

Case No. S260736

IN THE SUPREME COURT OF CALIFORNIA

Vera Serova,
Plaintiff and Respondent Below,

v.

Sony Music Entertainment; John Branca, as Co-Executor of the
Estate of Michael J. Jackson; and MJJ Productions, Inc.
Defendants and Appellants Below.

After A Decision By The Court Of Appeal,
Second Appellate District, Division 2
Case No. B280526

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION.

This is Petitioner Vera Serova’s second trip to the Supreme Court. In October 2019, she sought review of a narrowly-tailored opinion from the Court of Appeal holding that Michael Jackson’s posthumous album artwork, album title, and related statements identifying him as creator and performer are non-commercial speech beyond the reach of California’s UCL and CLRA statutes. Specifically, on Respondents’ anti-SLAPP motion, the Court found that there was widespread, public debate (which exists to this day) about whether Michael Jackson performed the lead vocals on three of the album’s tracks.¹ And the court found that Respondents were likely to prevail because, as non-commercial speech, the artwork, title, and statements identifying Michael Jackson as the artist are entitled to First Amendment protection and are beyond the UCL and CLRA’s reach as a matter of law.

In the wake of its decision in *FilmOn.com Inc. v. DoubleVerify Inc.* (2019) 7 Cal.5th 133 (*FilmOn*), the Court remanded Serova’s suit for further consideration. The Court of Appeal considered supplemental briefing from both parties on the impact of *FilmOn*. And after a meticulous and correct application

¹ Respondents are John Branca, as co-executor of the Estate of Michael J. Jackson (“the Estate”), MJJ Productions, Inc., and Sony Music Entertainment (“Sony,” and collectively with the Estate and MJJ Productions, Inc., “Respondents”).

For purposes of this appeal only, so as to permit the trial court to address the pure legal issue presented by the anti-SLAPP motion without trying to resolve who sang the vocals, Respondents hypothetically assumed that Jackson did not sing the lead vocals on the tracks in question. (CT 2:274.)

of this Court's opinion in *FilmOn*, the Court of Appeal again held in a unanimous decision that the challenged statements related to Michael Jackson's posthumous album were constitutionally protected, non-commercial speech shielded by the anti-SLAPP law. It reiterated that its ruling was factually limited to "the record in this case and the issues that have been appealed" and specifically stated that the opinion did not portend to be a far-reaching change in the law. (Op. at p. 42 ["Nor do we purport to decide whether statements in another context concerning the marketing of creative works might constitute commercial speech."].)

There is no reason to review the Court of Appeal's well-reasoned opinion. Serova identifies no split of authority or unsettled question of law that would justify the Court's intervention. Instead, her petition is a bare plea for error correction of a decision expressly limited to its unique factual circumstances. In addition to the fact that the Court is not in the business of error correction, Serova also has not even identified an error in need of correction. The opinion below is fully consistent with *FilmOn*, this Court's decision in *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, and the anti-SLAPP and First Amendment rulings of the various Courts of Appeals.

To make it appear as though there is reason to grant review, Serova contorts the underlying decision into something it is not. She hyperbolically declares that the Court of Appeal "confer[red] protection on all public misrepresentation and fraud," and sounded the "death knell to consumer protection in

California.” (Pet. at pp. 17-18, 23). She urges this Court to review both steps of the Court of Appeal’s anti-SLAPP analysis in order to prevent this contrived calamity. But looking beyond her exaggerated statements, Serova offers no real reason to review either part of the Court of Appeal’s sound analysis.

At step one, Serova does not dispute that the debate about Michael Jackson’s first posthumously released album involves a matter of public interest. She instead argues that the Court of Appeals got it wrong by concluding that statements by the Respondents attributing the tracks on the album to Michael Jackson were sufficiently connected to this public controversy. Serova specifically contends that the court below improperly limited *FilmOn* and failed to assess the various contextual factors highlighted by this Court in its recent decision. But on both accounts, Serova has grossly mischaracterized the decision below and fundamentally misunderstood the Court’s reasoning in *FilmOn*. The Court of Appeal carefully analyzed every factor this Court said it should, and it certainly did not purport to limit *FilmOn* in any way.

On step two, she seeks review of the Court of Appeal’s holding that the challenged artwork, title, and statements are non-commercial speech. Her arguments in this regard significantly mischaracterize the opinion and the authority on which it relies. For instance, she claims the Court of Appeal added a scienter element to the UCL and CLRA. It did not. The UCL and CLRA undisputedly apply only to commercial speech. And the Court of Appeal held that whether the speaker can verify

the statements at issue (which Serova equates to scienter) is **a factor** in determining whether speech is commercial, not an element of the UCL or CLRA. But in finding that the challenged artwork, title, and statements were non-commercial speech—in part because Respondents were not in a position to verify them—it held that the UCL and CLRA simply **did not apply**. Thus, the Court of Appeal could not and did not add scienter to (or even interpret) those statutes.

Even if the Court thought there might be something to either of the issues raised by Serova, it bears repeating that the Court of Appeal stressed its decision hinged upon the unusual and specific facts of this case and expressly cautioned that its holding is entitled to only narrow effect. (Op. at p. 42.) That means this case is an exceptionally poor vehicle for addressing any of the underlying First Amendment legal issues. The possible impact on future litigation is minimal to non-existent.

