Supreme Court of California
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Supreme Court of California
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No. S260736

In the Supreme Court of the State of California

VERA SEROVA, et al.
Plaintiff and Respondent,

v.

SONY MUSIC ENTERTAINMENT, et al.
Defendants and Appellants.

After a Decision by the Court of Appeal,
Second Appellate District, Division Two, Case No. B280526;
Superior Court of Los Angeles County, Case No. BC548468,
Honorable Ann I. Jones, Judge

APPLICATION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF CONSUMER ATTORNEYS OF CALIFORNIA SUPPORTING PLAINTIFF

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rule of Court 8.208, Consumer Attorneys of California certifies that it is a non-profit organization with no shareholders. Amicus curiae and its counsel certify that they know of no other entity or person that has a financial or other interest in the outcome of the proceeding that amicus curiae and its counsel reasonably believe the Justices of this Court should consider in determining whether to disqualify themselves under canon 3E of the Code of Judicial Ethics.

Dated: January 8, 2021

Respectfully submitted,

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MICHA STAR LIBERTY

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APPLICATION FOR PERMISSION TO FILE

Amicus curiae Consumer Attorneys of California ("CAOC") respectfully seeks permission to file the accompanying brief as friend of the Court. (Cal. Rules of Court, rule 8.520(f)(1).)

Founded in 1962, CAOC is a voluntary non-profit membership organization representing over 6,000 consumer attorney members that represents the interests of 39 million Californians. CAOC's members stand for plaintiffs seeking accountability from those who do wrong, including those who falsely, deceptively and misleadingly advertise and sell their products in California. CAOC has taken a leading role in advancing and protecting the rights of consumers, employees and injured victims in both the courts and the Legislature.

CAOC has participated as amicus curiae in precedent-setting decisions shaping California law. (*See, e.g.*, *Noel v. Thrifty Payless, Inc.* (2019) 7 Cal.5th 955; *Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260, *T.H. v. Novartis Pharmaceuticals Corp.* (2017) 4 Cal.5th 145; and *In re Tobacco II Cases* (2009) 46 Cal.4th 298.) Specifically, this Court has agreed with CAOC on the need to ensure the "effectiveness of class actions" to "provide relief in consumer protection cases." (*Pioneer Electronics (USA), Inc. v. Superior Court* (2008) 40 Cal.4th 360, 374.) CAOC also vigorously fights to preserve the right to trial and preserve pro-

consumer laws in the California Legislature. As is particularly relevant here, CAOC sponsored Senate Bill 515 (Kuhl) (2003) codified as Civil Code § 425.17, which was enacted to rein in corporate misuse and abuse of California's anti-SLAPP statute and cabin in the statute's use to the legislature's original intent and purpose. (See, Report of Senate Judiciary Committee on Senate Bill No. 515, as amended May 1, 2003, 4-5.)

CAOC is familiar with the parties' briefing, as well as the amici brief of UC Berkley Center for Consumer Law & Economic Justice, Truth in Advertising, Inc., Public Counsel, Legal Aid Society of San Diego, Housing and Economic Rights Advocates, East Bay Community Law Center, Consumers for Auto Reliability & Safety, Consumer Action and Bay Area Legal Aid. Here, CAOC seeks to assist the Court "by broadening its perspective" on the context bounding the issues presented: Namely, whether Sony Music Entertainment's false, deceptive and misleading statements on the cover of each of its music albums as marketed and sold throughout California, as well as those statements in its promotional video, are commercial speech and, therefore, not entitled to immunity or protection under the United States and California Constitution. (*Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1177, citation omitted.) CAOC also seeks to assist the Court by providing the consumer perspective as to the newly minted scienter requirement the Court of Appeal added to California's

consumer protection statutes, the UCL, FAL and CLRA. (Bus. & Prof. Code § 17200, et seq., § 17500, et seq., and Civ. Code § 1750, et seq., respectively.)

No party or its counsel authored any part of CAOC's amicus curiae brief and, except for CAOC and its counsel here, no one made a monetary or other contribution to fund its preparation or submission. (Cal. Rules of Court, rule 8.520(f)(4).)

SUMMARY OF ARGUMENT

This ordinary and rather unremarkable consumer fraud class action concerns alleged affirmative and unqualified misrepresentations on the outside of the product packaging of every music album *Michael* that Sony marketed and sold in California during the class period.[1] This case also concerns alleged affirmative and unqualified statements Sony made in its marketing and promotional video to encourage sales of this consumer product. CAOC wholeheartedly agrees with plaintiff and her amici, UC Berkley Center for Consumer Law & Economic Justice, et al. ("UC Berkeley Center")—this case presents a clear-cut textbook case of false advertising.

