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

10
11 JACKSON BROWNE, an individual

12 Plaintiff,

13 vs.

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

17 Defendants.
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CASE NO. CV08-05334 RGK (Ex)

**DEFENDANT JOHN MCCAIN'S
MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF SPECIAL
MOTION TO STRIKE UNDER
C.C.P. § 425.16**

Hearing:
Date: December 8, 2008
Time: 9:00 a.m.
Place: Courtroom 850

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Political speech is the cornerstone of American democracy and political
4 campaigns are the focus and fountain of society's political discourse. Campaign
5 messages by political parties and other political speakers educate and inform the public
6 and stimulate debate about the most important topics in a democracy: those who seek
7 to govern and the policies they will pursue. For these reasons, the U.S. Supreme Court
8 has made clear that political speech, including campaign-related and generated speech,
9 receives the highest level of protection under the First Amendment. In the hierarchy of
10 protected speech, political speech stands at the pinnacle.

11 In this action, Jackson Browne ("Browne") takes aim at such political speech by
12 suing over a video (the "Political Video") produced and disseminated by the Ohio
13 Republican Party ("ORP") about the energy plans espoused by presidential candidates
14 Barack Obama ("Obama") and John McCain ("McCain").¹ This Political Video
15 commented on Obama's statement that substantial energy savings could be met
16 through proper tire inflation and used a snippet of Browne's song *Running On Empty*
17 (the "Song") – including only nine seconds of Browne's voice from the Song – to
18 criticize Obama as "running on empty" when it comes to energy policy. Use of that
19 phrase in the debate about energy policy is nothing new; it was a staple of political
20 discourse long before the Political Video.

21 Browne's effort to punish those who engage in such political speech is precisely
22 the kind of action California Code of Civil Procedure § 425.16 (the "Statute") was
23 designed to stop. Browne's California common law right of publicity claim is subject
24 to dismissal under the Statute because the speech that is the basis for that claim
25 concerns matters of the utmost public interest: the policies of the candidates running
26

27 ¹ McCain has been sued only in his personal, individual capacity.
28

1 for the President of the United States. Thus, Browne’s right of publicity claim is within
2 the purview of the first prong of the Statute, which shifts the burden to Browne to
3 prove there is a probability he will prevail on the merits of his claim. Because Browne
4 cannot meet that burden, his right of publicity claim must be stricken.

5 **II. STATEMENT OF FACTS**

6 Browne is a “world-renowned singer and songwriter” known for his “politically
7 and socially charged songs.” Complaint (“Compl.”) ¶ 14. In 1977, he released the
8 album *Running on Empty*, which contained the Song of the same name. Over the years,
9 Browne has also been a vocal participant in the political arena, supporting various
10 Democratic and liberal causes, including Obama’s presidential campaign. Compl. ¶ 15.
11 This lawsuit stems from Browne’s objection to use of portions of the Song in a
12 political message created to comment on Obama’s campaign and energy policy.

13 Throughout the 2008 election campaign, the ORP created and disseminated web
14 videos, primarily to generate news coverage in Ohio about the candidates and issues in
15 the campaign. *See* concurrently-filed Declaration of John McClelland (“McClelland
16 Decl.”) ¶ 5 filed in connection with the ORP’s Motion to Dismiss. The purpose of
17 these web videos was to generate media attention on important political issues; they
18 were not used as a fundraising tool or to solicit contributions. *Id.* at ¶ 5. Beginning on
19 or about July 29, 2008, in preparation for Obama’s scheduled visit to Ohio during the
20 week of August 4, 2008, the ORP created a web video to criticize and comment on
21 Obama’s energy strategy. This Political Video is referenced in paragraph 2 of the
22 Complaint and is attached to the McClelland Decl. ¶ 8, Ex. 1.

23 The Political Video is one minute and twenty seconds long. It starts with clips
24 from local Ohio television news broadcasts in which reporters discuss the “pain at the
25 pump,” *i.e.*, high gasoline prices. One reporter asks “How do you bring down the price
26 of gas here in northeast Ohio and across the U.S.A.?” and the Political Video then cuts
27 to a clip of Obama saying at a rally “making sure your tires are properly inflated.” The
28 sound of a needle being dragged across a record is then heard as the screen flashes the

1 word “What!?!” The Political Video then shows information about McCain’s energy
2 plans and clips of McCain speaking at a political rally in which he states that low-
3 income Americans are bearing the brunt of a failed energy policy. The Political Video
4 then shows a screen that poses the question: “What’s that Obama plan again?” At this
5 point, 50 seconds into the Political Video, music (but no lyrics) from the Song is first
6 heard in the background. The Political Video then shows Obama stating that “we can
7 save all the oil they’re talking about getting off drilling if everyone was just inflating
8 their tires.” Senator Hillary Clinton is then shown exclaiming (at a press conference
9 while she was also a candidate for the President of the United States), “Shame on you,
10 Barack Obama!” A picture of Obama then appears next to the caption “Barack Obama:
11 No Solutions” and the words “No Solutions” change to the words “Not Ready to
12 Lead.” This screen with the picture and words appears at 1:11 into the Political Video,
13 and at this point the sound of Browne singing the lyrics “running on empty” along with
14 a few other words that bracket that phrase in the Song can be heard. The Political
15 Video ends with a screen stating: “Paid for by the Ohio Republican Party.
16 www.ohiogop.org. Not authorized by any candidate or candidate committee.” Thus,
17 Browne’s voice (*i.e.*, Browne singing the Song) is heard for **nine** seconds at the end of
18 the Political Video. McClelland Decl., ¶ 8, Ex. 1.

