

S260736

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

VERA SEROVA,

Plaintiff / Respondent

vs.

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

Defendant / Appellant

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

RESPONDENT'S REPLY BRIEF

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

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I. INTRODUCTION

California enacted the anti-SLAPP law to protect the “valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.” Cal. Code Civ. Pro. § 425.16(a). Although anti-SLAPP is construed broadly, its application has limits. This case presents conduct outside those limits. This Court should clarify that a commercial entity cannot distort the important protections of the anti-SLAPP statute to shield itself from liability for false and misleading statements made to consumers to induce product sales.

Misleading attribution of the *Michael* album to Michael Jackson by Defendants Sony Music Entertainment, the estate of Michael Jackson and MJJ Productions, Inc. (collectively, Sony) is not speech protected by the anti-SLAPP law. No matter how broadly the statute is construed, Sony’s representations about its product made to potential consumers were not in furtherance of Sony’s constitutional free speech right; nor were they connected to “a public issue or an issue of public interest.” Cal. Code Civ. Pro. § 425.16(e)(3), (4).

Particularly when applying the anti-SLAPP catch-all provision, as this Court emphasized in *FilmOn v. DoubleVerify* (2019) 7 Cal.5th 133 (*FilmOn*), the Legislature intended courts to follow fundamental constitutional principles in evaluating the challenged conduct. The plain statutory text requires that a court examine both the content and *context* of the speech at issue to determine whether speech satisfies the “arises from,” “in furtherance of,” and “in connection with [an issue of public

interest]” requirements. (*FilmOn, supra*, 7 Cal.5th at pp. 151–154.) Sony bears the burden of proof on these issues. Each of these requirements imposes substantive limits on the catch-all provision of the anti-SLAPP statute, which must be read as a whole.

Sony’s answering brief essentially urges this Court to ignore countless undisputed facts, including the following: Sony is a commercial business; it sells albums like *Michael* to consumers for a commercial purpose to make money; consumers make purchase decisions based on Sony’s attribution of albums to artists; Sony represented to potential buyers as a fact (not as opinion or position) that Jackson sang all the songs on *Michael*; and the attribution of the recordings to Jackson in the sales context does not add to a public discussion—it generates revenue for Sony.

Sony’s position that it is insulated from liability unless its executives were in the room when the impersonator recorded the disputed tracks (DAB 45–49) is absurd. The Consumers Legal Remedies Act (“CLRA”) and Unfair Competition Law (“UCL”) do not make an exception for false statements of fact made about expressive products in transactions with consumers if the seller/producer claims it was misled by a supplier of source material.

The CLRA and UCL allow consumers to seek relief from Sony in the form of a refund of the monies paid for the deceptively advertised songs and an injunction on future misleading advertising. There is absolutely no reason why Sony

should be allowed to retain revenue obtained via misrepresentations and continue to receive it going forward. Consumers should not sustain damages in perpetuity because of Sony's purported "right" to advertise forged music as genuine. A failure to reverse will license forgers, liars and cheats to dupe consumers into making purchases they would otherwise not make.

To the extent Sony claims it too was deceived, it can pursue its own action against defendants Cascio and Porte and recover damages it sustained because of Cascio and Porte's misrepresentation. But consumers who paid money to the seller based on the seller's misrepresentations must, as a matter of California law, be able to seek recovery from the seller and not be forced to investigate who the seller's suppliers were and which of them had sufficient means to "verify" its statements within the supply chain. This Court should guard the integrity of California's consumer protections and the careful balance achieved by the volume of precedent under the anti-SLAPP law, and reverse the decision below.

II. ARGUMENT

A. The challenged statements were not made in furtherance of Sony's free speech rights in connection with an issue of public interest.

1. The challenged statements were in furtherance of Sony's private interest in increasing sales.

Sony begins its argument in support of application of anti-SLAPP by contending this lawsuit arises from activities "in

furtherance of” Sony’s “right of free speech”: namely, from creation and distribution of *Michael*. (DAB 25–26.)

Sony fails to apprehend that Serova’s UCL and CLRA claims arise not from the creation and distribution of the album, but from Sony’s representations to consumers that Jackson is the sole lead vocalist on *Michael*. (CT 1:125–1:127 [FAC] ¶¶ 46, 54, 55.) Had the same album with the same title, cover art and track list been created and distributed with attribution of the Cascio recordings to their alleged true singer, there would have been no lawsuit.

As multiple cases that evaluate the applicability of the anti-SLAPP statute in the advertising and/or labeling context hold, advertising furthers the advertiser’s private interest in increasing sales, not free speech rights. (*Nagel v. Twin Laboratories, Inc.* (2003) 109 Cal.App.4th 39, 47–48 [the ingredient list “was not participation in the public dialogue...; the labeling...was designed to further Twin Labs’ private interest of increasing sales”]; *L.A. Taxi Coop., Inc. v. Indep. Taxi Owners Ass’n of Los Angeles* (2015) 239 Cal.App.4th 918, 929 [“the advertisements on their face were designed to further defendants’ private interest in increasing the use of their taxicab services”]; *All One God Faith, Inc. v. Organic & Sustainable Indus. Standards, Inc.* (2010) 183 Cal.App.4th 1186, 1204 (*All One God Faith*) [“The purpose of the ‘OASIS Organic’ seal is to promote the sale of the product to which it is affixed, not the standard or its elements”].)

The foregoing authorities are enhanced by *FilmOn*'s embrace of the importance of "context" in assessing anti-SLAPP protection: "contextual cues revealing a statement to be 'commercial' in nature... can bear on whether it was made in furtherance of free speech in connection with a public issue." (*FilmOn*, *supra*, 7 Cal.5th at p. 148.) Those cues firmly establish that the speech at issue was designed to further sales, not free speech.

SPEAKER: The speaker is Sony, the commercial manufacturer and seller of the album.

AUDIENCE: The audience of the statements on the album packaging and in the video commercial is the audience of potential purchasers.

PURPOSE: The purpose of the speech is to reach the consuming audience and inform it about the product with the goal of sales. (POB 28–30.)