Sony's representations on the album cover, and in its promotional video are unquestionably non-protected commercial speech. Sony has no free speech right to deceive and defraud consumers. It is well-settled—false, deceptive and misleading marketing and promotional messages are not protected speech under the United States Constitution or the California Constitution's free speech clause.

Under *FilmOn.com Inc. v. DoubleVerify Inc.* (2019) 7 Cal.5th 133 ("*FilmOn*"), Sony's false, deceptive and misleading advertising is not subject

[1] The four-year class period is presumably from June 12, 2010 to the date the trial court certifies this case as a class action. (CT 1:23 [FAC] ¶ 36.) Included within the class definition is a three-year subclass. (*Id*., ¶ 37, Civ. Code § 1781.)

to California's anti-SLAPP statute and therefore, may be regulated through California's consumer fraud statutes, the UCL, FAL and CLRA (Bus. & Prof. Code § 17200, et seq., § 17500, et seq. and Civ. Code § 1750, et seq.).[2]

It is well-settled that California's consumer fraud statue, the UCL, is a strict liability statute. Accordingly, the Court of Appeal's newly minted scienter requirement it grafted onto to this extremely important consumer protection statue is entirely unmoored from the language of the statute, its legislative history, and if adopted by the Court, would return California's consumer protection laws back to the era of *caveat emptor*.

Importantly, this action presents a paradigmatic case of corporate misuse and abuse of California's anti-SLAPP statute. The instant case has been stuck in the pleading stage for over four (4) years and Sony's use of the statute is directly at odds with the original purpose of the statue—to protect nonprofit corporations and common citizens from large corporate entities and trade associations in petitioning government. Here, a well-funded international corporation, Sony, has used the anti-SLAPP statute against common consumers, the antithesis of the original intent and purpose of the statute.

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[2] The operative complaint does not include a FAL—false advertising cause of action (Bus. & Prof. Code § 17500, et seq.). (CT 1:114-131.) However, for context and comparison, CAOC includes the FAL in its brief to assist the Court.

Ever since its enactment, well-funded corporations such as Sony have repeatedly misused California's anti-SLAPP statute, misappropriating the procedural advantages for their own financial gain. That is and has always been directly at odds with the original purpose of the statute. CAOC therefore strongly urges the Court to again narrow the breadth of the anti-SLAPP statute by applying the *FilmOn* criteria to the well-funded corporation vs. individual consumer factual circumstance this case presents, in order to limit the misuse and abuse from continuing.

ARGUMENT

A. Sony's Misrepresentations on its Product Packaging and in its Promotional Video Are Commercial Speech.

1. False, deceptive and misleading marketing and promotional messages are not protected speech under the United States constitution or the California Constitution's free speech clause.

The briefs of plaintiff and her *amici*, UC Berkeley Center for Consumer Law & Economic Justice, et al., thoroughly and correctly address why Sony's marketing messages on its album cover *Michael*, and its unqualified affirmative statements in its promotional video, are unquestionably commercial speech and thus, may be regulated. In response, Sony argues for a carve-out to be able to make false, deceptive and misleading statements about its product, with impunity. (ABOM, 12, 25-27.) This is not and cannot be the law as California has long ago departed from

the rule of *caveat emptor* to one of consumer protection, reason and common sense. Indeed, it was the harsh requirements of the common law that propelled the California legislature to enact the UCL, FAL and CLRA.

Briefly, this Court has determined that false, deceptive and misleading commercial speech is not entitled to protection under the California Constitution. (*Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 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"].)

CAOC agrees. The album cover Sony designed, marketed, and sold, *Michael*, contained the unqualified statement: "This album contains 9 previously unreleased vocal tracks performed by Michael Jackson." (POB at 12.) It is beyond dispute that any reasonable consumer exposed to this false, deceptive and misleading statement would think that all nine new tracks on the *Michael* album were, as represented by Sony, sung by the late Michael Jackson. In fact, the parties have stipulated that the album *Michael* contains three songs sung by someone other than Michael Jackson. Thus, by extension, Sony's stipulation is an admission, for the purposes of this matter, that Sony's unqualified statements on its album cover, and in its promotional

video are false, deceptive and misleading under the UCL and CLRA and may be regulated as commercial speech.

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); see also *Bolger v. Youngs Drug Prod. Corp.* (1983) 463 U.S. 60, 66.)[3]

Plaintiff's consumer fraud class action complaint squarely seeks to redress the false, deceptive and misleading statements Sony chose to broadly disseminate to California consumers. The statements were made to interject itself into California commerce—increase sales, entice consumers to purchase the *Michael* album, and earn a profit. Thus, CAOC agrees with plaintiff and her *amici,* UC Berkley Center, et al., this case is a straightforward textbook case of false, deceptive and misleading advertising.

[3] Plaintiff and her amici, UC Berkeley Center, cites and discusses the federal authorities concerning commercial speech. CAOC does not believe restating those arguments and authorities would add to or assist the Court in its analysis and consideration. Therefore, for the sake of brevity, CAOC does not repeat those arguments and authorities concerning well-settled federal law.

