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)

PLAINTIFF & RESPONDENT'S ANSWER TO THE AMICUS BRIEF OF THE FIRST AMENDMENT COALITION

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

MOSS BOLLINGER LLP
Dennis F. Moss
Jeremy F. Bollinger
Ari E. Moss
15300 Ventura Boulevard, Suite 207
Sherman Oaks, CA 91403
310-982-2984

ATTORNEYS FOR PLAINTIFF & RESPONDENT
VERA SEROVA

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. INTRODUCTION

First Amendment Coalition ("FAC"), whose mission statement is to promote "public participation in civic affairs" and "people's right to know"[1] argues, as amicus curiae in support of Defendants/Appellants, that, when it comes to sales of forged art, consumers not only have *no* right to know that the art they buy is dubious, but an exercise of the consumers' civic right of petitioning against the seller should be stifled at the inception of the consumer's claim by the California anti-SLAPP statute.

FAC's position is misguided. A consumer can prevail on the merits of false advertising claims concerning a work of art against a seller under the Unfair Competition Law ("UCL"), Business and Professions Code section 17200 *et seq.*, and the Consumers Legal Remedies Act ("CLRA"), Civil Code section 1750 *et seq.*; and such claims are not within the purview of the anti-SLAPP statute. It has long been settled that pure advertising speech in the form of product labels and TV commercials that describe the source or content of the product is commercial speech, even when the advertised product is expressive. If such commercial speech is false or misleading, it enjoys no First Amendment protection. Thus, the Legislature is free to choose the standard for regulating such false and misleading advertising, including the strict liability standard of the UCL and CLRA. Courts (other than the Court of Appeal in

---

[1] About Us, FIRST AMENDMENT COALITION, https://firstamendmentcoalition.org/about/ (accessed April 18, 2021).

this case) have also agreed that such advertising speech does not further the advertiser's free speech rights in connection with public issues under Code of Civil Procedure subdivision 425.16(b)(1).

Taking advantage of its late filing, FAC spends a good portion of its brief attacking the positions of other amici who timely filed their arguments, instead of Plaintiff Vera Serova's ("Serova") position.[2] For example, FAC argues that the amici "call for limiting anti-SLAPP motions directed against 'consumer protection claims'" (FAC's Amicus Brief ["AB"] 21) or "call for a much broader expansion of the definition of commercial speech" (*id.*, at p. 30) without giving the amici an opportunity to respond to these charges. Contrary to what FAC contends, this Court need not "narrow speech protections" in order to resolve the issues before it in favor of Serova and the putative class of consumers she represents. Serova only asks that the Court maintain the status quo as represented by established law. Sony's advertising statements are commercial speech, and the sales context in which they were made does not entitle them to anti-SLAPP protection.

---

[2] FAC's misuse of the amici process primarily to oppose the positions of other amici rather than Serova's arguments should not be countenanced as it will set a tempting precedent for amici in other cases who will seek extensions for the sole purpose of having the last word among the friends of the court. (*See* California Rules of Court, rule 8.520 (f) [stating that applications for permission to file an amicus curiae brief "must be filed no later than 30 days" after the parties' briefs].)

II. ARGUMENT

A. The challenged statements are not within the purview of the anti-SLAPP statute.

FAC focuses most of its argument under the first anti-SLAPP prong on defending the well-established principles of California anti-SLAPP law, such as:

- The anti-SLAPP statute protects corporations as well as individuals;
- Causes of action under consumer protection laws are not categorically excluded from the anti-SLAPP statute;
- Advertising of expressive products by media companies can be protected by the anti-SLAPP statute if it satisfies the "speech in connection with an issue of public interest" requirement; and
- Whether the speech at issue is false is relevant under prong two, but not under prong one of the anti-SLAPP framework.

Serova does not dispute these principles, nor asks the Court to overrule them.

Nonetheless, under this Court's decision in *FilmOn v. DoubleVerify* (2019) 7 Cal.5th 133 (*FilmOn*), the advertising statements by defendants Sony Music Entertainment, John Branca, as co-executor of the Estate of Michael J. Jackson, and MJJ Productions, Inc. (collectively "Sony") that are at issue here – whether they are true or false – are not protected by the anti-SLAPP statute because they are not speech "in connection with an issue of public interest." (Code Civ. Proc. § 425.16(e)(3), (4).)