19 Obama’s suggestion about proper tire inflation is used in the Political Video to
20 convey the message that Obama’s energy strategy was no strategy at all, *i.e.*, that it
21 was “empty” of substance. The ORP communications staffer who created the Political
22 Video believed that referencing the lyric “running on empty” helped convey this
23 message, which was particularly relevant during a time of rising gasoline prices and
24 heightened concern about dependency on foreign oil. McClelland Decl., ¶ 9.

25 Well before the creation of the Political Video, the phrase “running on empty”
26 had become part of the common political vernacular in discussing energy policy. *See*
27 Declaration of Lincoln D. Bandlow (“LDB”) ¶ 2, Ex. 5. Indeed, politicians from both
28 sides of the aisle regularly used the phrase to describe the oppositions’ energy policies:

- 1 • On June 11, 2008, Democratic Senator Klobuchar said at a press
2 conference that Republicans were “running on empty” with “the same old
3 ideas” about energy policy. LDB ¶ 3, Ex. 6.
- 4 • On June 16, 2008, HUMAN EVENTS published an article by Republican
5 Senator Inhofe titled “Dems Running On Empty.” LDB ¶ 4, Ex. 7.
- 6 • On June 17, 2008, the Senate Republican Policy Committee issued a
7 policy paper titled “Running On Empty: Why the Democrats’ Energy Bill
8 Won’t Lower Prices at the Pump.” LDB ¶ 5, Ex. 8.
- 9 • On June 30, 2008, President Bush publicly remarked that Democrats were
10 opposed to measures that would “lower prices at the pump” and thus
11 “[y]ou might say, when it comes to energy policy, the Democrats in
12 Congress are running on empty.” LDB ¶ 6, Ex. 9.
- 13 • On July 31, 2008, a Colorado Democrat commented in a press release that
14 McCain lacked “an energy plan for the future of our country” and “his
15 campaign is running on empty.” LDB ¶ 7, Ex. 10.²

16 Moreover, for years prior to the Political Video, journalists and commentators
17 had utilized the phrase “running on empty” to discuss energy policy and issues:

- 18 • A January 31, 2002 article by U.S. PIRG about subsidies to energy
19 industries was titled “Running On Empty: How Environmentally Harmful
20 Energy Subsidies Siphon Billions From Taxpayers.” LDB ¶ 8, Ex. 11.
- 21 • A March 12, 2005 article in the NEW YORK TIMES about skyrocketing
22 costs of energy was titled “Running On Empty.” LDB ¶ 9, Ex. 12.

23
24
25 ² This trite phrase has not escaped the notice of legal scholars. *See, e.g.*, Eric M.
26 Mencher, *Section 14(e) of the Williams Act: Can There Be Manipulation with Full*
27 *Disclosure or Was the Mobil Court Running on Empty?*, 12 Hofstra L. Rev. 159
28 (1983); F. Kaid Benfield, *Running on Empty: The Case for a Sustainable National*
Transportation System, 25 *Envtl. L.* 651 (1995).

- 1 • An April 2006 article by the Federal Reserve Bank of Dallas about rising
2 oil prices and oil depletion was titled “Running on Empty? How
3 Economic Freedom Affects Oil Supplies.” LDB ¶ 10, Ex. 13.
- 4 • A July 3, 2006 article from IN THESE TIMES about rising gasoline prices
5 was titled “Running On Empty: The United States’ real problem with oil
6 and energy policy goes beyond the rising prices.” LDB ¶ 11, Ex. 14.
- 7 • A June 27, 2007 article in MOTHER JONES about passage of a Senate
8 energy bill was titled “Running On Empty.” LDB ¶ 12, Ex. 15.
- 9 • A March 22, 2007 article in INVESTOR’S BUSINESS DAILY about energy
10 policy was titled “Running On Empty.” LDB ¶ 13, Ex. 16.
- 11 • A March 23, 2008 article from REAL CLEAR POLITICS about Democrats
12 blaming the rise in oil prices on the war in Iraq was titled “Running On
13 Empty.” LDB ¶ 14, Ex. 17.
- 14 • An April 24, 2008 article in THE NATION about oil reserves was titled
15 “Running On Empty.” LDB ¶ 15, Ex. 18.
- 16 • An April 27, 2008 article in THE ROCKY MOUNTAIN NEWS about gasoline
17 supply was titled “Denver Running On Empty.” LDB ¶ 16, Ex. 19.
- 18 • A June 23, 2008 article in the WEEKLY STANDARD was titled “Running on
19 Empty: Democratic energy policies ignore reality.” LDB ¶ 17, Ex. 20.

20 Thus, the cliché “running on empty” has long been used as a metaphor for a lack
21 of substance, ideas or solutions, particularly in the area of energy policy. The Political
22 Video was simply one of many such examples.