2. It is well-settled that Sony has no right to engage in false, deceptive and misleading advertising.

Plaintiff's and her *amici's* briefing make clear that Sony, just like any other seller of a common, mass-produced, products to California consumers, has no right to engage in false, deceptive and misleading advertising in connection with the sale of their products in this state. Sony's unqualified affirmative marketing statements were false, deceptive and misleading because Sony has admitted to the falsity of their advertising for purposes of this appeal. Thus, CAOC agrees with plaintiff and her *amici* that the start and end to the analysis is the well-established rule that commercial sellers, as the purveyors of goods, are free to truthfully and accurately describe their products, but they may not engage in deceptive advertising. Stated differently, if Sony decides to make representations about its product to the public, those representations must be true and accurate.

3. Under *FilmOn*, Sony's false, deceptive and misleading advertising is not subject to California's anti-SLAPP statute and therefore, its marketing statements may be regulated.

(a) The content and context of Sony's advertising statements are "well-wedded" to a commercial purpose.

Recently, in *FilmOn*, this Court provided guidance to lower courts when they are evaluating whether particular statements are protected or as is presented here, non-protected commercial speech. (*FilmOn.com Inc. v.*

DoubleVerify Inc., 7 Cal.5th at 149-151.) Specifically, this Court noted the proper analysis should focus on the "contextual cues" that show a statement "to be 'commercial' in nature—whether it was private or public, to whom it was said, and for what purpose." (*Id*. at p. 148.) The ultimate question is whether the "wedding of content and context" shows that the statement "contributes to or furthers the public conversation on an issue of public interest." (*Id*. at p. 154.) As driven home by plaintiff, the offending public statements on the album cover targeted consumers for the primary, if not exclusive purpose of selling its product. (RBOM at 22-33.) Thus, the content and context of the offending affirmative and unqualified representations are "well-wedded" to a commercial purpose. (*Id*.)

(b) Sony's convoluted and circular logic fails to justify its proposed expansion of the reach of California's anti-SLAPP statute.

In *FilmOn*, this Court clarified that it is the defendant's burden to show its speech was made "in connection with a public issue or an issue of public interest" under the first prong of the anti-SLAPP framework, which requires the defendant to not only identify some public issue implicated by the speech, but also to show that the speech "contributes to—that is, 'participat[es]' in or furthers—some public conversation on the issue." (*FilmOn*, *supra*, 7 Cal.5th at p. 151.) Specifically, this Court directed lower courts to evaluate whether the speech was made "in connection with a public

issue or an issue of public interest" in two steps. "First, we ask what 'public issue or [ ] issue of public interest' the speech in question implicates—a question we answer by looking to the *content* of the speech… Second, we ask what functional relationship exists between the speech and the public conversation about some matter of public interest." (*Id*. at p. 149, italics added.)

Here, the Sony defendants attempt to apply a rather convoluted and circular form of *post hoc ergo propter hoc* logic. In particular, they argue because Michael Jackson was famous and a lot of public interest surrounded him, *generally*, the statements on the *Michael* album and in its promotional advertising for its product are protected speech because, *ergo*, Michael Jackson was famous. (ABOM at 13, 16 ["King of Pop," and "…the most influential musical artist of all time."].) Nonsense. Just because the subject of a product is famous, even if they are the most famous "of all time," does not mean that they or their well-funded corporate purveyors are permitted to defraud, deceive and mislead with impunity. If the seller chooses to speak about their product, particularly on the album cover and in their marketing and promotional advertisements, they must speak truthfully.

Sony's attempt to expand the reach and corporate misuse of the anti-SLAPP statute is simply unworkable. For example, in 1906, author Upton Sinclair published his now "famed" book, The Jungle. The book exposed

labor and sanitary conditions in the U.S. meatpacking industry, causing "widespread public interest." The deplorable conditions in meat packing and processing plants became an issue of "great public interest," including the quality and contamination of the meat used to make sausage. In particular, images of rats and their feces on top of mounds of decomposing scrap meat used to make sausage "was directly connected to an issue of widespread public interest," and "furthered the public conversation" on the issue.) (See, https://en.wikipedia.org/wiki/Upton_Sinclair, *Cf.,* ABOM at 14.) The book, The Jungle, in fact, contributed in large part to the passage a few months later of the 1906 Pure Food and Drug Act and the Meat Inspection Act. (*Id*.) "Widespread public interest" concerning the contents and quality of the food we eat has continued, unabated, for the 114 years since The Jungle was made public. The contents and source of the food we eat is, and has long been, an issue of widespread public interest. As will be shown below, applying Sony's twisted logic and myopic reasoning is simply not workable.