FAC argues that the statements at issue have the connection to a public issue because the "broad topic" of Sony's publications is Michael Jackson's popular music. (FAC's AB 26-27.) However, the cases cited by FAC where the courts examined the "broad topic" of the speech do not support such a conclusion.

In *M.G. v. Time Warner, Inc.* (2001) 89 Cal.App.4th 623 (*M.G.*), an article in *Sports Illustrated* and an HBO program about adult coaches who sexually molest youths included a photograph of plaintiffs, the molestation victims. (*Id*. at pp 626-627). The plaintiffs sued the publishers for invasion of privacy and infliction of emotional distress. (*Id.* at p. 627.) In ruling on the publishers' anti-SLAPP motion, the court refused to adopt a narrow view of the speech limited to the identity of the molestation victims, finding it too restrictive, and held that the "broad topic" of the article and the program, child molestation in sports, was a matter of public interest. (*Id.* at p. 629.)

In *Taus v. Loftus* (2007) 40 Cal.4th 683 (*Taus*), the plaintiff, a child abuse survivor, alleged that the authors and publishers of scientific articles on the issue of recovered memories of child abuse invaded her privacy when they discussed her in the articles as "Jane Doe." (*Id*. at p. 688.) This Court found the articles protected by the anti-SLAPP statute because the defendants' "general course of conduct" from which the plaintiff's cause of action arose was the discussion of recovered memories in child abuse cases – an issue of public interest that was the subject of a substantial controversy in the mental health field. (*Id*. at pp. 712-13.)

In *Terry v. Davis Community Church* (2005) 131 Cal.App.4th 1534 (*Terry*), a church distributed among its members and youth's parents a report about the inappropriate relationship of two of its youth group leaders with a minor and discussed the report at the church meetings. The youth group leaders sued for defamation, and the church responded with an anti-SLAPP motion. (*Id.* at p. 1538.) The court found the church's report to be speech on an issue of public interest because "the broad topic of the report and the meetings was the protection of children in church youth programs, which is an issue of public interest." (*Id*. at p. 1548.)

In *Doe v. Gangland Productions* (9th Cir. 2013) 730 F.3d 946 (*Gangland*), the plaintiff, a former prison gang member and police informant, sued a television production company for revealing his identity in a TV series *Gangland* about street gangs. (*Id*. at pp. 950-951.) In ruling on defendants' anti-SLAPP motion, the Ninth Circuit affirmed the district court's finding that *Gangland*'s general topics of gang violence and murder of the gang's co-founder were issues of public interest. (*Id*. at p. 955.)

As evident from each of these decisions, the consideration of the "broad topic" of defendants' speech or defendants' "general course of conduct" involved judicial assessment of a non-commercial context, the analysis of which led the court to the conclusion that defendants' conduct was in furtherance of the exercise of their free speech rights. (*FilmOn*, *supra*, 7 Cal.5th at 140 [requiring the analysis of the context of the speech under the

first anti-SLAPP prong].) In *M.G.*, *Taus* and *Gangland*, the claims were based on media or scientific publications discussing public issues; and in *Terry*, the church's intention in distributing the report about its workers' inappropriate conduct was to alert the congregation of issues that might have affected other church members. Here, the "broad topic" of Sony's publication (in the sense this term was used in the above-discussed cases) was the description of the contents of its product (not Michael Jackson's popular music), and Sony's "general course of conduct" was advertising.

FAC argues that the advertising statements at issue were sufficiently connected to the discussion of Jackson's music because they "directly reflected the artistic content of the work by identifying the artist and describing the songs." (FAC's AB 27.) Not so.

First, FAC mischaracterizes the allegations: the statements at issue did not "reflect" the album content, but misrepresented its source in order to increase the album value in the eyes of consumers. Had Serova sued Sony based on Sony's use of a snippet of a particular album song as background music for *Michael's* video commercial, it would be fair to say that the commercial "reflected" the song and had a requisite "connection" to it. Code Civ. Proc. § 425.16(e)(4). But that is not the issue here: Serova's claims are based on Sony's misrepresentation about the source of the album songs in advertising materials and in no way attack "the [album] content itself." (FAC's AB 28.)