23 On August 4, 2008, an ORP communications staffer posted the Political Video
24 to the free YouTube website, using ORP’s account. McClelland Decl. at ¶ 12. The
25 ORP did not pay to have the Political Video run as a political advertisement on any
26 television station or website and the Political Video did not include any solicitations
27 for donations to the ORP or McCain. *Id.* at ¶¶ 22 and 23. On August 6, 2008, promptly
28

1 after Browne complained, the ORP removed the Political Video from YouTube and
2 the Political Video has not been used since that time. *Id.* at ¶ 24.

3 The Political Video was produced with no input or involvement whatsoever by
4 McCain (who, again, was sued in his personal, individual capacity). Indeed, McCain
5 was not even aware of the Political Video until he was informed of its existence in
6 connection with preparing a declaration for this Motion. Declaration of John McCain
7 (“McCain Decl.”) ¶ 3.

8 Notwithstanding the fact that the Political Video indicates that it was created
9 solely by the ORP and was removed from circulation only days after it was posted
10 (and shortly after Browne’s request that it be taken down from YouTube), on August
11 14 Browne filed this action, playing politics of his own by naming not only the ORP,
12 but the Republican National Committee and McCain as defendants. Browne then
13 leveraged the attention and notoriety generated by filing an action against a candidate
14 for President of the United States to enable Browne to hit the “campaign” trail as well
15 – the campaign to promote Browne and his new album “Time The Conqueror.” Since
16 filing this action, Browne has appeared on numerous television programs (including
17 *The Colbert Report* and *The Tonight Show with Jay Leno*) and has given numerous
18 interviews, discussing both this lawsuit and his new album. LDB ¶¶ 18 and 19, Exs. 21
19 and 22. Thus, Browne’s conduct evidences an important aspect of First Amendment
20 jurisprudence: the answer to speech one disagrees with is simply more speech, not
21 resort to legal action. *Mowles v. Commission of Governmental Ethics and Election*
22 *Practices*, --- A.2d ---, 2008 WL 4683722 (Me. 2008 (the “appropriate cure” for
23 allegedly misleading political speech is more speech) (citing *Linmark Assocs., Inc. v.*
24 *Twp. of Willingboro*, 431 U.S. 85, 97 (1977))). Unfortunately, engaging in such
25 additional speech was not enough for Browne, and so he pursues this action to punish
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1 political speakers. His right of publicity claim, however, cannot withstand a motion to
2 strike.³

3 **III. BROWNE’S COMMON LAW RIGHT OF PUBLICITY CLAIM MUST**
4 **BE STRICKEN UNDER THE STATUTE**

5 The Statute establishes a special procedure for striking claims, at the very outset
6 of litigation, that impinge upon rights of free speech:

7
8 A cause of action against a person arising from any act of that person in
9 furtherance of the person’s right of . . . free speech under the United
10 States or California constitution in connection with a public issue shall be
11 subject to a special motion to strike, unless the court determines that the
12 plaintiff has established that there is a probability that the plaintiff will
13 prevail on the claim.

14 C.C.P. § 425.16 (b)(1).⁴

15 The Statute “encourage[s] continued participation in matters of public
16 significance” by limiting “lawsuits brought primarily to chill the valid exercise of the
17 constitutional rights of freedom of speech.” *Equilon Enters v. Consumer Cause, Inc.*,
18 29 Cal. 4th 53, 59-60 & n.3 (2002); *Batzel v. Smith*, 333 F.3d 1018, 1025 (9th Cir.
19 2003) (Statute protects defendant from “having to litigate meritless cases aimed at
20 chilling First Amendment expression”). The Statute is to be construed broadly and a
21 court may strike “unsubstantiated causes of action arising from protected speech”
22 without regard to proof of whether plaintiff holds a subjective “intent to chill speech.”
23 *Equilon*, 29 Cal. 4th at 60.

24 ³ Moreover, Browne’s copyright infringement, vicarious copyright infringement and
25 Lanham Act claims also fail, as set forth in the concurrently-filed Motion to Dismiss.

26 ⁴ Although the Statute is part of the California Code of Civil Procedure, a defendant
27 may file an anti-SLAPP motion against pendent state law claims asserted in a federal
28 lawsuit, and the federal court must apply the Statute. *See, e.g., U.S. ex rel Newsham v.*
Lockheed Missiles & Space Co., Inc., 190 F.3d 963, 970-73 (9th Cir. 1999).

1 The Statute contains no “limiting language” that would restrict its protection to
2 certain claims. *Church of Scientology v. Wollersheim*, 42 Cal. App. 4th 628, 642
3 (1996). “[T]he Legislature did not limit application of the provision[,] . . . recognizing
4 that all kinds of claims could achieve the objective of a SLAPP suit – to interfere with
5 and burden the defendant’s exercise of his or her rights.” *Id.* at 652. “[T]he critical
6 point is whether the plaintiff’s cause of action itself was based on an act in furtherance
7 of the defendant’s right of petition or free speech.” *City of Cotati v. Cashman*, 29 Cal.
8 4th 69, 78 (2002). Accordingly, the Statute is not limited to defamation claims, but
9 applies to privacy and publicity claims arising from conduct in the exercise of free
10 speech rights. *See, e.g., Gates v. Discovery Communications, Inc.*, 34 Cal. 4th 679, 696
11 (2004) (applying Statute to right of privacy claim); *M.G. v. Time Warner, Inc.*, 89 Cal.
12 App. 4th 623, 630 (2001) (applying Statute to “misappropriation of identity” claim).

