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Lance Armstrong Wins Again by Surviving a Lawsuit for Misrepresentations and Fraud Without So Much as a "SLAPP" on the Wrist

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Casenotes

LANCE ARMSTRONG WINS AGAIN BY SURVIVING A LAWSUIT FOR MISREPRESENTATIONS AND FRAUD WITHOUT SO MUCH AS A "SLAPP" ON THE WRIST

"I know the truth. The truth isn't what was out there. The trust isn't what I said, and now it's gone—this story was so perfect for so long . . . . it's just this mythic perfect story, and it wasn't true."[1]

– Lance Armstrong

I. Introduction: How Livestrong Turned Into Living a Lie

In January 2013, Lance Armstrong shocked the world when he admitted he used performance-enhancing drugs to win the Tour de France an unprecedented seven times.[2] Armstrong's admissions devastated many fans, as the once-admired athlete and cancer-survivor feverishly claimed for over a decade that any allegations of his

1. *Oprah and Lance Armstrong: The Worldwide Exclusive Interview* (Oprah Winfrey Network television broadcast Jan. 17, 2013) (hereinafter "*Oprah and Lance*") (capturing Lance Armstrong's first public admission to using performance enhancement drugs). Part I of the interview is available at https://www.youtube.com/watch?v=e_-yfFIiDao. Part II of the interview is available at https://www.youtube.com/watch?v=6RxdHU5W3Lc. *See also Lance Armstrong & Oprah Winfrey: Interview Transcript*, BBC.com, Jan. 18, 2013, http://www.bbc.com/sport/0/cycling/21065539 (reporting transcript of Oprah Winfrey's interview with Lance Armstrong).

2. *See Oprah and Lance*, *supra* note 1 (discussing Lance Armstrong's performance-enhancing drug use). The allegations of drug use or "doping" among the professional cycling circuit were so widespread that, in 2012, the New York Times reported that only two Tour de France winners since 1995 have not been involved in controversial doping allegations. *See* Ian Austen, *2010 Tour de France Winner Found Guilty of Doping*, N.Y. Times, Feb. 7, 2012, at B13, *available at* http://www.nytimes.com/2012/02/07/sports/cycling/alberto-contador-found-guilty-of-doping.html?_r=0 (explaining that investigation results stripped fellow professional cyclist Alberto Contador of his 2010 Tour de France title and 12 other wins was not only cyclist to be accused of drug use). Nonetheless, people were truly dismayed to learn that Armstrong too had taken part in the doping scheme. *See* Bill Strickland, *Lance Armstrong's Endgame*, Bicycling Mag. (May 2013), http://www.bicycling.com/news/pro-cycling/lance-armstrongs-endgame (describing personal relationship with Armstrong and personally stating the following: "Accepting that Lance cheated makes me want to cry. A 46-year-old guy. Can you imagine that?").

drug use were false.[3] In his attempt to save his own image and the image of his cancer foundation, Livestrong, Lance Armstrong publicly destroyed private relationships with former teammates and friends who confirmed allegations.[4] Armstrong, an inspiration to cancer survivors and recreational cyclists, among others, left people "bitterly angry" and dismayed when he revealed the truth.[5]

Even though Armstrong was banned from competitions and stripped of his Tour titles and glory, some consumers felt this punishment was not enough.[6] Armstrong authored several bestsellers, including *It's Not About the Bike: My Journey Back to Life*, and *Every*

3. *See* Juliet Marcur, *On a Big Stage, a Tired Act*, N.Y. TIMES, Dec. 30, 2013, http://www.nytimes.com/2013/12/31/sports/cycling/on-a-big-stage-a-tired-act.html?ref=lancearmstrong&_r=0 (describing Armstrong interview and alleging interview did little to salvage reputation). New York Times writer Juliet Marcur, who also personally knew Armstrong, summarizes the betrayal that people felt after Armstrong's interview with Oprah Winfrey: "Armstrong failed to offer his fans what they were seeking: genuine contrition. For a few minutes here and there, he seemed sorry, but only about being caught." *See id.* (discussing fans' reaction to Armstrong's interview with Oprah Winfrey and suggesting Armstrong did not regret using performance enhancing drugs). *But see* Eun Kyung Kim, *Three Cups' Author Greg Mortenson: 'I let a lot of people down'*, USA TODAY (Jan. 21, 2014), http://www.today.com/books/three-cups-author-greg-mortenson-i-let-lot-people-down-2D11961320 (describing Mortenson's apology and gratitude to CBS and Jon Krakauer for breaking the story because "had they not brought up these issues, we could have gotten into more serious problems").

4. *See* Emmanuella Grinberg, *Livestrong Bracelet: To Wear or Not to Wear?,* CNN (Oct. 22, 2013), http://www.cnn.com/2012/10/18/living/lance-armstrong-livestrong-legacy/ (describing backlash from supporters of Armstrong's foundation, Livestrong). Armstrong's cancer foundation, Livestrong, was hugely successful due to the yellow Livestrong bracelet campaign. *See id.* Although criticized for using the foundation as a shield against his doping allegations, supporters "bought bracelets for more strength, for unity, and suddenly Lance wasn't just an athlete any longer . . . . Lance [was] Livestrong, he [was] the face of hope." *See id.* (discussing fans of Armstrong and his Livestrong foundation and their admiration for Armstrong). Nonetheless, the charity continues to acknowledge its founder, although he is no longer a board member. *See generally* LIVESTRONG FOUNDATION, LIVESTRONG.ORG, http://www.livestrong.org/ (last visited Mar. 12, 2013). Armstrong also reportedly filed various frivolous defamation suits against those who confirmed the allegations, despite later recanting his story. *See* Debra Cassens Weiss, *Was Lance Armstrong a Lawsuit Bully? Cyclist Admits 'Major Flaw'*, ABA J. (Jan. 18, 2013, 12:38 PM), http://www.abajournal.com/news/article/lance_armstrong_admits_to_lawsuit_bullying/ (discussing briefly Armstrong's lawsuits).

5. *See* Stutzman v. Armstrong, No. 2:13-CV-00116-MCE-KJN, 2013 U.S. Dist. LEXIS 129204, at *10 (E.D. Cal., Sept. 9, 2013) (describing allegations against defendants). *See also* Marcur, *supra* note 3. Marcur, who knows Lance Armstrong personally, called Armstrong an "Oscar-winning liar" and notes that "he was the guy who said that he would never do anything to jeopardize the faith that millions of people had in him as their inspiration to fight cancer." *See id.*

6. *See, e.g.*, *Lance Armstrong Sued for Fraud Over Memoirs*, CBSNEWS.COM (Jan. 24, 2013, 12:22 PM), http://www.cbsnews.com/news/lance-armstrong-sued-for-fraud-over-memoirs/ (describing lawsuit over books). Lance Armstrong was also reportedly sued for fraud in connection with the energy drinks he endorsed. *See* Brent Schrotenboer, *Lance Armstrong Wins Endorsement Lawsuit*, USA TODAY (Feb. 26,

Second Counts, both of which became the center of controversy in *Stutzman v. Armstrong* in 2013.[7] In *Stutzman*, several California residents brought a class action consumer suit against Armstrong, his management team, and book publishers for misrepresenting the books as autobiographies because Armstrong maintained throughout both books that he never used performance-enhancing drugs.[8] The plaintiffs asserted they would not have purchased the books if they had known the truth about the books' contents.[9] This is not the first time that a high-profile author has been brought to court for fraud claims relating to his books.[10] Both James Frey, author of *A Million Little Pieces*, and Greg Mortenson, author of *Three Cups of*

2014, 6:05 PM), http://www.usatoday.com/story/sports/cycling/2014/02/26/lance-armstrong-frs-false-advertising-ruling/5840623/.

7. *See Stutzman,* 2013 U.S. Dist. LEXIS 129204, at *5-6 ("According to Plaintiffs, the success of *Every Second Counts* and *It's Not About the Bike* permitted Armstrong to publish and sell, and thereby profit from, the other three books at issue."). *See also* First Amended Complaint at 5-6, Stutzman v. Armstrong, 2013 U.S. Dist. LEXIS 129204 (E.D. Cal. 2013) (No. 2:13-CV-00116-MCE-KJN) [hereinafter First Amended Complaint] (alleging success of later books was founded on bestseller status of earlier books). As noted by the plaintiffs, *It's Not About the Bike* was a New York Times number-one bestseller, spending twenty-four weeks on hardcover list, and twenty-two weeks on the paperback list. *See id.* at para. 4, at 5-6 (describing success of Armstrong's books). *Compare* LANCE ARMSTRONG & SALLY JENKINS, IT'S NOT ABOUT THE BIKE: MY JOURNEY BACK TO LIFE (2000) (telling autobiographical story of Armstrong's cycling career and personal life) *with* LANCE ARMSTRONG & SALLY JENKINS, EVERY SECOND COUNTS (2003) (telling autobiographical story of Armstrong's life following first book).

8. *See* First Amended Complaint, *supra* note 7, at 27 (describing false content of books). For example, the plaintiffs quoted a portion of Armstrong's first book, *It's Not About the Bike*, where he repeatedly denied any use of performance enhancing drugs. *See id.* The brief quoted Armstrong as stating the following in his book:Doping is an unfortunate fact of life in cycling . . . . Inevitably, some teams and riders feel . . . they have to [dope] to stay competitive with the peloton. I never felt that way, and certainly after chemo[therapy] the idea of putting anything foreign in my body was especially repulsive.

See id. (fourth alteration in original). Despite the fact that Armstrong repeatedly made such statements, plaintiffs alleged that the books continued to be marketed as biography, even though the publishers and his management team should have known the truth about their misrepresentations. *See id.* at 60-61 (explaining how each defendant was responsible for fraudulent or negligent misrepresentation).

9. *See id.* at 3-4 ("Plaintiffs [allege they] . . . would not have purchased . . . [or] paid as much money for the Armstrong Books had they known the true facts concerning . . . his [later] admitted involvement in a sports doping scandal that has led to his recent . . . public exposure and fall from glory.").

10. *See Lance Armstrong Sued for Fraud Over Memoirs*, CBS NEWS (Jan. 24, 2013), http://www.cbsnews.com/news/lance-armstrong-sued-for-fraud-over-memoirs/ (describing similar suits brought against Frey and Mortenson). For a discussion of how these lawsuits played out in court, see *infra* notes 127-130 and accompanying text.

Tea, made headlines when they were sued over misrepresentations made in their respective memoirs.[11]

Despite the fact that both of Armstrong's books and their advertisements clearly contained false statements, the United States District Court for the Eastern District of California found in favor of Armstrong and his fellow defendants.[12] Not only were the claims found to chill the defendants' right to free speech, but the defendants also had a powerful law on their side—California's Anti-SLAPP motion.[13] This special motion to strike may be employed by a defendant in response to a Strategic Lawsuit against Public Participation, more commonly referred to as a SLAPP, which is a suit that is simply brought to chill one's right to free speech.[14] The purpose of the Anti-SLAPP statute in California is to "protect[ ] a citizen's rights of petition and free speech from the chilling effect of expensive retaliatory lawsuits brought against them for speaking out."[15]

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11. *See generally* Daniel Fisher, *A Million Little Lawsuits over Frey Book?*, FORBES MAG. (Jan. 30, 2006, 7:28 PM), http://www.forbes.com/2006/01/30/frey-book-lawsuit-cz_df_0130autofacescan13.html (explaining lawsuit against Frey over book); Matt Volz, *Judge Throws Out Lawsuit Against "Three Cups of Tea" Author*, NBC NEWS (Apr. 30, 2012,1:41 PM), http://usnews.nbcnews.com/_news/2012/04/30/11474825-judge-throws-out-lawsuit-against-three-cups-of-tea-author?lite (explaining result in Mortenson case). *Compare* JAMES FREY, A MILLION LITTLE PIECES (2003) (telling story based on author's life of struggles with drug additions and rehabilitation) *with* GREG MORTENSON & DAVID OLIVER RELIN, THREE CUPS OF TEA (2006) (telling story of humanitarian efforts).

12. *See Stutzman*, 2013 U.S. Dist. LEXIS 129204, at *64-65 (granting defendants' Anti-SLAPP Motion to Strike on all counts). The court granted plaintiffs leave to amend their complaint pursuant to Anti-SLAPP motion procedures, which did not make defendants an immediately prevailing party. *See id.* at *65 (citing Verizon Del., Inc. v. Covad Commications Co., 377 F.3d 1081, 1091 (9th Cir. 2004) ("[G]ranting a defendant's anti-SLAPP motion to strike a plaintiff's initial complaint without granting the plaintiff leave to amend would directly collide with Fed. R. of Civ. P. 15(a)'s policy favoring liberal amendment."). *See also id.* at *65 ("However, when a plaintiff is granted leave to amend the complaint, a defendant whose anti-SLAPP motion is granted is not a 'prevailing party' for the purposes of the anti-SLAPP statutory framework." (citing Thornbrough v. W. Placer Unified Sch. Dist., No. 2:09-CV-02613-GEB, 2010 U.S. Dist. LEXIS 90173 (E.D. Cal. Aug. 3, 2010))). However, in October 2013, plaintiffs filed notice to dismiss their complaint. *See* Rule 41(a)(1) Notice of Dismissal with Prejudice, Stutzman v. Armstrong, , 2013 U.S. Dist. LEXIS 129204 (E.D. Cal. Sept. 9, 2013) (No. 2:13-cv-00116-MCE-KJN) (indicating notice of dismissal with prejudice of claims).

13. *See Stutzman*, 2013 U.S. Dist. LEXIS 129204, at *14 (explaining why anti-SLAPP statute protected defendants in case). For a discussion about the background of this law, *see infra* notes 69-109 and accompanying text.

14. *See* Cal. Civ. Proc. Code § 425.16 et seq. (Deering 2011) (providing procedures for special motion to strike arising from actions in furtherance of free speech rights). For a discussion of these statutes, see *infra* notes 69-109 and accompanying text.

15. *Anti-SLAPP (Strategic Lawsuit Against Public Participation) Law: Restrictions on Use of Special Motion to Strike: Bill Analysis Hearing before the Senate Committee on Judiciary*, 2003 (Ca. 2003) *reprinted in* 2003 Legis. Bill Hist. CA S.B. 515 [hereinafter *Bill*

In order to survive the motion, plaintiffs must prove a likelihood of success on their claims, which the plaintiffs in *Stutzman* could not do.[16]

Although the court's Anti-SLAPP analysis properly exposed the meritless nature of the suit, the outcome is notable for two primary reasons.[17] First, while the claims against the defendants qualified as a SLAPP, the use in this instance contradicts the original purpose of the motion—to protect the underdog from a more powerful party simply seeking to silence them.[18] This highlights an important point about the direction SLAPP laws are moving.[19] Second, while the threat of chilling free speech is recognizable, this decision further limits the recourse available to consumers who rely on misleading advertisements of books.[20] Ultimately, the court chose the more compelling policy argument in favor of free speech.[21]

Analysis Hearing], *available at* ftp://leginfo.ca.gov/pub/03-04/bill/sen/sb_0501-0550/sb_515_cfa_20030507_133358_sen_comm.html (description of original purpose of Anti-SLAPP motion by Consumer Attorneys of California).