Finally, reading her Petition, one would think Serova is without a remedy in this unique case. This is also untrue. In addition to her now-dismissed UCL and CLRA claims against Respondents, Serova brought a fraud claim against the people she alleges to have produced the recordings, namely the Angelikson Defendants.² That fraud claim against the source of the recordings (who were in a position to verify) was not part of

² The Angelikson Defendants are defendants Edward Joseph Cascio, James Victor Porte, and Angelikson Productions, LLC. They are not parties to this appeal.

the appeal, is unaffected by its result, and is not subject to a non-commercial speech defense. (CT 3:715–35; CT 3:612.)³

In the end, giving credence to Serova’s theory of liability would chill artistic expression to its core. The remedies Serova sought here were either for the music not to be published (chilling speech), to have it be unattributed (which, as the Court of Appeal realized, impermissibly alters the art’s meaning and is utterly infeasible), or to force Respondents to place “disclaimers” on the album notifying consumers of the controversy (which is compelled speech and thus unconstitutional). Consistent with the First Amendment, the Court protected Respondents’ good faith dissemination of creative artistic works and limited Serova’s right to recovery to common law fraud—those who knowingly misrepresented the authenticity of the works. There is no basis to review the decision.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY.

Serova’s claims arise from the release of an album titled *Michael*, which she describes as “the first posthumous compilation album of previously unreleased tracks by recording

³ Serova candidly admits that she sued Respondents because they have deeper pockets than the Angelikson Defendants. (RB at p. 56.) But Serova cannot trample on Respondents’ constitutional rights simply because the alleged wrongdoers lack funds to pay damages or plaintiff’s attorneys’ fees. (See *Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 490 [affirming judgment for the defendant where the lawsuit was “an artificial scheme designed not to fairly assess culpability but to reach into the deepest pocket”].)

artist Michael Jackson[.]” released in the United States on December 14, 2010. (CT 1:116 [First Amended Complaint (“FAC”) ¶ 10].)

She alleges that “Michael Jackson did not actually perform the lead vocals” on three of the album’s ten tracks (dubbed the “Cascio Tracks” because defendant Edward Joseph Cascio jointly produced and recorded the songs). (CT 1:116 [FAC ¶ 13].) Serova does not allege Jackson had nothing to do with the Cascio Tracks, only that Jackson did not sing “lead vocals” on them. (CT 1:116–23 [FAC ¶¶ 13, 14, 18, 23, 29, 30, 32, 33].)

Serova specifically alleges that the Cascio Tracks’ producers, the Angelikson Defendants, “represented to Defendants Sony and the Estate that Michael Jackson performed the lead vocals[.]” (CT 1:117 [FAC ¶¶ 14–17].) Critically, she alleges that the Angelikson Defendants “*failed to disclose to Sony or the Estate that Michael Jackson did not perform the lead vocals on*” the Cascio Tracks. (CT 1:117 [FAC ¶ 18], emphasis added.) She also alleges that the Angelikson Defendants—not Respondents—“*had exclusive knowledge*” of whether Jackson sang the lead vocals on the Cascio Tracks. (*Ibid.*, emphasis added.)

According to Serova, public “controversy has surrounded” the issue of whether Jackson sang the lead vocals on the Cascio Tracks. (CT 1:116 [FAC ¶¶ 11–13].) She admits that in November 2010, Sony and the Estate both investigated the issue and publicly released the results of those investigations, both of

which concluded Jackson sang the lead vocals. (CT 1:13–14 [FAC ¶¶ 13–14, 21–22].)

At issue in this appeal are the album’s artwork, its title, and statements on the album cover (the “Album Cover”) and in a video promoting the album (the “Announcement Video”). Serova claims they misleadingly imply that Jackson was the lead singer of the Cascio Tracks. As for the Album Cover, Serova challenges the title (“*Michael*”), the artwork, and a statement in a micro-font on the back of the album that states: “This album contains 9 previously unreleased vocal tracks performed by Michael Jackson. These tracks were recently completed using music from the original vocal tracks and music created by the credited producers.” (CT 1:119 [FAC ¶ 27], 1:144–49; 4:894.) The Announcement Video, released on December 3, 2010, has creative and stylized images of Jackson and describes *Michael* as “a brand new album from the greatest artist of all time.” (CT 1:119 [FAC ¶ 24]; Lodged CD, Video No. 1 at 0min 23sec.)

Importantly, Serova also pleaded a fraud claim against the Angelikson Defendants, but not Respondents. The fraud claims are not at issue on this appeal and are pending in the trial court.⁴

Respondents filed a motion to strike under the anti-SLAPP statute, arguing the speech at issue was made in connection with an issue of public interest and Serova could not prevail because she challenged speech that is non-commercial and, therefore, not

⁴ The case has been stayed in the trial court pending the outcome of this appeal.

subject to regulation under the UCL or CLRA. The trial court granted Respondents' anti-SLAPP motion in part and denied it in part, finding the album artwork, title, and Announcement Video were commercial speech and, therefore, Serova met her burden of showing a chance of prevailing on her UCL and CLRA claims on the pleadings pursuant to the parties' stipulation.