As an example of why Sony's proposed rule is unworkable, the late singer Jimmy Dean created several well-known "works" during his life. Jimmy Dean is best known for his song, "Big Bad John," his 1961 recitation song about a heroic miner. (See https://en.wikipedia.org/wiki/Jimmy_Dean.) During his life, Jimmy Dean's creative work also included his creation of a popular food product, "Jimmy Dean Pure Pork Sausage." (*Id*.) Under Sony's

strained analysis, it would argue that the advertising of Jimmy Dean Pure Pork Sausage, contributed to "the debate" about the contents of the food we eat and thus, Jimmy Dean Sausage Company should be immune from suit, regardless of the truth and veracity of its advertising statements on its product packaging and in its marketing materials. Without question, the above example provides an extremely tenuous connection between Jimmy Dean's fame and the public controversy that has persisted concerning the contents and quality of the food we eat since 1906, and likely earlier. However, it is on par with Sony's strained analysis. Both here, in the instant case and in the above example, a corporate purveyor of a consumer product falsely, deceptively and misleadingly chose to misrepresent its product on its product packaging and in its advertising materials to sell a consumer product. There is simply no difference between a music album and a food product, or any other product, for that matter. Both are consumer goods placed in the market for sale, to earn a profit.

The above example also shares common characteristics, such as Sony's release of the *Michael* album after his death. While Jimmy Dean sold his company, Jimmy Dean Sausage Company, he continued on as a spokesperson for the corporation and its products for a period but was later phased-out. (*Id*.) However, in 2018, *after* his death, the corporation who purchased the rights to his sausage "creative work" began airing some of

Jimmy Dean's old advertisements. (*Id*.) Without question, and while arguably not as "famous" as Michael Jackson, Jimmy Dean and his Pure Pork Sausage "creative work" is and has been a widely popular food for decades, concerning a matter of great public interest. And, while Jimmy Dean himself generated a large "public" following that does not mean the current corporation who has the rights to sell Jimmy Dean Pure Pork Sausage should be immune from marketing and selling, for example, rat feces contaminated meat advertised as "Pure Pork Sausage." Or that the corporate purveyor's use of Jimmy Dean's old advertisements, now made false, deceptive and misleading because of the hypothetical recent changes to the contents of the product. And that would be true even if two-thirds of each package contained "Pure Pork Sausage" despite the contamination just as only having two-thirds of the *Michael* album songs performed by Michael Jackson does not "cure" the fact that one-third are not as represented. (See, e.g., *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]; *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, just because Michael Jackson was a very popular public figure does not mean the well-funded corporate sellers of his products, music albums, should be immune from suit for misrepresenting the content of their products, here, three of the nine new songs sold are stipulated to have been sung by someone other than Michael Jackson.[4]

Simply put, Sony's attempt to expand the reach and misuse of California's anti-SLAPP statute is directly at odds with the legislative intent as evidenced by the passage of Section 425.17, sponsored by CAOC, which sought to rein in the corporate abuse of the statute.

As this Court keenly observed in *FilmOn*, a defendant will "virtually always …succeed in drawing a line—however tenuous—connecting their speech to an abstract issue of public interest." (*FilmOn.com Inc. v. DoubleVerify Inc., supra*, 7 Cal.5th at 150.) A mere reference to a subject of public interest is not enough; "the statement must in some manner itself *contribute* to the public debate." (*Ibid*, italics added.)

[4] The *Michael* album contained 10 songs, one of which was previously released. Of the 9 "new" songs, 3 of which are admitted by Sony to not having been sung by Michael Jackson. (RBOM at 12-13.)

c. Sony's public statements on the album cover and in its promotional video were made to sell its product, not to interject itself into an "ongoing public debate" and take a "position" on the authenticity of the three songs it has stipulated were <u>not</u> sung by Michael Jackson.

The second prong of this inquiry is meant to establish whether such contribution exists. Specifically, this inquiry does not turn on the social utility of the advertising statements at issue, or the degree to which it propelled a conversation in any particular direction; rather, this Court has instructed lower courts to examine "whether the defendant—through public or private speech or conduct—participated in, or furthered, the discourse that makes an issue one of public interest." (*Id*. at pp. 150–151.)

Moreover, during this examination, *FilmOn* instructs lower courts to consider not only the content of the speech, but also its context—including audience, speaker, and purpose. (*FilmOn.com Inc. v. DoubleVerify Inc., supra*, 7 Cal.5th at 149, 151–152.) As this Court explained, ruling on an anti-SLAPP motion involves a two-step procedure. First, the moving defendant must show that the challenged claims arise from protected activity. (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 396; *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056.) Sony has not and cannot make the requisite showing that the representations on the album cover, and in its marketing and promotional materials "arise from protected activity." (*Ibid*.)