Second, that Sony identified the artist on the album for sales purposes does not create a requisite "connection" of the advertising statements to an issue of public interest. Even if, as FAC argues, "there is public interest in the identification of artists and other creators of works" (*ibid.*), Sony has not shown it was pursuing that interest with its album label and the video commercial. (*FilmOn*, *supra*, 7 Cal.5th at p. 140 [even if "the topic discussed is, broadly speaking, one of public interest," that is not enough to make the speech protected, unless the context of the speech shows participation in the public discourse].) As evident from the statements' advertising context, Sony's goal was to sell the songs based on the popularity of the ascribed singer, not to contribute to the public discourse about whose voice can be heard on the disputed recordings. (*See* Appellants' Opening Brief on Appeal 41, 43.)

"Context matters," as Mr. Burke, who authored FAC's amicus brief, acknowledges in his Rutter Group treatise on anti-SLAPP litigation. Thomas R. Burke, *Anti-SLAPP Litigation* § 3:114 (The Rutter Group 2020). "The fact that 'a broad and amorphous public interest' can be connected to a specific dispute is not sufficient to meet the statutory requirements of the anti-SLAPP statute." (*Id.* at § 3:122, quoting *World Financial Group, Inc. v. HBW Ins. & Financial Services, Inc.* (2009) 172 Cal.App.4th 1561, 1570). Rather, "the focus of the speaker's conduct should be on public interest." (*Id.* at § 3:117, quoting *Weinberg v. Feisel* (2003) 110 Cal.App.4th 1122, 1132; *FilmOn*, *supra*, 7 Cal.5th at p. 146.) The focus of Sony's conduct in

making the advertising statements at issue was on selling its product, and not on public interest.

B. The advertising statements at issue are commercial and can be prohibited if false without running afoul of the First Amendment.

1. False commercial speech that advertises products for sale, whether or not the product is art, does not run afoul of the First Amendment.

The false advertising statements before this Court are plainly commercial speech under *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939 (*Kasky*).

Commercial speech that is false or misleading is not entitled to First Amendment protection and "may be prohibited entirely." (*In re R.M.J.* (1982) 455 U.S. 191, 203 (*In re R.M.J.*); *Central Hudson Gas & Elec. v. Public Svc. Comm'n* (1980) 447 U.S. 557, 566 (*Central Hudson*) ["For commercial speech to come within [the scope of the First Amendment], it at least must . . . not be misleading"].)

While First Amendment protection is extended to false non-commercial speech because an "erroneous statement is inevitable in free debate" (*New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 271), the same is not true with respect to false and misleading commercial speech. The reason is that First Amendment protection for commercial speech is based on an entirely different rationale. As Robert Post summarized in his March 9, 2000, Melville B. Nimmer Memorial Lecture on commercial speech, "[c]ommercial speech differs from public discourse because it is constitutionally valued merely for the

information it disseminates, rather than for being itself a valuable way of participating in democratic self-determination." (Robert Post, *The Constitutional Status of Commercial Speech* (2000) 48 UCLA L. REV. 1, 4.) Consequently, whereas "[m]any of the First Amendment safeguards of public discourse are *speaker oriented*", "[c]ommercial speech doctrine, by contrast, is sharply *audience oriented*. From a constitutional point of view, the censorship of commercial speech does not endanger the process of democratic legitimation." (*Id.* at p. 14, emphasis added.) The distinction between the two rationales "turns on whether constitutional value attaches to participation in a given speech act, or whether constitutional value attaches instead only to the information conveyed by the speech act." (*Id.* at p. 20.) Because within commercial speech "the primary constitutional value concerns the circulation of accurate and useful information," prohibition on false speech and mandatory disclosures designed to convey information more fully and completely advance, rather than contradict, pertinent constitutional values. (*Id.* p. 28; *Central Hudson*, *supra*, 447 U.S. at p. 563 [because "[t]he First Amendment's concern for commercial speech is based on the informational function of advertising . . . there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity"].) For the same reason, "chilling" of the commercial speaker's speech is generally not a concern. (Post, *supra*, 48 UCLA L. REV. at p. 35; *Bates v. State Bar of Ariz.* (1977) 433 U.S. 350, 380 (*Bates*).)

In the context of consumer protection cases like this one, *Kasky* defines commercial speech as "factual representations about the business operations, products, or services of the speaker (or the individual or company on whose behalf the speaker is speaking), made for the purpose of promoting sales of, or other commercial transactions in, the speaker's products or services." (*Id.*, at p. 962.) *Kasky's* definition puts proper emphasis on the interests of the audience to receive "accurate and useful information" in the sales context. (*See* Plaintiff's Opening Brief ("POB") 42 [discussing that whether a statement is factual is ordinarily judged from the perspective of the audience].)