Respondents appealed. In a 31-page published opinion, the Court of Appeal reversed, holding that the trial court should have granted Respondents' anti-SLAPP motion in its entirety because the challenged statements are non-commercial speech.⁵

Serova petitioned for rehearing in the Court of Appeal. The Court of Appeal denied rehearing on September 13, 2018, and modified the opinion to add a footnote. The modification did not alter the judgment.

In October 2018, Serova filed her first petition for review with this Court. This Court granted the petition in December 2018 and held briefing pending the resolution of *FilmOn*. (*Serova v. Sony Music Entm't.* (2019) 240 Cal.Rptr.3d 703 (Mem).) In September 2019, the Court remanded this case to the Court of Appeal for reconsideration in light of *FilmOn*. (*Serova v. Sony Music Entm't.* (2019) 252 Cal.Rptr.3d 227 (Mem).)

Once back in the Court of Appeal, the parties submitted supplemental briefing addressing the impact *FilmOn* had on the Court of Appeal's prior decision. In January 2020, the Court of

⁵ The Court of Appeal affirmed the trial court's grant of the remainder of Respondents' anti-SLAPP motion.

Appeal issued an opinion re-affirming its decision in favor of Respondents. The Court of Appeal provided a new analysis on prong one of the anti-SLAPP statute to account for the factors this Court said lower courts should consider in *FilmOn*. Because *FilmOn* did not impact the Court of Appeal’s prong two analysis, it re-issued its prior opinion on that question materially unchanged.

III. LEGAL STANDARDS.

“The Supreme Court may order review of a Court of Appeal decision . . . [w]hen necessary to secure uniformity of decision or to settle an important question of law[.]” (Cal. Rules of Court, rule 8.500(b)(1).)

If this Court were to grant review (which Respondents submit it should not), a ruling on an anti-SLAPP special motion to strike is subject to de novo review on appeal. (*Thomas v. Quintero* (2005) 126 Cal.App.4th 635, 645; *Bernardo v. Planned Parenthood Federation of America* (2004) 115 Cal.App.4th 322, 357 (*Bernardo*).)

Anti-SLAPP motions require a two-step analysis. (*Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 21.) *First*, the defendant must make a prima facie showing that the challenged cause of action arises from protected activity, *i.e.*, that the acts of which the plaintiff complains were taken in furtherance of the defendant’s right of free speech in connection with a public issue. (*Ibid.*) Under the first step of the anti-SLAPP analysis, the Court determines whether the claims arise out of at least one of four types of protected activities. (Code Civ. Proc., § 425.16, subd. (e).)

“A defendant’s burden on the first prong is not an onerous one.” (*Okorie v. Los Angeles Unified School Dist.* (2017) 14 Cal.App.5th 574, 590.) *Second*, “[i]f a defendant meets this threshold showing,” the burden shifts to the plaintiff and “the cause of action shall be stricken unless the plaintiff can establish ‘a probability that the plaintiff will prevail on the claim.’” (*Simpson Strong-Tie Co., Inc., supra*, 49 Cal.4th at p. 21, quoting Code Civ. Proc., § 425.16, subd. (b)(1).)

IV. ARGUMENT.

A. The Petition Should Be Denied Because There Are No Grounds for Supreme Court Review.

1. There Is No Question For Review At Step One Of The Analysis Because The Court Of Appeal Correctly Applied This Court’s Recent Decision in *FilmOn* To The Unique Circumstances Of This Case.

Under the first prong of the anti-SLAPP analysis, the Court determines whether the claims arise out of protected activities. (Code Civ. Proc., § 425.16, subd. (e).) The Album Cover and Announcement Video meet this test because they are statements made “in connection with . . . an issue of public interest[.]” (*Id.*, subd. (e)(3)–(e)(4).)

Serova does not dispute that statements about the *Michael* album—the first posthumously released music from pop icon Michael Jackson—are indeed issues of public interest.⁶ Rather,

⁶ Quite the opposite, she has repeatedly admitted that the album itself and whether Jackson sang lead vocals on the Cascio Tracks *are* the matters of public interest; she alleges that in California alone, thousands of individuals have purchased the

she contends that the statements were not made “in connection” with these issues of public interest. (Pet. at pp. 12–13.) Serova specifically takes issue with the Court of Appeal’s application of the analysis articulated in *FilmOn*, contending that the lower court both ignored and misapplied this Court’s ruling. (*Ibid.*) But that is not so.

Following supplemental briefing by the parties, the Court of Appeal issued an updated opinion in which it explicitly “revised the discussion of the first step of the anti-SLAPP procedure . . . to take account of the *FilmOn* decision and its application to the circumstances of this case.” (Op. at p. 3.) It devoted an entire section of its analysis to “[t]he relationship between the Challenged Statements and the public debate,” (*id.* at pp. 22–27), and it specifically addressed both the “Content” and the “Context” of the statements, (*id.* at pp. 23, 25). (See *FilmOn*, *supra*, 7 Cal. 5th at p. 154 (holding that courts must review the “wedding of content and context” to “discern if conduct is ‘in furtherance of’ free speech ‘in connection with’ a public issue or issue of public interest”)].)

