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JOHN MCCAIN

7 UNITED STATES DISTRICT COURT
8 CENTRAL DISTRICT OF CALIFORNIA
9 WESTERN DIVISION

10 JACKSON BROWNE, an individual

11 Plaintiff,

12 vs.

13 JOHN MCCAIN, an individual; THE
14 REPUBLICAN NATIONAL
15 COMMITTEE, a non-profit political
organization; THE OHIO REPUBLICAN
16 PARTY; a non-profit political
organization,

17 Defendants.

CASE NO. CV08-05334 RGK (Ex)

**REPLY IN SUPPORT OF
DEFENDANT JOHN MCCAIN'S
SPECIAL MOTION TO STRIKE
UNDER C.C.P. § 425.16**

Hearing:

Date: February 2, 2009

Time: 9:00 a.m.

Place: Courtroom 850

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 In his Consolidated Opposition (“Opp.”), Browne concedes from the outset that
4 his right of publicity claim stems from the use of his voice “to convey ... a message ...
5 [d]uring the recent Presidential election” that related to “the energy policy of Senator
6 Barack Obama.” Opp. at 1. Thus, it is undisputed that the challenged claim arises from
7 protected activity under the anti-SLAPP Statute (the “Statute”). Browne’s tactic of
8 ignoring **all** of the on-point cases, and his sole reliance on the inapposite case *Dyer v.*
9 *Childress*, 147 Cal. App. 4th 1273 (2007), do not defeat the showing made in the
10 Motion that the first prong for an anti-SLAPP motion is met here. Thus, the burden
11 shifts to Browne to prove there is a probability he will prevail on the merits of his
12 claim. The Motion and the Opposition demonstrate that this burden cannot be met.

13 As he must, Browne concedes that the political speech that is the subject of his
14 claim “is afforded broad protection under the First Amendment” (Opp. at 16); that
15 publication of matters in the public interest are exempt from right of publicity liability
16 under the First Amendment (Opp. at 10); and that a right of publicity claim based on a
17 “transformative” use is also barred by the First Amendment. Opp. at 16-17. As set
18 forth in the Motion and below, these concessions are fatal to Browne’s claim and
19 Browne’s fleeting arguments to the contrary do not stave off this conclusion.

20 Finally, Browne concedes that he named John McCain (the individual) as a
21 defendant without any evidence that McCain had anything to do with the Political
22 Video. In light of the undisputed evidence that McCain had no such involvement (or
23 even any knowledge at all of the Political Video prior to the lawsuit), Browne falsely
24 asserts, based on an agency theory, that McCain should be held personally responsible
25 for any act done by any person who might somehow “promote McCain’s candidacy.”
26 Opp. at 19. There is no authority for such a sweeping proposition. Accordingly, the
27 Motion should be granted and Browne’s right of publicity claim should be stricken.

1 **II. BROWNE CONCEDES THAT HIS CLAIM ARISES OUT OF**
2 **POLITICAL SPEECH THAT IS A MATTER OF PUBLIC INTEREST**

3 Browne's Opposition is rife with concessions that the speech that forms the
4 basis of Browne's right of publicity claim falls under the first prong of the Statute, *i.e.*,
5 that it is political speech about a matter of public interest and concern. Indeed, it is the
6 precise political nature of the speech that so irks Browne; he sues because the words
7 from the Song were used "[d]uring the recent Presidential election" to "attack[] the
8 energy policy" of Obama and thus "convey a message [Browne] would not have
9 otherwise endorsed." Opp. at 1-2. Browne concedes that his claim stems from use of
10 his identity to convey a "political message" and that "a message about McCain's
11 candidacy or Obama's energy policy relates to an issue of public concern." Opp. at 5.
12 Moreover, Browne concedes that "a commentary on Obama's energy plan ... generally
13 concerned a matter of public interest." Opp. at 5 n.4.

14 Thus, as set forth in the Motion, Browne's right of publicity claim arises from
15 political speech which, as established by numerous cases cited in the Motion, is
16 protected activity under the Statute. *See Macias v. Hartwell*, 55 Cal. App. 4th 669, 672
17 (1997) (Statute applies to "statements made during a political campaign"); *Beilenson v.*
18 *Sup. Ct.*, 44 Cal. App. 4th 944, 950 (1996) (statements made in a political campaign
19 mailer); *Robertson v. Rodriguez*, 36 Cal. App. 4th 347, 352 (1995) (statements made in
20 a campaign mailer in connection with a recall election); *Matson v. Dvorak*, 40 Cal.
21 App. 4th 539, 548 (1995) (statements made in a political flyer); *Rosenauro v. Scherer*,
22 88 Cal. App. 4th 260, 274-75 (2001) (it is "well settled that section 425.16 applies to
23 actions arising from statements made in political campaigns by politicians and their
24 supporters"). Browne's response to all of these cases was simple: he ignored them.