16. *Accord Stutzman*, 2013 U.S. Dist. LEXIS 129204 at *64-65, *67 ("Plaintiffs may file an amended complaint within twenty-one (21) days of the date of this Memorandum and Order. If no amended complaint is filed, the causes of action stricken by this Order shall be dismissed with prejudice without further notice to the parties."). For an explanation of why the judge granted leave in this case, see *infra* notes 197-199 and accompanying text. As of October 2013, all plaintiffs dismissed with prejudice all of their respective claims in the action against defendants pursuant to the Federal Rule of Civil Procedure 41(a)(1). *See* Rule 41(a)(1) Notice of Dismissal with Prejudice, Stutzman v. Armstrong, No. 2:13-cv-00116-MCE-KJN, 2013 US. Dist. LEXIS 129204 (E.D. Cal. Sept. 9, 2013) (providing notice of dismissal).

17. *See infra* notes 134-199 and accompanying text. (explaining why case was deemed meritless). *See also* Jonathan Turley, *Court Declares Armstrong has Protected Right to Lie*, RES IPSA LOQUITUR BLOG (Sept. 12, 2013), http://jonathanturley.org/2013/09/12/court-declares-armstrong-has-protected-right-to-lie-to-fans/ (claiming that lawsuit against Armstrong was certainly meritless).

18. *See infra* notes 69-109 (discussing typical use of anti-SLAPP statutes). *See generally* Jerome I. Braun, *Article: Increasing SLAPP Protection: Unburdening the Right of Petition in California*, 32 U.C. DAVIS L. REV. 965, 970 (1999). *But see FAQs About SLAPPS*, PUBLIC PARTICIPATION PROJECT, http://www.anti-slapp.org/your-states-free-speech-protection/ (last visited Mar. 12, 2013) (asserting that anybody can be subject to SLAPP).

19. *See infra* notes 216-233 and accompanying text (discussing notable outcome of case).

20. *See infra* notes 216-233 any accompanying text (discussing impact of case on future litigation).

21. *See* Stutzman v. Armstrong, No. 2:13-CV-00116-MCE-KJN, 2013 U.S. Dist. LEXIS 129204, at *64 (E.D. Cal., Sept. 9,. 2013) ("[A]lthough Plaintiffs assert the public interest in this case weighs in favor of protecting consumers from books that contain false statements, the case law makes clear that the public interest . . . [favors] free speech"). *But see* Keimer v. Buena Vista Books, Inc., 75 Cal. App. 4th 1220 (1999) (holding that advertisements on book jackets were commercial speech and less protected). For a discussion on how *Keimer* fits in the commercial

This Note examines the fraud case, *Stutzman v. Armstrong*, brought against Lance Armstrong, his management team, and publishers for the misleading nature of his "autobiographies."[22] Part II tells the story of Lance Armstrong's downfall, and what led these plaintiffs to seek recourse in court.[23] Part III explains the various laws at play in this case, including California's Consumer Protection Statutes, Anti-SLAPP procedures, First Amendment principles, and the strong policy arguments at the heart of these laws.[24] Parts IV and V examine the court's analysis of these issues and expose both the strengths and shortcomings of the opinion.[25] Finally, Part VI discusses how *Stutzman* may impact future litigation involving misleading advertisements of protected speech and where anti-SLAPP laws are headed.[26]

II. FACTS: LANCE ARMSTRONG AND THE TOO GOOD TO BE TRUE STORY

In 1991, at only nineteen years old, Armstrong was already climbing the road to stardom as an amateur cyclist who was predicted to "certainly leave an impression."[27] In 1996, Armstrong survived a battle against testicular cancer only to make an impressive comeback to cycling.[28] This prediction continued to prove true when Armstrong won an unprecedented seven consecutive Tour de France titles in 1999 through 2005.[29] His incredible story led to the publication of several autobiographical and training books, includ-

doctrine jurisprudence and how the *Stutzman* court disregarded it, see *infra* notes 128-39 and accompanying text.

22. *See* Stutzman v. Armstrong, No. 2:12 – CV-00116-MCE-KJN, 2013 U.S. Dist. LEXIS 19204 (E.D. Cal., Sept. 9, 2013) (examining allegations of misrepresentation).

23. For a discussion of the circumstances leading to the *Stutzman* case, see *infra* notes 40-46 and accompanying text.

24. For a discussion of the laws and background in *Stutzman*, see *infra* notes 47-133 and accompanying text.

25. For an explanation of the court's analysis in *Stutzman*, see *infra* notes 134-215 and accompanying text.

26. For a discussion of what role this case may play in future litigation, see *infra* notes 217-233 and accompanying text.

27. *See* Frank Litsky, *CYCLING: Armstrong May Not Win, But Watch This Space*, N.Y.TIMES.COM (May 13, 1991), http://www.nytimes.com/1991/05/13/sports/cycling-armstrong-may-not-win-but-watch-this-space.html?ref=lancearmstrong (discussing early cycling career of Lance Armstrong).

28. *See Lance Armstrong: Biography*, THE BIOGRAPHY CHANNEL http://www.biography.com/people/lance-armstrong-9188901?page=2 (last visited Mar. 3, 2014) (discussing bout with testicular cancer).

29. *See generally* BIOGRAPHY CHANNEL, *supra* note 28 (describing life of Lance Armstrong). The Tour de France is a grueling eleven-day race totaling 1,085 miles across the mountainous terrain of France. *See id.* (describing Tour de France).

ing *It's Not About the Bike: My Journey Back to Life,* published in 2000, and *Every Second Counts*, published in 2003, both of which became New York Times Bestsellers.[30]

Beginning around 1999 and continuing for ten years, the United States Anti-Doping Agency ("USADA") continually speculated that Armstrong, like many of his fellow cyclists on the professional circuit, was using performance-enhancing drugs.[31] Despite fervent denials, in 2012, several of Armstrong's former teammates testified to his drug use when USADA brought formal charges against him.[32] As a result of the damning testimony, emails, lab tests, and other evidence, USADA and the International Cycling Union stripped Armstrong of his seven Tour titles and the other awards he won between 1999 and 2005.[33] Even after losing his titles, Armstrong continued to deny the charges brought against him and even filed defamation claims against some of the people he thought betrayed him.[34] Finally, in a January 2013 interview with

30. *See* Stutzman v. Armstrong, 2013 U.S. Dist. LEXIS 129204 at *5-8 (E.D. Cal. Sept. 9, 2013) (describing books at issue in suit). *Compare* LANCE ARMSTRONG & SALLY JENKINS, IT'S NOT ABOUT THE BIKE: MY JOURNEY BACK TO LIFE (2000) (telling autobiographical story of cycling career and personal life) *with* LANCE ARMSTRONG & SALLY JENKINS, EVERY SECOND COUNTS (2003) (telling autobiographical story of Armstrong's life following first book).

See generally, Manatt, Phelps & Phillips, LLP, *It's All About the First Amendment: Lance Armstrong Wins Dismissal in False Ad Suit Over Books*, LEXOLOGY: ASS'N OF CORPORATE COUNSEL (Sept. 26, 2013) http://www.lexology.com/library/detail.aspx?g=89c80370-f605-4443-aa91-00550beeff77 (describing outcome of suit against Lance Armstrong, agents, and publishers).

31. *See Statement from USADA CEO Travis T. Tygart Regarding The U.S. Postal Service Pro Cycling Team Doping Conspiracy*, USADA U.S. POSTAL SERVICE TEAM PRO CYCLING INVESTIGATION (Oct. 10, 2012), *available at* http://cyclinginvestigation.usada.org/ (making statement regarding decisions to press charges against Armstrong).

32. *See* BIOGRAPHY CHANNEL, *supra* note 28 (describing allegations against teammates and Armstrong related to performance enhancing drugs). *See also* Juliet Macur, *Armstrong Seemingly Readies for Battle*, N.Y. TIMES, June 14, 2012, http://www.nytimes.com/2012/06/15/sports/cycling/armstrong-seemingly-readies-for-new-doping-fight.html?ref=lancearmstrong&_r=0 (discussing charges brought by USADA against Armstrong). Armstrong was accused of using and distributing various steroids and "cocktail of banned performance-enhancing drugs, including the blood booster EPO, testosterone and human growth hormone." *See id.*

33. *See* BIOGRAPHY CHANNEL, *supra* note 28 (declaring results of Armstrong's misconduct).

34. *Accord* Krishnadev Calamur, *Lance Armstrong Admits to Using Performance-Enhancing Drugs*, NATIONAL PUBLIC RADIO (Jan. 17, 2013, 8:24 PM), http://www.npr.org/blogs/thetwo-way/2013/01/17/169650077/lance-armstrong-to-admit-to-using-performance-enhancing-drugs (describing confessions to drug use in famed Winfrey interview). Armstrong, in addition to public denials, also brought defamation suits against his former teammates and others that truthfully alleged that he used performance-enhancing drugs. *See id.*

Oprah Winfrey, Armstrong publically admitted to using various performance-enhancing drugs beginning in the mid-1990s.[35]

Following Armstrong's public admission, California residents Rob Stutzman, Jonathan Wheeler, Gloria Lauria, David Reimers, and Scott Armstrong brought a class action suit on January 22, 2013 regarding Armstrong's alleged autobiographies.[36] Both books, advertised as truthful retellings of his life and career, included Armstrong's repeated denials of his drug use.[37] Besides Armstrong, plaintiffs also named William J. Stapelton, Thomas Weisel, and publishers Penguin Group and Random House as defendants.[38] The plaintiffs claimed the defendants violated the California Consumer Legal Remedies Act ("CLRA"), The Unfair Competition Law ("UCL") and the False Advertising Law ("FAL"), through acts of negligent misrepresentation, fraud, and deceit.[39]

The plaintiffs alleged that Armstrong's two autobiographies, *It's Not About the Bike: My Journey Back to Life* and *Every Second Counts*, were advertised and represented as "truthful and honest works of nonfiction biography when, in fact, Defendants knew or should

35. *See Oprah Interview supra* note 1 (announcing use of performance-enhancing drugs).

36. *See* Stutzman v. Armstrong, 2013 U.S. Dist. LEXIS 129204, at *2-3 (E.D. Cal. Sept. 9, 2013) (describing plaintiffs). Rob Stutzman is reportedly a public relations executive who was deputy chief of staff for former governor of California, Arnold Schwarzenegger, and Jonathan Wheeler is an amateur cyclist. *See* Alison Frankel, *Lance Armstrong Sued for Fraud Over Book Fabrications*, REUTERS (Jan. 23, 2013, 9:04 PM), http://www.reuters.com/article/2013/01/24/us-usa-armstrong-lawsuit-idUSBRE90N02V20130124 (explaining plaintiffs in suit). Plaintiff Gloria Lauria suffered from breast cancer at the time the suit was filed. *See Stutzman*, 2013 U.S. Dist. LEXIS 129204, at *9-10 (describing plaintiffs' personal claims).

37. *See* First Amended Complaint, *supra* note 7, para. 41, at 27 (describing false content of books). For example, plaintiffs quoted a portion of Armstrong's first book, *It's Not About the Bike*, where he repeatedly denied any use of performance enhancing drugs. *See id.* Plaintiff's quoted Armstrong as writing the following statement:Doping is an unfortunate fact of life in cycling . . . Inevitably, some teams and riders feel . . . they have to [dope] to stay competitive within the peloton. I never felt that way, and certainly after chemo[therapy] the idea of putting anything foreign in my body was especially repulsive.
Id. (fourth alteration in original) (citing LANCE ARMSTRONG & SALLY JENKINS, ITS NOT ABOUT THE BIKE: A JOURNEY BACK TO LIFE (2000)). Despite the fact that Armstrong repeatedly made such statements, plaintiffs alleged that the books continued to be marketed as biographical, even though publishers and his management team should have known the truth about their misrepresentations. *See id.* paras. 94-97, at 60-61 (explaining how each defendant was responsible for fraudulent or negligent misrepresentation).

38. *See Stutzman*, 2013 U.S. Dist. LEXIS 129204, at *7 (discussing named defendants). Plaintiffs named Stapleton, Armstrong's agent and manager, and Weisel, his cycling team owner and financier, because they were both integral in creating the "Lance Armstrong 'brand.'" *See id.*

39. *See id.* (stating claims made by plaintiffs). For a discussion of the California's consumer protection laws, *see supra* notes 47-68 and accompanying text.

have known that these books were works of fiction containing false and misleading statements."[40] Plaintiffs, ranging from recreational cyclists to cancer survivors, claimed they were misled by the inspiring story and would not have purchased or paid as much for the books had they known the truth about the contents.[41]

Additionally, plaintiffs claimed defendants neither took action to discover nor correct their misrepresentations regarding the books, even after Armstrong admitted to doping.[42] Specifically, plaintiffs claimed defendants failed or avoided to conduct investigations into the merits of the doping charges, publish corrective notices after the interview and offer refunds, but instead, continued to sell the books with same promotional materials despite Armstrong's confession.[43] The defendants' "multi-faceted scheme to defraud the plaintiffs," as plaintiffs claimed, led to the financial success of Armstrong's books published after the two autobiographies at issue.[44] Likewise, the plaintiffs accused Stapleton and Weisel of conspiring to the actions by building the "Armstrong brand" and concealing his doping to maintain his image.[45] The defendants, however, prevailed by using California's Anti-SLAPP statute to win a successful motion to strike the plaintiffs' claims because they chilled the defendants' free speech rights.[46]

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40. *See id.* at *6 (internal citations omitted) (summarizing plaintiffs' arguments). *See* LANCE ARMSTRONG & SALLY JENKINS, IT'S NOT ABOUT THE BIKE: MY JOURNEY BACK TO LIFE (2000) (telling autobiographical story of cycling career and personal life); LANCE ARMSTRONG & SALLY JENKINS, EVERY SECOND COUNTS (2003) (telling autobiographical story of Armstrong's life following first book).

41. *See id.* Stutzman and Wheeler both testified that they read and recommended the books after learning about Armstrong's "inspiring account of his triumphant return [to cycling.]" *See id.* Similarly, Lauria, a cancer survivor, was "bitterly angry" upon finding out that Armstrong's books were untrue, and that she would not have purchased the books had she known the truth. *See id.* at *10. *See also* Frankel, *supra* note 36 (explaining plaintiffs in suit).

42. *See id.* at *2 (discussing claims that Defendants should have proactively discovered and corrected error).

43. *See* First Amended Complaint, *supra* note 7, para. 36, at 23 (arguing misrepresentations by publishers). *But see Stutzman*, 2013 U.S. Dist. LEXIS 129204 at *57 (acknowledging precedent noting that publishers owe no duty to fact check or verify truthfulness of nonfiction books or memoirs).

44. *See Stutzman*, 2013 U.S. Dist. LEXIS 129204 at *60-61 (internal quotation marks omitted) (explaining allegations of defendants Stapleton's and Weisman's actions).

45. *See id.* at *60 (internal quotation marks omitted) (explaining involvement of defendants).

46. *See id.* at *64-65 (stating conclusion and holding).

