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8
9 UNITED STATES DISTRICT COURT
10 CENTRAL DISTRICT OF CALIFORNIA
11 WESTERN DIVISION

12
13 JACKSON BROWNE., an individual

14 Plaintiff,

15 vs.

16 JOHN MCCAIN, an individual; THE
17 REPUBLICAN NATIONAL
18 COMMITTEE, a non-profit political
organization; THE OHIO REPUBLICAN
19 PARTY, a non-profit political
organization,

20 Defendants.

CASE # CV08-05334 RGK (Ex)

**MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF DEFENDANT
JOHN MCCAIN'S MOTION TO
DISMISS UNDER FRCP 12(b)(6)**

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 AND SUMMARY OF ARGUMENT**

3 This action relates to the use of a snippet from the song *Running on Empty* (the
4 “Song”), which was released over thirty years ago by singer/celebrity/political activist
5 Jackson Browne (“Browne”), in a political video (the “Political Video”) created last
6 August during the heat of the presidential race between Barack Obama (“Obama”) and
7 John McCain (“McCain”). The right to comment on political candidates and their
8 policies is at the core of American democracy and First Amendment protection. The
9 Political Video offers important political commentary on Obama and McCain’s
10 respective energy policies by asserting that Obama’s policy – that significant energy
11 savings can be made through proper tire inflation – is “running on empty.” As a matter
12 of law, Browne’s effort in this action to punish this political speech can go no further.

13 **First**, Browne’s copyright infringement and vicarious copyright infringement
14 claims fail as a matter of law. Given the political, non-commercial, public interest and
15 transformative nature of the use of a long-ago published Song, the miniscule amount
16 used and the lack of any effect on the market for the Song (other than perhaps to
17 *increase* sales of the Song), these claims are barred by the fair use doctrine.

18 **Second**, Browne’s Lanham Act claim is barred as a matter of law because (a)
19 the Lanham Act does not apply to political speech such as the Political Video; (b) the
20 use of the Song is protected by the First Amendment “artistic relevance” test which the
21 Ninth Circuit reaffirmed this month; and (c) there can be no possible likelihood that
22 viewers could be confused about the source of the Political Video or believe that it is
23 somehow sponsored by or affiliated with Browne.

24 **Finally**, as set forth in greater detail in McCain’s concurrently-filed Motion To
25 Strike Under Section 425.16 (“Anti-SLAPP Motion”) (which is incorporated herein by
26 reference), Browne’s California common law right of publicity claim fails as a matter
27 of law because (a) the Political Video is non-commercial political speech that relates to
28

1 a matter of public interest; (b) the Political Video is subject to full and stringent
2 protection under the First Amendment; and (c) the use of Browne’s voice in the
3 Political Video was transformative, outweighing any interest Browne may have in the
4 economic value of the use of a fleeting nine seconds of his voice singing the cliché
5 “running on empty.” Accordingly, the Complaint should be dismissed with prejudice.

6 **II. RELEVANT FACTS**

7 This action stems from a Political Video released by the Ohio Republican Party
8 (“ORP”) that “mocks the suggestion of the presumptive Democratic candidate for
9 President, Senator Barack Obama, that the country can conserve gasoline by keeping
10 their automobile tires inflated to the proper pressure.” Complaint (“Compl.”) ¶ 2. In
11 making that commentary, the Political Video used a portion of “Browne performing
12 one of his most famous musical compositions [*i.e.*, the Song]” to illustrate the point.
13 *Id.* The Song, released in 1977, has sold over seven million copies. Compl. ¶ 13.

14 The facts necessary to resolve this Motion and dispose of this case are
15 undisputed and incorporated by reference in the Complaint: the Political Video.
16 Compl. ¶ 2; *see* concurrently-filed Request for Judicial Notice (“RFJN”) ¶ 1. The
17 Political Video is one minute and twenty seconds long and starts with clips of Ohio
18 television news reporters discussing high gasoline prices. One reporter asks “How do
19 you bring down the price of gas here in northeast Ohio and across the U.S.A.?” and the
20 Political Video cuts to Obama saying at a rally “making sure your tires are properly
21 inflated.” The sound of a needle scratching an album is heard as the screen flashes the
22 word “What!?!” Information is shown about McCain’s energy plans and McCain is
23 shown speaking at a rally and stating that low-income Americans are bearing the brunt
24 of a failed energy policy. A screen then poses the question: “What’s that Obama plan
25 again?” At this point, 50 seconds into the Political Video, music (but no lyrics) from
26 the Song is first heard in the background. Obama is shown stating that “we can save all
27 the oil they’re talking about getting off drilling if everyone was just inflating their
28 tires.” Senator Hillary Clinton is then shown saying (at a press conference during a

1 time when she was also a presidential candidate), “Shame on you, Barack Obama!” A
 2 picture of Obama then appears next to the caption “Barack Obama: No Solutions” and
 3 the words “No Solutions” change to “Not Ready to Lead.” This screen with the picture
 4 and words appears at 1:11 of the Political Video, and at this point the sound of Browne
 5 singing the lyrics “running on empty” along with a few other words that bracket that
 6 phrase in the Song can be heard. The Political Video ends with a screen stating as
 7 follows: “Paid for by the Ohio Republican Party. www.ohiogop.org. Not authorized
 8 by any candidate or candidate committee.” Thus, Browne’s voice (*i.e.*, Browne singing
 9 the Song) is heard for **nine** seconds at the end of the Political Video. RFJN ¶ 1. Based
 10 on the undisputed contents of the Political Video, all of Browne’s claims fail as a
 11 matter of law. Accordingly, the Complaint must be dismissed with prejudice.