Even the Court of Appeal acknowledged the statements at issue were made in a commercial context that involved sales promotion of the album. (*Serova v. Sony Music Entertainment* (2020) 44 Cal.App.5th 103, 109, 121. Nothing in this context remotely suggests that they were made in furtherance of Sony's free speech rights.)

Nor were the challenged statements made in connection with an issue of public interest.

2. *The challenged statements do not further public discourse about Michael Jackson and his music.*

This Court has made clear that the first anti-SLAPP prong’s focus is on the “specific nature of the speech,” rather than on any “generalities that might be abstracted from it.” (*FilmOn, supra*, 7 Cal.5th at p. 152 [citing *Commonwealth Energy Corp. v. Investor Data Exchange, Inc.* (2003) 110 Cal.App.4th 26, 34].) Nevertheless, Sony attempts to equate its representations of fact about the contents (“ingredients”) of the *Michael* album with a discussion of Jackson and his music. (DAB 29.) This attempt fails.

First, Sony’s statements do not sufficiently implicate either topic. As discussed in detail in the Opening Brief, the challenged statements inform potential buyers only that *Michael* consists entirely of Jackson’s songs. (POB 23.) These advertisements communicate nothing about Jackson or his music—they convey a fact about the product contents. Second, the context analysis shows that Sony’s representations made to consumers with the purpose to sell the album do not further any public discussion of Jackson or his music. (*See All One God Faith, Inc., supra*, 183 Cal.App.4th at pp. 1203–1204 [finding the ‘OASIS Organic’ seal on products did not “contribute to a broader debate on the meaning of the term ‘organic’”].)

FilmOn cautions that “[d]efendants cannot merely offer a ‘synecdoche theory’ of public interest, defining their narrow dispute by its slight reference to the broader public issue.” (*FilmOn, supra*, 7 Cal.5th at p. 152; *see also Rand Res., LLC v.*

City of Carson (2019) 6 Cal.5th 610, 625 [“At a sufficiently high level of generalization, any conduct can appear rationally related to a broader issue of public importance. What a court scrutinizing the nature of speech in the anti-SLAPP context must focus on is the speech at hand, rather than the prospect that such speech may conceivably have indirect consequences for an issue of public concern.”].) The question of what music the consumer will hear if she buys the CD to which the representations are affixed is not a part of any public discourse about Jackson or his music, but rather information to inform a possible commercial transaction.

3. *The challenged statements do not further public discourse about the release of the Michael album.*

Sony argues that the release of *Michael* itself was an issue of public interest. (DAB 29.) While the release may be of interest to the public, a manufacturer’s advertisements *promoting sales* of its product do not participate in public discourse about the product release. (*FilmOn, supra*, 7 Cal.5th at p. 140 [noting that even if “the topic discussed is, broadly speaking, one of public interest,” that is not enough to make the speech protected by the anti-SLAPP statute, unless the context of the speech shows participation in the public discourse].)

The context in which the statements were made (the commercial speaker, the consuming audience, and the format of packaging labels and TV commercial) shows that Sony made these statements in order to sell the album to consumers, not to participate in the public discourse about its release. Sony has not offered evidence suggesting otherwise.

Indeed, if the consuming public’s interest in a popular product were enough to confer protection on product advertisements and labels, then *all* labels and advertisements of popular products would automatically be protected by the anti-SLAPP statute. Courts have long since rejected this proposition. (*Scott v. Metabolife Int’l, Inc.* (2004) 115 Cal.App.4th 404, 423 [refusing to hold that, simply because the product treats a life-threatening illness, its advertisements will satisfy the public interest requirement]; *Rezec v. Sony Pictures Entm’t, Inc.* (2004) 116 Cal.App.4th 135, 143 (*Rezec*) [holding the public interest in films is insufficient to turn film advertisements into speech in connection with an issue of public interest]¹), and the Legislature, too, disapproved of this logic and meant to eradicate it by enacting section 425.17(c). (California Bill Analysis, Senate Committee, 2003–2004 Regular Session, Senate Bill 515, (May 6, 2003) [discussing the need to overrule the “dangerous precedent” of *DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562, an early case, where the court of appeal found a manufacturer’s speech about the product concerned an issue of public interest because the product was used by 1.8 million people].)

¹ *FilmOn* disapproved of *Rezec* to the extent *Rezec* was inconsistent with *FilmOn* in suggesting commercial speech would categorically not be protected by the anti-SLAPP statute. (*FilmOn, supra*, 7 Cal.5th at p.148 n.5.) The cited part of *Rezec*’s holding is not inconsistent with *FilmOn*.

4. *The challenged statements did not further public discourse about the authenticity of the Cascio recordings.*

Nor, as discussed at length in the Opening Brief, did the challenged statements in Sony’s advertisements further the debate about whether Jackson is the vocalist on the Cascio recordings.

Sony does not dispute that the *content* of the advertisements does not refer to the controversy or to the authenticity of the Cascio recordings. Nor could it, given Sony’s admission in the Opening Brief on appeal that the advertisements do not make any statement on the controversial issue. (AOB 41 [“The Album Cover does not include any statements about who sang the lead vocals on the Cascio Tracks...”]; AOB 43 [“The video does not state that Jackson sang lead vocals on the Cascio Tracks”].) Sony argues, instead, that there is no authority conditioning anti-SLAPP protection on the speaker specifying the public issue or controversy to which its speech relates. (DAB 31.) But courts engage in that very inquiry when they determine what the speech is *about*. (*See FilmOn, supra*, 7 Cal.5th at p. 149 [“Most often, courts strive to discern what the challenged speech is really ‘about’”]; *Scott, supra*, 115 Cal.App.4th at p. 423 [“Scott's cause of action for false advertising is based on advertising by a manufacturer...about the safety and efficacy of its specific weight loss product”]; *All One God Faith, supra*, 183 Cal.App.4th at pp. 1209–1210 [“the use of the ‘OASIS Organic’ seal on member products is ... only speech

about the contents and quality of the product... [I]t is not intertwined with speech about...the merits of a particular definition of ‘organic.’”].) Sony’s contention that the challenged statements are “about” the controversial issue does not hold up to scrutiny when the statements do not even mention the issue or the controversy, and the mass consumer audience is comprised of persons who do not know a controversy exists.