III. BACKGROUND: WHERE FREE SPEECH AND CONSUMER PROTECTION INTERSECT

A. California Consumer Protection Laws

California has multiple consumer protection laws that seek to protect consumers from unfair or deceptive trade practices.[47] In fact, California was the first state to contemplate adoption of the National Consumer Act, the uniform code designed to level the playing field between consumers and industry.[48] As an early leader in consumer protection, California's laws evolved into one of the more useful systems for consumers because of the selection of claims available.[49] Today, consumers frequently allege violations under the Consumer Legal Remedies Act, Unfair Competition Law, and False Advertising Law together because of their close relation to one another.[50]

The CLRA is purposed to "protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection."[51] The CLRA provides a consumer who suffers damages from a seller's unfair methods in a transaction or sale of goods or services with the option to bring a class action or individual suit to obtain a broad range of damages.[52] The CLRA does have a comparatively limited scope,

47. *See generally* Carolyn L. Carter, *Consumer Protection in the States: A 50-State Report on Unfair and Deceptive Acts and Practices Statutes*, NAT'L CONSUMER L. CENTER (Feb. 2009), http://www.nclc.org/images/pdf/udap/report_50_states.pdf (revealing strengths and weaknesses in state consumer protection laws). The National Consumer Law Center, a non-profit that provides advocacy and treatises on consumer law, is critical of California consumer statutes, but does describe their laws as comparatively strong. *See id.* at 24 (stating mission and purpose).

48. *See generally* ANTITRUST AND UNFAIR COMPETITION LAW SECTION, THE STATE BAR OF CALIFORNIS, CALIFORNIA ANTITRUST AND UNFAIR COMPETITION LAW REVISED EDITION, § 19.02 (Cheryl Lee Johnson, ed., Matthew Bender & Co., 2014) [hereinafter CALIFORNIA ANTITRUST] (explaining history and origin of California Consumer Legal Remedies Act). Here, plaintiffs sought damages and injunctive relief in response to the "multifaceted scheme to defraud unsuspecting consumers" that plaintiffs claim defendants employed. *See also* First Amended Complaint, *supra* note 7, para. 35, at 22-23 (describing alleged wrongdoing and relief sought).

49. *See generally* CALIFORNIA ANTITRUST, *supra* note 48, (explaining history and origin of California Consumer Legal Remedies Act).

50. *See* CALIFORNIA ANTITRUST, *supra* note 48, §§ 19.04 - 19.10 (explaining scope, remedies, similarities and differences between California consumer laws).

51. *See 13-127 California Forms of Pleading and Practice—Annotated §127.14* (2013) (citing Cal Civ. Code §1750 et seq.) (explaining basic purpose and remedies under CLRA).

52. *See id.* (explaining methodology for bringing claim under CLRA). *See also* Cal. Civ. Code § 1761(d) (stating remedies under CLRA).

however, as it prohibits twenty-four specific categories of deceptive activities.[53]

Similarly, a person may sue under California's FAL, which permits lawsuits when a seller presents an untrue or misleading advertisement that the seller knew, or reasonably should have known, is misleading.[54] Thus, it has a broader reach than the CLRA, as the FAL does not list certain prohibited activities.[55] Stemming from an early twentieth century movement to protect consumers from unscrupulous business practices, the FAL was designed for use when other common law fraud theories are insufficient.[56] As a remedy, the FAL entitles misled consumers to injunctive relief or damages.[57]

A person who brings a claim under the FAL, "also has a cause of action for injunctive and other equitable relief" under the UCL.[58] The UCL contains a broad prohibition against "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by [the FAL]."[59] As originally drafted, the broad language meant that any person, not only persons who could prove they suffered an injury, could sue under the UCL.[60] This led to a 2004 reform to curb the amount of frivolous lawsuits that were attributed to the overly

53. *See generally* California Antitrust, *supra* note 48 (explaining comparisons and differences between statutes) (citing Cal. Civ. Code § 1761(d); Cal. Bus. & Prof. Code §§ 17200-17210).

54. *See 1-2 California White Collar Crime and Business Litigation Sec. 3.2* (2013) (citing Bus. & Prof. Code, § 17500) (describing history, purpose, and constitutionality of FAL).

55. *See, e.g.*, California Antitrust, *supra* note 48, at § 19.02 (explaining comparisons and differences between statutes) (citing Cal. Civ. Code § 1761(d); Cal. Bus. & Prof. Code § 17200 et seq.).

56. *See id.* (discussing history of California False Advertising Act). The model statute for false advertising, the "*Printer's Ink* statute" originally did not contain a requirement for proof on intention to defraud or reliance, as the difficulty of proving these requirements were why common law fraud claims were largely too difficult to prove in the context of advertising. *See id.* § 17.02 (discussing origins of elements of offense of false advertising). However, California's version of the FAL today does have such a requirement. *See id.* (citing Bus. & Prof. Code § 17500) (requiring that misleading advertisement be "known, or which by the exercise of reasonably care should be known, to be untrue or misleading.").

57. *See 1-2 California White Collar Crime and Business Litigation Sec. 3.2* (2013) (describing history, purpose, and constitutionality of FAL and discussing remedies and scope of statute (citing Bus. & Prof. Code, §§ 17200-17210)).

58. *See 1-14 California Points & Authorities § 14.05* (2013) (citing Bus. & Prof. Code § 17200 et seq.) (stating causes of action and describing statutory action for UCL).

59. *See* Cal. Bus. & Prof. Code § 17200 (providing cause of action and relief).

60. *See generally* H. Scott Leviant, *Unintended Consequences: How the Passage of Ballot Proposition 64 May Increase the Number of Successful Wage and Hour Class Actions in California,* 6 U.C. Davis Bus. L.J. 18 (2006), *available at* http://blj.ucdavis.edu/archives/vol-6-no-2/Unintended-Consequences.html#_ftn3 (explaining how ballot

broad language.[61] Nonetheless, like the FAL, the UCL still has relatively broad language to provide for more widespread application than the CLRA.[62]

B. Fraud and Negligent Misrepresentation

Although California has consumer statutes specifically enacted for use when traditional fraud may be too difficult to prove, consumers may still plead the forms of fraud in addition to their consumer law claims.[63] To prove fraud in California, a claimant must meet five elements: (1) a misrepresentation, (2) knowledge of the falsity of that misrepresentation, (3) intent to defraud or induce reliance, (4) justifiable reliance, and (5) resulting damage.[64] Given the knowledge requirements, claimants often use other types of fraud, like negligent misrepresentation, as a safeguard.[65]

Proving negligent misrepresentation, also requires a showing of five elements: (1) a misrepresentation of a material fact; (2) without reasonable grounds for believing that fact; (3) with intent to induce another's reliance; (4) inducing justifiable reliance thereon by the person hearing the misrepresentation; and (5) damages.[66] While negligent misrepresentation is a type of fraud, the primary difference between the two claims is the scienter, or knowledge, requirement.[67] Negligent misrepresentation requires neither the in-

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Proposition 64 amended UCL to limit claimants to those who actually suffered injury to curb frivolous lawsuits).

61. *See id.* (explaining how ballot Proposition 64 amended UCL to limit claimants to those who actually suffered injury to curb frivolous lawsuits).

62. *See generally* CALIFORNIA ANTITRUST, *supra* note 48 (explaining comparisons and differences between statutes).

63. *See e.g.*, Stutzman v. Armstrong, 2013 U.S. Dist. LEXIS 129204, *10 (E.D. Cal., Aug. 2013) (No: 2:13-CV-0016-MCE-KJN) (plaintiffs pled fraud and negligent misrepresentation in addition to consumer claims). *See also 1-2 California White Collar Crime and Business Litigation Sec. 3.2* (2013) (citing Bus. & Prof. Code, § 17500) (explaining motivation for exacting FAL).

64. *See* Tom Trading, Inc. v. Better Blue, Inc., 26 F. App'x 733, 736 (9th Cir. 2002) (citing Lovejoy v. AT&T Corp., 92 Cal. App. 4th 85, 93 (2001)) (stating elementary requirements of fraud).

65. *See* Susan L. Thomas, *34A Ca. Jur. Fraud and Deceit § 43* (explaining elements of negligent misrepresentation and fraud). *See, e.g.*, *Stutzman,* 2013 U.S. Dist. LEXIS 129205 at *61 (alleging fraud and negligent misrepresentation together).

66. *See Stutzman,* 2013 U.S. Dist. LEXIS 129205 at *61 (citing Petersen v. Allstate Indem. Co., 281 F.R.D. 413, 417 (C.D. Cal. 2012) (providing elements of fraud). That misrepresentation must be material. *See id.*

67. *See* Susan L. Thomas, *34A Ca. Jur. Fraud and Deceit § 43* (explaining elements of negligent misrepresentation and fraud).

tent to defraud nor the intent to induce reliance, whereas fraud requires such a showing.[68]

C. What it Means to Get "SLAPPed"

SLAPP suits are defined as suits that "'masquerade as ordinary lawsuits'. . . [and] they are generally meritless suits brought primarily to chill the exercise of free speech."[69] In SLAPP suits, the primary goal of the plaintiffs is usually not to seek recovery from defendants, but rather to silence a group or individual that has spoken out against them by initiating costly and time-consuming litigation.[70] SLAPP cases have been described as suits which:

> (1) involve communications made to influence a government action or outcome, (2) which result in civil lawsuits . . . (3) filed against non-governmental individuals or groups (4) on a substantive issue of some public interest or social significance' to intimidate individuals and organizations who speak out against corporate decisions . . . or other activities that affect their financial interest.[71]

Originally, plaintiffs brought SLAPP suits against individuals who were engaging in core First Amendment political speech such as circulating petitions, reporting violations of the law, engaging in peaceful protests, or lobbying for legislation.[72] Further, the parties to SLAPP suits involved a "plaintiff who could afford years of litigation . . . . whereas the defendant [was] often an ordinary 'middle-class[,] . . . middle-of-the-road American[ ].'"[73] Due to the abuses

68. *See id.* (explaining elements of negligent misrepresentation and fraud). *See also* Tom Trading, Inc. v. Better Blue, Inc., 26 F. App'x 733, 736 (9th Cir. 2002) (*citing* Lovejoy v. AT&T Corp., 92 Cal. App. 4th 85, 93 (2001)) (stating elementary requirements of fraud).

69. *See Bill Analysis Hearing*, *supra* note 15 (statement of Senator Kuehl regarding anti-SLAPP statute).SLAPP suits were first defined in a 1988 article by a University of Denver Law School Professor George Pring and a Sociology Professor Penelope Canan. *See* GEORGE PRING AND PENELOPE CANAN, SLAPPS: GETTING SUED FOR SPEAKING OUT (1996) (identifying and explaining SLAPP suits).

70. *See generally* Carson Hilary Barylak, Note, *Reducing Uncertainty in Anti-SLAPP Protection*, 71 OHIO ST. L.J. 845, 846 (2010) (explaining original definition of SLAPP statute).

71. *See id.* at 846 (footnotes omitted) (internal quotation marks omitted) (citing GEORGE PRING AND PENELOPE CANAN, SLAPPS: GETTING SUED FOR SPEAKING OUT (1996)) (noting what qualities make for SLAPP suits). *But see* PUBLIC PARTICIPATION PROJECT, *supra* note 18 (explaining that anybody can be subject to SLAPP).

72. *See* Braun, *supra* note 18, at 970 (citing George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PACE ENVTL. L. REV. 3, 8 (1989) (explaining typical SLAPP suit).

73. *See* Katelyn E. Saner, Note, *Getting SLAPP-ed in Federal Court: Applying State Anti-SLAPP Special Motions to Dismiss in Federal Court after Shady Grove*, 63 DUKE L.J.

inherent in SLAPP suits, courts and legislative bodies became frustrated that traditional defenses proved inadequate, as the truly abusive natures of the suits often only became apparent after years of pre-trial processes.[74] As a result, at least twenty-nine states, including California, have passed some form of anti-SLAPP statutes, which give defendants a tool to combat such a suit.[75]

The California legislature shared this concern, noting in the language of their Anti-SLAPP statute that there was a "disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional right[ ] of freedom of speech . . . ."[76] When California enacted its Anti-SLAPP law in 1992, the legislature sought to create a policy to encourage the public to participate in "matters of public significance" without the potential threat of litigation, which is also an abuse of the judicial process.[77] The statute provides the defendant a special motion to strike when the cause of action against the defendant arises from "any act of that person in furtherance of the person's right of petition or free speech under" either the United States or California Constitutions.[78] To survive the mo-

781, 789-790 (2013) (third and fourth alterations in original) (footnotes omitted) (citing George W. Pring & Penelope Canan, *Strategic Lawsuits Against Public Participation ("SLAPPs"): An Introduction for Bench, Bar and Bystanders*, 12 BRIDGEPORT L. REV. 937, 940 (1992) (describing why SLAPP suits are criticized). *See also* Braun, *supra* note 18, at 1068 (discussing how "deep pocket" entities may use litigation to exhaust adversaries). *But see* PARTICIPATION PROJECT, *supra* note 18 (explaining that anybody can be subject to SLAPP).

74. *See* Saner, *supra* note 73, at 790 (explaining motivation for instituting anti-SLAPP statutes). The author notes that even before the enactment of anti-SLAPP laws, some courts created their own common law remedy. *See id.* at 791 (describing judicial solutions in response to lack of protection). SLAPP suits are also problematic because they further backlog the justice system with meritless and lengthy claims procedures. *See* Braun, *supra* note 18 (explaining why SLAPPs are problematic).

75. *See* PUBLIC PARTICIPATION PROJECT, *supra* note 18 (listing states with anti-SLAPP laws).

76. *See* Cal. Code Civ. Proc. § 425.16(a) (Deering 2011), *available at* http://codes.lp.findlaw.com/cacode/CCP/3/2/6/2/1/s425.16 (declaring reason for enacting motion).

77. *See id.* (presenting legislative findings leading to enactment of statute).

78. *See* Cal. Code Civ. Proc. § 425.16(b)(1) (Deering 2011), *available at* http://codes.lp.findlaw.com/cacode/CCP/3/2/6/2/1/s425.16 (providing right to use special motion to strike). The statute also clarifies what actions may be an "act in furtherance of a person's right . . . in connection with a public issue[,]" such as statements before a legal or official proceeding or statements made in a place open to the public. *See id.* § 425.16(e). Defendants have a sixty-day window to file the motion after service of the complaint, or at a later time at the court's discretion. *See id.* § 425.16(f). Given this short window, some critics note that it can be difficult for the plaintiff to prove the merits of the claim simply on the pleadings without discovery. *See* Saner, *supra* note 73, at 793 (discussing difficulty of making claims without discovery).

tion, the plaintiffs must establish a probability that they will prevail on their claim.[79] Additionally, the statute can stay discovery proceedings until notice of an order has been given.[80] If the special motion is granted, defendants are entitled to recover attorney's fees and costs related to the claim.[81]

The California legislature's word choice of "public interest" is considered by California courts to be "inherently amorphous" and following *Hilton v. Hallmark Cards*, these courts use two tests to determine what qualifies for this undefined term.[82] The first test, developed in *Rivero v. American Federation of State, County, and Municipal Employees, AFL-CIO*,[83] considers three categories of public issues, including: statements that concern a person in the public

79. *See id.* at § 425.16(b)(1)-(3) (Deering 2011), *available at* http://codes.lp.findlaw.com/cacode/CCP/3/2/6/2/1/s425.16 (explaining burden of proof). In determining whether plaintiff will prevail, the court considers the pleadings and affidavits from all parties which state the facts upon which the defense or liability is based. *See id.* at § 425.16(b)(2). If the court finds in favor of the plaintiff, "neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case . . . ." *Id.* at § 425.16(b)(3).