13 In ruling on an anti-SLAPP motion, the court must engage in a two-step process.
14 *Rusheen v. Cohen*, 37 Cal. 4th 1048, 1056 (2006). First, the court decides whether the
15 defendant has made a *prima facie* showing that the challenged claim is one arising
16 from an act in furtherance of the “right of petition or free speech under the United
17 States or California Constitution in connection with a public issue. *Id.*; *Slauson*
18 *Partnership v. Ochoa*, 112 Cal. App. 4th 1005, 1020 (2003); *Ingels v. Westwood One*
19 *Broad. Servs., Inc.*, 129 Cal. App. 4th 1050, 1064 (2005).

20 Once a defendant has made its threshold showing that the plaintiff’s claim arises
21 from conduct constituting free speech on a public issue, the burden shifts to the
22 plaintiff to demonstrate a reasonable probability of prevailing on the claim. *Rusheen*,
23 37 Cal. 4th at 1056; *Equilon*, 29 Cal. 4th at 67. To make such a showing, the plaintiff
24 “must ‘state[] and substantiate[] a legally sufficient claim.’” *Wilson v. Parker, Covert*
25 *& Chidester*, 28 Cal. 4th 811, 821 (2002) (citations omitted); *Four Navy Seals v.*
26 *Associated Press*, 413 F. Supp. 2d 1136, 1150 (S.D. Cal. 2005) (same). Thus, a motion
27 under the Statute establishes a procedure where the trial court evaluates the merits of
28

1 the lawsuit using a summary judgment-like procedure. *Varian Medical Sys., Inc. v.*
 2 *Delfino*, 35 Cal. 4th 180, 192 (2005); C.C.P. § 425.16(b)(2) (in ruling on a motion
 3 under the Statute, “the court shall consider the pleadings, and supporting and opposing
 4 affidavits stating the facts upon which the liability or defense is based”). The Court
 5 “should grant the motion if, as a matter of law, the defendant’s evidence supporting the
 6 motion defeats the plaintiff’s attempt to establish evidentiary support for the claim.”
 7 *Wilson*, 28 Cal. 4th at 821; *Four Navy Seals*, 413 F. Supp. 2d at 1150.

8 Here, Browne’s fourth claim for relief under California’s common law right of
 9 publicity⁵ is based on McCain’s speech in connection with issues of public interest.
 10 Therefore, the claim falls within the ambit of the Statute and the burden shifts to
 11 Browne to demonstrate a probability of success on his claim. If this burden cannot be
 12 satisfied, the claim must be stricken. *Equilon*, 29 Cal. 4th at 67; C.C.P. § 425.16(b)(1).
 13 Browne cannot satisfy that burden.

14 **A. The Claim Arises Out Of Political Speech That Is A Matter Of Public**
 15 **Interest And Concern.**

16 The Statute is routinely applied to political speech, in particular speech
 17 involving a political campaign. *Macias v. Hartwell*, 55 Cal. App. 4th 669, 672, 64 Cal.
 18 Rptr. 2d 222 (1997) (Statute “applies to suits involving statements made during a
 19 political campaign”); *Beilenson v. Sup. Ct.*, 44 Cal. App. 4th 944, 950 (1996) (holding
 20 that “[t]here is nothing in the language of section 425.16 that denies its use by
 21 politicians” and thus Statute applied to a campaign mailer); *Robertson v. Rodriguez*, 36
 22 Cal. App. 4th 347, 352 (1995) (statements made in a campaign mailer in connection
 23 with a recall election are subject to Statute); *Matson v. Dvorak*, 40 Cal. App. 4th 539,
 24 548 (1995) (statements made in a political flyer concerning a candidate are subject to

25 _____
 26 ⁵ Browne did not sue under California’s right of publicity statute, Civil Code § 3344,
 27 for the obvious reason that the statute expressly exempts from liability any claim based
 28 on the use of a voice “in any political campaign.” *Id.* § 3344(d).

1 Statute). Thus, it is “**well settled that section 425.16 applies to actions arising from**
2 **statements made in political campaigns by politicians and their supporters.**”

3 *Rosenauro v. Scherer*, 88 Cal. App. 4th 260, 274-75 (2001) (court granted anti-SLAPP
4 motion against defamation action arising out of a political flier, stating that “[t]he right
5 to speak on political matters is the quintessential subject of our constitutional
6 protections of the right of free speech”) (emphasis added).

7 In *Beilenson*, the court specifically noted political speech must be given “wide
8 latitude” in order to protect the right to free expression:

9
10 [P]olitical campaigns are one of the most exhilarating phenomena of
11 our democracy. They bring out the best and the worst in us. They allow
12 candidates and their supporters to express the most noble, and
13 lamentably, the most vile sentiments. They can be fractious and unruly,
14 but what they yield is invaluable: an opportunity to criticize and
15 comment upon government and the issues of the day.

16 *Id.* at 954-55. Thus, “it is a prized American privilege to speak one’s mind, although
17 not always with perfect good taste, on all public institutions.” *Id.* at 951 (*quoting*
18 *Bridges v. California*, 314 U.S. 252, 270-71 (1941)).