Sony's statements misrepresenting the singer of three songs on *Michael* on the product packaging and in the video commercial were made in the traditional sales context. The manifest goal of the speech was to describe the product to the audience of consumers. In this context, the interest of consumers to receive "accurate and useful information" is the primary First Amendment interest at stake: the First Amendment rationale for protecting non-commercial speech takes a backseat because Sony, by making these statements, was not "participating in democratic self-determination." Post, *supra*, 48 UCLA L. REV. at p. 4. Consequently, if these statements are false or misleading, their regulation under the UCL and CLRA advances, not contravenes the First Amendment values.

FAC concedes that the default rule in California is consistent with this rationale: a seller's false or misleading

factual representations about its product made to consumers are actionable under the UCL and CLRA. (FAC's AB 41-42.) FAC, however, asks the Court to carve out a special exception for advertising about the content or origins of expressive works. (*Id*., at p. 40.) FAC has failed to provide a Constitutional basis to justify undermining the legislative judgment that does not except the lies at issue here from the reach of consumer protection laws.

2. Acknowledging the reality that Sony's advertising statements are commercial under Kasky does not constitute an expansion of the definition of commercial speech.

Recognition by this Court that the advertising statements at issue are commercial speech in the narrow consumer protection context at issue is consistent with *Kasky* and would not encroach on any of the areas of constitutionally protected speech FAC discusses in its brief.

First, such a holding would not jeopardize the standards established in the defamation cases relied on by FAC because defamation cases typically do not involve commercial speech (much less commercial speech in *Kasky*'s narrow definition of it). In particular, cases involving parodies and editorials, cited by FAC, did not involve factual representations by the seller about its product made to consumers – they involved protected creative content in newspapers and magazines. (*San Francisco Bay Guardian, Inc. v. Superior Court* (1993) 17 Cal. App. 4th 655, 657, 662 [claims arising out of the publication of a parody letter-to-the-editor purportedly written by plaintiff]; *Pring v. Penthouse*

Intern., Ltd. (10th Cir. 1982) 695 F.2d 438, 439 [claims arising from a spoof article purportedly written by Miss Wyoming]; *Mink v. Knox* (10th Cir. 2020) 613 F.3d 995, 998 [claims arising from a parodic "editorial column" in an "internet-based journal" purportedly written by a university professor].) Even the parody advertisement in *Hustler Magazine, Inc. v. Falwell* (1988) 485 U.S. 46, had it arisen in California in the consumer protection context, could not have been deemed commercial speech because *Kasky* requires the statement to be factual in nature, and the jury in *Hustler* found the parody ad could not "reasonably be understood as describing actual facts . . . or events." (*Id.* at p. 49.) Thus, finding Sony's statements commercial under *Kasky* would not affect situations involving defamation claims based on parodies governed by the above line of cases. And in any event, cases involving parodies present a distinct circumstance for which courts could fashion a special rule if the need arose (as the courts have already done, for example, in copyright cases involving parodies, deeming such cases almost invariably within the scope of fair use; *see, e.g., Campbell v. Acuff-Rose Music, Inc.* (1994) 510 U.S. 569, 579). There is no need to sacrifice the protection of consumers in legitimate consumer deception situations in order to confer the type of special protection of parodies FAC advocates.

Next, right of publicity cases like *Guglielmi v. Spelling-Goldberg Prods.* (1979) 25 Cal.3d 860 (*Guglielmi*), *Montana v. San Jose Mercury News* (1995) 34 Cal.App.4th 790 (*Montana*) and *De Havilland v. FX Networks*, LLC (2018) 21 Cal.App.5th

845 (*De Havilland*), cited by FAC, are typically based on the use of the celebrity's image within an expressive work, which is non-commercial speech. To the extent such claims are based on *truthful* advertising of the work with the use of the celebrity's image, such advertising falls within the "adjunct" speech exception which enjoys the same level of protection as the advertised work itself. (*See* Plaintiff's Reply Brief ("PRB") 37-39 [discussing the "adjunct" speech exception]; *Guglielmi*, *supra*, 25 Cal.3d at 872 ["the use of Valentino's name and likeness in advertisements for the film . . . was merely an adjunct to the exhibition of the film"]; *Montana*, *supra*, 34 Cal.App.4th at p. 797 ["Constitutional protection extends to the truthful use of a public figure's name and likeness in advertising which is merely an adjunct of the protected publication and promotes only the protected publication"]; *De Havilland*, *supra*, 21 Cal.App.5th at 862 [same]; *see also Croce v. New York Times Co.* (S.D. Ohio 2018) 345 F. Supp. 3d 961 [treating social media posts truthfully promoting a New York Times article to the same constitutional standard as the article in a defamation case].)

