Since Sony has no constitutional right to engage in deceptive advertising, Sony's misleading commercial statements to promote *Michael* are not "protected speech" for purposes of the anti-SLAPP statute. (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1063 [In determining whether speech is protected by the anti-SLAPP statute, "the focus is on determining what 'the defendant's activity [is] that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning'"]; *City of Cotati v.*

Cashman (2002) 29 Cal.4th 69, 78 [“In the anti-SLAPP context, the critical point is whether the plaintiff’s cause of action itself was based on an act in furtherance of the defendant's right of petition or free speech”].)

Anti-SLAPP laws originated from the need to “protect nonprofit corporations and common citizens from large corporate entities.” (*USA Waste of California, Inc.*, *supra*, 184 Cal.App.4th at p. 66 [describing “well-funded” companies that limit free speech by “imposing litigation costs on citizens who protest”]; *FilmOn.com Inc. v. DoubleVerify Inc.* (2019) 7 Cal.5th 133, 143 [“The anti-SLAPP law was enacted ‘to protect nonprofit corporations and common citizens “from large corporate entities and trade associations” in petitioning government’”].)

Ms. Serova’s lawsuit is not the type of action that the anti-SLAPP statute is designed to prevent. (See *FilmOn.com Inc.*, *supra*, (2019) 7 Cal.5th at p. 139 [noting that the California Legislature enacted Code of Civil Procedure section 425.16 to address “strategic lawsuits against public participation”].) A SLAPP suit is brought by a more powerful party to deter someone who has spoken out against that party, and typically includes claims such as defamation, malicious prosecution, abuse of process, libel, slander, conspiracy, or other intentional torts — not false advertising. (Joseph J. Brecher, *The Public Interest and Intimidation Suits: A New Approach* (1988) 28 Santa Clara L. Rev. 105, 113.) Ms. Serova’s consumer

protection claims are not targeted at Sony's "public participation." Sony has not been and will not be prevented by this lawsuit from participating in public debate.[4] (See Sen. Com. on Judiciary, Analysis of S.B. 515 (2003-2004 Reg. Sess.) as amended May 1, 2003, p. 6 ["Wealthy corporate defendants, some with their own legal departments, simply do not suffer the chilling effect on their rights when faced with a lawsuit claiming, for example, false advertising or fraud or illegal business practices, that common citizens suffer when sued for speaking out"].)

What the present proceeding entails is the misuse of the anti-SLAPP statute by a well-funded corporation to try to silence individual consumer claims arising from what are conceded to be, for purposes of this appeal, the corporation's misleading commercial statements. In other words, this

[4] See, e.g., POB at p. 11-12 ("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"); Aswad, *Sony Music Has Not Conceded That Vocals on Michael Jackson Album Are Fake* (Aug 24, 2018) Variety, <https://variety.com/2018/biz/news/sony-music-has-not-conceded-that-vocals-on-michael-jackson-album-are-fake-1202916324 > (as of Dec. 2, 2020) ("'No one has conceded that Michael Jackson did not sing on the songs,' said Zia Modabber of Katten Muchin Rosenman LLP, who is representing … Sony Music"); Aswad, *Michael Jackson Estate, Sony Music Cleared in 'Fake Vocal' Lawsuit* (Aug. 28, 2018) Variety, <https://variety.com/2018/biz/news/michael-jackson-estate-sony-music-cleared-in-fake-vocal-lawsuit-1202919443> (as of Dec. 2, 2020) ("'We had a total victory in the appellate court in the Vera Serova Class Action matter,' said Howard Weitzman, an attorney for the estate, in a statement").

action embodies precisely the *reverse* of what the anti-SLAPP statute is intended to accomplish. (*FilmOn.com Inc.*, *supra*, 7 Cal.5th at p. 143 [noting that the Assembly Committee on the Judiciary recognized that SLAPP suits are typically "brought by well-heeled parties who can afford to misuse the civil justice system to chill the exercise of free speech … by the threat of impoverishing the other party"]; *In re NCAA Student-Athlete Name & Likeness Licensing Litigation* (9th Cir. 2013) 724 F.3d 1268, 1272 ["California's anti-SLAPP statute is designed to discourage suits that masquerade as ordinary lawsuits but are brought to deter common citizens from exercising their political or legal rights or to punish them for doing so"]; *Metabolife Intern., Inc. v. Wornick* (9th Cir. 2001) 264 F.3d 832, 838, fn. 7 ["The purpose of the [anti-SLAPP] statute is to protect individuals from meritless, harassing lawsuits whose purpose is to chill protected expression"].)