19 In this case, there is no question that Browne’s fourth claim for relief arises out
20 of speech in connection with a matter of public interest. The claim is based solely on
21 the contents of the Political Video created in connection with the 2008 Presidential
22 campaign to comment on the candidates for President of the United States. *See* Compl.
23 ¶ 2 (Political Video “mocks the suggestion of the presumptive Democratic candidate
24 for President, Senator Barack Obama, that the country can conserve gasoline by
25 keeping their automobile tires inflated to the proper pressure”); *id.* ¶ 40 (right of
26 publicity claim is based on “use of Browne’s voice” in the Political Video). Having
27 injected himself into the public arena through his (constitutionally protected) political
28 advocacy, Browne cannot now use the courts to silence those who reference this
advocacy to make competing political points. As a New York court recognized forty

1 years ago, when a “well-known entertainer” delves into the arena of presidential
2 politics, “it is clearly newsworthy and of public interest.” *Paulsen v. Personality*
3 *Posters, Inc.*, 299 N.Y.S.2d 501, 507 (N.Y.Sup. 1968).

4 No one can dispute that the candidates and their campaigns for the Presidency
5 are matters of the utmost public interest affecting the public at large. The Political
6 Video directly commented on the Presidential candidates and their respective positions
7 on a key national policy issue: energy and dependence on foreign oil. The Political
8 Video questioned the substance and seriousness of Obama’s energy plan while touting
9 the plans of McCain. At the time the Political Video was posted on YouTube, rapidly
10 rising gas prices and dependence on foreign oil were at the forefront of the campaign
11 and were topics of great public concern. LDB ¶ 20. Thus, the Political Video addressed
12 issues of tremendous public interest and concern.

13 **B. Browne Cannot Meet His Burden To Demonstrate A Probability He**
14 **Will Prevail On His Right Of Publicity Claim.**

15 Because the claim arises out of speech relating to a matter of public concern, the
16 first prong of the Statute is met and the burden shifts to Browne to demonstrate there is
17 a likelihood he will prevail on the claim. He cannot meet that burden because his claim
18 fails for a variety of reasons.

19 **1. Browne’s Right Of Publicity Claim Fails Because The Political**
20 **Video Is Non-Commercial Speech That Relates To A Matter Of**
21 **Public Interest**

22 Browne’s right of publicity claim must be dismissed because such a claim only
23 applies to commercial speech – which the Political Video clearly is not. Expressive,
24 noncommercial speech about matters of public concern is simply not subject to a right
25 of publicity claim. In California, a plaintiff such as Browne who alleges a common law
26 claim for right of publicity must “establish a direct connection between the use of [his]
27 name or likeness and a *commercial* purpose.” *Polydoros v. Twentieth Century Fox*
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1 *Film Corp.*, 67 Cal. App. 4th 318, 322 (1997) (original emphasis). In this context,
2 commercial speech is limited to that which “does no more than propose a commercial
3 transaction” such as advertisements, endorsements and commercials. *Hoffman v.*
4 *Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1184 (9th Cir. 2001) (citation omitted);
5 *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387, 396 (2001)
6 (Three Stooges drawings on t-shirts not commercial speech because they were not
7 “advertisements for or endorsement of a product”). Because a right of publicity claim
8 applies solely to such commercial speech, an “informative or cultural” use is
9 “immune” from misappropriation liability. *New Kids on the Block v. News America*
10 *Publ’g, Inc.*, 971 F.2d 302, 309-310 (9th Cir. 1992).

11 Here, the Political Video did not propose a commercial transaction, and it was
12 not an advertisement for or endorsement of a product. Nor did the Political Video
13 solicit funds on behalf of any candidate or political cause. Indeed, even if the Political
14 Video *had* solicited funds for a candidate or cause, the law would still consider it non-
15 commercial. In *American Family Life Insurance Co. v. Hagan*, 266 F. Supp. 2d 682
16 (N.D. Ohio 2002), the court noted that speech used during a political campaign,
17 including speech utilized for the “solicitation of contributions ... is much more than
18 merely a commercial transaction. ***Indeed, this exchange is properly classified not as a***
19 ***commercial transaction at all, but completely noncommercial, political speech.***” *Id.*
20 at 697 (emphasis added) (citing *Fed. Election Com’n v. Colorado Republican Fed.*
21 *Campaign Comm.*, 533 U.S. 431, 440 (2001) (“Spending for political ends and
22 contributing to political candidates both fall within the First Amendment’s protection
23 of speech and political association”)); *see also Mastercard Int’l Inc. v. Nader 2000*
24 *Primary Comm., Inc.*, 70 U.S.P.Q.2d 1046 (S.D.N.Y. 2004) (even if candidate’s ad
25 resulted in increased contributions, the ad would still not be “commercial”; “If so ...
26 all political campaign speech would also be ‘commercial speech’ since all political
27 campaigns collect contributions”).