Second, if the defendant makes such a showing, the "burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated." (*Baral v. Schnitt* (2016) 1 Cal.5th at 396.) And, without resolving evidentiary conflicts, the court determines "whether the plaintiff's showing, if accepted by the trier of fact, would be sufficient to sustain a favorable judgment." (*Ibid*.)

As this Court in *FilmOn* further explained, " '[w]hether speech has a commercial or promotional aspect is not dispositive' of whether it is made in connection with an issue of public interest." (*FilmOn.com Inc. v. DoubleVerify Inc., supra*, 7 Cal.5th at 154, quoting *Industrial Waste & Debris Service, Inc. v. Murphy* (2016) 4 Cal.App.5th 1135, 1150.) Concerning this analysis, this Court cautions that while "[s]ome commercially oriented speech will, in fact, merit anti-SLAPP protection," the proper analysis focuses on the same "contextual cues" that show a statement "to be 'commercial' in nature—whether it was private or public, to whom it was said, and for what purpose." (*FilmOn.com Inc. v. DoubleVerify Inc., supra*, 7 Cal.5th at 148, 153.) The guidance this Court provides is that the important question for courts to consider and answer is whether the "wedding of content and context" demonstrates that the statement "contributes to or furthers the public conversation on an issue of public interest." (*Id*. at p. 154.) This is where Sony's arguments fall flat. The content and context of Sony's

advertisements (i.e., statements on the album cover and in its promotional video) clearly demonstrate the unqualified statements of fact, in Sony's advertising, did not participate in or further discourse on issues of public interest. Moreover, Sony has admitted that three of the nine new songs on the *Michael* album were not sung by Michael Jackson.[5] Therefore, defendants fail the first prong of the *FilmOn* test.

CAOC also strongly believes that the Court of Appeal below got it wrong after this Court sent this case back down to be decided under *FilmOn*. (*Serova v. Sony Music Entertainment* (2019) 252 Cal.Rptr.3d 227.) Resorting to twisted logic and outcome determinative reasoning, the Court of Appeal contorted the central purpose of Sony's advertising statements, i.e., to sell music albums and generate profit (regardless of its consumer fraud and deception about the product), into a "position" on authenticity, mistakenly finding that the advertising statements had the requisite connection to the public debate, when they clearly do not. (*Serova v. Sony Music Entertainment* (2020) 44 Cal.App.5th 103, 121-122.) Unquestionably, Sony's focus in making the advertising statements to consumers was to promote sales of its product (the album *Michael*) rather than interject itself into an "ongoing public debate" over the source and

[5] Sony's album *Michael* contains 10 songs, one of which was previously released. (RBOM at 12, citing CT:119 [FAC] ¶¶ 26-27.)

authenticity of three (3) of the songs on the album and the fame and public's interest in Michael Jackson himself, generally.

In CAOC's collective experience, this would not be the first time a well-funded commercial seller of a product, like Sony here, has resorted to consumer fraud and deception in order increase the sales of its products.

B. The UCL is a Strict Liability Statute: the Court of Appeal's Newly Minted Scienter Requirement Is Unsupported, Misguided, and Plain Wrong

The UCL is a strict liability statute that plainly does not include an element of personal knowledge. (*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"].)

As alleged, a genuine issue of material fact exists as to whether Sony knew, or should have known, whether the songs were in fact sung by Michael Jackson when it decided to make its unqualified statements on the album cover and in its advertising. (CT 1:116-123.) At minimum, Sony had doubts as to whether all 10 tracks on the Michael album were sung by Michael Jackson, but rather than informing consumers as to what it knew, it chose to advertise its product as all of the songs having been sung by Michael Jackson. The CLRA takes a different tack and protects consumers against 23 specific

activities that it defines as unfair and deceptive business practices. (Civ. Code § 1770.)[6] Completely ignoring the absence of a knowledge requirement under the plain language of the statute, its legislative history, and numerous courts who have analyzed the statute, the Court of Appeal took it upon itself to add a scienter requirement to the statute. That is wrong. By comparison, the FAL requires the advertiser know or "by the exercise of reasonable care should be known, to be untrue or misleading." (Bus. & Prof. Code § 17500.)[7] Plaintiff's complaint does not include a false advertising cause of action however, it appears to CAOC that a FAL claim under the facts presented would be viable. Nevertheless, even the FAL does not have a *caveat emptor* like scienter requirement the Court of Appeal added to the UCL.

Created out of whole cloth with no support, the Court of Appeal grafted onto the statute a scienter requirement, that is unmoored from the statute itself, the legislative intent or the decades of case law that has shaped

[6] Plaintiff and her amici, UC Berkeley Center's briefing adequately cover the CLRA, and the decisional law thereunder. CAOC therefore did not believe it would assist the Court to repeat the statutory basis and cases decided under the CLRA.