As for the context of the challenged statements, Sony points at two factors: its advertising speech was made “in the midst” of the controversy, and it was public. (DAB 34.) As discussed in the Opening Brief (POB 27–33), neither factor shows that Sony’s challenged statements participated in the debate about the Cascio recordings. That speech was made concurrently with the controversy does not mean it participated in the ongoing debate. (*FilmOn, supra*, 7 Cal.5th at 150, 153 [holding DoubleVerify’s report identifying the presence of copyright-infringing content on FilmOn’s websites did not contribute to the ongoing debate over whether FilmOn’s streaming model was infringing copyright].) Nor does the public nature of the speech matter. Sony was not addressing the audience involved in the debate (instead, its advertisements targeted unsuspecting consumers), and, by its own admission, said nothing about the controversial issue on the album cover or in the video commercial. Rather, the challenged statements were mere descriptions of product content designed to promote sales. (*All One God Faith, supra*, 183 Cal.App.4th at pp. 1203–1204.)

Sony argues *All One God Faith* is distinguishable because it did not involve a controversy about the particular product that was advertised as “organic.” (DAB 31–32.) This distinction does not change the outcome. *FilmOn* held that “even where the topic discussed is, broadly speaking, one of public interest,” statements do not qualify for anti-SLAPP protection unless there is at least an “attempt to participate in a larger public discussion.” (*FilmOn*, *supra*, 7 Cal.5th at p. 140.) Sony has not shown such an attempt—moreover, Sony disclaimed it.²

Accordingly, the challenged statements are not protected by the anti-SLAPP statute.

B. The challenged statements are actionable as commercial speech under *Kasky*.

“Speech is commercial in its content if it is likely to influence consumers in their commercial decisions.” (*Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 969 (*Kasky*)). Here, there can be no question that attribution of the album to Jackson is “likely to influence consumers in their commercial decisions.”

² The commercial context of the challenged statements is not altered by the fact that Sony made *other* statements that might have furthered the debate about the Cascio recordings, such as Howard Weitzman’s statement to fan clubs. The challenged statements and Howard Weitzman’s statement were made in different contexts: to different audiences and for different purposes. (POB 31–32.)

1. *Titles, cover art and attribution of expressive products are protected only to the extent they are not misleading.*

Sony posits that titles and cover art of expressive products are fully protected by the First Amendment because they are “independent forms of artistic expression,” and attribution of the work to the artist is fully protected because it “imparts unique meaning to the art.” (DAB 23–24.) This is not so.

Titles are considered “hybrid” speech, which combines expressive and commercial elements. (*Rogers v. Grimaldi* (2d Cir. 1989) 875 F.2d 994, 998 (*Rogers*)). Because of their partly commercial nature, titles are not insulated from laws that protect consumers. In *Rogers*, Ginger Rogers, the famous dance partner of Fred Astaire, sued producers of a film entitled “Ginger and Fred” about two fictional Italian cabaret performers who imitated the famous duo and became known as “Ginger and Fred.” *Rogers* claimed the film title violated section 43(a) of the Lanham Act by creating a false association with her in the minds of consumers. (*Id.* at pp. 996–997.) Noting the hybrid nature of film titles, the Second Circuit balanced the public interest in avoiding consumer confusion against the public interest in free speech and formulated the now-widely adopted *Rogers* standard: a title that is minimally relevant to the underlying work is protected by the First Amendment “***unless the title explicitly misleads as to the source or the content of the work.***” (*Id.* at p. 999, emphasis added.) In other words, laws that serve to protect consumers from deception, like the Lanham Act, the CLRA and

the UCL, can regulate explicitly misleading titles because in such circumstances, “the public interest in avoiding consumer confusion outweighs the public interest in free expression.”

(*Ibid.*) Both the Ninth Circuit and California adopted the *Rogers* standard for protection of titles. (*Mattel, Inc. v. MCA Records, Inc.* (9th Cir. 2002) 296 F.3d 894, 902 (*Mattel*); *Winchester Mystery House, LLC v. Glob. Asylum, Inc.* (2012) 210 Cal.App.4th 579, 588, 590.)

The same standard applies to cover art, which, like titles, combines expressive and commercial elements. (*Id.* at pp. 590–592 [applying *Rogers* to both title and cover art of a DVD film].)

Notably, the *Kasky* test devised by this Court for the limited purpose of applying deception-prevention laws incorporates essentially the same standard: it allows for regulation of titles and cover art to the extent they convey false or misleading *facts about the product* to consumers. (*Kasky, supra*, 27 Cal.4th at pp. 960–961 [describing the audience as “actual or potential buyers or customers” of the speaker’s products and the content of a commercial message as “representations of fact” about the speaker’s products].)

Just like titles and cover art that explicitly mislead as to the source of the work, any form of attribution of a work that misleads as to its source is not protected by the First Amendment. (*See, e.g., Giddings v. Vision House Prod., Inc.* (D. Ariz. 2008) 584 F.Supp.2d 1222, 1228 [“A forged signature on artwork is [actionable] in that the forged signature misleads the public”]; *Johnson v. Jones* (6th Cir. 1998) 149 F.3d 494, 502 [false

designation of design drawings is actionable].) While the artist's identity may be "an inseparable part of their expression" (DAB 42), there is nothing inseparable in the seller's false attribution of the work to the *wrong* artist. The court must balance the seller's right to "impart" the desired "meaning" on the expressive work by attributing it to someone other than the actual artist (DAB 24), and the consumer's right to be free from deception. When consumers are misled, the First Amendment gives way. (*Rogers, supra*, 875 F.2d at p. 999; *see also Toho Co. v. William Morrow & Co.* (C.D. Cal. 1998) 33 F.Supp.2d 1206, 1212 [book title was not protected by the First Amendment where it created a strong likelihood of consumer confusion as to the source of the book].)

Here, the attribution of the album to Jackson via, among other things, the album title "Michael" and the cover art with multiple depictions of Jackson misleads consumers about the source of three tracks on the album. It also misleads consumers about the contents of the album by falsely promising that all songs on it are performed by Jackson. For these reasons, the album's title and cover as well as the other challenged statements of attribution are actionable.