25 Rather than address these directly on-point and controlling cases, Browne relies
26 solely in his Opposition on *Dyer v. Childress*. That case is inapposite. *Dyer* involved
27 an action brought by a private figure against the producers of a fictional motion picture
28

1 about Generation-X slackers. The speech that generated the claim was simply the use
2 of plaintiff's name as the name for one of the characters in the movie. The court agreed
3 that the movie addressed topics of public interest, but the use of plaintiff's name as a
4 character in the movie did not relate in any way to those topics. That holding has no
5 relevance here where it is **conceded** that the specific speech that forms the basis for the
6 claim directly relates to a topic of profound public interest: the qualifications of the
7 man who is now the President of the United States and whether his policies are
8 "running on empty." See Complaint ¶ 2 (Browne's voice used to "mock[] the
9 suggestion" by Obama "that the country can conserve gasoline by keeping their
10 automobile tires inflated to the proper pressure"); Opp. at 11 (speech "related to a
11 presidential campaign and therefore to a matter of public interest"); Opp. at 14 ("direct
12 commentary on Obama's energy policy" is "certainly a matter of public interest").¹
13
14

15 ¹ Browne's passing citations (Opp. at 4) to *Gallimore v. State Farm Fire & Cas. Ins.*
16 *Co.*, 102 Cal. App. 4th 1388, 1398 (2002) and *Wilcox v. Sup. Ct.*, 27 Cal. App. 4th
17 809, 819 (1994) are unavailing and support McCain. *Gallimore* involved an action
18 against an insurance company for mishandling claims. Defendant asserted that the
19 action stemmed from defendant's communications with the Department of Insurance,
20 but the court held that it stemmed from defendant's claim handling policies. The court
21 held that the first prong is met where the claim "arose from some act of the defendant
22 that was taken *in furtherance of* the defendant's constitutional rights of petition or free
23 speech" and "the critical point is whether the plaintiff's cause of action itself was
24 based on an act in furtherance of the defendant's right of petition or free speech."
25 *Gallimore*, 102 Cal. App. 4th at 1397-98. Here, Browne's claim does not stem from
26 someone busting his guitar; it stems from use of his words *in furtherance of* a political
27 message and thus Browne's claim is *based on* defendants' use of words in that
28 political message, which is quintessential first prong activity. *Wilcox* is inapposite
because it involved petitioning activity, but it should be noted that the court held that
an action based on a conspiracy to boycott shorthand reporters fell within the first
prong of the Statute. *Wilcox*, 27 Cal. App. 4th at 822. If a claim based on speech about
the person chosen to transcribe a deposition is a matter of public concern, a claim
based on speech about the person chosen to lead the free world is as well.

1 Because Browne’s right of publicity claim is based on the use of his voice to
2 “convey a message that Plaintiff disagrees with” (Opp. at 18) and the use was made in
3 furtherance of defendants’ “protected message” (Opp. at 16) about the qualifications of
4 the candidates for President, the claim is subject to the first prong of the Statute.
5 Accordingly, the burden shifts to Browne to demonstrate a probability he will prevail
6 on the claim. As set forth below, Browne’s Opposition only confirms that he cannot.

7 **III. BROWNE FAILED TO MEET HIS BURDEN TO DEMONSTRATE A**
8 **PROBABILILTY THAT HE WILL PREVAIL ON HIS CLAIM**

9 Browne concedes that: (1) it is “indisputable that political speech is afforded
10 broad protection under the First Amendment and that such protections are meant to
11 foster open debate without fear of reprisal” (Opp. at 16); (2) “where the publication or
12 dissemination of matters is in the public interest, a defense exists under the First
13 Amendment to a right of publicity claim” (Opp. at 10); and (3) a “transformative” use
14 that “adds significant creative elements” to create a new message is protected by the
15 First Amendment. Opp. at 16-17. These concessions mandate dismissal of Browne’s
16 claim, notwithstanding Browne’s fleeting arguments to the contrary.