80. *See id.* § 425.16(g). *See also* Saner, *supra* note 73 (explaining purpose of anti-SLAPP statutes). Since it is hard to distinguish SLAPP suits from other legitimate tort suits prior to completing discovery, this provision gives the defendants a tool to avoid expensive and unnecessary discovery. *See* Saner, *supra* note 73, at 793. In contrast, given that defendants have only sixty days to file the motion, some critics note that it can be difficult for the plaintiff to prove the merits of the claim simply on the pleadings without any discovery. *See id.*

81. *See id.* § 425.16(b)(3) (stating relief to those who prevail on motion to strike). Interestingly, in line with the spirit of the statute, if the special motion to strike is found to be frivolous or is used only to cause delay, plaintiffs who prevail on the motion may be awarded costs and reasonable attorney fees. *See id.* (providing relief when anti-SLAPP motion to strike is abused).

82. *See* Vitus v. Steiner, No. 2:12-CV-01381-GEB, 2012 U.S. Dist. LEXIS 178962 (E.D. Cal. Dec. 18, 2012) ("Section 425.16 does not define 'public interest' or 'public issue.' Those terms are inherently amorphous and thus do not lend themselves to a precise, all-encompassing definition." (quoting Cross v. Cooper, 197 Cal. App. 4th 357, 371 (2011))). *See also* Stutzman v. Armstrong, No. 2:13-CV-00116-MCE-KJN, 2013 U.S. Dist. LEXIS 129204, at *16-17 (E.D. Cal. Sep. 9, 2013) (explaining source and application of multiple tests). Rather than decide which state test is appropriate, federal courts sitting in diversity apply both. *See Stutzman*, 2013 U.S. Dist. LEXIS 129204, at *16-17. The *Stutzman* court noted the following:

> California intermediate appellate courts have developed multiple tests to determine whether a defendant's activity is in connection with a public issue. In *Hilton*, the Ninth Circuit applied two tests: one from Rivero v. American Federation of State, County, and Municipal Employees, AFL-CIO . . . and one from Weinberg v. Feisel . . .

Id. (citations omitted) (quoting Hilton v. Hallmark Cards, 599 F.3d 894, 903 (9th Cir. 2010) (citing Rivero v. American Federation of State, County, and Municipal Employees, AFL-CIO, 105 Cal.App. 4th 913 (2003); Weinberg v. Feisel, 110 Cal. App. 4th 1122 (2003)).

83. 105 Cal. App. 4th 913 (Alameda Cnty. 2008) (providing test regarding public issues).

eye; conduct that directly affects many people beyond the direct participants; or a topic of widespread, public interest.[84]

The second and more restrictive test requires that public interest be something beyond "mere curiosity."[85] This test requires the interest of a substantial number of people, "some degree of closeness" between the statements at issue and the public interest, the focus of the conduct must be of public interest, and there must not be a private matter that was merely communicated to many people.[86] Because the tests are so similar, courts have declined to decide between the two tests and continue to apply both of them.[87]

Although the statute was designed to curb abuse of the system, the meritless overuse of SLAPP motions has become equally problematic, as some defendants have used the motion as a "litigation weapon."[88] In response, the California statute was amended in 2003 to exempt certain claims from SLAPP motions: when the plaintiff does not seek relief greater than or different from the relief sought for the general public, if the action as successful would enforce a right affecting public interest or confer a significant benefit on the general public or large class, or when private enforcement is necessary and this places a disproportionate financial burden as compared to the plaintiff's stake in the claim.[89] It also exempts certain commercial speech and artistic and literary works.[90]

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84. *See* Doe v. Gangland Prods., Inc., 802 F. Supp. 2d 1116, 1123 (C.D. Cal. 2011) (citing *Rivero*, 105 Cal. App. 4th at 924) (explaining categories of public issues).

85. *See Hilton*, 599 F.3d at 906 (holding that Hallmark Cards could not use Anti-SLAPP motion to strike in case where Paris Hilton filed suit over Hallmark's use of her likeness in greeting card) (citing *Weinberg*, 110 Cal. App. 4th at 1132).

86. *See Hilton*, 599 F.3d at 906-07 (quoting *Weinberg*, 110 Cal. App. 4th at 1132-33).

87. *See Hilton*, 599 F.3d at 906-07 (declining to decide between tests because both were met). The *Stutzman* court followed this reasoning, and applied both state court tests rather than deciding between the two. *See* Stutzman v. Armstrong, No. 2:13-CV-00116-MCE-KJN, 2013 U.S. Dist. LEXIS 129204, *18-20 (E.D. Cal. Sep. 9, 2013) (following Ninth Circuit precedent in applying both tests).

88. *See Bill Analysis Hearing*, *supra* note 15 (statement of Senator Kuehl regarding reforms for Anti-SLAPP statute since Anti-SLAPP motions have been used as a "litigation weapon"). *See also* Barylak, *supra* note 70, at 848 (discussing overuse of Anti-SLAPP motions).

89. *See Bill Analysis Hearing*, *supra* note 15 (statement of Senator Kuehl regarding reforms for Anti-SLAPP statute) (discussing proposed changes to law). *See also* Cal. Code Civ. Proc. § 425.17(b)(1)-(3) (Deering 2003) (listing exceptions to statute).

90. *See* Cal. Code Civ. Proc. § 425.17(c)(1)-(2) (Deering 2003) (describing exemptions related to statements or conduct concerning businesses).

Furthermore, although not a statutory exemption, defendants cannot use the Anti-SLAPP motion to protect against speech made in furtherance of illegal conduct because such speech is not entitled to First Amendment protection.[91] In California, speech that is in furtherance of allegedly illegal conduct maintains protection, and only loses protection if defendants concede to such illegality or if the court conclusively determines through evidence that such actions are illegal.[92] Accordingly, courts must determine whether the actions in question are actually illegal as a matter of law before continuing the analysis.[93]

Importantly, these exemptions also have certain exemptions.[94] The statute, as reformed in 2003, clarifies that the Anti-SLAPP motion may be used by "any person engaged in dissemination of ideas or expression in any book . . . [and] any action against any person or entity based upon the creation, dissemination, exhibition, advertisement, or other similar promotion of any dramatic, literary . . . or artistic work . . . ."[95] These changes provided clarity to the question of who may use the anti-SLAPP motion.[96]

Ultimately, once a defendant employs the Anti-SLAPP motion, the court must engage in a two-tiered, burden shifting analysis.[97]

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91. *See* Lauter v. Anoufrieva, 642 F. Supp. 2d 1060, 1108 (C.D. Cal. 2008) (holding that "[t]he Anti-SLAPP statute cannot be invoked by a defendant whose assertedly protected activity is illegal as a matter of law, and for that reason, not protected by constitutional guarantees of free speech and petition." (citing Flatley v. Mauro, 139 P.3d 2, 13 (Cal. 2006))).

92. *See id.* ("[U]nder California state law, conduct that would otherwise come within the scope of the anti-SLAPP statute does not lose its coverage simply because it is *alleged* to have been unlawful or unethical." (citing Birkner v. Lam, 156 Cal. App. 4th 275, 285 (2007))).

93. *See* Stutzman v. Armstrong, No. 2:13-CV-00116-MCE-KJN, 2013 U.S. Dist. LEXIS 129204, at *22 (E.D. Cal. Sep. 9, 2013) (determining that issue of illegal conduct is preliminary issue unrelated to plaintiff's burden of proof and that "[t]he asserted protected speech or petition activity loses protection only if it is established through defendant's concession or by uncontroverted and conclusive evidence that the conduct is illegal as a matter of law." (citing *Lauter*, 642 F. Supp. 2d at 1109)).

94. *See* Cal. Code Civ. Proc. § 425.17(b)(1)-(3) (Deering 2003), *available at* http://codes.lp.findlaw.com/cacode/CCP/3/2/6/2/1/s425.17 (listing exceptions to statute). *See also Bill Analysis Hearing*, *supra* note 15 (statement of Senator Kuehl regarding reforms for Anti-SLAPP statute).

95. *See* Cal. Code Civ. Proc. § 425.17(d)(1)-(2) (Deering 2003), *available at* http://codes.lp.findlaw.com/cacode/CCP/3/2/6/2/1/s425.17 (confirming permissible use of Anti-SLAPP statutes for literary works).

96. *See Bill Analysis Hearing*, *supra* note 15 (statement of Senator Kuehl regarding reforms for Anti-SLAPP statute). *Contra* Stutzman v. Armstrong, 2013 U.S. Dist. LEXIS 129204, 28-29 (E.D. Cal. 2013) (employing principles of statutory interpretation to determine meaning and intention of statute reforms).

97. *See Stutzman*, 2013 U.S. Dist. LEXIS 129204, at *12-13 ("First, the defendant moving to strike must make a threshold showing . . .[.] Second, '[if] the

The court must first determine whether the defendants have met the threshold burden of proof that the challenged action was taken "in furtherance of the exercise of free speech rights" in connection with a public issue.[98] If defendants meet their threshold burden, the burden then shifts to the plaintiffs.[99] In the second step, the court must determine whether the plaintiffs, who have two opportunities to survive the motion, have met their burden.[100] Under the statute, plaintiffs are required to show that their claim is legally sufficient, such that there is a "reasonable probability" of prevailing in their claims.[101] Additionally, plaintiffs can also prove that their claim is statutorily exempt from the defendant's use of the Anti-SLAPP motion.[102] If the court finds that plaintiffs made either of these showings, the Anti-SLAPP motion will be denied.[103] If plaintiffs failed to meet their burden, the court must grant the Anti-SLAPP motion to strike, but it must also provide plaintiffs an opportunity to amend their complaint.[104] However, defendants are not

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court finds that such a showing has been made, it must then determine whether the plaintiff has demonstrated'" its burden (first and second alterations in original) (citations omitted) (internal quotation marks omitted) (quoting Navellier v. Sletten, 52 P.3d 703 (Cal. 2002))).

98. *See* Hilton v. Hallmark Cards, 599 F.3d 894, 903 (9th Cir. 2010) (internal quotation marks omitted) (citing Cal. Civ. Proc. Code § 425.16(e)(4)) (explaining system of analysis under Anti-SLAPP statute).

99. *See id.* (explaining burden shifting mechanism of statute). Critics note that this burden shifting makes it unfairly difficult for plaintiffs to prevail on their claims, especially without discovery proceedings. *See generally* Saner, *supra* note 73 (discussing inherent issues with Anti-SLAPP procedures).

100. *See Stutzman*, 2013 U.S. Dist. LEXIS 129204, *39-40 ("Accordingly, '[o]nce it is determined that an act in furtherance of protected expression is being challenged, the plaintiff must show a reasonable probability of prevailing in its claims for those claims to survive dismissal.'" (internal quotation marks omitted) (alteration in original) (quoting Metabolife Int'l. v. Susan Wornick, 264 F.3d 832 (9th Cir. 2001))).

101. *See* Metabolife Int'l. v. Susan Wornick, 264 F.3d 832, 840 (citing Cal. Civ. Proc. Code § 425.16(b)).

102. *See* Cal. Civ. Proc. Code §§ 425.17-425.50 (Deering 2003) (listing statutory exceptions). For a discussion on the analysis and application of these exemptions, see Stutzman v. Armstrong, 2013 U.S. Dist. LEXIS 129204, at *28-29 (E.D. Cal. Sept. 9, 2013) (analyzing exemptions of Anti-SLAPP statute).

103. *See Bill Analysis Hearing*, *supra* note 15 (statement of Senator Kuehl regarding reforms for Anti-SLAPP statute).

104. *See* Cal. Civ. Proc. Code §425.17 et seq. (Deering 2003) (providing procedures for Anti-SLAPP motions). *See also* Verizon Del., Inc. v. Covad Commc'ns Co., 377 F.3d 1081, 1091 (9th Cir. 2004) (holding that "granting a defendant's anti-SLAPP motion to strike a plaintiff's initial complaint without granting leave to amend would directly collide with Fed. R. Civ. P. 15(a)'s policy favoring liberal amendment."). *But see* Saner, *supra* note 73, at 808 (declaring that courts disagree whether Anti-SLAPP procedures conflict with Federal Rules of Procedure).

considered a prevailing party for the purposes of recovering attorneys' fees until after proceedings have fully concluded.[105]

Finally, not all Federal Circuits agree that state SLAPP procedures are available in federal court.[106] Circuits are currently split on this issue due to a disagreement about whether the special motion conflicts with the motion to dismiss available under the Federal Rules of Civil Procedure.[107] However, in 2009, the Ninth Circuit held that California's Anti-SLAPP procedures are available to litigants in federal court, as the laws do not conflict with Federal Rules of Civil Procedure.[108] Thus, litigants are permitted to file for California's Anti-SLAPP special motion to strike in federal courts in the Ninth Circuit.[109]

D. Where First Amendment Principles Collide: The Commercial Speech Doctrine and the Protected Speech of Literary Works

Since the First Amendment right to free speech provides the foundation for Anti-SLAPP procedures, understanding Anti-SLAPP motions requires insight into the First Amendment and Commercial Speech Doctrine.[110] While the First Amendment provides a

105. *See, e.g.*, Thornbrough v. W. Placer Unified Sch. Dist., No. 2:09-CV-02613-GEV, 2010 U.S. Dist. LEXIS 90173, at *5 (E.D. Cal. Aug. 3, 2010) (noting that defendant is not prevailing party under Anti-SLAPP statute when plaintiffs are granted leave to amend).

106. *See* Saner, *supra* note 73, at 796-808 (explaining lack of clarity about whether state SLAPP procedures apply in federal courts).

107. *See id.* (discussing split among circuits). This is not an issue all circuits have reached however, because not all states have Anti-SLAPP laws. *See* Public Participation Project, *supra* note 18 (naming states that have Anti-SLAPP laws).

108. *See* Thomas v. Fry's Elecs., Inc., 400 F.3d 1206, 1206-07 (9th Cir. 2005) (acknowledging precedent holding that California Anti-SLAPP motions are available in federal court as anti-SLAPP procedures do not conflict with federal procedural rules) (citing United States v. Lockheed Missiles & Space Co., 190 F.3d 963 (9th Cir. 1999)). *But see generally* Saner, *supra* note 73 (explaining lack of clarity about whether state SLAPP procedures apply in federal courts). As of 2013, courts disagreed about whether Anti-SLAPP motions should be available in federal courts. *See id.* For example, while the First and Ninth Circuits have held that SLAPP motions do not conflict with federal procedural rules, the Federal District Court for the District of Columbia has held that they do conflict with federal rules. *See id.* at 802-06 (citing Godin v. Schenks, 629 F.3d 79 (1st Cir. 2010); 3M Co. v. Boulter, 842 F. Supp. 2d 85, 111 (D.D.C. 2012)).