2. The challenged statements communicated facts, which Sony was in a better position than consumers to verify.

Without support in precedent or the law, Sony argues it cannot be held liable because defendants Cascio and Porte concealed the truth from Sony, and Sony could not verify the identity of the vocalist. (DAB 46.) In other words, Sony is saying

the law permits it to make false statements inducing consumers to buy its products whenever it cannot be sure whether the statements are true. This position, if allowed to stand, would restore *caveat emptor* in California.

Neither the CLRA nor the UCL makes an exception for false representations that are difficult for the speaker to verify. And the *Kasky* test for commercial speech requires only that the statements be *factual*, i.e., susceptible to being proven true or false—not that they must be easy for the advertiser to verify. (*Kasky, supra*, 27 Cal.4th at p. 961.) Sony cites no cases for the proposition that a seller’s failure to verify advertised facts about its own product turns the advertisements into noncommercial speech.

Kronemyer v. Internet Movie Database, Inc. (2007) 150 Cal.App.4th 941 (*Kronemyer*), on which Sony relies, is not to the contrary because it did not involve advertising. The speech challenged there—IMDb’s movie credits—did not concern commercial products of IMDb, consisting of IMDb’s free information available to Internet users about movies. The court concluded accordingly that the credits were “informational rather than directed at sales,” and IMDb was not required to verify and correct this noncommercial information. (*Id.* at pp. 948–951; see also *IMDb.com Inc. v. Becerra* (9th Cir. 2020) 962 F.3d 1111, 1122 [public profiles on IMDb do not propose a commercial transaction].) Sony’s challenged statements, in contrast, are touting Sony’s product to consumers. As discussed in the previous section, Sony’s First Amendment right to advertise its

product is qualified by the buying public's interest in not being deceived. (See *Keimer v. Buena Vista Books, Inc.* (1999) 75 Cal.App.4th 1220, 1223 (*Keimer*) [reiterating "California's legitimate right to protect the public by regulating the dissemination of false or misleading advertising," and recognizing "the broad sweep" of the unfair business practice provisions of the Business and Professions Code].)

Nor does the United States Supreme Court precedent limit commercial speech to facts that are easy for the seller to verify. In *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.* (1976) 425 U.S. 748 (*Virginia Pharmacy Bd.*), cited by Sony, the Supreme Court observed that commercial speech is "more easily verifiable by its disseminator than...news reporting or political commentary." (*Id.* at p. 772, fn. 24.) Indeed, a commercial speaker has access to its suppliers and manufacturing process and is better equipped to verify the truth of its statements about its own product than, for example, a journalist who reviews the product in a magazine based solely on the product's packaging and apparent qualities.

Virginia Pharmacy Bd. does not suggest that where commercial speakers have trouble verifying their speech, they can be off the hook for misrepresentations. To the contrary, it suggests that the seller and not the consumer should always shoulder the consequences of false advertisements because, regardless of how difficult it is for the seller to verify the truth of its advertisements, it is always *easier* for the seller to do so than it is for the consumer. It was *easier* for Nike to inspect labor

conditions at its foreign subcontractor's factories than it was for Californians who bought Nike sneakers. It was likewise *easier* for Sony to verify whether Jackson sang on the Cascio recordings than it is for a shopper at Walmart.

Sony had access to defendants Cascio and Porte, could question them extensively and explore in depth the implausible explanations Cascio provided. (CT 1:120 [FAC] ¶ 32(b).) Sony could question sound engineers with whom Cascio and Porte worked. (CT 1:121 [FAC] ¶ 32(g), (h).) Sony could interview in person Jason Malachi whom it identified as the possible singer early on. (CT 2:279–280.) Sony could demand that Cascio and Porte provide all work materials and metadata for the Cascio recordings in order to determine authenticity. Sony had access to the best experts in the industry and had the resources to procure their opinions. Consumers attracted by Sony's advertisements judged *Michael* by its cover and had none of those tools. It, therefore, makes sense that in drafting the CRLA and UCL, the Legislature made sellers like Sony bear the burden of representing the truth.

Especially troubling in Sony's position is the incentive it creates for sellers to keep their heads in the sand when it comes to determining the veracity of their advertisements and labels.

Sony seems to suggest that some level of culpability (e.g., willful ignorance) is necessary for it to be liable for misrepresenting the singer. (DAB 48.) There is nothing in the language of the CLRA or UCL that supports Sony's position, nor is there anything in the case law that allows a seller's ignorance

to shield it from liability for speech that misleads consumers. Significantly, even if Sony made a bona fide error in attribution, consumers have a remedy: Sony must “make an appropriate correction... or replacement” of the product. (Civ. Code § 1784.) Sony’s position deprives consumers of that remedy.

In any event, Sony’s alleged conduct is sufficiently culpable to justify imposition of liability even if Sony could not be subjected to strict liability. Prior to the album release, multiple members of the Jackson family told Sony based on their familiarity with Jackson’s voice that the Cascio recordings were fake. (CT 1:118 [FAC] ¶ 20.) Some of Jackson’s closest collaborators told Sony the same or expressed doubts about the authenticity of the recordings. (CT 1:118, 1:122 [FAC] ¶¶ 20j, 32i.) When Sony questioned defendant Casio about the absence of demos and multi-track tapes, Casio offered implausible and inconsistent explanations, which, again, suggested that the recordings were not genuine. (CT 1:120 [FAC] ¶ 32b.) Sony chose not to disclose these troubling facts, or the logical conclusion that the songs’ authenticity was dubious to consumers on the album cover or in the video commercial and instead attributed the album unequivocally to Jackson. (*Linear Technology Corp. v. Applied Materials, Inc.* (2007) 152 Cal.App.4th 115, 132 [a duty to disclose can arise from the making of affirmative representations with knowledge of undisclosed facts that “materially qualify the

facts disclosed, or ... render [the disclosed facts] likely to mislead”].)³

3. *Regulation of false attribution of art in sales transactions does not chill artistic expression.*