In evaluating the content, the Court of Appeal found the Album Cover and Announcement Video “related directly to the issue of public interest.” (Op. at p. 23.) That was so because the

Cascio Tracks, she identifies numerous high-profile individuals who have publicly offered their opinions on the tracks’ authenticity, and she admits that the controversy was discussed in the press and on a segment of “The Oprah Winfrey Show.” (CT 1:118–23 [FAC ¶¶ 20, 22, 23, 25, 32, 38].)

statements “identified Michael Jackson as the singer on the Disputed Tracks, which was the precise focus of the public controversy.” (*Ibid.*) “Thus, the statements at issue here were not just tangentially connected to the issue of public interest through a creative generalization of their subject matter,” which distinguished the facts of this case from those of *FilmOn*. (*Ibid.*)

As for the context, the Court of Appeal analyzed a number of characteristics of the challenged statements and how those characteristics informed the relationship of the statements to the public debate. It specifically considered the “public” nature of the Album Cover and Announcement Video, the “commercial purpose” of these statements, “the identity of the speaker,” and “the audience” of the speaker’s messages. (*Id.* at pp. 25-27.) The lower court did not place dispositive weight on any one factor—noting, for example, that the “commercial purpose” of the messages was “a neutral consideration” in the analysis. (*Id.* at p. 25.) It ultimately concluded that context confirmed the Album Cover and Announcement Video were protected speech because the challenged statements were “public” in nature, directed towards an audience “that was highly likely to be interested in the identity of the singer on the Disputed Tracks,” and disseminated by a speaker engaged in artistic expression (*i.e.*, music)—which of course is “subject to First Amendment protection.” (*Id.* at pp. 25-27.)

Dissatisfied with this outcome, Serova offers two reasons why this Court should review the Court of Appeal’s analysis under step one of the anti-SLAPP law. *First*, she claims the

lower court ignored *FilmOn* by “resurrect[ing]” the so-called “synecdoche theory” of public interest. (Pet. at p. 12) *Second*, she asserts the Court of Appeal “g[ave] short shrift to the context analysis require[d] by *FilmOn*” by failing to analyze fully the various factors pointed out by the Court. (*Ibid.*) Neither of these arguments holds up under scrutiny, much less justifies discretionary review by this Court.

As an initial matter, Serova does not argue that either of her objections implicates a split of authority. Nor could she. *FilmOn* is not even a year old. This case does not present any attempt to extend the legal reasoning of *FilmOn*. Instead, it presents a basic application of this Court’s 10-month-old decision to a set of peculiar facts. Tellingly, Serova does not identify a single case (other than *FilmOn*) with which the decision below purportedly clashes.⁷ Her petition is therefore a bare plea for

⁷ She also cites this Court’s decision in *Rand Resources, LLC v. City of Carson* (2019) 6 Cal.5th 610 to support her understanding of *FilmOn*. (Pet. at pp. 11-13.) But aside from cherry picking quotes, Serova never analyzes *Rand* to explain why it is relevant. And, indeed, it is easily distinguishable. In that case, the City of Carson made allegedly false statements about who represented it in its negotiations with the NFL. (See *Rand, supra*, 6 Cal.5th at p. 623.) However, the only issue of public interest was whether or not an NFL stadium should be built in the City; the identity of the City’s agent was not a matter of public importance. (*Id.* at p. 625.) Thus, although the statements misidentifying the City’s agent were made “in connection with” the issue of the agent’s identity, they did not merit anti-SLAPP protection because that issue was not itself a matter of public concern. (*Id.* at pp. 623, 625.) Here, by contrast, identifying Michael Jackson as the artist *was* directly responding to the public controversy.

purported error correction—not a request “to secure uniformity of decision.” (Cal. Rules of Court, rule 8.500(b)(1).) Put simply, Serova’s petition to supposedly correct a specific factual application of *FilmOn* is not an important issue of law—the Court already decided that in *FilmOn*—and would do nothing to secure uniformity of decisions below.

Setting that aside, the fact remains that her entire argument is built upon a fundamental misunderstanding of the law. Serova first faults the Court of Appeal for purportedly reviving the “synecdoche theory’ of public interest,” (Pet. at pp. 13–16)—a phrase this Court used to refer to a connection between challenged speech and a public debate based upon “generalities that might be abstracted” from the speech instead of “the specific nature of the speech.” (*FilmOn*, *supra*, 7 Cal. 5th at p. 152.) According to Serova, the Court of Appeal erred by linking the Album Cover and Announcement Video to the public dispute over the identity of the singer of the Cascio Tracks based upon the “represent[ation] that the lead vocals on all of the album’s tracks were performed by Jackson.” (Pet. at p. 14.) She does not (and cannot) dispute that this representation directly conveys that Michael Jackson did in fact sing the Cascio Tracks. But that was not enough, according to Serova, because “[t]hese representations . . . pertain to the album *as a whole*, not specifically to the three songs subject to controversy.” (Pet. at p. 14 [emphasis original].)