The advertising statements at issue here do not fall within the "adjunct" speech exception and do not encroach on it because they do not truthfully reflect the album contents, but misrepresent the identity of the artist on three songs. As the Ninth Circuit observed in *Cher v. Forum Internat., Ltd.* (9th Cir. 1982) 692 F.2d 634 (*Cher*), the line is drawn where the advertisement misleads consumers about the contents of the

expressive work.[3] (*Id.* at p. 639.) Finding the advertising statements at issue commercial will not result in the double standard against which FAC cautions. Truthful "adjunct" advertisements are deemed protected by the First Amendment; and to prevail on a claim arising from adjunct advertisements, the plaintiff must show a level of fault on the part of the defendant consistent with the United States Supreme Court's First Amendment jurisprudence. (FAC's AB at 32-34.) In contrast, false advertisements that mislead as to the source or contents of a product, such as the advertisements at issue here, are not protected by the First Amendment (*In re R.M.J.*, *supra*, 455 U.S. at p. 203; *Central Hudson*, *supra*, 447 U.S. at p. 566), and therefore, constitutional concerns are not implicated. The Legislature is free to choose the level of fault required for liability based on such false advertisements, and in drafting the UCL and CLRA, the Legislature chose not to require any showing of fault.[4]

---

[3] In *Cher*, the district court found that Forum's misrepresentation was made knowingly, which bolstered the Ninth Circuit conclusion that the advertisement was actionable. (*Cher,* 692 F.2d at p. 640 [stating "no matter how carefully the editorial staff of Forum may have trod the border between the actionable and the protected, the advertising staff engaged in the kind of knowing falsity that strips away the protection of the First Amendment"].) That additional consideration, however, followed the general holding that the advertisement was not protected by the First Amendment because it was false. (*Id.* at p.639.)

[4] As Plaintiff's Reply Brief mentions, the First Amended Complaint alleges facts supporting Sony's negligence. (PRB 25-26, n.3.) Should the Court establish a novel rule that the same

Blatty v. New York Times Co. (1986) 42 Cal.3d 1033, which involved claims based on New York Times' allegedly inaccurate bestseller list, likewise does not compel a different outcome here because it did not involve the consumer protection context of *Kasky* or commercial speech within the *Kasky* definition: the New York Times did not make factual representations about its own products to consumers.

Finally, situations involving inextricably intertwined speech, like those in *Dex Media West, Inc. v. City of Seattle* (9th Cir. 2012) 696 F.3d 952 (*Dex Media*) and *White v. City of Sparks* (9th Cir. 2007) 500 F.3d 953 (*White*), are inapposite because the allegedly false advertising statements here are not inextricably intertwined with the protected album contents. (*See* PRB 31-37.)

Dex Media dealt with a Seattle ordinance, which imposed substantial conditions and costs on the distribution of yellow pages phone directory. (*Dex Media West*, *supra*, 696 F.3d at pp. 953, 962-965.) In granting the preliminary injunction against the application of the ordinance, the court readily found yellow pages, considered as a whole (since the ordinance regulated them as a whole), were noncommercial and protected by the First Amendment. (*Id*. at pp. 957-960, 962.) As an additional reason, the court deemed phonebooks' commercial elements (paid

---

constitutional bar of negligence applies to false advertising of expressive products as to non-commercial statements under *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 339-348, the Court should remand to allow Serova to make the factual showing of negligence under the second anti-SLAPP prong.

advertisements) inextricably intertwined with its noncommercial elements (telephone listings and community information) because economic reality generally compels phonebook publishers to publish advertisements to sustain phonebooks' noncommercial elements. (*Id*. at p. 963.)

In *White*, the Ninth Circuit affirmed a summary judgment for the artist who facially challenged a city ordinance banning street sale of paintings as violating his First Amendment right. *White*, *supra*, 500 F.3d at pp. 954-955. The court found that the sale of the paintings was intertwined with the expressive content of the paintings themselves, and therefore entitled to the same degree of First Amendment protection. (*Id.,* at pp. 955-957).