[7] Under California law, a negligent misrepresentation, is a form of "deceit," and is defined by Civil Code Section 1710(2) as: "The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true."

the UCL, an extremely important consumer protection statute to California consumers.

Adding this actual knowledge requirement interferes with the remedial, preventive, and deterrent purposes of the statute. The prevention and deterrence of false, deceptive and misleading statements, in direct connection with the sales of their products, can only be achieved if product advertisers are held accountable for their false, deceptive and misleading statements, regardless of their own, claimed lack of personal knowledge.

Particularly salient here is the undisputed fact that Sony chose to market and sell the *Michael* album as containing songs performed only by Michael Jackson. It was Sony's decision as to what information it would provide and what information it would not provide, on the album cover and in its marketing and advertising statements. That Sony chose to falsely portray all of the songs on the album *Michael* as being sung my Michael Jackson, was its decision. Sony could have easily chosen to include a disclaimer as to the three songs it admits were not sung by Michael Jackson. In fact, nothing prevented Sony from including a disclaimer on the album cover and in its promotional advertising. Rather, Sony intended to capitalize on its misrepresentation that all of the songs on the album were sung by Michael Jackson when they were not. That is textbook consumer "fraud" under the UCL. (See, e.g., *In re Tobacco II Cases* (2009) 46 Cal.4th 298,

312 [making clear that the "fraudulent" prong of the UCL is distinct from common law fraud, where the victim must demonstrate the perpetrator's knowledge, "None of these elements are required to state a claim for injunctive relief under the UCL"]; 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"].) Accordingly, the UCL does not and has never had an actual knowledge requirement that the statements it chooses to make are false, deceptive or misleading. Sony's claim that it did not have actual knowledge whether the songs were not sung by Michael Jackson is irrelevant. As noted above, the UCL is a strict liability statute and thus, the Court of Appeal's addition of a personal knowledge requirement, if followed, would do great violence to the legislative intent and purpose of the statute. Moreover, even if an FAL cause of action was pled, Sony was, at the very least, aware that three of the songs may not have been sung by Michael Jackson. The claimed doubt as to the actual singer on these three songs did not give it license to misrepresent its product. As noted above, Sony was free to include a disclaimer and inform consumers about these songs but chose not to. Nothing in the statutory language or the cases decided under the UCL

provided the Court of Appeal with even a hint that the legislature intended for the UCL to have a scienter requirement.

Only through enforcement of the UCL, and having to face the prospect of being required to remedy the harm they have caused to consumers, will commercial sellers and advertisers, like Sony, be motivated to be careful in choosing their representations about their products on the product packaging and in their promotional advertising for the product. Here, plaintiff's claims are directly targeted at Sony's false and misleading statements that it made on the *Michael* album cover and in its promotional video. There is nothing remarkable nor intolerable to impose a burden on Sony, and similarly situated well-funded corporations, that when they describe their products in their advertising, they have to speak truthfully.

Unqualified factual misrepresentations about a product made by a seller to consumers are unquestionably actionable as false, deceptive and misleading advertising under California's consumer protection statutes. There is nothing remarkable or different here. Sony, like numerous other sellers of products, just like any other misrepresenting seller, should be held accountable for their false, deceptive and misleading statements. Enforcement of California's consumer protection statutes fulfills the legislature's purpose and reason for enacting these statutes. Providing immunity does not, and if followed, would do great violence to the UCL.

California courts routinely deem unqualified factual statements on product packaging and labels of commercial products concerning the products themselves to be actionable. (*Keimer v. Buena Vista Books, Inc.* (1999) 75 Cal.App.4th 1220, 1228–1230 [drawing "commonsense conclusion" that statements about inflated investment returns on the covers of investment books "were designed with a single purpose in mind, to sell the books" and thus were commercial]; *Nagel v. Twin Laboratories, Inc.* (2003) 109 Cal.App.4th 39, 48–49 [holding the description of ingredients on the label of a nutritional supplement was commercial speech]; *Benson v. Kwikset Corp.* (2007) 152 Cal.App.4th 1254, 1268 [holding "Made in U.S.A." and similar labels on locksets were commercial speech].)

Whether a statement is factual or an opinion is ordinarily judged from the perspective of the audience, not the speaker. (*Baker v. Los Angeles Herald Exam'r* (1986) 42 Cal.3d 254, 260–61.) If the intended audience understands the message as factual and relies on it as a fact in deciding whether to buy the product, the speech is commercial. Therefore, what matters under the plain language of the *Kasky* test is how the consumer perceives and understands the message, not what the commercial speaker knew when he or she uttered it.

Accordingly, the Court of Appeal's newly minted scienter requirement cannot reasonably be read into the *Kasky* test or into California's

statutes specifically designed and targeted to curb false advertising. The Court of Appeal's newly created scienter requirement is unmoored from the plain language and well-established interpretations of the UCL. California has a well-established and legitimate right to protect the public by regulating the dissemination of false or misleading advertising, and thus, grafting on a scienter requirement to these statutes, if adopted, would be nothing more than a drastic return to the days of *caveat emptor*.