12 **III. STANDARD FOR MOTION TO DISMISS**

13 A Rule 12(b)(6) motion to dismiss tests the legal sufficiency of the claims.
 14 *Pegasus Holdings v. Veterinary Centers of Am., Inc.*, 38 F. Supp.2d 1158, 1159-60
 15 (C.D. Cal. 1998). Although the scope of review on Rule 12(b)(6) motion is generally
 16 limited to the content of the complaint, the Court may consider exhibits referenced in
 17 the complaint and matters that may be judicially noticed pursuant to Federal Rule of
 18 Evidence 201. *Id.* at 1160. *See Daly v. Viacom, Inc.*, 238 F. Supp. 2d 1118, 1121-22
 19 (N.D. Cal. 2002) (court considered television program referenced in complaint);
 20 *Burnett v. Twentieth Century Fox Film Corp.*, 491 F. Supp. 2d 962, 966 (C.D. Cal.
 21 2007) (reviewing two works referenced in the complaint and holding, on Motion to
 22 Dismiss, that copyright and Lanham Act claims were barred as a matter of law). Here,
 23 the Song and the Political Video are referenced in the Complaint. Compl. ¶ 2. Pursuant
 24 to McCain’s concurrently-filed RFJN, those works can be considered on this Motion.

25 “Dismissal under Rule 12(b)(6) is appropriate when it is clear that no relief
 26 could be granted under any set of facts that could be proven consistent with the
 27 allegations set forth in the complaint.” *Burnett*, 491 F. Supp. 2d at 966. Although
 28 allegations of material fact must be accepted as true, “[c]onclusory allegations of law

1 and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to
2 state a claim.” *In re VeriFone Sec. Litig.*, 11 F.3d 865, 868 (9th Cir. 1993). Further,
3 leave to amend should not be granted where additional facts will not cure the defects in
4 the complaint, thereby rendering it futile. *Burnett*, 491 F. Supp. 2d at 966, 971-2.

5 **IV. BROWNE’S CLAIMS ALL FAIL AS A MATTER OF LAW**

6 **A. Browne’s Copyright Infringement Claims Are Barred By The Fair** 7 **Use Doctrine.**

8 It is well-established that not all uses of copyrighted materials require the
9 copyright owner’s permission. The fair use doctrine “permits the use of copyrighted
10 works without the copyright owner’s consent under certain situations.” *Perfect 10, Inc.*
11 *v. Amazon.com, Inc.*, 508 F.3d 1146, 1163 (9th Cir. 2007); 4 *Nimmer on Copyright*, §
12 13.05 at 13-155 (2005) (“*Nimmer*”) (“the courts have long recognized that certain acts
13 of copying are defensible as ‘fair use’”). The fair use doctrine “encourages and allows
14 the development of new ideas that build on earlier ones” and is designed to “avoid
15 rigid application of the copyright statute when, on occasion, it would stifle the very
16 creativity which that law is designed to foster.” *Perfect 10*, 508 F.3d at 1163 (citing
17 *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994)); *see also Kelly v.*
18 *Arriba Soft Corp.*, 336 F.3d 811, 820 (9th Cir. 2003) (“To preserve the potential future
19 use of artistic works for purposes of teaching, research, criticism, and news reporting,
20 Congress created the fair use exception”). Thus, “[f]air use is an important safety valve
21 that acts as a bulwark against the monopoly power that inheres in an exclusive right
22 and which leads owners of such rights to act in ways contrary to the public interest.” 4
23 *Patry On Copyright*, § 10.1.50 at 10-10 (2008) (“*Patry*”); *See also Nat’ Rifle Ass’n of*
24 *Am. v. Handgun Control Fed. of Ohio*, 15 F.3d 559, 561 (6th Cir. 1994) (“because
25 some uses of copyrighted works are desirable for policy reasons, the courts have long
26 held that many uses of copyrighted work do not infringe upon the copyright”).