Dex Media and *White* are distinguishable from this case because they addressed regulations that burdened both the commercial and noncommercial elements of mixed speech, where it was not legally or practically feasible to separate the two kinds of speech. In *Dex Media*, the regulation imposed substantial conditions and costs on the distribution of yellow pages as a whole, and in *White*, the regulations prohibiting the sale of expressive goods would have chilled the expressive activity itself. There is no such problem here. Applying the UCL and CLRA here would not burden the expressive elements of the album but would only preclude Sony from engaging in deceptive sales efforts. The concept of "inextricably intertwined" speech is by its nature inapplicable and not implicated in the false advertising context where the suit narrowly targets only allegedly *false* commercial speech. The regulation of false commercial speech does not chill

protected activity because it does not restrict the seller's right to engage in the protected activity and advertise or otherwise promote it truthfully.

3. Bates supports finding the statements at issue commercial.

Contrary to what FAC argues, *Bates* discussed by the Attorney General's amicus brief does not stand for the proposition that "different types of advertising warrant different levels of constitutional scrutiny." (FAC's AB 32.) *Bates* reaffirms the notion that any false or misleading commercial advertisement is not constitutionally protected. (*Bates*, *supra*, 433 U.S. at p. 383 ["Advertising that is false, deceptive, or misleading, of course, is subject to restraint"; "the leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena"].) The quote relied on by FAC simply states that whether an advertisement is false or misleading is a factual inquiry requiring the assessment of the sophistication of the audience;[5] and where the audience is less sophisticated, a higher degree of regulation may be warranted. (*Bates*, *supra*, 433 U.S. at p. 383 n.37.) The degree of regulation is the Legislature's choice, not a constitutional question. Here, the audience – a general audience of consumers from around the world – is

[5] The Supreme Court "explicitly created commercial speech doctrine to protect the rights of *listeners* rather than the autonomy of *speakers*." Robert Post & Amanda Shanor, *Adam Smith's First Amendment* (2015) 128 HARV. L. REV. F. 165, 172 (original italics); *see also* Post, *supra*, 48 UCLA L. REV. at p. 14.

unsophisticated and vulnerable to confusion. To protect this unsophisticated audience, the Legislature chose the highest degree of regulation imposing strict liability.

Further, *Kasky* already properly distinguished commercial speech "by its content" in accordance with *Bates* (*id*. at p. 363) – it defined commercial message as "factual representations about the business operations, products, or services of the speaker". (*Kasky*, *supra*, 27 Cal.4th at p. 962.) Under this definition, product labels and video commercials describing a product to consumers are commercial speech. Nothing in *Bates* suggests the conclusion that a distinction must be made according to the type of advertised product – that misrepresentations about a book, movie, record, or newspaper raise "different constitutional concerns and different consumer protection rationales" than false or misleading claims in advertising for legal services or dietary supplements. (FAC's AB 32.)

4. FAC's policy arguments do not support a different outcome.

None of the remaining arguments advanced by FAC supports a conclusion that Sony's advertising statements are non-commercial speech.

Like Sony, FAC brings up the purported challenges involved in establishing whether the work is a forgery as a justification for imposing a more lenient standard of liability. (FAC's AB 35.) But FAC's empirical assertion that the authentication of expressive works is supposedly challenging (or more challenging than verification of the source or content of other types of products) is completely unsubstantiated. If this

assertion has merit, it is up to the California Legislature to carve out an exception from the UCL and CLRA for expressive works based on corresponding legislative findings. The Legislature has not carved out such an exception, and neither should the Court based on Sony's and FAC's bare claim. *Cf. The Internat. Brotherhood of Boilermakers, etc. v. NASSCO Holdings, Inc.* (2017) 17 Cal.App.5th 1105, 1128.

Moreover, the purported challenges in authenticating expressive works do not pose an insurmountable obstacle for the sellers and publishers: As discussed at length in Plaintiff's Opening Brief, when the seller or publisher cannot authenticate a work with confidence, it can avoid the risk of liability by simply disclosing this fact in the product description. (POB 52-54) Nor do such challenges justify immunizing sales of forgeries from suits and placing the burden of the mistake on the least informed party in the distribution chain: the consumer. As the Attorney General's amicus brief notes, many litigated issues are difficult to establish, including the identity of murderers, but this has never been a reason not to prosecute crimes or entrust the fact-finding on them to the jury. (Cal. Attorney General's AB 50.)