Sony next argues that because “uncertainty over credit and attribution for expressive works is common,” greater efforts would not prevent mistakes but would instead chill distribution of expressive works. (DAB 49.) However, the cases Sony cites, *Kronemyer, supra*, 150 Cal.App.4th 941, and *Almuhammed v. Lee* (9th Cir. 2000) 202 F.3d 1227, refer to disputes over credits between industry professionals and studios, not the issue of sellers deceiving consumers. Consumers purchase expressive products based on the primary artist: the author of a book, the lead actor or director of a film, the painter of a painting, and the singer of a song. The importance of protecting the public from misleading advertising and the effect of the primary attribution on the value of the work justify the imposition on the seller of a duty to ensure that *primary* attribution is truthful. The CLRA and UCL do not, as Sony contends, chill artistic expression. If

³ Serova has not had a chance to present evidence in support of these allegations because the plain language of the CLRA, UCL and *Kasky*, as well as case law interpreting them prior to the Court of Appeal’s decision, did not require any showing of culpability. The trial court accordingly found the challenged statements commercial without any showing of culpability. If this Court agrees with Sony that a showing of culpability is required, the Court should remand to let Serova make that showing.

anything, they chill forgery and dissemination of forgeries in the art marketplace.

Sony's attempt to analogize this controversy to debates about the authorship of works ascribed to Bach, da Vinci and Shakespeare is unconvincing. If an art dealer sold a fake da Vinci painting in California as an original, believing it was original, for \$10,000,000, and the buyer could prove through an expert that it was a fake, the CLRA and UCL would provide to the buyer the remedies of damages and restitution no different than the remedies Serova has been denied here. Sony's argument to the contrary does not conform to the current state of the law.

Moreover, attribution of art to famous artists is an example of "hardy" speech because of the great commercial value such attribution imparts on the underlying work. (POB 53–54; *Va. Pharmacy Bd.*, *supra*, 425 U.S. at pp. 771–772, fn. 24.) In light of this, distribution of expressive works and attribution of them to famous artists is unlikely to be chilled by holding sellers liable for misattributions when promoting the sale of art. The market forces and the law will strike the proper balance: Only when the doubt about the artist is so serious that the projected revenue from the unqualified attribution (R) multiplied by the probability that the work is genuine and this attribution is correct (P_G) is outweighed by the projected revenue from the work advertised

with full disclosure of uncertainty (r), will the cautious seller be economically justified in disclosing the doubt to consumers.⁴

$$R \times P_G < r$$

When, on the other hand, the work is very likely genuine and it is more profitable for the seller to take the risk ($R \times P_G > r$), an unqualified attribution will be economically justified. Thus, sellers can maximize revenue from sales of expressive works, qualified only by serious doubt about the veracity of attribution. And purchasers are protected because they have a cause of action against the seller if the attribution is false.

In contrast, if Sony's policy of "editorial discretion" over the attribution is adopted (DAB 52), havoc in the art market will result: sellers will be motivated to drive up the price of any work unclaimed by an author by attributing it to a famous deceased artist based on a purported inability to verify the attribution and the exercise of "editorial discretion." The incentive for unscrupulous actors to get into the art-selling world will grow enormously if the Court of Appeal's decision is not abrogated.

⁴ See, e.g., Isaac Kaplan, "The 'Getty Kouros' Was Removed from View at the Museum after It Was Officially Deemed to Be a Forgery," ARTSY (Apr. 16, 2018), <https://www.artsy.net/news/artsy-editorial-getty-kouros-removed-view-museum-officially-deemed-forgery> (describing that, prior to removal, the museum displayed the controversial sculpture with a disclosure: "Greek, about 530 B.C. or modern forgery").

4. *Regulating the challenged statements is consistent with traditional government authority to regulate commercial transactions.*

As discussed in more detail in the Opening Brief and above, the government authority to regulate commercial advertising of expressive products, including titles and cover art, to prevent consumer deception is well settled. (*See generally Keimer, supra*, 75 Cal.App.4th 1220; *Rezec, supra*, 116 Cal.App.4th 135; *Toho, supra*, 33 F.Supp.2d 1206.) The cases Sony cites for the proposition that some level of fault must be shown to impose liability on the speaker are inapplicable here because all of the cited cases dealt with fully protected speech, not false commercial speech.

Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323 was a defamation case in which a magazine published disparaging statements about an attorney. The U.S. Supreme Court did not consider the question whether the statements were commercial speech.

In *Eastwood v. Superior Court* (1983) 149 Cal.App.3d 409, Clint Eastwood sued the National Enquirer for misappropriation of his right of publicity and defamation based on an article about him and the advertisements of the article. (*Id.* at pp. 414–415.) The court of appeal held that Eastwood’s claims based on the noncommercial contents of the article required a showing that the National Enquirer acted with scienter. (*Id.* at p. 425.) The court did not explicitly discuss the standard for the advertisements, but Eastwood did not allege that the

advertisements misled consumers as to the article's content. Where the advertisements of an expressive work merely accurately reflect its content, they are deemed "adjunct" to the work and generally entitled to the same level of First Amendment protection as the work itself. (See Section II.B.6 for the discussion of the "adjunct" speech exception.)

Stewart v. Rolling Stone LLC (2010) 181 Cal.App.4th 664 was a right of publicity case where a music band claimed the magazine, which published an editorial about the band, improperly used the musicians' image and likeness in a cigarette advertisement located on the same page. The court analyzed whether the speech was commercial for purposes of determining the level of culpability the plaintiffs must demonstrate and concluded that the editorial was distinct from the cigarette advertisement and noncommercial. (*Id.* at pp. 686–688.) Tellingly, *Stewart* observed that false or misleading commercial speech is not protected by the First Amendment, and the same showing of culpability would generally not be required if the statements were commercial. (*Id.* at p. 683 [citing, inter alia, *Liquormart, Inc. v. Rhode Island* (1996) 517 U.S. 484, 498].)

Here, the challenged statements fall squarely within *Kasky's* definition of commercial speech: they are factual statements by a manufacturer about its product directed at consumers. (*Kasky, supra*, 27 Cal.4th at pp. 960–961.) The trial court found that, if Jackson is not the singer on the Cascio recordings, these statements are likely to mislead a reasonable consumer as to the contents of the album. (*Serova v. Sony Music*

Entm't (2020) 44 Cal.App.5th 103, 114.) Therefore, these statements constitute *prima facie* false commercial speech that receives no constitutional protection and can be regulated by the UCL and CLRA.