17 **A. Browne Confuses The Elements Of A Right Of Publicity Claim With**
18 **The Protections Against Such Claims Under The First Amendment**

19 In an effort to cloud the Court’s analysis, Browne confuses the elements of his
20 claim with the defenses the First Amendment provides. Browne concedes that the use
21 of Browne’s voice in the Political Video was not a “commercial” use. Opp. at 7
22 (Political Video “did not propose a commercial transaction and did not endorse a
23 product”). That concession, of course, was mandatory under even more cases that
24 Browne ignored in his Opposition. *See Am. Family Life Ins. Co. v. Hagan*, 266 F.
25 Supp. 2d 682, 697 (N.D. Ohio 2002) (political campaign speech, including the
26 “solicitation of contributions ... is properly classified not as a commercial transaction
27 at all, but completely noncommercial, political speech”); *Mastercard Int’l Inc. v.*

1 *Nader 2000 Primary Comm., Inc.*, 70 U.S.P.Q.2d 1046 (S.D.N.Y. 2004) (even if
2 candidate's spot increased contributions, the ad would still not be "commercial").

3 In response, Browne asserts that defendants are contending that a "commercial"
4 use is a required element for a right of publicity claim and then proceeds to attack this
5 straw man. Opp. at 6-7. Defendants, however, make no such argument.² Rather, under
6 basic First Amendment jurisprudence, the showing in the Motion (and the concession
7 in the Opposition) that the speech was not "commercial" dictates that the speech be
8 afforded full protection under the First Amendment, rather than a lesser degree of
9 protection afforded to "commercial" speech. *See Hoffman v. Capital Cities/ABC, Inc.*,
10 255 F.3d 1180, 1184 (9th Cir. 2001). When such fully-protected speech (rather than
11 commercial speech that promotes the sale of goods or services) is at the heart of a right
12 of publicity claim, the claim typically fails, as set forth in the Motion and below, under
13 the "public interest" and "transformative use" tests.

14 **B. *Midler and Waits* Are Irrelevant And Unavailing**

15 In yet another attempt to confuse the issues, Browne contends that defendants
16 are asserting that the use of a person's voice cannot give rise to a common law right of
17 publicity claim and then cites *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988)
18 and *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992) to knock down that straw-
19 man. Opp. at 7-8. But Defendants are making no such contention here.

20 _____
21 ² There is authority for such an argument. *See Polydoros v. Twentieth Century Fox*
22 *Film Corp.*, 67 Cal. App. 4th 318, 322 (1997) (plaintiff alleging a common law claim
23 for right of publicity must "establish a direct connection between the use of [his] name
24 or likeness and a **commercial** purpose"). Tellingly, in the two cases cited by Browne
25 regarding the elements of a common law right of publicity claim (Opp. at 7), the courts
26 held that the claims were barred by the First Amendment. *See Montana v. San Jose*
27 *Mercury News, Inc.*, 34 Cal. App. 4th 790 (1995) (use of Joe Montana's likeness to
28 promote newspaper protected by the First Amendment); *Gionfriddo v. Major League*
Baseball, 94 Cal. App. 4th 400 (2001) (use of baseball players' names and likenesses
in work that related to history of baseball protected by the First Amendment).

1 In *certain circumstances*, of course, the use of a person’s voice can give rise to a
 2 viable common law right of publicity claim that is not barred by the First Amendment.
 3 *This lawsuit, however, does not present such a circumstance.* In contrast to *Midler* and
 4 *Waits*, Browne’s claim does not stem from speech that hawks Doritos or new cars.³
 5 Rather, this case stems from the use of particular words from a song because those
 6 words directly commented on the qualifications of a candidate for the nation’s highest
 7 office. Moreover, as to those particular words that are the subject of the claim, Browne
 8 concedes that it was he who made “famous” the phrase “running on empty” and that
 9 this phrase “has often been used by various pundits” to comment on energy policy.
 10 Opp. at 15. Having made the phrase famous and injected it into the common political
 11 vernacular, Browne cannot now impose liability on political speakers who use its most
 12 well-known iteration in the Song to comment on issues of conceded national import.
 13 Accordingly, the First Amendment bars Browne’s claim.