Further, FAC's parade of horribles concerning the purportedly endangered practice of the use of pseudonyms, pen names and alter egos (FAC's AB 37-38) is imaginary and does not warrant special protection of this practice at the expense of legitimate consumer deception claims. It is highly unlikely that the use of pseudonyms, pen names or alter egos would ever be challenged under the consumer protection laws because a

plaintiff would face an insurmountable challenge proving reliance. Using one of FAC's examples, the plaintiff would have to show that they intended to buy a Richard Bachman book and would not have made the purchase had they known the book was in reality written by Stephen King. Not surprisingly, FAC does not cite to a single case where such an implausible scenario had arisen. On the other hand, the scenario where, as here, a work created by a forger is attributed to a famous artist and sold for millions of dollars it would not otherwise fetch, is far more damaging to consumers and likely to end up in court. (*See, e.g.*, Julia Halperin, *Who Sued Whom: A Comprehensive Timeline of the Knoedler Lawsuits*, THE ART NEWSPAPER (Sept. 30, 2013), https://www.theartnewspaper.com/archive/who-sued-whom-a-comprehensive-timeline-of-the-knoedler-lawsuits [listing ten lawsuits against the infamous Knoedler gallery and its personnel over the inadvertent selling of forged art].)

Finally, FAC appears to argue that the advertising statements at issue should be deemed noncommercial, or at least not subject to strict liability, because they are "partially true." (FAC's AB 36.) This argument goes not to the issue of whether the statements are commercial speech, but to the issue of whether they can mislead a reasonable consumer. That issue was resolved by the trial court against Sony; and it is not before this Court.

III. CONCLUSION

California, as a champion of consumer protection, has taken a clear stand supportive of the simple concept of truth in the marketplace. Adoption of FAC's radical position will

completely undermine truth. It will lead unscrupulous purveyors of music to sell fakes in which all songs on an album are not by the artist advertised, invite unscrupulous book sellers to market works by unknown authors as written by famous authors to reap massive profits, and encourage fine art sellers to stay willfully ignorant in attributing forgeries to artists whose original works sell for tens of millions of dollars.

The people of the State of California, acting through the legislative process, have made important choices regarding the rights of consumers and the obligations of advertisers. FAC, despite its mission to promote "people's right to know," advocates a weaponization of the First Amendment that interferes with policy decisions the people of California have made in the realm of consumer protection. Neither now nor in the future should this Court allow for such an assault on democratic principles in the guise of an unprecedented perversion of the First Amendment.

Dated: April 30, 2021

Respectfully Submitted,

/s/ Dennis F. Moss
DENNIS F. MOSS,
MOSS BOLLINGER, LLP
Attorneys for Plaintiff, Respondent
Vera Serova

RULE 14 CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.260(b)(1) of the California Rules of Court, the enclosed brief of Appellant is produced using 13-point Century Schoolbook type including footnotes and contains approximately 6,119 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: April 30, 2021

/s/ Dennis F. Moss
Dennis F. Moss

PROOF OF SERVICE

1, 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 April 30, 2021, declarant served **RESPONDENT'S ANSWER TO THE AMICUS BRIEF OF THE FIRST AMENDMENT COALITION** by VIA TrueFiling to:

Phillips, Paula	Katten	paula.phillips@katten.com
Demko, Andrew	Katten	andrew.demko@katten.com
Liberty, Micha	Liberty Law Office	micha@libertylaw.com
Wilcox, Rochelle	Davis Wright Tremaine LLP	rochellewilcox@dwt.com
Freedman, Bryan	Freedman & Taitelman, LLP	bfreedman@ftllp.com
Burke, Thomas	Davis Wright Tremaine, LLP	thomasburke@dwt.com
Arbogast, David	Arbogast Law	david@arbogastlaw.com
Sims, Tami	Katten Muchin Rosenman LLP	tami.sims@katten.com
Weitzman, Howard	Kinsella Weitzman Iser Kump & Aldisert LLP.	hweitzman@kwikalaw.com
Duggan, Eliza	Center for Consumer Law and Economic Justice	ejduggan@berkeley.edu
Laidman, Daniel	Davis Wright Tremaine LLP	danlaidman@dwt.com
Ruiz, Miguel	Office of the Los Angeles City Attorney	miguel.j.ruiz@lacity.org
Harbourt, Samuel	Office of the Attorney General	samuel.harbourt@doj.ca.gov
Duncan, Ellen	Davis Wright Tremaine LLP	ellenduncan@dwt.com
Modabber, Zia	Katten Muchin Rosenman LLP	zia.modabber@kattenlaw.com