109. *See Thomas*, 400 F.3d 1206 (9th Cir. 2005) (acknowledging precedent holding that California Anti-SLAPP motions are available in federal court as anti-SLAPP procedures do not conflict with federal procedural rules (citing United States v. Lockheed Missiles & Space Co., 190 F.3d 963 (9th Cir. 1999))).

110. *See Bill Analysis Hearing*, *supra* note 15 (noting that SLAPP suits are generally meritlessly intended to chill party's first amendment right to free speech). For more information on cases where free speech that is commercial is at issue see generally Samantha J. Katze, Note, *A Million Little Maybes: The James Frey Scandal and*

general presumption in favor of free speech, commercial speech, or speech that "does 'no more than propose a commercial transaction,'" is only entitled to limited protection.[111] However, identifying speech as commercial involves an analysis beyond whether financial gain was involved.[112]

To determine whether speech is commercial, the Ninth Circuit applies a three-pronged analysis based on the Supreme Court's decision in *Bolger v. Youngs Drug Products Corporation*.[113] First, Ninth Circuit courts must determine whether the speech "fall[s] within the core notion of commercial speech," meaning whether it does no more than propose a commercial transaction.[114] Second, if the court finds that the speech is actually "mixed content"—such that it is both commercial and noncommercial in nature—Ninth Circuit courts then apply the test articulated in *Bolger*.[115] Under *Bolger*, speech is commercial if it is "admittedly advertising, [ ]the speech references a specific product, and the speaker has an economic motive for engaging in such speech."[116]

However, these characteristics are not dispositive and the analysis for protection of commercial speech does not end there.[117] A

Statements on a Book Cover or Jacket as Commercial Speech, 17 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 207, 221-25 (2006).

111. *See* Va. State Bd. Of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976) (citing Pittsburgh Press Co. v. Human Relation Comm'n, 413 U.S. 377, 385 (1973)) (holding that because free flow of ideas is essential for creating well-informed consumers, commercial speech is given limited protection to also protect consumers). *See generally* Katze, *supra* note 110, at 221-24 (explaining commercial speech doctrine with respect to scandal regarding sale of James Frey's book *A Million Little Pieces* as memoir when it was exposed as fabricated).

112. *See Va. State Bd. of Pharmacy*, 425 U.S. at 761 (stating that "speech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another." (citing Buckley v. Valeo, 424 U.S. 1, 35-39 (1976); *Pittsburgh Press Co.*, 413 U.S. at 384; New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964))).

113. *See* Dex Media W., Inc. v. City of Seattle, 696 F.3d 952, 957 (9th Cir. 2012) (discussing commercial speech analysis and Supreme Court's approach (citing Bolger v. Youngs Drugs Prods. Corp., 463 U.S. 60, 66 (1983)). *See also* Stutzman v. Armstrong, No. 2:13-CV-00116-MCE-KJN, 2013 U.S. Dist. LEXIS 129204, at *43-44 (E.D. Cal. Sept. 10, 2013) (explaining source of analysis for commercial speech in Ninth Circuit (citing *Dex Media*, 696 F.3d at 957)).

114. *See Bolger*, 463 U.S. at 66 (declaring qualification for commercial speech (citing *Va. State Bd. of Pharmacy*, 425 U.S. at 760-61)).

115. *See* Am. Acad. of Pain Mgmt. v. Joseph, 353 F.3d 1099, 1106 (9th Cir. 2004) (explaining analysis of commercial speech (citing *Bolger*, 463 U.S. at 66-67)).

116. *See id.* (stating factors). The factor "admittedly advertising" requires that defendants agree that the speech is a form of advertising. *See Stutzman*, 2013 U.S. Dist. LEXIS 129204, at *52 (noting that statements at issue were not admittedly advertising because defendants denied they were advertising).

117. *See Stutzma*n, 2013 U.S. Dist. LEXIS 129204, at *44 ("The Supreme Court made clear that these three factors are not dispositive, but the 'combination of all

second test explained by the Ninth Circuit in *Dex Media West, Inc. v. City of Seattle* creates a narrow exception even where the *Bolger* test finds the speech commercial:

> [E]ven if the publication meets this threshold commercial speech classification, courts must determine whether the speech still receives full First Amendment protection, because the commercial aspects of the speech are "inextricably intertwined" with otherwise fully protected speech, such that the publication sheds its commercial character and becomes fully protected speech.[118]

This exception reinstates full First Amendment protection when protected and unprotected speech are "inextricably intertwined," and is particularly applicable in the context of books, which generally contain protected speech.[119] As the California Court of Appeals stated in *Keimer v. Buena Vista Books, Inc.*, "no one involved in modern jurisprudence can reasonably dispute [that] the content of . . . books is entitled to the full protection of the First Amendment."[120]

In spite of this, false commercial speech receives no protection.[121] This lack of protection contrasts the general rule stated in *U.S. v. Alvarez*, which holds that false speech made by private indi-

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these characteristics . . . provides strong support for the . . . conclusion that the [publication at issue is] properly characterized as commercial speech.'" (alterations in original) (quoting *Dex Media*, 696 F.3d at 958))).

118. *Dex Media*, 696 F.3d at 958 (explaining how inextricable intertwinement test clarifies status of commercial speech (citing Reiley v. Nat'l Federation of the Blind of North Carolina, Inc., 487 U.S. 781, 796 (1988))).

119. *See Dex Media*, 696 F.3d at 957-59 (explaining source of analysis for commercial speech in Ninth Circuit).

120. Keimer v. Buena Vista Books, Inc., 89 Cal. Rptr. 2d 781, 788-89 (Cal. Ct. App. 1999) (holding that misleading statements in promotional materials on jacket of book were unprotected commercial speech).

121. *See generally* Katze, *supra* note 110, at 222-24 (explaining protections and limits on protections afforded commercial speech (citing Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980))). In *Central Hudson*, the Supreme Court provided the following four-part test for commercial speech cases:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within the provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquires yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than necessary to serve that interest.

See Central Hudson, 447 U.S. at 566 (discussing four-part analysis).

viduals is entitled to protection.[122] This doctrine that exempts false commercial speech from the general rule is recognized by the Supreme Court and sets the foundation for consumer protection statutes, both at the state and federal level.[123] However, protecting consumers and protecting free speech rights requires some balancing. Even though false statements may not appear worthy of First Amendment protection, the Supreme Court has concluded that such speech is essential to ensure the free flow of ideas, and thus deserve First Amendment protection.[124] Although the states may regulate the publication of false statements of facts, "a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship."[125] This balancing recognizes a strong policy in favor of protecting book publishers by neither imposing a requirement to fact check nor requiring they guarantee the truthfulness of book contents.[126]

Even so, readers continue to challenge authors and publishers in court when it is revealed that stories, advertised as truthful

122. *See* United States v. Alvarez, 132 S. Ct. 2537 (2012) (striking down Stolen Valor Act because lies are protected form of free speech). As the *Alvarez* court noted, there is value in protecting falsehoods in order to prevent the chill of other speech. *See id.* at 2548. Likewise, when a private person is speaking, they are entitled to protection because "[s]peaking about oneself is precisely when people are most likely to exaggerate, obfuscate, embellish, omit key facts, or tell tall tales." *See* U.S. v. Alvarez, 638 F.3d 666, 674 (9th Cir. 2011) (Koziniski, C.J., concurring in denial of rehearing petition), *aff'd*, 132 S. Ct. 2537 (2012).

123. *See 1-2 California White Collar Crime and Business Litigation Sec. 3.2* (2013) ("Section 17500 [California's Unfair Competition Law] has been consistently upheld as a valid constitutional exercise of the state's police power regulatory authority. It has survived constitutional challenges involving: The commerce clause of the U.S. Constitution . . . Fifth and Fourteenth Amendment due process . . . [and the] First Amendment freedom of speech."). *See also* Kantze, *supra* note 110, at 223 ("Unlike truthful commercial speech, which receives some First Amendment Protection, albeit less than other forms of speech, false commercial speech falls outside the purview of the First Amendment. Consequently, the state and federal government may freely regulate such statements through the enactment of consumer protection statutes.").

124. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 343 (1974) (holding that First Amendment is defense to defamation claims brought by private persons).

125. *See id.* at 340 (placing limits on state control of First Amendment issues).

126. *Compare* Barden v. Harpercollins Publishers, Inc., 863 F.Supp. 41, 45 (D. Mass. 1994) (holding that misrepresentations relating to attorney qualifications on book covers were not unfair or deceptive practices nor actionable under negligent misrepresentation) *and* Winter v. G.P. Putnam's Sons, 938 F.2d 1033, 1037 (9th Cir. 1991) (holding that people who became ill after picking mushrooms advocated by advice in book could not recover for products liability and publishers had no duty to investigate contents of books) *with* Lacoff v. Buena Vista Publishing, Inc., 705 N.Y.S.2d 183, 191 (N.Y. Sup. Ct. 2000) (holding that statements advertising book as how-to investment guide were protected noncommercial speech).

memoirs, turn out to be falsified.[127] In 2006, readers sued author James Frey and his publishers over the book *A Million Little Pieces* after it was exposed that his so-called inspiring "memoir" was largely fabricated.[128] The suit, which alleged consumer fraud, false advertising, unfair competition, and misrepresentation among other claims, reportedly settled.[129] A similar suit brought in 2012 against author Greg Mortensen and his publishers of the book *Three Cups of Tea* was dismissed for failure to state a claim by the Federal District Court in Montana.[130]

Previously, in 1999 and 2000, readers filed class action suits in New York and California over books that suggested that following the provided investment model in the book would yield similar returns.[131] Although the New York Supreme Court found that the advertisements on the cover of the book were protected speech, the California Court of Appeals disagreed.[132] That court found that California has a "legitimate right to protect the public" from false advertising, and thus concluded that the advertising statements were commercial speech and therefore, unprotected.[133]

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127. *See generally* Katze, *supra* note 110 and accompanying text (describing outcome of claims against James Frey and similar suits in response to false books advertised as memoirs).

128. *See generally* Katze, *supra* note 110, at 207 n.2 (describing settlement). According to the New York Times, both the author and publishers proposed a settlement involving refunds for customer purchase fees and lawyers' fees and a donation to charity not to exceed $2.35 million. *See also* Daniel Fisher, *A Million Little Lawsuits over Frey Book?*, Forbes Magazine (Jan. 30, 2006, 7:28 pm), http://www.forbes.com/2006/01/30/frey-book-lawsuit-cz_df_0130autofacescan13.html (explaining lawsuit against Frey over book).

129. *See Lance Armstrong Sued for Fraud over Memoirs*, CBS News (Jan. 24, 2013, 12:22 PM), http://www.cbsnews.com/news/lance-armstrong-sued-for-fraud-over-memoirs/ (describing similar suits). Random House publishers reportedly paid $27,348 in refunds, $180,000 to charity, and $1,000,000 in legal fees in a settlement. *See id.*

130. *See* Pfau v. Mortenson, 858 F.Supp. 2d 1150 (D. Mont. 2012), *aff'd*, 2013 U.S. App. LEXIS 20567 (9th Cir. 2013) (dismissing case for failure to state claim on fraud, deceit, contract claims, and claims under the Racketeer Influence and Corrupt Organizations Act at Title 18 U.S.C § 1961 et. seq.)).

131. *See generally* Katze, *supra* note 110, at 224-30 (discussing "Beardstown Ladies" cases).

132. *See generally* Katze, *supra* note 110, at 224-30 (explaining conflicting outcomes regarding same factual circumstances). *Compare* Lacoff v. Buena Vista Publ'g Inc., 705 N.Y.S.2d 183 (N.Y. Sup. Ct. 2000) (holding advertisements on jacket cover were protected noncommercial speech) *with* Keimer v. Buena Vista Books, 89 Cal. Rptr. 2d 781(Cal. Ct. App. 1999) (holding advertisements on jacket cover were not protected noncommercial speech).

133. *See Keimer*, 89 Cal. Rptr. 2d at 783 (holding advertisements on jacket cover were not protected noncommercial speech).

IV. NARRATIVE ANALYSIS

In determining whether the defendants in *Stutzman* were entitled to their Anti-SLAPP motion to strike, the District Court for the Eastern District of California engaged in a three-step analysis of the issues within the scheme of the Anti-SLAPP procedures.[134] The three steps included determining: first, whether defendants met their burden by showing that their acts at issue were in furtherance of defendant's right of free speech in connection with a public issue; second, whether the actions are exempt from Anti-SLAPP motions; and third, whether plaintiffs met their burden as required by the SLAPP statutes.[135] These burden-shifting elements of the Anti-SLAPP statute provided the structure for the court's analysis.[136]

A. Defendant's Burden

The court had to first decide whether Lance Armstrong qualified as a topic of "public interest" as required by the two applicable tests.[137] This order of analysis was dictated by the defendants' claim that their statements in the books and about the books were actions in furtherance of free speech as related to public issues.[138] The court quickly decided the first test was met because both statements regarding Lance Armstrong and his bestselling books were "without question" of public interest.[139] Likewise, because Armstrong's books concerned his public cycling career, not just his personal life, the books were in furtherance of free speech.[140] Thus, the speech

134. *See* Stutzman v. Armstrong, No. 2:13-CV-00116-MCE-KJN, 2013 U.S. Dist. LEXIS 129204, at *14 (E. D. Cal. Sept. 9, 2013) (explaining organization and threshold questions).

135. *See id.* (listing major issues in case).

136. For a more detailed discussion of the process for analyzing Anti-SLAPP motions, see *supra* notes 69-109 and accompanying text (discussing statutory process of California's Anti-SLAPP law).

137. *See Stutzman*, 2013 U.S. Dist. LEXIS 129204, at *16-17 (determining whether defendants' burden was met by deciding whether speech at issue concerned issue of public interest). For a discussion of the two California state court tests applied here, see *supra* notes 82 -86 and accompanying text.

138. *See id.* at *16-17 (analyzing within framework of SLAPP statute).

139. *See id.* at *17. Because Lance Armstrong is a famous figure, the court likened this scenario to Paris Hilton, another figure that was found to be of public interest in a similar suit. *See* Hilton v. Hallmark Cards, 599 F.3d 894, 907 (9th Cir. 2010) (finding that Paris Hilton was a topic of widespread public interest). New York Times Bestsellers are also, by their very nature, topics of public interest. *See* Wallace v. Henderson, No. CIV 09CV1603-L(WMC), 2010 U.S. Dist. LEXIS 30519, at *7 (S.D. Ca. Mar. 30, 2010) (finding book on New York Times Bestseller list topic of widespread public interest).