Sony argues that *Kasky's* examples of statutes which traditionally regulate false statements about products regulate advertisements of *tangible* products. (DAB 55–56.) First, this is not so: among its examples, *Kasky* lists section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), which, as discussed in section II.B.1, regulates misleading titles and artwork of expressive products. Second, there is no material difference between regulation of tangible and intangible products. Third, there is no question that the laws at issue here, the CLRA and UCL, make no exception for intangible products. Whether the product misleadingly described is tangible or intangible is of no consequence.

5. *The challenged statements are not “inextricably intertwined” with the Michael album.*

Sony argues that, even if its statements are commercial in the abstract, they should be treated as noncommercial because they are “inextricably intertwined” with the protected musical speech of the *Michael* album including the Cascio recordings. (DAB 56–60.)

Commercial speech is rarely “inextricably intertwined” with protected speech; only if there is legal or practical compulsion to consider the two kinds of speech as inseparable will the principle apply to confer enhanced protection for

commercial speech. The noncommercial contents of the *Michael* album are not inextricably intertwined with false representations to potential buyers that Jackson sang all of its songs.

In *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.* (1988) 487 U.S. 781 (*Riley*), the U.S. Supreme Court addressed whether a state statute requiring charitable fundraisers to tell donors the percentage of funds that historically went to charity was subject to strict scrutiny—the test for restrictions on fully protected speech—or the more deferential standard for restrictions on commercial speech. (*Id.* at pp. 784–786, 795.) Assuming, without deciding, that the speech compelled by the statute was commercial in the abstract, the Court held that such speech does not retain “its commercial character when it is inextricably intertwined with otherwise fully protected speech.” (*Id.* at p. 796.) The Court explained that “in deciding what level of scrutiny to apply to a compelled statement” it needed to assess “the nature of the speech taken as a whole and the effect of the compelled statement thereon.” (*Ibid.*) Assessing charitable solicitations as a whole, the Court found that the commercial aspects of charitable solicitations are inextricably intertwined with charities’ protected informative and persuasive speech because “without solicitation the flow of such information and advocacy would likely cease.” (*Ibid.*; see also *People v. Fogelson* (1978) 21 Cal.3d 158 (*Fogelson*) [holding the ordinance which prohibited soliciting contributions on public property without a permit was unconstitutional on its face because it burdened fully

protected distribution of religious materials intertwined with solicitation]).

The following year in *Board of Trustees of State Univ. of New York v. Fox* (1989) 492 U.S. 469 (*Fox*), the U.S. Supreme Court made clear that *Riley* was a special case and reiterated that the inextricably intertwined principle was a narrow exception. *Fox* dealt with a university's attempt, by resolution, to bar campus Tupperware parties where students sold housewares (commercial speech) and discussed home economics (noncommercial speech). (*Id.* at pp. 471–474.) The students challenging the resolution argued that the commercial and noncommercial aspects of the parties were inextricably intertwined under *Riley*. (*Id.* at p. 474.) The Court disagreed, explaining:

[In *Riley*] of course, the commercial speech (if it was that) was “inextricably intertwined” because the state law required it to be included. By contrast, there is nothing whatever “inextricable” about the noncommercial aspects of these presentations. No law of man or of nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares. Nothing in the resolution prevents the speaker from conveying, or the audience from hearing, these noncommercial messages, and nothing in the nature of things requires them to be combined with commercial messages. (*Ibid.*)

Following *Fox*, this Court and the Ninth Circuit have rejected similar attempts to characterize commercial and noncommercial speech as inextricably intertwined where there

was no legal or practical compulsion to combine them. (See *Kasky, supra*, 27 Cal.4th at p. 967 [rejecting the argument that Nike’s representations about labor practices were inextricable from its opinions about economic globalization; stating that “[n]o law required Nike to combine [them], nor was it impossible for Nike to address those subjects separately”]; *United States v. Schiff* (9th Cir. 2004) 379 F.3d 621, 627, 629 [finding the expressive and political portions of a book were not inextricably intertwined with its deceptive commercial elements because the author could “relate his long history with the IRS and explain his unorthodox tax theories without simultaneously urging his readers to buy his products”].)

Under these authorities, Sony’s statements naming Jackson as the performer of the Cascio recordings are not inextricably intertwined with the protected expressive elements of the album or the Cascio recordings because nothing compelled Sony to combine the Cascio recordings with false representations that Jackson performed them: Sony could sell the Cascio recordings without falsely attributing them to Jackson.

The cases cited by Sony are inapposite. In *Hoffman v. Capital Cities/ABC, Inc.* (9th Cir. 2001) 255 F.3d 1180 (*Hoffman*), Los Angeles Magazine published an article that used computer technology to alter famous film stills to make it appear that actors from the films were wearing seasonal fashions of famous brands. (*Id.* at p. 1183.) One of the actors sued for violation of section 43(a) of the Lanham Act and misappropriation of his right of publicity. (*Ibid.*) He argued

proof of “actual malice” was not required because the article was commercial speech: it featured famous brands advertised elsewhere in the magazine. (*Id.* at p. 1185.) The Ninth Circuit disagreed that this fact made the photograph purely commercial: the photograph did not appear inside the advertisement; rather, it was a part of an article that combined fashion photography, humor, and visual and verbal editorial comment on classic films and famous actors. Any commercial aspects were “inextricably entwined” with expressive elements of the article. (*Ibid.*)

In *Mattel*, *supra*, 296 F.3d at pp. 906–907, the Ninth Circuit found that the use of trademark “Barbie” in the song “Barbie Girl” was inextricably intertwined with the noncommercial aspects of the song which commented humorously on the values Barbie dolls represent.

And in *Boule v. Hutton* (2d Cir. 2003) 328 F.3d 84, 88, 91–92 (*Boule*), where the family of artist Lazar Khidekel stated in an article about fraud in the art market that certain works attributed to Lazar were forged, the Second Circuit held that, while the statements may have promoted the Khidekels’ commercial interest, they were nevertheless inextricably intertwined with the coverage of the topic of the article.