Serova appears to be arguing that some narrow set of magic words was required for the statements to be sufficiently

connected to the controversy. But *FilmOn* does not require an exact and explicit reference to a public debate to trigger anti-SLAPP protection. Rather, it requires only “some degree of closeness between the challenged statements and the asserted public interest.” (*FilmOn, supra*, 7 Cal. 5th at p. 150 [internal quotation marks omitted].) A speaker does not need to explicitly reference a public debate to “participate[] in, or further[], the discourse” on the subject. (*FilmOn, supra*, 7 Cal. 5th at p. 151.) Serova cites no case requiring this level of exactitude that she seemingly thinks is necessary to conjure anti-SLAPP protection. In fact, by focusing solely on the statement’s sufficiently narrow (or too broad) content divorced from the ongoing public controversy, it is Serova that runs afoul of *FilmOn*. (*FilmOn, supra*, 7 Cal. 5th at p. 152 [noting that “the specific nature of the defendants’ speech and its relationship to the matters of public interest” cannot be assessed “simply by looking at the content of the challenged statements”]).

Moreover, and as the Court of Appeal pointed out, Serova’s position “ignores her own allegations, which she may not do.” (Op. at p. 24.) The entire premise of her claims is that, by attributing the *Michael* album to Michael Jackson, Respondents misrepresented that Jackson was the singer of the Cascio Tracks. (See CT at p. 119.) Serova cannot have it both ways: If the connection between the album as a whole and the Cascio Tracks is strong enough to give rise to her causes of action, it has to be strong enough to give rise to anti-SLAPP protection. (See *Serova, supra*, at 44 Cal. App. at p. 122 [“Serova cannot contradict her

own allegations in arguing that the Challenged Statements did not identify the singer on the Disputed Tracks as Michael Jackson.”].)

Serova’s second argument is even more dubious than her first. She goes so far as to accuse the Court of Appeal of engaging in a “careless” contextual analysis that allegedly placed dispositive emphasis on the public nature of challenged statements, which she claims “essentially limited *FilmOn*’s reach to cases involving private speech.” (Pet. at p. 16.) Serova further complains that the lower court did not fully consider the “purpose,” “audience,” or “speaker” of the challenged statements. (*Ibid.*)

Her characterization of the decision below is plainly false. The Court of Appeal analyzed all three contextual factors referenced by this Court in *FilmOn*: “audience, speaker, and purpose.” (*FilmOn, supra*, 7 Cal. 5th at 152); (Op. at pp. 25-27.) As part of its analysis, the Court of Appeal also considered whether the statements were delivered in confidence or made to the general public—another key factor considered by this Court in *FilmOn*. (*FilmOn, supra*, 7 Cal. 5th at pp. 148-49, 151, 153-54); (Op. at pp. 25-26.) It correctly reviewed these factors holistically and did not find any single element to be dispositive. (*FilmOn, supra*, 7 Cal. 5th at p. 153.) Instead, it concluded that the public nature of the statements, the intended audience, and the identity of the speaker together weighed in favor of anti-SLAPP protection. (Op. at pp. 25-27.)

Serova's remaining complaints about the Court of Appeal's contextual analysis are essentially disagreements with how the Court of Appeal viewed the particular circumstances of the case. Her points are meritless. For example, she argues the Court of Appeal was wrong to conclude that the target audience of the statements ("persons who might buy the album") was "highly likely to be interested in the identity of the singer." (Op. at pp. 25-26); (Pet. at pp. 18-19.) Her point simply does not make sense; her entire suit hinges upon the *materiality* of the identity of the singer, which means would-be purchasers necessarily placed importance on this issue under her own theory. As the Court of Appeal held, Serova cannot "ignore her own allegations." (Op. at p. 24.)

She also claims the Court of Appeal placed improper weight on the fact that the Album Cover and Announcement Video were part and parcel of the protected, artistic expression embodied in the music contained on the album. (Op. at pp. 19-20.) In her view, telling the public that Michael Jackson was the lead vocalist for all of the tracks on *Michael* is no different than telling the public that a potato chip is organic. (*Id.* at pp. 4-5, 19-20.) Once again, this argument defies common sense and is not supported by the law. This Court in *FilmOn* explicitly told courts to consider the *full* context in which challenged statements are made, which is exactly what the Court of Appeal did here when it considered the fact that the Album Cover and Announcement Video relate to and convey information about music tracks

purportedly sung by one of the most celebrated musical artists of all time.

Ultimately, Serova identifies no split of authority for this Court to resolve on step one of the anti-SLAPP analysis. And she identifies no important issue of law to review. She simply argues that the Court of Appeal misapplied *FilmOn* based on the unique facts of this case. That argument is wrong and, more importantly, presents no basis to review the Court of Appeal's decision under Rule 8.500.

2. There Is No Question For Review At Step Two Of The Anti-SLAPP Analysis Because The Court of Appeal Faithfully Followed *Kasky*.