140. *See Stutzman*, 2013 U.S. Dist. LEXIS 129204, at *21-22 (explaining how this case surpasses limitation expressed in *Weinberg*).

about the books, speech in the books, and conduct in furtherance of those statements by the other defendants met the threshold burden required by the Anti-SLAPP statute.[141]

B. Anti-SLAPP Motion Exemptions

Having found the defendants easily satisfied their burden, the court next turned to whether the actions where otherwise exempt from SLAPP motions.[142] In doing so, the court first responded to plaintiffs' assertion that the defendants could not use the Anti-SLAPP motion to protect themselves from illegal activity.[143] Specifically, the plaintiffs argued Armstrong's admittance to drug trafficking precluded him from evoking the Anti-SLAPP motion, because that conduct is illegal.[144] While the court did agree with the plaintiffs that speech related to illegal activity is not protected speech under the First Amendment, the court did not ultimately adopt the plaintiffs' position.[145] Instead, the court recognized that "conduct that would otherwise come within the scope of the anti-SLAPP statute does not lose its coverage simply because it is alleged to have been unlawful or unethical."[146] The court further explained its position by stating that the illegal action of drug trafficking was not the underlying conduct at issue.[147] Rather, the activity at issue was Armstrong's statements that he did not use drugs, the content of the books, and the promotional materials, none of which are criminal in themselves.[148]

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141. *See id.* at *17-18 ("Here, it is without question that statements concerning Lance Armstrong 'concern a person or entity in the public eye' and/or are 'a topic of widespread, public interest.'").

142. *See id.* at *22-25 (explaining exemptions plaintiffs claimed). The California Legislature enacted such exemptions under Section 425.17 of the California Civil Code to curb overuse of the motions. *See Bill Analysis Hearing*, *supra* note 15.

143. *See Stutzman*, 2013 U.S. Dist. LEXIS 129204, at *22-25 (describing claims that defendants' conduct was in furtherance of illegal actions). For a further discussion of why illegal activity serves as an exception, see *supra* notes 91-93 and accompanying text.

144. *See Stutzman*, 2013 U.S. Dist. LEXIS 129204, at *22-25 (explaining plaintiffs contention that Armstrong's actions of drug trafficking were not entitled to protection by the Anti-SLAPP motion).

145. *See id.* (citing Lauter v. Anoufrieva, 642 F. Supp. 2d 1060, 1108, 1109 (C.D. Cal. 2009)) (discussing California law requiring analysis whether conduct at issue is actually illegal).

146. *See id.* at *23 (citing *Lauter*, 642 F. Supp. 2d at 1108) (explaining nuances of application).

147. *See id.* (explaining reasoning behind analysis).

148. *See id.* at *24 (explaining exemption is inapplicable because plaintiff relied on illegal conduct that was not basis of actions in case). *Accord* United States v. Alvarez, 638 F.3d 666, 670 (9th Cir. 2011) (declaring that false statements made by private person are entitled to First Amendment protection).

The court next addressed the plaintiffs' contentions that their claims were exempt from the Anti-SLAPP motion.[149] In opposition the defendants claimed that, even if the statutory exemptions did apply, defendants met the exemptions to the exemptions that protect any dramatic or literary work; this led the court to pass over the analysis of the exemptions claimed by the plaintiffs.[150]

As there are only a few cases addressing the recently added exemptions, this court relied on California's principals of statutory construction and interpretation to determine whether the statutory exemptions applied.[151] After considering legislative intent and the text's plain meaning, the court determined that the word "work" encompasses books such as Armstrong's.[152] Likewise, after considering legislative history and public policy, the court concluded the legislative history and public policy considerations of the statute provided that Anti-SLAPP motions were intended to apply to authors and publishers of books.[153] As such, the court found that none of the exemptions limited the defendants' use of the motion.[154]

C. Plaintiff's Burden

Finally, the court determined whether the plaintiffs met their burden to survive the motion.[155] The court noted that the probability presented need not be high, but rather, when claims cannot meet the requisite burden, those cases tend to "lack even

149. *See Stutzman*, 2013 U.S. Dist. LEXIS 129204, at *25-29 (explaining plaintiffs contention that commercial speech is not protected under exemptions). For a discussion on these statutory exemptions, see *supra* notes 89-95 and accompanying text.

150. *See id.* at *25 ("Plaintiffs contend that both sections 425.17(b) and (c) exempt Plaintiff's first Amended Complaint from an anti-SLAPP motion. However, Defendants respond that even if these statutory exemptions apply, Defendants meet the statutory exception to the exemptions, set out in section 425.17(d).").

151. *See id.* at *28-29 ("Few cases have dealt with the application of subsection (d) . . . . [w]here there is no binding authority, a court must undertake to ascertain the meaning of the statute by use of statutory interpretation." (citations omitted)).

152. *See id.* at *31-32 (noting that California Appellate courts consider work as something to involve creative effort).

153. *See id.* at *37-39 (explaining how meaning of statute protects use of Anti-SLAPP motion in case).

154. *See id.* at *39 (describing decision regarding validation of motion).

155. *See id.* at *40 (analyzing plaintiffs' burden as second step under Anti-SLAPP statutory scheme). For a discussion of the burden-shifting elements of this statute, see *supra* notes 97-105 and accompanying text.

minimal merit."[156] In response to plaintiffs' Unfair Competition, Consumer Legal Remedies, and False Advertising claims, defendants raised the First Amendment as a defense.[157] This required the court to apply the Commercial Speech Doctrine, and the related tests to determine whether the speech is commercial or mixed content.[158] This inquiry was necessary because, as the court noted, "the strength of First Amendment protection afforded 'depends on whether the activity sought to be regulated constitutes commercial or noncommercial speech.'"[159] Thus, the court subjected the commercial speech at issue to the Ninth Circuit's version of the *Bolger* test, and any mixed speech to the *Dex Media* test for inextricable intertwinement.[160]

The nature of the speech required that the court separate the speech at issue into three categories in order to analyze the speech to ensure each speech received the appropriate level of protection.[161] The court organized its analysis by the three types of statements at issue:

> [1] statements contained within the [b]ooks themselves[;] . . . . [2] statements relating to the [b]ooks, in-

156. *See Stutzman*, 2013 U.S. Dist. LEXIS 129204, at *25-29 (quoting Hilton v. Hallmark Cards, 599 F.3d 894, 908 (9th Cir. 2010)). Because the first step is proving that the challenged act is in furtherance of protected expression, this "second step" the court refers to is the burden that is shifted to the plaintiff. *See id.* This statement made by the California Supreme Court highlights the problem with these types of suits—the meritless nature of the suits is generally not discovered until trial. *See Bill Analysis Hearing*, *supra* note 15 (statement of Senator Kuehl regarding need to reform anti-SLAPP statute).

157. *See Stutzman*, 2013 U.S. Dist. LEXIS 129204, at *42 ("California's consumer protection laws, like the unfair competition law, govern only commercial speech." (quoting Rezec v. Sony Pictures Entm't, Inc., 116 Cal. App. 4th 135 (2004))).

158. *See id.* at *43 (explaining three-prong test applied in Ninth Circuit). For a discussion on the Supreme Court cases that instruct the commercial speech doctrine analysis, see *supra* notes 47-133 of this Casenote.

159. *See id.* at *43 (citing Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 65 (1983) (describing First Amendment implications related to free speech). While the First Amendment does not authorize the government to restrict speech based on content or subject matter, commercial speech operates in a slightly different realm. *See id.* at *42 (citing *Bolger*, 463 U.S. at 65). Likewise, civil litigation is frequently treated as an interference with speech, but where consumer speech is false or misleading, that speech will be granted no protection under first amendment grounds. *See id.* at *42-43 (citations omitted) (citing New York Times v. Sullivan, 376 U.S. 254 (1964); Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180, 1184 (9th Cir. 2011)).

160. *See Stutzman*, 2013 U.S. Dist. LEXIS 129204, at *42 (explaining source of Ninth Circuit analysis). For a discussion of the *Bolger* test and the Ninth Circuit's application, see *supra* notes 113-133 and accompanying text.

161. *See Stutzman*, 2013 U.S. Dist. LEXIS 129204, at *45 ("In this case, the speech at issue can be divided into three types or categories.").

> cluding promotion statements . . . and statements contained on the flyleaves and covers of the [b]ooks[;] . . . . [3]statements made by Armstrong and Stapleton relating to Armstrong's use of performance enhancing drugs, but which do not specifically reference the [b]ooks or promote the [b]ooks.[162]

As for the statements in the books, the court quickly declared these statements as fully protected speech because the statements were neither commercial nor mixed content.[163] Rather, the books contained statements about Armstrong's childhood, personal relationships, cancer, and cycling career.[164] The court even reprimanded the plaintiffs for suggesting the speech was commercial, and warned they came close to "ignor[ing] 'modern jurisprudence[.]'"[165] Ultimately, despite the fact that the books contained obviously false and misleading claims, the strong presumption in favor of free speech protected the content of the books.[166]

The second type of speech at issue—statements related to Armstrong's use of performance enhancing drugs—was also easily found not to be commercial speech.[167] The court noted that, because there was no commercial transaction proposed, further inquiry was unnecessary.[168] Nonetheless, the court subjected the

162. *See id.* at *45. (outlining categories of statements for further analysis).

163. *See Stutzman*, 2013 U.S. Dist. LEXIS 129204, at *46 ("The content of the Armstrong Books is not an advertisement for a product; rather, the statements are Armstrong's account, albeit partially untruthful, of his life and cycling career.").

164. *See id.* (describing contents of books).

165. *See id.* at *46-47 ("While Plaintiffs in this case do not go so far as to ignore 'modern jurisprudence' and dispute that the content of the Books is entitled to full First Amendment protection, they come quite close.").

166. *See id.* at *47-48 (explaining why books were not commercial speech). In precedent, California courts have noted that "no one involved in modern jurisprudence can reasonably dispute [that] the *content* of [the] books entitled the the full protection of the First Amendment." *See id.* (alterations in original) (citations omitted) (internal quotation marks omitted) (quoting Keimer v. Buena Vista Books, Inc., 75 Ca. App. 4th 1220, 1231 (1999)). The court nearly admonished plaintiff's counsel for "ignor[ing] 'modern jurisprudence" by claiming that, "that's not how books are sold nowadays." *See id.* at *47. This was an interesting attempt that, given Armstrong's fame, the content of the books is allegedly what drove some of the plaintiffs to purchase the books. *See infra* note 196. Nonetheless, as the Court noted, the First Amendment is so strongly in favor of free speech, courts give "near absolute protection . . . to false but nondefamatory statements of facts outside the commercial realm." *Stutzman*, 2013 U.S. Dist. LEXIS 129204, at *48 (alteration in original) (internal quotation marks omitted) (quoting United States v. Alvarez, 638 F.3d 666, 670 (9th Cir. 2011) (Smith, J., concurring in denial of rehearing opinion)).

167. *Stutzman*, 2013 U.S. Dist. LEXIS 129204, at *49-50 (discussing statements about defendant Armstrong's use of performance enhancement drugs).

168. *See id.* at *49 (describing why statements failed test).

statements to the *Bolger* test for mixed-content "for the sake of thorough analysis."[169] While the plaintiffs urged the court to treat Armstrong as a "brand" and asserted that Armstrong and the other defendants "financially benefited from convincing the public that Armstrong did not use performance enhancing drugs[,]" the court declined to do so, because economic motivations alone are insufficient to establish commercial speech.[170]

Next, the court addressed at greater length whether the promotional statements relating to the books were commercial speech, but found they were protected in their own right.[171] The court found that the speech at issue did more than propose financial transaction because it described the content of the books as biographical, as well as Lance Armstrong himself, and this "informational" and promotional nature of the speech qualified as mixed content, which required analysis under *Bolger*.[172] First, the Court found that, because the defendants adamantly denied this was commercial speech, this was "by no means admittedly an advertisement[,]" which failed the first prong.[173] However, defendants did meet the second and third prongs as the statements clearly referred to a specific product—the books—and, because the statements were clearly made to sell the books, an economic motivation existed.[174]

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169. *See id.* (discussing application of *Bolger* test).

170. *See id.* at *49-50 (explaining why UCL, FAL, and CLRA claims failed). The Court did not want to extend the meaning of the "product" or "brand", as in *Bolger* and other courts, the products were more tangible items such as contraceptives or shea butter. *See id.* at *49 (citing Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66 (1983); Hunt v. City of L.A., 638 F.3d 703, 714-15 (9th Cir. 2011)). Likewise, the assertion that the defendants financially benefited from Armstrong's statements only satisfied one of the three *Bolger* factors. *See id.* at *50 (explaining why statements failed *Bolger* test).

171. *See id.* at *55 ("[T]he promotional materials relating to the Books are inextricably intertwined with the Books' contents, which is non-commercial speech. Thus, these promotional materials are also entitled to full First Amendment protection as noncommercial speech."). The promotional statements included representations that the books were "nonfiction biography" and that "false and misleading statements" were made through the media and in interviews," and statements on the flyleaves and book jackets. *Id.* at *51.

172. *See Stutzman*, 2013 U.S. Dist. LEXIS 129204, at *52 (explaining why speech was did more than propose a commercial transaction).

173. *See id.* at *52 (internal quotation marks omitted) (citing Am. Acad. of Pain Mgmt. v. Joseph, 353 F.3d 1099, 1106 (9th Cir. 2004)). In *Bolger*, the defendants "conceded" that the pamphlets at issue were advertising, but that this "clearly does not compel the conclusion that they are commercial speech." *See Bolger*, 463 U.S. at 66 (citing New York Times v. Sullivan, 376 U.S. 254, 265-266 (1964)).

174. *See Stutzman*, 2013 U.S. Dist. LEXIS 129204, at *52 (describing application of factors of *Bolger* test).

Due to the nature of the product, the third factor was not afforded much weight due to the concern of chilling free speech.[175] As the Supreme Court has instructed, merely because "books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment."[176] The court did not give this factor much weight because an economic motivation is not enough to characterize such publications as commercial.[177]

Even so, the court still had to determine under the third prong whether the speech was protected to the fullest extent under the First Amendment.[178] Under the Ninth Circuit "inextricable intertwinement" test developed in *Dex Media*, speech may be eligible for "full First Amendment protection because the commercial aspects of the speech are 'inextricably intertwined' with otherwise fully protected speech, such that [it] sheds its commercial character[.]"[179]

Here, policy concerns led the court to the conclusion that the promotional statements and protected content were inextricably intertwined with each other.[180] In other words, given that the content of the books are afforded full protection, commercial material promoting that fully protected speech receives the same full protection by association.[181] As the court reasoned, the "economic real-

175. *See id.* at *53 ("[W]hile the third *Bolger* factor is satisfied, the Court, in order to balance the concerns of the First Amendment, does not afford this factor much weight.").

176. *See* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952). The district court in *Stutzman* also relied on the Court's proposition in *Joseph Burstyn*. *See Stutzman*, 2013 U.S. Dist. LEXIS 129204, at *52 (quoting *Joseph Burstyn*, 343 U.S. at 501).

177. *See Stutzman*, 2013 U.S. Dist. LEXIS 129204, at *53 (quoting Dex Media W., Inc. v. City of Seattle, 696 F.3d 952, 960 (9th Cir. 2012)). This minimal weight afforded means that, although the factors are technically met and the speech is considered commercial, defining it as "definitely commercial" is unnecessary as they are afforded full First Amendment protection. *See id.* at *52 (explaining minimal weight afforded third *Bolger* prong given nature of products at issue).