Unfortunately, the anti-SLAPP statute has been subject over time to significant abuse by the well-resourced corporate litigants that it was designed to rein in. In just the decade after the statute was passed, over 100 published opinions noted that a corporate defendant had brought an anti-SLAPP motion — and that the motion had been denied. (See Assem. Com. on Judiciary, Analysis of S.B. 515 (2003-2004 Reg. Sess.) as amended June 27, 2003, p. 4.) However, these motions accomplished their purpose: they

"delayed the litigation because of the automatic discovery stay and interlocutory appeal provisions of the anti-SLAPP statute." (*Ibid*.) The litigation in the present case has been at the pleading stage for four years (POB, at p. 7) because Sony has taken advantage of the anti-SLAPP statute to keep the case from progressing — precisely the outcome that the Legislature was attempting to avert.

An anti-SLAPP motion is intended to vindicate the speech of individuals or organizations threatened with a meritless but expensive lawsuit filed by a wealthy corporation. (*FilmOn.com Inc.*, *supra*, 7 Cal.5th at p. 143 ["In the paradigmatic SLAPP suit, a well-funded developer limits free expression by imposing litigation costs on citizens who protest, write letters, and distribute flyers in opposition to a local project"]). The present motion, by contrast, would *suppress* the speech of individuals who have filed an apparently *meritorious* lawsuit *against* a wealthy corporation. Neither the anti-SLAPP statute nor this Court's jurisprudence compels such an Orwellian outcome. Allowing Sony to protect its false and misleading statements using anti-SLAPP protection contravenes the Legislature's intent. There is no public interest in commercial entities deceiving consumers about their products, and corporations that do so are not exercising their right to free speech. (*Keimer*, *supra*, 75 Cal.App.4th at p. 1231 [explaining that the right of consumers to be free from false

advertising is "zealously protected"].)

B. Allowing Corporations To Use The Anti-SLAPP Statute To Strike Consumer Complaints Would Lead To Unjust Results And Undermine California's Consumer Protection Statutes.

If this Court were to find that Sony's statements here deserve anti-SLAPP protection, it is hard to imagine a case in which misleading commercial statements about a literary, musical, or artistic work could be held to violate consumer protection laws. (*See Rezec*, *supra*, (2004) 116 Cal.App.4th at p. 144 ["[A]s a practical matter, Sony's position would shield all sorts of mischief. For example, a film could be advertised as having garnered 'Three Golden Globe Nominations' when it had received none. An advertiser of a biography could use the word 'autobiographical' even though the subject of the work had nothing to do with its creation and had renounced it from the beginning"]; *Consumer Justice Center v. Trimedica International, Inc.* (2003) 107 Cal.App.4th 595, 602 [noting that providing anti-SLAPP protection to advertising statements that are not truly connected to a matter of genuine public interest would allow "every defendant in every false advertising case (or nearly any case that involves any type of speech) to bring a special motion to strike under the anti-SLAPP statute, even though it is obvious that the case was not filed for the purpose of chilling participation in matters of public interest"].) All that would be required of a particular seller of fraudulent art or music to shield

itself from the consumer protection statutes would be to claim lack of knowledge, as Sony did here.

That is not a viable regime. It is necessary that commercial sellers of art retain their long-established responsibility of establishing that the art is genuine. (See, e.g., *Rogers*, *supra*, 875 F.2d at p. 999; *Toho Co., Ltd.*, *supra*, 33 F.Supp.2d at p. 1212.) Neither California's Legislature nor its courts — nor, for that matter, its record-buying public — have any interest in removing the incentive for purveyors of art to tell the truth about the provenance and nature of the product they are selling.

CONCLUSION

The anti-SLAPP statute must not be misused to undermine California's consumer protection laws. When Sony promoted *Michael*, it engaged in misleading or deceptive advertising. Sony has no free speech right to deceive consumers. Ms. Serova's claim for misleading advertising is not a "strategic lawsuit against public participation." To the contrary: it is a straightforward deceptive advertising action brought to vindicate precisely the individual rights that both California's consumer protection laws and its anti-SLAPP statute are designed to protect.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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