At step two, the Court of Appeal found that Serova had no chance of prevailing on her UCL or CLRA claims because the challenged statements were not commercial speech and therefore those statutes did not apply. No aspect of this holding creates a conflict with other appellate authority or rests upon unsettled law. Accordingly, review is not warranted.

The UCL and the CLRA govern only commercial speech. (Pet. at p. 22.) The United States Supreme Court has defined “commercial speech” as speech that “does no more than propose a commercial transaction.” (*Bolger v. Youngs Drug Products Corp.* (1983) 463 U.S. 60, 66, internal quotations omitted (*Bolger*)). “If speech is not ‘purely commercial’—that is, if it does more than propose a commercial transaction—then it is entitled to full First Amendment protection.” (*Stewart v. Rolling Stone LLC* (2010) 181 Cal.App.4th 664, 685, quotation marks and citation omitted.)

The analysis of whether speech is commercial is guided by three factors: whether the speech (1) is a traditional advertisement; (2) references a product; and (3) was economically motivated.

(*Bolger, supra*, 463 U.S. at pp. 66-67.) This Court subsequently described the three factors as “the speaker, the intended audience, and the content of the message.” (*Kasky, supra*, 27 Cal.4th at p. 960.)

Applying the three-factor test set forth in *Kasky*, the Court of Appeal found the third factor, the content of the speech, rendered the challenged statements non-commercial. This holding was based on multiple interrelated findings—namely, that the challenged statements were expressive (*i.e.*, did more than promote a transaction) because identifying the singer of the tracks comprised “an important component of understanding the art itself” (*id.* at p. 26); that Respondents did not have personal knowledge of the content of the message, and had no means of verifying it (*id.* at pp. 20-21); and that the challenged statements were opinions in the sense that they concerned a matter of irresolvable public controversy, and thus were not actionable factual assertions (*id.* at p. 23).

The Court of Appeal also held that to permit Serova’s claims against Respondents to proceed would violate the First Amendment because it would either chill speech (by disincentivizing the distribution of art if there were any scintilla of question as to its authorship) or impermissibly compel speech (by requiring purveyors of art to include a “disclaimer” about the

controversy despite concluding the tracks were authentic after performing an investigation). (*Id.* at pp. 24-25.)

Indeed, while Serova concludes that the challenged statements are “advertisements” (see, e.g., Pet. at pp. 4, 10, 28), they are not. Serova sued over ***part of the artistic work itself***—namely, the album’s title and cover artwork. Album covers are unquestionably expressive works, and when consumers purchase (or even stream) an album, they expect to also receive that expressive content. Similarly, even though the title is simple (“*Michael*”), it is expressive. (See *Tri-Star Pictures, Inc. v. Leisure Time Productions, B.V.* (S.D.N.Y. 1990) 749 F.Supp. 1243, 1252, *affd.* (2d Cir. 1994) 17 F.3d 38 [“Interpreting the Lanham Act broadly to protect movie titles invokes first amendment concerns because movie titles are a form of artistic expression.”]; *Stutzman v. Armstrong* (E.D. Cal. Sept. 10, 2013, No. 2:13-CV-00116-MCE) 2013 WL 4853333, at pp. 17–19 [“The speech at issue does more than merely propose a commercial transaction, because it describes the contents of the Books, the Books’ classification as a biography, and describes one of the Books’ authors . . . the promotional materials relating to the Books are inextricably intertwined with the Books’ contents, which is non-commercial speech”].)

While the title here also happens to connect the artist to the album, the title was an artistic choice to use the artist’s first name only, and in a particular font and manner, like an artist’s personal signature on the corner of a painting, or the title of his

or her self-portrait. Those choices represent expressive works in and of themselves.⁸

Serova claims the Court of Appeal misapplied *Kasky* because its three-part test “does not contain on its face a requirement that the speaker has personal knowledge of whether his speech is true.” (Pet. at p. 24.) But the opinion does not hold that commercial speech “requires” the speaker’s personal knowledge; it was only one of many factors it considered—just like *Kasky*. (See Op. at pp. 34-36.) And Serova completely ignores that *Kasky* expressly permitted courts to consider whether a factual statement was verifiable; it even emphasized the importance of personal knowledge to the commercial speech analysis in noting that the United States Supreme Court’s precedent on this issue “assumes that commercial speech consists of factual statements *and that those statements describe matters within the personal knowledge of the speaker.*” (*Kasky, supra*, 27 Cal.4th at p. 962, emphasis added.)

Serova also misrepresents the Court of Appeal’s discussion of this issue; the point is not just that Respondents lacked personal knowledge of the singer’s identity, but instead that there was no way for Respondents to conclusively verify it. In other words, the opinion relies not upon whether Respondents

⁸ Serova tries to bolster her point with an odd analogy to the U.S. Supreme Court’s decision in *Omnicare, Inc. v. Laborers Dist. Council Constr. Industry Pension Fund* (2015) 575 U.S. 175. *Omnicare* has nothing to do with the subject matter of this case; it generally addresses whether statements of opinion are actionable under the Securities Act of 1933. (*Id.* at pp. 188-195.)