178. *See id.* at *53 ("The third prong of the *Bolger* Framework requires the Court to examine whether this speech may 'still receive[ ] full First Amendment protection'" because of inextricable intertwinement. (alteration in original) (citing *Dex Media*, 696 F.3d at 958)). *See also Dex Media*, 696 F.3d at 958 (explaining inextricable intertwinement test).

179. *See Stutzman*, 2013 U.S. Dist. LEXIS 129204, at *53 (first alteration added) (citing *Dex Media*, 696 F.3d at 958) (discussing inextricable intertwinement).

180. *See id.* at *54. The court referenced *Dex Media*, where commercial components of charitable speech and commercial speech in yellow pages respectively were intertwined with the noncommercial content. *See Dex Media*, 696 F.3d at 963 (discussing intertwinement of commercial and noncommercial speech).

181. *See Stutzman*, 2013 U.S. Dist. LEXIS 129204, at *54 ("In *Dex Media*, the Ninth Circuit stated that '[t]he full First Amendment protection of newspapers, magazines, television shows, radio programs, and the like demonstrates that the inclusion of commercial material does not support treating those publications and

ity" is that publishers must be able to promote the books they publish in order to sell them, making it impossible to separate promotional materials from the books themselves.[182] As a result, defendants prevailed on their anti-motion claims for the UCL, FAL, and CLRA claims for these three types of speech.[183]

Next, the court analyzed the fraud claims filed against defendant-publishers and defendants Stapleton and Weisel and, in the process, determined that both fraud claims should also be stricken.[184] The publishers claimed they made no misrepresentations, as the book is technically nonfiction.[185] Under their reasoning, labeling a book as nonfiction is not a guarantee that "every statement is in fact demonstrably true[,]" but rather that the story is based on true events.[186] This argument made sense to the court; Lance Armstrong won the Tour de France, but no longer had the titles.[187] Since the plaintiffs could not even show that a misrepresentation was made, the court also struck this fraud claim.[188]

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broadcasts as commercial speech entitled to less First Amendment protection.'" (first alteration in original) (quoting *Dex Media*, 696 F.3d at 963)).

182. *See id.* at *54-55 (explaining why statements about books and statements in books are equally protected). The court relied on *Dex Media*, where the Ninth Circuit was concerned with "the economic reality that advertising is required to keep newspapers, magazines, and telephone directories afloat, [and] the same is true of books and publishers." *See id.* at *55 (citing *Dex Media*, 696 F.3d at 963). The court also noted that plaintiffs conceded this proposition at oral argument. *See id.* at *55.

183. *See id.* at *55 ("Defendants' Anti-SLAPP motions to strike Plaintiff's UCL, FAL, and CLRA claims are therefore granted.").

184. *See id.* at *56-60 (citing Tom Trading, Inc. v. Better Blue, Inc., 26 F. Appx. 733, 736 (9th Cir. 2002)) (finding fraud motions both stricken). In California, to prove fraud, a plaintiff must plead with particularity misrepresentation, knowledge of falsity, intent to defraud or induce reliance, justifiable reliance, and the resulting damage. *See Tom Trading, Inc.*, 26 F. App'x at 736 (citing Lovejoy v. AT&T Corp., 92 Cal. App. 4th 85, 93 (2001)) (stating elementary requirements of fraud).

185. *See Stutzman*, 2013 U.S. Dist. LEXIS 129204, at *56 ("Defendants contend that these statements are in fact true—Defendant Armstrong did win the Tour de France, even though these victories were later taken away from him, and the book is a biography and nonfiction, even though it is apparent that the book contains false statements.").

186. *See id.* at *57 ("Other courts have held that 'the term nonfiction only means that the literature is based on true stories or events, not that every statement is in fact demonstrably true."). *See also* Greenspan v. Random House, Inc., 859 F. Supp. 2d 206, 220 (D. Mass. 2012) *aff'd*, 2012 U.S. App. LEXIS 22285 (1st Cir. 2012) (declining to hold requirement for publishers to fact check).

187. *See Stutzman*, 2013 U.S. Dist. LEXIS 129204, at *57 (reasoning that statements were not false, as Armstrong was Tour de France winner at one time).

188. *See id.* at *56-57 (quoting Greenspan v. Random House, Inc., 859 F. Supp. 2d 206, 220 (D. Mass. 2012) *aff'd*, 2012 U.S. App. LEXIS 22285 (1st Cir. 2012)). Recall that the *Stutzman* court noted the following from the concurring opinion in *Alvarez*: "[s]peaking about oneself is precisely when people are most

Turning to defendants Stapleton and Weisel, the court found that the plaintiffs failed to plead with particularity how either defendant engaged in fraudulent conduct and failed to present proof that plaintiffs actually relied on statements made by Stapleton and Weisel.[189] Plaintiffs attempted to claim that defendants Stapleton and Weisel "built the brand" of Lance Armstrong through interviews, and as such aided and abetted in publishing the books all while aware of the truth that Armstrong systematically doped.[190] However, the requisite reliance was lacking, since plaintiffs never stated they relied on statements made specifically by these defendants.[191] Without the requisite particularity or proof of actual reliance, the court struck these claims as well.[192]

Finally, the court struck the claims for negligent misrepresentation, because the policy behind encouraging free speech outweighed plaintiffs' policy claims that public interest suggests protecting consumers from false statements.[193] The court relied on precedent from various jurisdictions stating that a publisher has no duty to "investigate the accuracy of the contents of the books it publishes[,]" because such a requirement would unreasonably raise the costs of publishing and produce a "chilling effect on the free flow of ideas [that the] First Amendment seeks to avoid."[194] Although

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likely to exaggerate, obfuscate, embellish, omit key facts, or tell tall tales." *See id.* at *57 (alteration in original) (quoting United States v. Alvarez, 638 F.3d 666, 674 (9th Cir. 2011) (Koziniski, C.J., concurring in denial of rehearing petition), *aff'd*, 132 S. Ct. 2537 (2012)).

189. *See id.* at *59-60. (explaining why fraud claims failed against Stapleton and Weisel).

190. *See id.* (explaining aforementioned allegations).

191. *See id.* at *58 (describing what statements plaintiffs did rely on).

192. *See id.* at *57-60 ("Because Plaintiffs fail to state a legally cognizable claim against Defendants Stapleton and Weisel, their motions to strike Plaintiffs' fraud claims are granted.").

193. *See id.* at *63 (explaining finding for defendants publishers for misrepresentation). To prove negligent misrepresentation in California, a claimant must show the following: "(1) a misrepresentation of a past or existing material fact; (2) without reasonable grounds for believing it to be true; (3) with intent to induce another's reliance on the fact misrepresented; (4) justifiable reliance thereon by the party to whom the misrepresentation was directed; and (5) damages." *See id.* at *61 (internal quotation marks omitted) (citing Peterson v. Allstate Indem. Co., 281 F.R.D. 413, 417 (C.D. Cal. 2012)) (describing elements of negligent misrepresentation under California law).

194. *See id.* at *61-63 (internal quotation marks omitted) (citing Barden v. Harpercollins Publishers, Inc., 863 F. Supp. 41, 45 (D. Mass. 1994); Winter v. G.P. Putnam's Sons, 983 F.2d 1033, 1037 (9th Cir. 1991)) Further, the court illuminated its point with the following quote: "'[T]he gentle tug of the First Amendment and the values embodied therein . . . remind us of the social cost' were the Court to create such a [fact-checking] duty for publishers, and to allow publishers to be held liable for allegedly fast statements contained within a book." *See id.* at

the court briefly noted the plaintiffs' policy concerns for protecting unwitting consumers, it was instead persuaded that First Amendment jurisprudence instructs that the public interest pendulum swing the other way—in favor of protecting free speech.[195] Again, because the plaintiffs failed to meet their burden and failed to make conclusive statements attributed to defendants Weisel and Stapleton, the court also granted the defendants' motion on these claims.[196]

Although the court agreed the plaintiffs were unable to show a probability of success on any of their claims, it did grant plaintiffs leave to amend their complaint.[197] The plaintiffs, however, chose not to amend.[198] By granting leave, the court also left open the opportunity for defendants to collect attorney fees.[199]

V. Critical Analysis

The Eastern District of California's decision in *Stutzman v. Armstrong*, which granted Lance Armstrong, his publishers, manager, and financier their Anti-SLAPP motion to strike in response to the claims brought by consumers who purchased his books with the belief they were biographical, highlights important policy arguments.[200] To the court's credit, the opinion follows a consistent line of reasoning while sifting through the complicated interplay of

*63 (second alteration in original) (citing Winter v. G.P. Putnam's Sons, 983 F.2d 1033, 1037 (9th Cir. 1991))).

195. *See id.* at *63 (noting that, "although Plaintiffs assert that the public interest . . . weighs in favor of protecting consumers from books that contain false statements, the case law makes clear that the public interest swings in the opposite direction, towards closely guarding the right . . . the First Amendment seeks to protect.")

196. *See id.* at *63-64 (granting motion with respect to misrepresentation claims).

197. *See id.* at *64-66 (granting leave to amend complaint). There is an existing principle in the Ninth Circuit that "granting a defendant's anti-SLAPP motion to strike a plaintiff's initial complaint without granting the plaintiff leave to amend would directly collide with Federal Rule of Civil Procedure 15(a)'s policy favoring liberal amendment." *See id.* at *64-65 (citing Verizon Del., Inc. v. Covad Commc'ns Co., 377 F.3d 1081, 1091 (9th Cir. 2004)).

198. Plaintiffs were granted twenty-one days to file the complaint. *See id.* at *67 (listing orders). *See also* Fed. R. Civ. P. 41(a)(1) (providing defendants with plaintiffs' notice of dismissal with prejudice). For a discussion of the varying court opinions on this issue, see *supra* notes 106-109 and accompanying text.

199. *See Stutzman*, 2013 U.S. Dist. LEXIS 129204, at *67. *See also* Thornbrough v. W. Placer Unified Sch. Dist., No. 2:09-CV-02613-GEB, 2010 U.S. Dist. LEXIS 90173 (E.D. Cal. 2010) ("However, where a plaintiff is granted leave to amend the complaint, a defendant whose anti-SLAPP motion is granted is not a "prevailing party" for the purposes of the anti-SLAPP statutory framework.").

200. *See Stutzman*, 2013 U.S. Dist. LEXIS 129204, at *66-67 (stating holding). The competing interests here, free speech and consumer protection are both

laws, exemptions, and strong policy arguments favoring both sides.[201] Likewise, the analysis fulfilled one of strong purposes of the SLAPP statute—it properly disposed of a largely meritless suit.[202] The opinion, however, may not have adequately recognized the countervailing policy arguments favoring consumers.[203]

First, with respect to the interplay of free speech, Judge England consistently considered the great weight of the danger of chilling free speech.[204] Throughout the opinion, the free speech issues were recognized and addressed, which created a consistent pattern for prevailing issues.[205] At all points of analysis, the court highlighted the chilling effect on free speech to show the importance of this policy.[206]

However, despite that internal consistency and faithful respect of free speech concerns, the court did sidestep the strong policy arguments working in favor of the plaintiffs.[207] Rather than recog-

founded in strong policy arguments, and for a discussion of these policies, see *supra* notes 47-133 and accompanying text.

201. *See Stutzman*, 2013 U.S. Dist. LEXIS 129204, at *48-57 (providing examples of free speech concerns). The court consistently noted back to the threat of chilling free speech by requiring publishers to fact check or verify the truthfulness of memoirs, the protection of false speech by private persons, and the protected statements made in books. *See id.* The court maintained this consistency all while applying the Anti-SLAPP statutory framework. *See, e.g.*, *id.* at *40-45 (discussing commercial speech doctrines as element of plaintiff's burden under anti-SLAPP law).

202. *See* CAL. CODE CIV. PROC. §425.16(a) (Deering 2011) (presenting legislative findings leading to enactment of statute). *See also Bill Analysis Hearing*, *supra* note 15 (statement of Senator Kuehl regarding anti-SLAPP statute that statute is designed to protect those dragged into meritless litigation). *See generally*, Braun, *supra* note 18, at 970 (describing purpose of SLAPP laws).

203. *See* Stutzman v. Armstrong, No. 2:13-CV-00116-MCE-KJN, 2013 U.S. Dist. LEXIS 129204, *63 (E.D. Cal., Sept. 9, 2013) ("[A]lthough plaintiffs assert the public interest in this case weighs in favor of protecting consumers from books that contain false statements, the case law makes clear that the public interest . . . favors free speech"). *But see* Keimer v. Buena Vista Books, Inc., 75 Cal. App. 4th 1220 (1999) (holding that advertisements on book jackets were commercial speech and less protected); Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180, 1184 (9th Cir. 2011) (holding that misleading commercial speech acquires less protection than truthful commercial speech).

204. *See Stutzman*, 2013 U.S. Dist. LEXIS 129204, at *42-44 (describing basic guiding principles regarding First Amendment jurisprudence).

205. *See id.* at *14 ("First, the Court must determine whether Defendants have met their burden by making a threshold showing that the acts of which Plaintiffs complain were taken in furtherance of Defendants' right of free speech in connection with a public issue.").

206. *See id.* at *42-43 (citing Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 65-67 (1983)) (noting that generally First Amendment provides a presumption in favor of free speech and that civil liability exists for free speech issues).

207. *See id.* at *63 (finding that protection of First Amendment rights outweighs policy arguments raised by Plaintiffs). The court merely recognized the policy concerns asserted by the Plaintiffs, but quickly dismissed in favor of First

nizing the serious consumer protection policy concerns at play, the court dismissed these concerns relatively quickly in favor of policy protecting the First Amendment.[208] In doing so, the court ignored California precedent, *Keimer v. Buena Vista Books*, which held that advertising statements on the cover of the books are unprotected commercial speech.[209] The court acknowledged that opinion only when discussing the protected content in the books.[210] In contrast, when discussing the promotional statements about the books, where that opinion is most relevant, the court only applied the more recent Ninth Circuit opinion in *Dex Media* and the test for inextricable intertwinement.[211] Although it properly recognized more recent precedent, it is curious that the court failed to mention that precedent where it applied most directly.[212] This strong interest in protecting consumers in spite of First Amendment policy must not be completely irrelevant, if in 2006 publishers and author James Frey settled a very similar case for an amount upwards of two million dollars.[213]

Amendment policy. *See id. But see* Lacoff v. Buena Vista Publ'g, Inc., 705 N.Y.S.2d 183, 190 (Sup. Ct. 2000) (holding that statements advertising a book as how-to investment guide were protected noncommercial speech).

208. *See Stutzman*, 2013 U.S. Dist. LEXIS 129204, at *63 (weighing protecting consumers and protecting free speech).

209. *See* Keimer v. Buena Vista Books, Inc., 75 Cal. App. 4th 1220, 1231 (Ct. App. 1999) (holding that misleading statements in promotional materials on jacket of book were unprotected commercial speech). *But see Lacoff*, 705 N.Y.S.2d at 183 (holding that statements advertising book as how-to investment guide were protected noncommercial speech).