Riley, *Fogelson*, *Hoffman*, *Mattel*, and *Boule* are distinguishable. They all address situations where the law or regulation at issue burdened both commercial and noncommercial elements of mixed speech and it was not legally or practically feasible to separate the two kinds of speech. In *Riley*, the regulation injected a compelled statement into a

protected charitable solicitation. In *Fogelson*, application of the ordinance to commercial solicitation would have effectively stopped religious speech altogether. In *Hoffman*, plaintiff's claims attacked the very concept of the editorial in which the photograph appeared. In *Mattel*, the reference to "Barbie" could not be eliminated without destroying the message of the song. And in *Boule*, exclusion of Khidekels' opinion because of its commercial motivation would result in the loss of their statements as members of the artist's family, which was an important part of the article. There is no such problem here. Applying the UCL and CLRA to the challenged statements would not burden the expressive elements of the *Michael* album or the Cascio recordings—it would only preclude Sony from selling them *deceptively*.

Finally, Sony relies on an unpublished district court outlier *Stutzman v. Armstrong* (E.D. Cal. 2013) 2013 WL 4853333 (*Stutzman*). In *Stutzman*, consumers sued cyclist Lance Armstrong and the publishers of his autobiographies over false statements concerning Armstrong's use of doping, including allegedly false advertisements on book covers and in promotional materials characterizing the books as "nonfiction biography." (*Id.* at *1–2, 17.) The district court found statements on the covers and promotional materials inextricably intertwined with the books' noncommercial contents. (*Id.* at *18.) Although the court's reasoning is not explicit, the court noted that economic realities compel book publishers to advertise and found it "nearly

impossible to separate the promotional materials for the Books from the Books themselves.” (*Ibid.*)

Stutzman misapplied the “inextricably intertwined” doctrine. There was no legal or practical compulsion to combine the allegedly false advertisements of the books with the books themselves. Had any of the alleged promotional statements been adjudged false, they could have been replaced with truthful statements without burdening the publication. (*See Keimer, supra*, 75 Cal.App.4th 1220.) In any event, *Stutzman* is not the law in California.

6. *The challenged advertisements are not adjunct or incidental to the Cascio recordings.*

To the extent necessary to safeguard the ability to promote protected speech, courts treat **truthful** advertisements that reflect the content of protected expressive works as adjunct or incidental to the protected work, and thus entitled to the same First Amendment status as the advertised work. (*Charles v. City of Los Angeles* (9th Cir. 2012) 697 F.3d 1146, 1153–56.) This exception does not apply where the advertisements are false.

For example, in *Rezec, supra*, 116 Cal.App.4th 135, Sony argued its film advertisements containing a fictitious critic’s favorable opinions of films were protected by the First Amendment because the films themselves were protected noncommercial speech. (*Id.* at pp. 141–142.) The court rejected Sony’s position, explaining:

Had the advertisements here been ‘merely ... adjunct[s] to the exhibition of the film[s]’, such as by using photographs of actors in the films,

Sony would have a point because, just as the films are noncommercial speech, so is an advertisement reflecting their content.

But in this case, the advertisements did not reflect any character or portion of the films. Rather, they contained a fictitious critic's favorable opinion of the films. As such, the advertisements constitute commercial speech and are subject to regulation under consumer protection laws.

(*Id.* at pp. 142–143.)

In *Keimer, supra*, 75 Cal.App.4th 1220, the court refused to extend the “adjunct” or “incidental” use exception to statements made on book and videotape covers that reiterated false statements in the protected books and videotapes. (*Id.* at pp. 1231–1232.) The falsity of the statements overrode the fact that the statements repeated content from the protected works.

Under these authorities, the challenged statements do not qualify for the adjunct or incidental use exception because they do not accurately reflect *Michael's* content, but mislead as to its origin.

Sony's authorities are not to the contrary. In *William O'Neil & Co. v. Validea.com Inc.* (C.D. Cal. 2002) 202 F.Supp.2d 1113, a district court found the use of plaintiff's name and likeness in *truthful* advertising for the book about plaintiff's investment strategies “adjunct” to the book. (*Id.* at pp. 1114, 1117, 1119).

In *Cher v. Forum Internat., Ltd.* (9th Cir. 1982) 692 F.2d 634, the Forum magazine published an unauthorized interview Cher gave to a journalist for publication in *Us* magazine. Forum falsely advertised the magazine issue with the interview as

“There are certain things that Cher won't tell People and would never tell Us. She tells Forum.” (*Id.* at pp. 637–638.) In evaluating whether the First Amendment protected the advertisements from Cher’s misappropriation of the right of publicity claim, the Ninth Circuit stated that, had Forum merely used Cher’s picture and referred to her truthfully in the advertising for the purpose of indicating the content of the interview, such use would be protected as “adjunct” to the interview. However, because Forum falsely proclaimed to the readers of its advertising that Cher “tells Forum” things that she “would never tell Us,” the advertisement did not receive constitutional protection. (*Id.* at p. 639.)

In sum, Sony’s challenged speech is commercial and subject to the UCL and CLRA.

C. The Copyright Act does not preempt a consumer’s false advertising claims.

In an argument not made in the lower Courts, Sony posits that Serova’s claims are preempted by the Copyright Act. (DAB 60.) They are not.

Section 301(a) of the Copyright Act states that the Act governs exclusively “all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright.” (17 U.S.C. § 301(a).) Serova’s right not to be deceived by a seller of goods in a commercial transaction is not equivalent to any right “within the general scope of copyright” which encompasses the right to reproduce, prepare derivative

works of, distribute, display and publicly perform original works of authorship. (17 U.S.C. §§ 102, 106.)

Neither of the two prongs of the preemption test cited by Sony (DAB 60–61) is satisfied. The “subject matter” of Serova’s claim is representations Sony made about the contents of the album to consumers, not the distribution of the album. Sellers’ representations about goods they sell are not within the subject matter of copyright. (17 U.S.C. § 102.) And Serova’s asserted right to be free from deception on the marketplace is not “equivalent” to any of the exclusive rights the Copyright Act provides to copyright holders. (17 U.S.C. § 106.)