verified the challenged statements (and they did so to the best of their ability) but whether the statements were conclusively *verifiable* by Respondents (and they were not). This analysis closely follows *Kasky*, which held verifiability to be a factor in determining whether speech is commercial. (*Id.* at p. 963 [holding Nike’s statements were commercial speech because “Nike was in a position to readily verify the truth of any factual assertions it made”]; *id.* at p. 962.) Other cases similarly include verifiability as a component of the analysis. (See, e.g., *Bernardo, supra*, 115 Cal.App.4th at p. 348 [holding an advertisement not commercial speech where it does not involve “readily verifiable factual assertions” but instead matters of “genuine . . . debate”]; *Keimer v. Buena Vista Books, Inc.* (1999) 75 Cal.App.4th 1220, 1224 [advertisements were commercial speech where defendant misrepresented the “verifiable fact” “that the investment club’s actual average rate of return from 1984 to 1994 was 9.1 percent as opposed to the advertised 23.4 percent”].)

Next, she claims the opinion impermissibly rewrites the UCL and CLRA to include a scienter component. (Pet. at pp. 28-29.) That is not even a colorable interpretation of what the Court of Appeal did. It is undisputed that if the UCL and CLRA apply, then there is no scienter requirement. It is also undisputed that the UCL and CLRA only apply to commercial speech. The Court of Appeal considered verifiability as a factor in the analysis of whether or not speech is commercial. If the speech at issue is commercial, then the UCL and CLRA could apply on a strict liability basis. If the speech at issue is not commercial, like here,

then the UCL and CLRA do not apply at all. In neither case does the opinion read or add a scienter requirement into the statutes.

Finally, she claims the opinion would nullify the “bona fide error” defense available under the CLRA. (Pet. at p. 29 [citing Civ. Code, § 1784].) This argument is waived because Serova failed to raise it below. (Cal. Rules of Court, Rule 8.500(c)(1) [“on petition for review the Supreme Court normally will not consider an issue that the petitioner failed to timely raise in the Court of Appeal”].)⁹ Moreover, it is a nonstarter because, again, it assumes the very question presented; the bona fide error defense is only relevant *if* the CLRA applies in the first instance, *i.e.*, if the challenged statements are commercial speech. The mere fact that a bona fide error defense exists does not mean the CLRA can or should apply to non-commercial speech like the statements challenged here.

In sum, review of the Court of Appeal’s decision at prong two of the anti-SLAPP analysis is not warranted.

B. The Court Of Appeal’s Holding Avoids Constitutional Infirmities.

Under Serova’s theory of the case, if Respondents distribute the Cascio Tracks, to avoid liability they must include a message to consumers that discloses the possibility that a singer other than Jackson sang the lead vocals on the Cascio Tracks—even

⁹ A footnote to the opinion mentions this provision of the CLRA in dicta. (Op. at pp. 35-36, fn. 13.) It noted that the defense only applies where the defendant “makes an appropriate correction, repair or replacement or other remedy of the goods and services[.]” (Civ. Code, § 1784.)

though Respondents believed Jackson did. Serova’s Petition ***completely ignores*** the Court of Appeal’s discussion of why recent U.S. Supreme Court precedent confirms that the ruling Serova seeks is unconstitutional. (Op. at pp. 36-37.) The Court of Appeal explained that the “United States Supreme Court recently emphasized the potentially problematic nature of regulations that compel speech, even in a commercial context.” (*Ibid.*, citing *Nat’l Inst. of Family & Life Advocates v. Becerra* (2018) ___ U.S. ___, 201 L.Ed.2d 835 (*Life Advocates*).) And a ruling “compelling disclosure of the controversy . . . to avoid liability . . . would, in effect, require Appellants to present views in their marketing materials with which they do not agree.” (Op. at p. 37) This would represent an “impermissible ‘content-based regulation of speech.’” (*Ibid.*, citing *Life Advocates*, 201 L.Ed.2d at p. 846.) Serova offers no response to or discussion of this aspect of the opinion.¹⁰

Indeed, Serova’s request that the Court impose some sort of disclosure requirement upon Respondents tramples upon Respondents’ core First Amendment right of expression. At oral argument in the trial court, Serova’s counsel and the court engaged in a disturbing exchange regarding how Respondents should have designed the Album Cover and related statements. (See, e.g., RT 633:2–3 [The Court: “Maybe Michael’ would have

¹⁰ Having failed to address it in her Petition, she may not raise the issue for the first time in response to this brief. (*Bell v. H.F. Cox, Inc.* (2012) 209 Cal.App.4th 62, 79, fn. 6 [“We generally disregard arguments raised for the first time in a reply brief.”].)

been a much better title.”]; RT 632:26–27 [Serova’s counsel suggesting the title: “Maybe It’s Michael, Maybe It’s Not, But It’s A Record And Here Have A Listen.”]; Op. at p. 36, fn. 14.) At appellate oral argument, Serova’s counsel reiterated that Respondents should avoid liability for distributing the songs only if they offered a disclaimer announcing to consumers that some people think¹¹ the lead vocals were sung by someone other than Jackson, even if Respondents think he did. These impermissible attempts to shape and disclaim expressive works underscore why the Court of Appeal got it right, and why no review is warranted. (See *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 340 [“a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship”]; *Brodeur v. Atlas Entertainment, Inc.* (2016) 248 Cal.App.4th 665, 675 [“[t]he creative process must be unfettered, especially because it can often take strange turns . . . We must not permit juries to dissect the creative process in order to determine what was necessary to achieve the final product and what was not, and to impose liability . . . for that portion deemed unnecessary”], citation and internal quotation marks omitted.)