210. *See Stutzman*, 2013 U.S. Dist. LEXIS 129204, at *42 (citing Dex Media W., Inc. v. City of Seattle, 696 F.3d 952, 957 (9th Cir. 2012)) (describing inextricable intertwinement test and explaining source of analysis for commercial speech in Ninth Circuit).

211. *See id.* at *50-51 ("Given that the speech does more than propose a commercial transaction, the Court must consider whether the speech contains mixed content—that is, both commercial and non-commercial elements." (quoting *Dex Media*, 696 F.3d at 957)).

212. *See id.* at *46-57 (analyzing categories of speech). The *Stutzman* court quoted *Keimer* when discussing the content of the books and noted that in *Keimer*'s holding, the statements made in promotional materials were unprotected commercial speech. *See id.* at *46 (citing *Keimer*, 75 Cal. App. 4th at 1231). However, upon turning to the discussion of the promotional materials on the books, where *Keimer*'s holding is most relevant, the court instead discussed *Keimer*'s companion case—a New York state court case that addressed the same factual findings as *Keimer*, but held the opposite way. *See id.* at *62-63 (citing Lacoff, 705 N.Y.S.2d at 183 (holding that statements advertising book as how-to investment guide were protected noncommercial speech)). *See generally* Katze, *supra* note 110, at 17 (explaining commercial speech doctrine with respect to scandal regarding sale of James Frey's book *A Million Little Pieces* as memoir when it was exposed as fabricated).

213. *See, e.g.*, Fisher, *supra* note 11 (explaining lawsuit against Frey over book).

Despite the precedent and policy in favor of protecting consumers, these plaintiffs faced a comparatively steeper obstacle with the Anti-SLAPP motion.[214] Given that Lance Armstrong's telling of his life concerns a matter of general concern, and the burden-shifting the SLAPP motion provides, the SLAPP analysis did properly expose the meritless nature of the claims.[215]

VI. IMPACT

The decision in *Stutzman* exposes two notable points regarding, first, the diminished power of consumer laws when free speech is a concern and, second, where SLAPP litigation is headed.[216] While this lawsuit may have turned out to be meritless, its analysis further closes the door to the courts for disgruntled readers and leaves open the window for wide use of SLAPP motions.[217]

First, while there is already settled precedent regarding the content of books, courts are in disagreement about how to treat promotional statements about books that contain statements made within the books.[218] Rather than following California's precedent in *Keimer*, the Eastern District applied a newer test developed by the Ninth Circuit in *Dex Media*.[219] This decision disregarded the holding in *Keimer* that advertisements on book covers were unprotected

214. *Compare Stutzman*, 2013 U.S. Dist. LEXIS 129204, at *46-57 (granting Defendants' anti-SLAPP motion), *and Keimer*, 75 Cal. App. 4th at 1231 (implying that Anti-SLAPP motion was not available as it was not used in case), *with Lacoff*, 705 N.Y.S.2d at 183 (implying that Anti-SLAPP motion not applicable to case). *But see* Pfau v. Mortenson, 858 F. Supp. 2d 1150, 1162 (D. Mont. 2012), *aff'd*, 542 F. App'x 557 (9th Cir. 2013) (finding that plaintiffs could not prove publishers should be held liable). Defendant-publishers in *Pfau* prevailed even without using the anti-SLAPP law, as it is not available in Montana. *See State Anti-SLAPP Laws*, PUBLIC PARTICIPATION PROJECT, http://www.anti-slapp.org/your-states-free-speech-protection/ (last visited Sept. 7, 2014) (listing states that have anti-SLAPP laws).

215. *See Stutzman*, 2013 U.S. Dist. LEXIS 129204, at *18 (finding that Armstrong is "without question" person of public interest). *See also Bill Analysis Hearing*, *supra* note 15 (statement of Senator Kuehl regarding Anti-SLAPP statute as tool against meritless suits). For a discussion what qualifies as "public interest" see *supra* notes 137-140.

216. *See infra* notes 216-241 and accompanying text (explaining future of SLAPP laws).

217. *See Stutzman*, 2013 U.S. Dist. LEXIS 129204, at *54-55 (holding that book advertisements were inextricably intertwined with protected speech and therefore protected; permitting Anti-SLAPP motion by use of publishing companies and Lance Armstrong).

218. *See, e.g.*, Katze, *supra* note 110, at 221 (explaining commercial speech doctrine with respect to scandal regarding sale of James Frey's book *A Million Little Pieces* as memoir when it was exposed as fabricated).

219. *See Stutzman*, 2013 U.S. Dist. LEXIS 129204, at *51 (citing Dex Media W., Inc. v. City of Seattle, 696 F.3d 952, 957 (9th Cir. 2012)) (applying inextricable intertwinement test).

commercial speech, in favor of the policy that suggests that promotional materials about books can simply not be separated from the books themselves.[220] As a result, even though Armstrong and his publishers did substantially profit from his lies, the advertisements of those protected lies were likewise safeguarded.[221] Although this opinion does not really address *Keimer*, it will be much harder to reconcile the two opinions in the future.[222] Likewise, while *Stutzman* serves the purpose of protecting publishers from the vast burden of having to verify every book advertised as a memoir, after this decision, consumers will find it difficult to buy into a heroic tale.[223]

Second, the opinion in *Stutzman* highlighted the way in which SLAPP laws have evolved and where they are headed in the fu-

220. *See id.* (explaining that the court must analyze "whether the speech contains mixed content," i.e. both commercial and non-commercial content (citing Dex Media W., 696 F.3d at 957)). The court noted the following:

> To this end, although Plaintiffs assert that the public interest in this case weighs in favor of protecting consumers from books that contain false statements, the case law makes clear that the public interest swings in the opposite direction, towards closely guarding the right to free speech and the free flow of ideas that the First Amendment seeks to protect.

Id. at *63 (discussing public policy arguments). *But see* Katze, *supra* note 110, at 223 (explaining protections and limits on protections afforded commercial speech (citing Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980)). Recall that, in *Central Hudson*, the Supreme Court provided a four-part test regarding misleading commercial speech and that the following language describes the Court's analysis under this test:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within the provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquires yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than necessary to serve that interest.

See Central Hudson, 447 U.S. at 566 (discussing four-part analysis). In California, consumer protection laws were enacted specifically with a strong interest to provide misled consumers an outlet. *See* THOMAS A. PAPAGEORGE & ROBERT C. FELLMETH, 1-2 CAL. WHITE COLLAR CRIME AND BUS. LITIGATION, § 3.2 (2013) ("Section 17500 [California's Unfair Competition Law] has been consistently upheld as a valid constitutional exercise of the state's police power regulatory authority"). However, California has reformed consumer protection laws to ensure they are not misused for frivolous suits. *See generally* Leviant, *supra* note 60.

221. *See Stutzman*, 2013 U.S. Dist. LEXIS 129204, at *55 (granting anti-SLAPP motion for defendants).

222. *Compare id.* at *54-55 (holding that promotional materials of books are protected speech), *with* Keimer v. Buena Vista Books, Inc., 75 Cal. App. 4th 1220, 1231 (Ct. App. 1999) (holding that promotion materials of books were unprotected commercial speech).

223. *See Stutzman,* 2013 U.S. Dist. LEXIS 129204, at *56-57 (citing Greenspan v. Random House, Inc., 859 F. Supp. 2d 206, 220 (D. Mass. 2012), *aff'd* No. 12-1594, 2012 U.S. App. LEXIS 22285 (1st Cir. Oct. 16, 2012)) (holding that publishers are not required to fact check memoirs). *See also* Grinberg, *supra* note 4 (noting that fans called Armstrong "face of hope").

ture.[224] This case confirms that SLAPP laws have transformed from their origins.[225] SLAPP motions have the primary purpose of detecting meritless suits that, at least originally, more economically powerful parties brought to silence the underdogs.[226] In California, the legislature specifically noted concerns that corporations were abusing the Anti-SLAPP motion.[227] Here, Lance Armstrong, his management team, and his publishers are hardly underdogs; they are rather wealthy individuals and large corporations, who relied on the motion to defeat claims that Armstrong profited from lies he told.[228] This exposes an important truth: Anti-SLAPP motions are available now more than ever, despite reforms.[229]

On the other hand, the Anti-SLAPP motion did here what it was designed to do—it exposed the *Stutzman* suit as meritless claim.[230] Certainly, consumers and admirers were dismayed to learn that their inspiration, Lance Armstrong, was a fraud.[231] However, if Americans were entitled to sue for every time an idolized celebrity fell from grace, the judicial system would be even more backlogged than it already is.[232] While Lance Armstrong deserved

224. *See generally* Braun, *supra* note 18, at 970 (noting use of SLAPP laws by persons faced with suit brought by larger corporation).

225. *Accord FAQs About SLAPPs,* PUBLIC PARTICIPATION PROJECT, http://www.anti-slapp.org/slappdash-faqs-about-slapps/ (last visited Sept. 7, 2014) (listing states that have anti-SLAPP laws).

226. *See generally* Braun, *supra* note 18, at 970 (noting purpose of SLAPP laws).

227. *See Bill Analysis Hearing*, *supra* note 15 (noting that Consumers Attorneys of California sponsored legislative reforms to stop corporate abuse of the statute and return it to its original purpose of protecting citizen's rights of petition).

228. *See Stutzman*, 2013 U.S. Dist. LEXIS 129204, at *66 (holding that SLAPP motion dismissed claims for fraud against Armstrong and publishers).

229. *See* PUBLIC PARTICIPATION PROJECT, *supra* note 225 (explaining who can use SLAPP laws).

230. *See Bill Analysis Hearing*, *supra* note 15 (statement of Senator Kuehl regarding anti-SLAPP statute as tool against meritless suits).

231. *See* Marcur, *supra* note 3 (describing Armstrong interview and alleging that interview did little to salvage reputation). In reference to Armstrong's interview with Oprah, New York Times writer Marcur, who also personally knew Armstrong, notes the betrayal that people felt after his interview, writing that "Armstrong failed to offer his fans what they were seeking: genuine contrition." *See id.*

232. *See The Risk in Making Sports Stars "Heroes"* (CBS News website broadcast Jan. 19, 2013), *available at* http://www.cbsnews.com/videos/the-risk-in-making-sports-stars-heroes/ (broadcasting discussion between Jim Axelrod and New York Times sports columnist William Rhoden about potential problems that arise when people idolize sports figures). During the discussion, Mr. Rhoden notes the following about sports figures in the United States:

> [Americans] are always looking for people and things that . . . express the . . . great possibilities. . . . And sports is a great metaphor for that. . . . [because in sports [t]here are heroic moments. . . . But . . . [we] take that leap from [heroic moments in sports] and make that an existence. We

to be punished for his actions, challenging his First Amendment right was not necessarily the best means to do so.[233]

VII. Conclusion

Readers and fans instituted this case when they felt betrayed by their hero's actions.[234] They were not the first; other authors have been subjected to similar suits when their mesmerizing memoirs were exposed as fabrications.[235] Lance Armstrong was truly an inspiration and a "face of hope[;]" he beat the cancer odds only to pedal his way into cycling history.[236] With the American tendency toward elevating athletes to hero status, it is not surprising people bought his story.[237] Nonetheless, the Supreme Court has protected one's right to lie as one of the rights protected under the large free speech umbrella.[238] Now, the District Court of Eastern California in *Stutzman* has taken this one-step further, and joined the pack of jurisdictions that protect the promotional statements that sell protected lies.[239]

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make that the person and then we become disappointed to find out. Guess what, this guy is just like me.

Id. (discussing difficulty of differentiating heroic acts and heroes). As Rhoden discusses the list of disgraced professional athletes, he notes this danger in associating the heroic act with the human who is imperfect. *See id.*

233. *See s**upra* note 1 and accompanying text (discussing Armstrong admitting wrongdoing during interview with Oprah). But recall that, in reference to Armstrong's interview with Oprah, New York Times writer Juliet Marcur, who personally knew Armstrong, notes the betrayal that people felt after the interview: ". . . Armstrong failed to offer his fans what they were seeking: genuine contrition." *See* Marcur, *supra* note 3.

234. *See* Stutzman v. Armstrong, No. 2:13-CV-00116-MCE-KJN, U.S. Dist. LEXIS 129204, at *10 (E.D. Cal., Sept. 9, 2013) (noting that plaintiff Lauria claimed to be "bitterly angry" after learning about Armstrong's drug use (citations omitted) (internal quotation marks omitted)). *See* Grinberg, *supra* note 4 (describing backlash of people who supported Armstrong's foundation LIVESTRONG).

235. *See supra* notes 127-130 and accompanying text (discussing similar application of SLAPP laws in high profile fraud cases against authors).

236. *See* Grinberg, *supra* note 4 (describing backlash of people who supported Armstrong's foundation LIVESTRONG). Armstrong's cancer foundation, Livestrong, was hugely successful thanks to the yellow Livestrong bracelet campaign. *See* Grinberg, *supra* note 4. Although criticized for using the foundation as a shield against his doping allegations, supporters "bought bracelets for more strength, for unity, and suddenly Lance wasn't just an athlete any longer . . . . Lance [was] Livestrong, he [was] the face of hope." *See* Grinberg, *supra* note 4.

237. *See The Risk in Making Sports Stars "Heroes"* (CBS News website broadcast Jan. 19, 2013), *available at* http://www.cbsnews.com/videos/the-risk-in-making-sports-stars-heroes/ (discussing issue with idolizing public sports figures).

238. *See* United States v. Alvarez, 132 S. Ct. 2537, 2553 (2012) (noting that there is genuine usefulness to free speech jurisprudence by protecting one's right to lie).

239. *See Stutzman*, 2013 U.S. Dist. LEXIS 129204, at *47-48 ("[T]he Court concludes, despite Plaintiffs' allegations that the Armstrong Books contained false and

Given the purpose of the Anti-SLAPP statutes and the strong policy concerns in favor of protecting free speech, the court was not wrong in dismissing the suit.[240] Nonetheless, this case does unfortunately expose an important lesson: before you buy into a story that seems too good to be true, remember that you cannot always believe what you read.[241]

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misleading statements, that the content of the Books is afforded full First Amendment protection."); Katze, *supra* note 110, at 221 (explaining commercial speech doctrine with respect to scandal regarding sale of James Frey's book *A Million Little Pieces* as memoir when it was exposed as fabricated).

240. *See Stutzman,* 2013 U.S. Dist. LEXIS 129204, at *23-25 (holding that plaintiffs could not show probability of success to survive Anti-SLAPP motion).

241. *See* Katze, *supra* note 110, at 221 (observing in reference to James Frey memoir scandal, one attorney remarked, "I've just come to assume that anything published under the memoir label in the twenty-first century is the modern-day equivalent of a Philip Roth novel that isn't well-written enough to be successfully marketed as fiction" (quoting Ted Frank, *A Million Little Plaintiffs*, OVERLAWYERED (Jan. 12, 2006), http://overlawyered.com/2006/01/a-million-little-plaintiffs/)).

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