C. Sony's Misuse and Abuse of California's Anti-SLAPP Statute: Sony Should Not Be Permitted to Defraud, Deceive, and Mislead Consumers with Impunity.

California's Anti-Strategic Lawsuit Against Public Participation (anti-SLAPP) statute was enacted to protect nonprofit corporations and common citizens from large corporate entities and trade associations in petitioning government. (*FilmOn.com Inc. v. DoubleVerify Inc., supra*, 7 Cal.5th at 143, citing Cal. Civ. Proc. Code § 425.16.) As this Court observed in *FilmOn*, "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." (*Id*. citing Assem. Com. on Judiciary, Analysis of Sen. Bill No. 1296 (1997–1998 Reg. Sess.) as amended June 23, 1997, 2–3; Barker, *Common-Law and Statutory Solutions to the Problem of SLAPPs* (1993) 26 Loyola L.A. L.Rev. 395, 396.)

This case presents the complete opposite of the paradigmatic SLAPP suit the statute was meant to prevent. Here, we have a large, well-funded international corporation that has misused the anti-SLAPP statute to further its attempt to falsely and misleadingly market its album *Michael*, to unwary consumers. This Court should decline Sony's invitation to expand California's anti-SLAPP statute, and refuse to empower well-funded corporations like Sony to abuse the statute.

1. Brief history of California's Anti-SLAPP law.

The anti-SLAPP statute was first passed in 1992 and was amended by the California Legislature in 1997 to emphasize that it was to be construed broadly in furtherance of its expressed purpose of encouraging the right of petition and right of free speech in connection with a public issue. As noted in the legislative history of section 425.16, the statute derived from observations made in a journal article by George Pring and Penelope Canan, *Strategic Lawsuits Against Public Participation* (1988) 35 Social Problems 506 ("Pring and Canan, 1988"). (See Senate Judiciary Committee analysis of SB 1296 (1997-1998) amending 425.16.) Similarly, it was noted in that legislative history, as it is in the statute itself, that "it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process." (*Id.*; Code Civ. Proc. § 425.16 (a).)

In 2003, Senate Bill 515 (Kuhl), sponsored by CAOC, amicus herein, and codified as Code of Civil Procedure § 425.17, "to stop corporate abuse of the statute and to return Section 425.16 to its original purpose of protecting a citizen's rights of petition and free speech from the chilling effect of expensive retaliatory lawsuits brought against them for speaking out." (See, Report of Senate Judiciary Committee on Senate Bill No. 515, as amended May 1, 2003, pp. 4-5.) As this case demonstrates, the corporate abuse of the anti-SLAPP statute has continued.

The most common SLAPP suit typically concerns a powerful corporation suing local citizens for speaking against the company. (Shannon Hartzler, *Protecting Informed Public Participation: Anti-SLAPP Law and the Media Defendant* (2007), 41 Val. U.L. Rev. 1235, 1240.) A key feature of a typical SLAPP suit is that the plaintiff is "not [necessarily] interested in winning the case" but rather, to silence the other, weaker party. (Pring & Canan, *Slapps: Getting Sued For Speaking Out* (1996), Temple University Press, Philadelphia at 8-11.) As is particularly relevant here, the main point of the Sony defendants' anti-SLAPP suit is to silence and punish or retaliate against the plaintiff, who merely seeks redress for Sony's false, deceptive and misleading commercial speech, advertising. This is far removed from the original legislative intent and purpose of the statue.

2. Corporate misuse and abuse of California's anti-SLAPP law.

Because of the unique construction of section 425.16, which advantages defendants and disadvantages plaintiffs, it is of no surprise that corporate defendants, like Sony, glommed onto the statute and attempts to pervert its central purpose, to prevent stronger, well-funded corporations from limiting the free speech of citizens. The tactical advantages which enticed large corporations to pervert its intended purpose are plain:

- The motion is brought within 60 days after the complaint is served, i.e., before any meaningful discovery has occurred;
- The filing of the motion instantly and immediately stays all discovery proceedings;
- The motion puts the plaintiff in the position of having to prove a prima facie case – without discovery;
- If the defendant prevails, the court must award attorneys' fees; and
- Whether the motion is granted or denied, the order is immediately appealable.

(Code Civ. Proc. § 425.16, et seq.)

Because of these clearly advantageous rules of procedure, a defendant, like Sony, bringing an anti-SLAPP motion has an enormous litigation advantage, the equivalent of forcing a plaintiff to deal with a summary judgment motion without the 75-day notice period and without discovery and with the added bonus of obtaining attorneys' fees. If the plaintiff does not meet this burden, through submission of admissible

evidence, the cause of action is stricken. Additionally, any ruling on the motion is an appealable order, needlessly dragging out the case for years, even if the plaintiff wins the motion. Here, this case has been stuck at the pleading stage for four years. (Original Complaint, Jun. 12, 2014, CT 1:11.)