1 Indeed, courts are extremely reluctant to impose liability for alleged violations
2 of the right of publicity in the non-commercial, political context. In *Friends of Phil*
3 *Gramm v. Americans for Phil Gramm In '84*, 587 F. Supp. 769 (E.D.Va. 1984), an
4 official campaign committee of a candidate for the United States Senate brought an
5 action against an independent political action committee to prevent it from using the
6 candidate's name in its solicitations against the candidate's wishes. The court rejected
7 the request for a preliminary injunction on the grounds that it would "unduly interfere
8 with defendants First Amendment right." *Id.* at 778. The court further found that "the
9 interest in protecting the commercial value of a person's name does not apply in this
10 type of case," because any economic interest a person may have in their identity
11 "cannot justify restrictions on[] this type of preeminently political speech." *Id.* at 776.

12 Not only is a non-commercial use not subject to liability, but a claim under
13 California's common law right of publicity is defeated "where the publication or
14 dissemination of matters is 'in the public interest.'" *Daly v. Viacom, Inc.*, 238 F. Supp.
15 2d 1118, 1122 (N.D. Cal. 2002). The public interest defense to a right of publicity
16 claim is a "complete" defense and provides "extra breathing space" even beyond the
17 First Amendment. *New Kids*, 971 F.2d at 309-10; *see also Maheu v. CBS, Inc.*, 201
18 Cal. App. 3d 662, 676-77 (1988) (affirming dismissal on demurrer of right of publicity
19 claims based on public interest test); *Paulsen*, 299 N.Y.S.2d at 506 (right of publicity
20 claim by celebrity running mock Presidential campaign barred by public interest
21 exception; court held that "[t]he scope of the subject matter which may be considered
22 of 'public interest' or newsworthy has been defined in most liberal and far reaching
23 terms"). Indeed, the California Legislature recognized these First Amendment-
24 mandated protections by incorporating them into exemptions to California's right of
25 publicity statute. *See* Cal. Civil Code § 3344(d) (exempting claims stemming from use
26 in any "news, public affairs, or sports broadcast or account, or any political
27 campaign"); *see also Garrison v. Louisiana*, 379 U.S. 64, 74-75, 85 S. Ct. 209 (1964)

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1 (“speech concerning public affairs is more than self expression; it is the essence of self
2 government”); *Cox v. Hatch*, 761 P. 2d 556, 560 (Utah 1988) (use by Senator Hatch of
3 a photograph of post office employees without permission in campaign materials was
4 permissible because “[c]ommunications to voters by an elected official or candidate
5 for public office which appropriately pertain to a political campaign are a matter of
6 public interest...[s]uch communications are essential to the public in choosing
7 governmental officials and...in informing the public”); *Davis v. Duryea*, 99 Misc. 2d
8 933, 939 417 N.Y.S. 2d 624 (1979) (“any political candidate must be capable of
9 discussing and attempting to document the validity of a position on a public election
10 without fear of being subjected to a warrantless suit,” to do otherwise would be
11 “destructive of the essence of the freedom of positional or ideological exchange which
12 is vital to the existence of a democratic electoral process”); *Paulsen*, 299 N.Y.S.2d at
13 505 (“troublesome confrontations with constitutionally protected areas of speech and
14 press have also caused our courts to engraft exceptions and restrictions” onto the right
15 of publicity to “avoid any conflict with the free dissemination of thoughts, ideas,
16 newsworthy events, and matters of public interest”). As addressed below, political
17 speech has the highest protection under the First Amendment in large part because it is
18 a matter of utmost public interest and importance, necessary for self-government.

19 Here, the Political Video and its commentary on the candidates for the
20 Presidency certainly qualifies as a matter of “public interest.” The public interest
21 inherent in the qualifications, policies and political beliefs of the candidates for the
22 presidency of the United States is obvious. Moreover, the energy policy of the next
23 President of the United States will affect every American and an open debate about the
24 merits of those potential policies is of the utmost importance. Browne’s voice (as he
25 sings his familiar and cliché line “running on empty”) played an important role in the
26 commentary on those policies. The public’s familiarity with that line was an important
27 tool to make a complicated message accessible to the public. *See Comedy III*, 67 Cal.

1 App. 4th at 406, 397 (when celebrities become “an important part of our public
2 vocabulary,” appropriating their idiom can have “important uses in uninhibited debate
3 on public issues”); *Paulsen*, 299 N.Y.S.2d at 507 (noting that entertainers “actively
4 seek[] to promote and stimulate such public attention to enhance [their] professional
5 standing”). Use of Browne’s voice in the Political Video to engage in important
6 political speech certainly qualifies as a matter of public interest. The protection for
7 such speech is “complete.” *New Kids*, 971 F.2d at 309-10. Browne’s interest in seeking
8 an economic windfall for the use of his voice is trumped by this non-commercial,
9 public interest political speech. *Davis*, 99 Misc. 2d at 936 (“privacy rights may not
10 vitiate or abridge the paramount rights of society to information and necessary free
11 expression in preparing for the exercise of the electoral franchise”); *Paulsen*, 299
12 N.Y.S.2d at 507-09 (use of a person’s identity in connection with a matter of public
13 interest “is constitutionally protected and must supersede any private pecuniary
14 considerations”). Accordingly, Browne’s fourth claim fails as a matter of law.