14 **C. Nothing In The Opposition Refutes The Fact That Browne’s Claim Is**
 15 **Barred By The “Public Interest” And “Transformative Use” Tests**

16 In light of the conceded fact that the Political Video is not commercial speech,
 17 but rather political speech afforded full First Amendment protection, such protection is
 18 applied through the “public interest” and “transformative use” tests. Indeed, Browne
 19 concedes as much. *See* Opp. at 10 (“a defense exists under the First Amendment to a
 20

21 ³ Thus, *Midler* and *Waits* are not “squarely on all fours” (Opp. at 9) with this case. In
 22 *Midler*, Ford used a “sound-alike” to mimic singer Bette Midler in a commercial for
 23 Ford automobiles. The Ninth Circuit limited its holding to the purely commercial
 24 advertising context at issue in that case. *Midler*, 849 F.2d at 463 (Midler was
 25 “deliberately imitated in order to sell a product”). Indeed, the Ninth Circuit specifically
 26 noted that often times “[t]he First Amendment protects” the use of a famous person’s
 27 identity and if “the purpose [of the use] is ‘informative or cultural’ the use is immune”
 28 from liability. *Id.* at 462. Likewise, in *Waits*, defendants used a sound-alike of Tom
 Waits in a “commercial for SalsaRio Doritos.” *Waits*, 978 F.2d at 1096. No First
 Amendment challenge was raised in the case because of the pure commercial use.

1 right of publicity claim” that is based on “the publication or dissemination of matters
2 [that are] in the public interest”); Opp. at 16-17 (claim based on a “transformative”
3 use, *i.e.*, a use that “adds significant creative elements” to create a new message, is
4 barred by the First Amendment). In response, Browne merely asserts that, because use
5 of his voice was purportedly not a “parody” or a commentary on Browne, it is not so
6 protected. That assertion is wrong on both the facts and the law.

7 First, it is simply incorrect to assert that the use is not a commentary on Browne.
8 As Browne concedes, his voice is “well-known in this country” (Opp. at 8) and the
9 Song is “one of Plaintiff’s most famous and enduring songs” (Opp. at 2-3) that has
10 made “famous” the phrase “running on empty” such that it is often used by pundits to
11 comment on energy policy (Opp. at 15). Thus, the use of his particular voice singing
12 the Song to convey the message that Obama’s energy policy was “running on empty”
13 comments on Browne’s celebrity and his voice singing those words can instantly
14 convey a powerful message. *See Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 25 Cal.
15 4th 387, 397, 406 (2001) (a celebrity’s idiom can serve “important uses in uninhibited
16 debate on public issues”).⁴

17 Second, the contention that the use must directly comment on or “parody” the
18 plaintiff to be protected by the “public interest” and “transformative use” test is simply
19 incorrect; indeed, it has been specifically rejected. Browne concedes (Opp. at 11 n.7)

21 ⁴ Browne’s contention (Opp. at 15) that the ORP did not “need to” use Browne’s voice
22 to convey that message is a red-herring; “necessity” is not a requirement under the
23 “public affairs” and “transformative use” tests. One does not “need to” reference
24 Mickey Dora to discuss surf culture or use the identities of rock legends to create
25 cartoon characters, yet those uses were protected by the First Amendment. *Dora v.*
26 *Frontline Video, Inc.*, 15 Cal. App. 4th 1273, 1278 (1993) (use protected by “public
27 interest” test); *Winter v. D.C. Comics*, 30 Cal. 4th 881, 885 (2003) (use protected by
28 the “transformative use” test); *see also Lennon v. Premise Media*, 556 F.Supp. 2d 310,
324 (S.D.N.Y. 2008) (“Determining whether a use is transformative, however, does
not require courts to decide whether it was strictly necessary that it be used”).

1 that the court in *Daly v. Viacom, Inc.*, 238 F. Supp. 2d 1118 (N.D. Cal. 2002) held that
2 a use of a plaintiff's identity in a work that related to matters of public interest (the
3 world of rock and roll) was barred by the First Amendment, regardless of the fact that
4 the use made no commentary on plaintiff.⁵ *See also Cox v. Hatch*, 761 P. 2d 556, 560
5 (Utah 1988) (claim based on use of plaintiff's likeness in campaign materials issued by
6 Senator Hatch was barred by the "public interest" test despite fact that materials made
7 no commentary whatsoever on plaintiff).

8 Moreover, the California Supreme Court's opinion in *Winter* directly refutes
9 Browne's contention. *Winter* involved fictional comic book characters who were "less-
10 than-subtle evocations of [famous musicians] Johnny and Edgar Winter." *Winter*, 30
11 Cal. 4th at 890. The court held that such a use was protected by the First Amendment
12 under California's "transformative use" test and specifically rejected the argument that
13 the use must be a parody or specific commentary on the plaintiff:

14 The distinction between parody and other forms of literary expression
15 is irrelevant to the *Comedy III* transformative test. It does not matter
16 what precise literary category the work falls into. What matters is
17 whether the work is transformative, not whether it is a parody or satire
18 or caricature or serious social commentary or any other specific form
of expression.