And this case is no outlier. Rather, this case follows an unprecedented history of corporate misuse and abuse of the statute yet again elevating the need for further clarification as to when the statute applies, and, like here, when it clearly does not. CAOC strongly urges the Court to rein in the misuse and abuse of the statute by applying this Court's recent guidance it provided in *FilmOn*, to this typical and ordinary consumer fraud class action.

3. This Court should again narrow the scope of the anti-SLAPP statute to prevent the abuse from continuing.

The evolution of restricting the statute, and limiting corporate abuse of the statute, began with this Court's trilogy: *City of Cotati v. Cashma*n (2002) 29 Cal.4th 69; *Navellier v. Sletten* (2002) 29 Cal.4th 82; and *Equilon Enterprises, Inc. v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53. The most recent of which is *FilmOn.com Inc. v. DoubleVerify Inc.* (2019) 7 Cal.5th 133, where this Court established the criteria for evaluating whether certain speech is commercial, and thus not entitled to protection. (*Id*. at 154.) However, *FilmOn* concerned two corporate entities, whereas this case concerns a well-funded corporate entity, Sony, and the much less powerful

individual consumers Sony targeted with its advertising and marketing messages.

This case also presents the paradigmatic case of corporate misuse and abuse of California's anti-SLAPP statute. Thus, the instant case presents the Court with a factual scenario to apply the *FilmOn* criteria to a case that involves false, deceptive and misleading statements on a well-funded corporate seller's product packaging, and in their promotional advertising to California consumers.

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CONCLUSION

The opinion of the Court of Appeal should be reversed. This Court should find that Sony's statements on its product packaging, and in its promotional advertising may be redressed through enforcement of California's consumer protection statutes, the UCL, FAL, and CLRA. The Court should reject the Court of Appeal's newly minted scienter requirement to California's strict liability, consumer protection statutes.

Dated: January 8, 2021

Respectfully submitted,

ARBOGAST LAW
David M. Arbogast

MICHA STAR LIBERTY

/s/ Micha Start Liberty

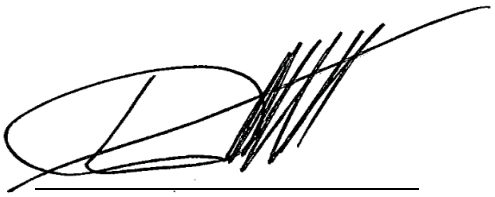
_____
President, CAOC

Attorney for Amicus Curiae Consumer Attorneys of California

CERTIFICATE OF COMPLIANCE

Under California Rule of Court 8.204(c)(1), counsel of record certifies that this Application to File Amicus Curiae Brief of Consumer Attorneys of California Supporting Petitioner is produced using 13-point Roman type, including footnotes, and contains 6,157 words, which is less than the 14,000 words permitted by Rule 8.204(c)(4). Counsel relies on the word count provided by Microsoft Word word-processing software.

Dated: January 8, 2021



David M. Arbogast

Attorney for Amicus Curiae
Consumer Attorneys of California

DECLARATION OF SERVICE

I, the undersigned, declare:

1. That declarant is, and was at the time of service, a citizen of the United, over the age of 18 years, and not a party to, or interested in, this legal action; and that declarant's business address is 7777 Fay Avenue, Suite 202, La Jolla, CA 92037-4324.

2. That on January 8, 2021, declarant caused to be served this **APPLICATION TO FILE AN AMICUS CURIAE BRIEF AND BRIEF OF CONSUMER ATTORNEYS OF CALIFORNIA SUPPORTING PLAINTIFF AND RESPONDENT** by

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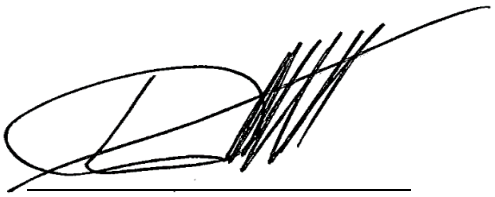

DAVID M. ARBOGAST

SERVICE LIST

Vera Serova v. Sony Music Entertainment, et al.
Supreme Court Case No. S260736

Los Angeles County District Attorney 211 West Temple Street, Suite 1000 Los Angeles, CA 90012	Via U.S. Mail

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 1/13/2021 by Celia Wong, Deputy Clerk

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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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: **david@arbogastlaw.com**

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

1/8/2021

Date

/s/David Arbogast

Signature

Arbogast, David (167571)

Last Name, First Name (PNum)

Arbogast Law

Law Firm