C. Review Is Unwarranted Because The Court Of Appeal’s Opinion Properly And Carefully Balances The Public Interests In Consumer Protection And Promoting Artistic Expression.

¹¹ How many was unclear. Is it enough that one person thinks it’s not Michael Jackson? Is fifty enough? Taken to its logical extreme, Serova’s position could result in disclaimers on almost all expressive work.

Obviously, this case required that either First Amendment expression must be subjugated to the public interest in consumer protection, or vice versa. The Court of Appeal's decision carefully treads the line between these two competing objectives, crafting a narrow ruling that protects Respondents' First Amendment rights while avoiding any significant impediment to the enforcement of consumer protection laws.

Meanwhile, Serova's Petition hyperbolically and incorrectly argues that the opinion "will resurrect 'buyer beware' in California and endanger the benefits to the health and welfare of Californians" by "provid[ing] blanket immunity to sales of forged art." (Pet. at pp. 34, 36.) This is baseless. Even in this very case, there is no "immunity" provided to any knowingly "false attribution," because Serova is pursuing her fraud claims against the Angelikson Defendants in the trial court.

Moreover, Serova's argument defies common sense and ignores market realities. She claims that as a result of the opinion, art purveyors will purposely avoid investigating the provenance of the work, so as to be able to escape liability under the CLRA or UCL. (Pet. at p. 35.) But the Court of Appeal's decision rested not on the fact that Respondents *failed to verify* the truth of the statements or even failed to try, but that they were *not verifiable*. Moreover, reputation matters in the art business; it would not be advantageous for an art dealer to sell a painting that ended up being a forgery. The market thus contains inherent protections against the harms Serova claims will result absent review.

Similarly, she claims with no factual basis whatsoever, let alone citation to the record, that “publishers do not ordinarily reveal who they license the rights to creative works from, and art auctions do not reveal the identities of owners,” and therefore plaintiffs will not be able to identify or sue the true fraudsters. (Pet. at p. 36.) In fact, the only evidence in the record on this point shows the concern is nonexistent, as Serova had no difficulty identifying the Angelikson Defendants here. Nor is there any reason to think it would be a problem in other cases that fall within the exceedingly narrow scope of the opinion (assuming any will), which applies only where there is a public controversy that already exists surrounding the work’s authorship. Where there is public controversy, alleged fraudsters are often flushed out by the media, governmental or voluntary investigations, or potentially pre-litigation discovery procedures. As such, Serova’s parade of horrors is both unsupported and unlikely.

D. The Court of Appeal’s Opinion Is Narrow And Limited To The Unusual Facts Presented.

Another reason review should be denied is that the opinion expressly limited its holding to the facts and issues implicated in this unusual case:

[T]here is no apparent reason why a statement falsely stating that a particular song is included in an album should be subject to full First Amendment protection simply because the statement promotes the sale of music. However, where, as here, a challenged statement in an advertisement relates to a public controversy about the identity of an artist

responsible for a particular work, and the advertiser has no personal knowledge of the artist's identity, it is appropriate to take account of the First Amendment significance of the work itself in assessing whether the content of the statement was purely commercial. This conclusion is consistent with the flexible approach that the United States Supreme Court has adopted for identifying commercial speech.

(Op. at pp. 40-41, footnote omitted; see also *id.* at p. 42 [“Nor do we purport to decide whether statements in another context concerning the marketing of creative works might constitute commercial speech.”].) It also made clear that nothing in the opinion applied to Serova's fraud claim against the Angelikson Defendants. (*Id.* at p. 42.) Thus, the opinion may have little precedential effect, and does not even prevent Serova from having her day in court in this very case.

In sum, the practical implications of the opinion are far less extreme and harmful than Serova claims. In fact, due to its expressly narrow holding and the unusual facts at issue here, the opinion may have limited precedential value. This forms another basis to deny review.


V. CONCLUSION.

Serova has failed to show a lack of uniformity of decision or an unsettled important legal principle. Respondents respectfully request that the Petition be denied.

Respectfully submitted,

Dated: March 9, 2020

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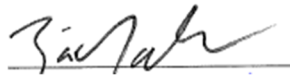
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WORD COUNT CERTIFICATION

The undersigned counsel for Respondents certifies pursuant to rule 8.504(d)(1) of the California Rules of Court that the word count for this document using Microsoft Word is 7,212 words, including footnotes but excluding the tables and this certificate, and certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Los Angeles, California, on March 9, 2020.

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Katten Muchin Rosenman LLP, 2029 Century Park East, Suite 2600, Los Angeles, California 90067-3012.

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Supreme Court of California

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STATE OF CALIFORNIA
Supreme Court of California

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ENTERTAINMENT**

Case Number: **S260736**

Lower Court Case Number: **B280526**

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