15 **2. The Political Video Is Subject To Full And Stringent Protection**
16 **Under The First Amendment.**

17 “Political expression, in general, and speech uttered during a campaign for
18 political office, in particular, enjoys the broadest protection of the First Amendment.”
19 *Geary v. Renne*, 880 F. 2d 1062, 1065 (9th Cir. 1989) (citing *Buckley v. Valeo*, 424
20 U.S. 1, 14 (1976)). Thus, because political speech is the “primary concern of the First
21 Amendment,” it is stringently protected. *See National Endowment for the Arts v.*
22 *Finley*, 524 U.S. 569, 597 (1998) (Scalia, J., concurring). Public discussion and debate
23 on the qualifications and position of political candidates are integral to the operation of
24 the system of government established by the United States Constitution. *Buckley*, 424
25 U.S. at 14 (invalidating provisions of the Federal Election Campaign Act limiting
26 certain campaign expenditures as violative of the candidates and individuals’ rights to
27 freedom of speech). Political expression serves the public interest by assuring the

1 “unfettered interchange of ideas for the bringing about of political and social changes
2 desired by the people.” *Roth v. United States*, 354 U.S. 476, 484 (1957).

3 The public interest in the protection of political speech extends to discussion of
4 candidates for public office and their campaigns. *Mills v. Alabama*, 384 U.S. 214, 218
5 (1966) (“there is practically universal agreement that a major purpose of that [First]
6 Amendment was to protect the free discussion of governmental affairs. . . . of course
7 includ(ing) discussions of candidates”); *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272
8 (1971) (“it can hardly be doubted that the constitutional guarantee has its fullest and
9 most urgent application precisely to the conduct of campaigns for political office”);
10 *Buckley*, 424 U.S. at 14-15 (“[i]n a republic where the people are sovereign, the ability
11 of the citizenry to make informed choices among candidates for office is essential, for
12 the identities of those who are elected will inevitably shape the course that we follow
13 as a nation”). This protection of political speech reflects the “profound national
14 commitment to the principle that debate on public issues should be uninhibited, robust,
15 and wide-open.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *see also*
16 *Sammartano v. First Judicial District Court for the County of Carson City*, 303 F. 3d
17 959 (9th Cir. 2002) (the public interest is better served by “protecting the core First
18 Amendment right of political expression”) (citation omitted); *Geary v. Renne*, 880 F.
19 2d 1062, 1065 (9th Cir. 1989) (“any interference with the freedom of a [political] party
20 is simultaneously an interference with the freedom of its adherents”) (quoting *Sweezy*
21 *v. New Hampshire*, 354 U.S. 234, 250 (1957)).

22 The Political Video is easily recognizable as fully protected political expression.
23 It is an obvious political commentary on the relative strengths of two Presidential
24 candidates’ energy plans and whether the candidates are qualified to serve in the
25 highest office in the country and perhaps the most powerful position in the world. This
26 is the paradigm for the kind of speech the First Amendment was intended to protect.

1 Thus, the Political Video is entitled to the full protection of the First Amendment of
2 the United States Constitution, which bars Browne’s claim.

3 **3. The Transformative Nature Of The Use In The Political Video**
4 **Precludes Liability.**

5 The California Supreme Court has long recognized that the right of publicity
6 “has not been held to outweigh the value of free expression.” *Guglielmi v. Spelling-*
7 *Goldberg Productions*, 25 Cal. 3d 860, 872 (1979) (Bird, C.J., concurring)⁶ (affirming
8 dismissal of right of publicity claim at demurrer stage on free speech grounds); *see*
9 *also Daly*, 238 F. Supp. 2d at 1123 (dismissing common law right of publicity claim
10 against expressive work as being barred by the First Amendment). “Any other
11 conclusion,” warned Chief Justice Bird, “would allow reports and commentaries on the
12 thoughts and conduct of public and prominent persons to be subject to censorship
13 under the guise of preventing the dissipation of the publicity value of a person’s
14 identity.” *Guglielmi*, 25 Cal.3d at 872; *see also Comedy III*, 25 Cal. 4th at 403.

15 Thus, to safeguard free expression, the California Supreme Court devised the
16 “transformative use” test to determine if the First Amendment bars a right of publicity
17 claim. *Comedy III*, 25 Cal. 4th at 405; *Winter v. DC Comics*, 30 Cal.4th 881, 888
18 (2003). Borrowing from the fair use test in copyright law, the Court held that “when a
19 work contains significant transformative elements,” the use is protected under the First
20 Amendment. *Comedy III*, 25 Cal. 4th at 405. Indeed, such a transformative work is
21 “not only especially worthy of First Amendment protection, but it is also less likely to
22 interfere with the economic interest protected by the right of publicity.” *Id.* Under this
23 test, the expressive and transformative use of Browne’s voice in the Political Video
24 outweighs Browne’s publicity rights.

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27 ⁶ Although a concurring opinion, “Chief Justice Bird’s views in *Guglielmi* commanded
28 the support of the majority of the court.” *Comedy III*, 25 Cal. 4th at 396 n.7.

1 Because the works and expressions of public figures and entertainers such as
2 Browne “take on public meaning” and become part of our common vernacular, the use
3 of celebrity indicia and a celebrity’s signature expressions become important “in
4 uninhibited debate on public issues.” *Comedy III*, 25 Cal. 4th at 397. Speakers,
5 particularly political speakers, must have liberty to make reference to such celebrity-
6 infused expression and imagery to express common understanding – just as the
7 Political Video has done here: using a familiar expression in a familiar song to convey
8 an important message. That the message was political in nature weighs more heavily in
9 favor of protecting the speech.