3. That on April 30, 2021, declarant served **RESPONDENT'S ANSWER TO THE AMICUS BRIEF OF THE FIRST AMENDMENT COALITION** via FEDERAL EXPRESS to:

Clerk, California Court of Appeal
300 S. Spring Street
Los Angeles, CA 90013

Attorney General, State of California
1300 "I" Street
Sacramento, CA 95814-2919

District Attorney, County of Los Angeles
211 W Temple Street
Los Angeles, CA 90012

I declare under penalty of perjury that the foregoing is true and correct. Executed this 30th day of April, 2021 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

Case Name: **SEROVA v. SONY MUSIC ENTERTAINMENT**
Case Number: **S260736**
Lower Court Case Number: **B280526**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **lea@dennismosslaw.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
BRIEF	RESPONDENTS ANSWER TO THE AMICUS BRIEF OF THE FIRST AMENDMENT COALITION

Service Recipients:

Person Served	Email Address	Type	Date / Time
Jeremy Bollinger Moss Bollinger, LLP 240132	jeremy@mossbollinger.com	e-Serve	4/30/2021 12:54:46 PM
Tami Sims Katten Muchin Rosenman LLP 245628	tami.sims@kattenlaw.com	e-Serve	4/30/2021 12:54:46 PM
Paula Phillips Katten	paula.phillips@katten.com	e-Serve	4/30/2021 12:54:46 PM
Andrew Demko Katten 247320	andrew.demko@katten.com	e-Serve	4/30/2021 12:54:46 PM
Micha Liberty Liberty Law Office	micha@libertylaw.com	e-Serve	4/30/2021 12:54:46 PM
Rochelle Wilcox Davis Wright Tremaine LLP 197790	rochellewilcox@dwt.com	e-Serve	4/30/2021 12:54:46 PM
Bryan Freedman Freedman & Taitelman, LLP 151990	bfreedman@ftllp.com	e-Serve	4/30/2021 12:54:46 PM
Thomas Burke Davis Wright Tremaine, LLP 141930	thomasburke@dwt.com	e-Serve	4/30/2021 12:54:46 PM
David Arbogast Arbogast Law 167571	david@arbogastlaw.com	e-Serve	4/30/2021 12:54:46 PM
Tami Sims Katten Muchin Rosenman LLP 245628	tami.sims@katten.com	e-Serve	4/30/2021 12:54:46 PM

Howard Weitzman Kinsella Weitzman Iser Kump & Aldisert LLP.	hweitzman@kwikalaw.com	e-Serve	4/30/2021 12:54:46 PM
Eliza Duggan Center for Consumer Law and Economic Justice 312621	ejduggan@berkeley.edu	e-Serve	4/30/2021 12:54:46 PM
Daniel Laidman Davis Wright Tremaine LLP 274482	danlaidman@dwt.com	e-Serve	4/30/2021 12:54:46 PM
Miguel Ruiz Office of the Los Angeles City Attorney 240387	miguel.j.ruiz@lacity.org	e-Serve	4/30/2021 12:54:46 PM
Samuel Harbourt Office of the Attorney General 313719	samuel.harbourt@doj.ca.gov	e-Serve	4/30/2021 12:54:46 PM
Ellen Duncan Davis Wright Tremaine LLP	ellenduncan@dwt.com	e-Serve	4/30/2021 12:54:46 PM
Ari Moss Moss Bollinger LLP 238579	lea@dennismosslaw.com	e-Serve	4/30/2021 12:54:46 PM
Zia Modabber Katten Muchin Rosenman LLP 137388	zia.modabber@kattenlaw.com	e-Serve	4/30/2021 12:54:46 PM
Zia Modabber Katten 137388	zia.modabber@katten.com	e-Serve	4/30/2021 12:54:46 PM
Dennis Moss 77512	dennis@mossbollinger.com	e-Serve	4/30/2021 12:54:46 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

4/30/2021

Date

/s/Lea Garbe

Signature

Moss, Ari (238579)

Last Name, First Name (PNum)

Moss Bollinger LLP

Law Firm