19 *Winter*, 30 Cal. 4th at 891; *see also Comedy III*, 25 Cal. 4th at 406 ("We emphasize
20 that the transformative elements or creative contributions that require First
21 Amendment protection are not confined to parody"); *Kirby v. Sega of Am., Inc.*, 144
22 Cal. App. 4th 47, 61 (2006) (the law does not require defendant's work "to 'say
23 something – whether factual or critical or comedic' about [plaintiff] the public figure
24 in order to receive First Amendment protection" and thus whether the use "conveys

25 _____
26 ⁵ Browne simply contends that the *Daly* court did not *also* analyze the case under the
27 "transformative use" test as well as the public interest test, but Browne cites no
28 authority for the proposition that a court cannot rely on either test. *Opp.* at 11 n.7.

1 any expressive meaning is irrelevant to a First Amendment defense”). Indeed, in
2 *Comedy III*, the California Supreme Court recognized that First Amendment protection
3 (as applied through the transformative use test) applies to uses that serve as a “subtle
4 social criticism” of “the celebrity *phenomenon*” itself, not necessarily of the celebrity
5 that is the subject of the use. *Comedy III*, 25 Cal. 4th at 406 (emphasis added).

6 Moreover, the Ninth Circuit, in the analogous copyright fair use context, held
7 that the use of entire copies of plaintiffs’ works was “transformative” despite the fact
8 that the uses made no commentary whatsoever on the plaintiffs’ works. *Perfect 10 v.*
9 *Amazon.com*, 508 F.3d 1146, 1165 (9th Cir. 2007) (use transformative because it used
10 entire work “in a new context to serve a different purpose”). Thus, a use need not
11 convey any parodic message or commentary about the plaintiff to be deemed
12 “transformative” and entitled to First Amendment protection. Rather, a use is
13 transformative when it does not “merely supersede” the plaintiff’s identity, but “adds
14 something new, with a further purpose or different character, altering [plaintiff’s
15 identity] with new expression, meaning, or message.” *Campbell v. Acuff Rose Music,*
16 *Inc.*, 510 U.S. 569, 579 (1994). Thus, a work that transforms the celebrity’s identity
17 and/or manipulates the context in which the celebrity’s identity normally appears will
18 be considered transformative, fully protected under the First Amendment and immune
19 from right of publicity liability. *See Comedy III*, 25 Cal. 4th at 408-409 (celebrity
20 images presented through the use of “distortion and the careful manipulation of
21 context” that make a “social comment” are entitled to First Amendment protection).
22 The ORP did not need to transform the actual words used from the Song for this
23 doctrine to apply, rather, a use can be “transformative” by change of context. *See Wall*
24 *Data Inc. v. L.A. County Sheriff’s Dep’t.*, 447 F.3d 769, 778 (9th Cir. 2006) (a use is
25 considered transformative where defendant “uses the plaintiff’s copyright work in a
26 different context such that plaintiff’s work is transformed into a new creation”).

1 Here, the use in the Political Video of Browne’s voice singing the words
2 “running on empty” to comment on Obama’s energy policy did not “merely
3 supersede” the regular use of Browne’s voice from the Song (to be entertained by
4 listening to a work about “life on the road”) but transformed his voice into something
5 new with a further purpose or different character (to comment on presidential
6 candidates). Accordingly, Browne’s claim must fail.

7 **D. Browne’s Concession That McCain Had No Involvement In The**
8 **Political Video Defeats Browne’s Right Of Publicity Claim**

9 Browne concedes that he must show that McCain made a use of Browne’s
10 identity. Opp. at 6. The undisputed evidence, however, demonstrates that McCain
11 (sued only in his personal capacity) made no use of Browne’s identity because McCain
12 played no part in the creation or dissemination of the Political Video and was not even
13 aware of its existence until after this lawsuit was filed. In the face of this glaring defect
14 in his claim, Browne merely contends that, despite his total lack of knowledge of even
15 the existence of the Political Video (let alone his lack of actual *involvement*), McCain
16 can be held responsible for the acts of anyone who might have been acting to “promote
17 McCain’s candidacy.” Opp. at 19. There is no authority for such a sweeping
18 proposition, one that would threaten to hold political candidates strictly liable for their
19 supporters’ actions, and one that would dramatically chill the entry of individuals into
20 the political arena. Accordingly, this reason alone bars Browne’s claim.

21 **IV. CONCLUSION**

22 For the reasons set forth above, the Court should grant the Motion.

23 Dated: January 21, 2009

LATHROP & GAGEL LLP

24
25 By: 

26 Lincoln D. Bandlow
27 Attorneys for Defendant JOHN MCCAIN
28