In support of its theory, Sony cites a host of inapplicable copyright infringement lawsuits. To the extent plaintiffs in those cases alleged violations of the UCL or similar state laws, plaintiffs were asserting their *intellectual property* rights under the guise of preventing public deception as to the authorship. (See *Fisher v. Dees* (9th Cir. 1986) 794 F.2d 432, 440 [composer’s UCL claim based on the use of his song is preempted by the Copyright Act]; *Lacour v. Time Warner, Inc.* (N.D.Ill. 2000) 2000 WL 688946 [unauthorized use of plaintiff’s song]; *Nutter v. Clear Channel Commc’ns* (N.D.W.Va. 2006) 2006 WL 2792903 [same]; *Media.net Advert. FZ-LLC v. Netseer, Inc.* (N.D.Cal. 2016) 198 F.Supp.3d 1083, 1087–1088 [defendant unlawfully copied HTML code]; *Xerox Corp. v. Apple Computer, Inc.* (N.D.Cal. 1990) 734 F.Supp. 1542, 1550 [defendant unlawfully copied plaintiff’s software]; *Terarecon, Inc. v. Fovia, Inc.* (N.D.Cal. 2006) 2006 WL 1867734 [same]; *Patterson v. Diggs* (S.D.N.Y. 2019) 2019 WL

3996493 [unauthorized use of a photograph]; *Enerlites, Inc. v. Century Products, Inc.* (C.D.Cal. 2018) 2018 WL 4859947 [same]; *Angelini Metal Works Co. v. Hubbard Iron Doors, Inc.* (C.D.Cal. 2016) 2016 WL 6304476 [same]; *Lukens v. Broder/Kurland Agency* (C.D.Cal. 2000) 2000 WL 35892340 [misappropriation of elements of a script]; *Laws v. Sony Music Entertainment, Inc.* (9th Cir. 2006) 448 F.3d 1134 (*Laws*) [misappropriation of a performance]; *Butler v. Target Corp.* (C.D.Cal. 2004) 323 F.Supp.2d 1052 [same].)

In contrast to the above, Serova is not claiming intellectual property rights. Nor is she litigating a third party's copyright like plaintiffs in Sony's remaining authorities. (*Sybersound Records, Inc. v. UAV Corp.* (9th Cir. 2008) 517 F.3d 1137; *Perfect 10, Inc. v. Megaupload Ltd.* (S.D.Cal. 2011) 2011 WL 3203117; *Perfect 10, Inc. v. Cybernet Ventures, Inc.* (C.D.Cal. 2001) 167 F.Supp.2d 1114; *Laws, supra*, 448 F.3d 1134.) Rather, Serova is seeking a refund of sums Sony wrongfully obtained from consumers by means of a misrepresentation. In Sony's host of authorities, there is not a single case where a *consumer's* right to be free from deceptive advertisement has been found preempted by the Copyright Act.

D. A seller should not be allowed to disseminate the forged work endlessly while hiding behind the forger.

Finally, Sony argues that the forgery is not without a remedy, and Serova should seek recovery from the alleged forgers, Cascio and Porte. (DAB 67.) But one of the goals of

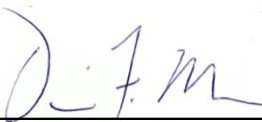
Serova’s lawsuit is to prevent Sony’s ongoing deception of consumers by continued false attribution of the Cascio recordings to Jackson. Defendants Cascio and Porte are not the ones selling the Cascio recordings today, and injunctive relief against them under the UCL would be futile. Sony, essentially, argues that it should be allowed to continue selling the Cascio recording with false attribution because it cannot conclusively “verify” it, and the endless line of damaged consumers should collect from Cascio and Porte who are helpless to stop Sony’s deceptive sales campaign. This allows for perpetual deceit that will continuously burden the courts and completely defeat the preventive objective of the UCL. (*Nationwide Biweekly Admin., Inc. v. Superior Court of Alameda Cty.* (2020) 9 Cal.5th 279, 326 [“the primary objective of the [UCL] is preventive, ... to protect consumers from unfair or deceptive business practices and advertising.”]).

III. CONCLUSION

For the reasons discussed, the Court should overturn the decision of the Court of Appeal in its entirety, leaving none of it binding or citable for any purpose pursuant to California Rules of Court, rule 8.1115(e)(3).

Dated: November 12, 2020

Respectfully Submitted,

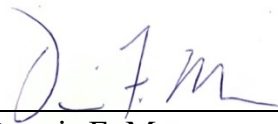


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RULE 14 CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.260(b)(1) of the California Rules of Court, the enclosed brief of Appellant is produced using 13-point Century Schoolbook type including footnotes and contains approximately 8,398 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: November 12, 2020



Dennis F. Moss

PROOF OF SERVICE

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 15300 Ventura Boulevard, Suite 207, Sherman Oaks, California 91403.
2. That on November 12, 2020 declarant served **RESPONDENT'S REPLY BRIEF** by VIA TrueFiling to:

Amicus Consumer Attorneys of America,
Kkralowec@kraloweclaw.com
Howard Weitzman, hweitzman@kwikalaw.com
Zia Modabber, zia.modabber@kattenlaw.com
Bryan Freedman, bfreedman@ftllp.com.

3. That on November 12, 2020, declarant served **RESPONDENT'S REPLY BRIEF** via FEDERAL EXPRESS to:

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

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

District Attorney, County of Los Angeles
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I declare under penalty of perjury that the foregoing is true and correct.
Executed this 12th day of November, 2020 at Sherman Oaks, California.



Lea Garbe

STATE OF CALIFORNIA
Supreme Court of California**PROOF OF SERVICE**STATE OF CALIFORNIA
Supreme Court of CaliforniaCase Name: **SEROVA v. SONY MUSIC
ENTERTAINMENT**Case Number: **S260736**Lower Court Case Number: **B280526**

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Date

/s/Lea Garbe

Signature

Moss, Ari (238579)

Last Name, First Name (PNum)

Moss Bollinger LLP

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