10 Thus, a work that transforms the celebrity’s identity and/or manipulates the
11 context in which the celebrity’s identity normally appears will be considered
12 transformative, fully protected under the First Amendment and immune from right of
13 publicity liability. *See Comedy III*, 25 Cal. 4th at 408-409 (celebrity images presented
14 through the use of “distortion and the careful manipulation of context” that make an
15 “ironic social comment on the dehumanization of celebrity itself” are entitled to First
16 Amendment protection); *see also Kirby v. Sega of America, Inc.*, 144 Cal. App. 4th 47,
17 59 (2006) (right of publicity and Lanham Act claims by celebrity lead singer of group
18 “Deee-Lite” against maker of videogame that allegedly contained character based on
19 plaintiff barred by First Amendment because of changes in characteristics and setting
20 were transformative and “added creative elements to create new expression”).

21 The use in the Political Video of nine seconds of Browne’s voice singing the
22 words “running on empty” was inserting his expression it into an entirely new and
23 different context than the Song *per se*, and is undoubtedly transformative. The
24 combination of the unexpected use of a rock song combined with a manipulation of the
25 message of the Song is neither the same traditional use of the Song, nor an acceptable
26 substitute for the Song’s conventional full-length version. The Political Video
27 transforms the Song from an anthem for the rock-and-roll lifestyle into a scathing
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1 commentary on Obama's energy plan. Browne cannot use the courts to block all uses
2 of his voice when used to comment on an important political issue by invoking the
3 right of publicity. Accordingly, his claim must fail.

4 **4. McCain Had No Part In The Creation Or Distribution Of The**
5 **Political Video And Therefore Has No Liability.**

6 In addition to the dispositive First Amendment bar of Browne's claim, an
7 additional and much simpler reason exists for why Browne cannot prevail on his
8 claim: *McCain* did not make a use of Browne's voice because *McCain* had nothing to
9 do with the Political Video. As set forth above, McCain played no part in the creation
10 or dissemination of the Political Video and was not even aware of its existence until
11 days before this Motion was filed. Declaration of John McCain at ¶¶ 2 and 3. A basic
12 element of a common law right of publicity claim is that plaintiff show that *the*
13 *defendant* made a use of plaintiff's identity. *Eastwood v. Sup. Court*, 149 Cal. App. 3d
14 409, 417 (1983) (to sustain a common law cause of action for right of publicity,
15 plaintiff must show "defendant's use of the plaintiff's identity"); *Newcombe v. Adolf*
16 *Coors Co.*, 157 F.3d 686, 694 (9th Cir. 1998) (upholding dismissal of defendant where
17 there was no evidence that defendant made knowing use of plaintiff's identity).
18 McCain made no such use. Accordingly, the claim fails.

19 **IV. CONCLUSION**

20 Although the right of free speech guaranteed by the First Amendment serves a
21 multitude of important individual and societal purposes, its most safeguarded function
22 is to serve as a bulwark of self-governance:

23
24 Our form of democratic government is dependent upon the unfettered
25 exchange of information. ... The '[p]reservation of free expression is of
26 particular urgency in the political arena, since it is universally agreed that
27 a major purpose of the First Amendment is to ensure vigorous,
28 uninhibited discussion of governmental affairs.'

1 *Beilenson*, 44 Cal. App. 4th at 956 (citations omitted); *Cox*, 761 P.2d at 558 (“Freedom
2 of speech is not only the hallmark of a free people, but is, indeed, an essential attribute
3 of the sovereignty of citizenship”). Our society cannot effectively pursue and achieve
4 such self-governance without the unfettered right to comment on those who seek to
5 govern us. *Friends of Phil Gramm*, 587 F. Supp. at 775 (“Advocacy of particular
6 candidates for public office is essential to effective self government”).

7 It is inevitable (and desirable) in such a debate that celebrities and the phrases
8 they have infused into our lexicon become fodder for such commentary. Allowing
9 celebrities a civil action veto over this vital area of public discourse is not tolerated by
10 California’s anti-SLAPP statute or the First Amendment. *Beilenson, supra* (holding
11 that “SLAPP lawsuits stifle free speech” and the “threat of a SLAPP action brings a
12 disquieting stillness to the sound and fury of legitimate political debate” and thus such
13 a lawsuit “has no place in our courts”).

14 Accordingly, for the reasons set forth above and in the concurrently-filed
15 Motion To Dismiss, McCain respectfully requests that the Court grant the Special
16 Motion to Strike Under C.C.P. § 425.16 and strike Browne’s fourth claim for common
17 law misappropriation of right of publicity.⁷

18
19 Dated: November 17, 2008

SPIELMAN, SHAEFFER, ARONOFF BANDLOW LLP

20
21 By: 

22 Lincoln D. Bandlow
23 Attorneys for Defendant
24 JOHN MCCAIN

25 _____
26 ⁷ Moreover, under C.C.P. § 425.16(c), should McCain prevail on this motion, he will
27 be entitled to recover attorney’s fees and costs and will seek such amounts in a
28 separately filed motion.

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