27 The fair use doctrine is an integral part of the policy of the Copyright Act to
28 foster and support the creation of new works and unfettered discussion of controversial

1 social and political issues. Indeed, protecting and allowing proper fair uses is not just a
 2 statutory protection – it is a Constitutional requirement for the Copyright Act’s validity
 3 under the First Amendment. *See Eldred v. Ashcroft*, 537 U.S. 186, 220 (2003)
 4 (“copyright law contains built-in First Amendment accommodations” such as the fair
 5 use defense). When speakers set about to convey important messages, such as the
 6 information contained in the Political Video, they are shaped by their perception of our
 7 culture and its well-known iconic works, phrases and references. *See* Mark Sableman,
 8 *Artistic Expression Today: Can Artists Use the Language of our Culture?*, 52 St. Louis
 9 U.L.J. 187, 193 (2007). Thus, the fair use doctrine staves off the “danger that
 10 overprotection of commercial interests will stifle and limit expression that employs the
 11 language and symbols of our popular culture.” *Id.* at 192-193.¹

12 The Copyright Act of 1976 provides the framework for determining when the
 13 fair use doctrine shields a defendant from liability: “the fair use of a copyrighted work
 14 ... for purposes such as criticism [or] comment... is not an infringement of copyright.”
 15 17 U.S.C. § 107. In determining whether a use in any particular case is a fair use,
 16 Courts must consider four factors: (1) the purpose and character of the use, including

17
 18 ¹ In today’s society, people frequently use the language of iconic songs as a basic form
 19 of communication, and such reference must be protected by the fair use doctrine.
 20 Indeed, courts themselves routinely engage in this mode of protected expression. *See*,
 21 *e.g., In re Gallaher*, --- F.3d ---, 2008 WL 4877454 at *1 (9th Cir. Nov. 13, 2008) (“In
 22 the classic words of the Rolling Stones, “You can’t always get what you want”); *Kahn*
 23 *v. I.N.S.*, 36 F.3d 1412, 1423 (9th Cir. 1994) (“[s]ome may agree with the Beatles that
 24 ‘All You Need is Love,’ but in our society people still regularly get married as a means
 25 of formalizing their commitment to each other”); *Dept. of Corrections v. Daughtry*,
 26 954 So.2d 659, 664 (Fla. Dist. Ct. App. 2007) (quoting Eagles’ song *Hotel California*
 27 in expressing concern that county jail will be converted “into the mythical Hotel
 28 California, where the defendant is ‘free to check out any time [he wants], but [he] can
 never leave”); *Smith v. Bd. of Horse Racing*, 288 Mont. 249, 253 (Mont.1998) (party
 might not get what he wanted and thus “like Mick Jagger, [he] will be lamenting ‘I
 can’t get no satisfaction”); *Portnoy v. Texas Int. Airlines, Inc.*, 678 F.2d 695, 698 (7th
 Cir. 1982) (“as Duke Ellington said, ‘It don’t mean a thing if it ain’t got that swing”).
 The fair use doctrine protects the use of such vernacular.

1 whether such use is of a commercial nature or is for nonprofit educational purposes;
 2 (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion
 3 used in relation to the copyrighted work as a whole; and (4) the effect of the use upon
 4 the potential market for or value of the copyrighted work. *Id.* This entails a “case-by-
 5 case analysis” of the four factors, which are not to be treated in isolation, but to be
 6 explored and weighed together in light of the copyright law’s purpose “to promote the
 7 progress of science and art by protecting artistic and scientific works while
 8 encouraging the development and evolution of new works.” *Mattel, Inc. v. Walking*
 9 *Mountain Prods.*, 353 F.3d 792, 799-800 (9th Cir. 2003) (citing *Campbell*, 510 U.S. at
 10 577). These factors are balanced to determine whether “the public interest in the free
 11 flow of information” outweighs the interest in the copyright. *Hustler Magazine, Inc. v.*
 12 *Moral Majority, Inc.*, 796 F.2d 1148, 1151-52 (9th Cir. 1986).

13 The Court can conduct this analysis on a motion to dismiss. *Burnett*, 491
 14 F.Supp.2d at 967, 972 (motion to dismiss granted without leave to amend because
 15 plaintiff’s claims were barred by fair use doctrine). Ultimate conclusions to be drawn
 16 from facts pertaining to fair use are legal in nature and may be made by the court.
 17 *Fisher v. Dees*, 794 F.2d 432, 436 (9th Cir. 1986); *Burnett*, 491 F. Supp. 2d at 967.
 18 Here, analysis of the fair use factors demonstrates that Browne’s copyright
 19 infringement claims are barred by the fair use doctrine.

20 **1. The First Factor, The Purpose And Character Of The Use,**
 21 **Favors McCain Because The Use Was Made In A Non-**
 22 **Commercial Political Message About Matters Of Public**
 23 **Concern And Was Transformative.**

24 Browne concedes that the purpose of the use was to make a political statement
 25 in a work of political speech and that the Political Video was the subject of substantial
 26 national media attention. Compl. ¶ 2 (Political Video used Song to “mock[] the
 27 suggestion of the presumptive Democratic candidate for President, Senator Barack
 28 Obama, that the country can conserve gasoline by keeping their automobile tires

1 inflated to the proper pressure”); *id.* ¶ 16 (Political Video “discussed by the national
2 news media”). It is well-established that fair use protection extends to uses made in
3 political works relating to matters of public interest. *Savage v. Council On American-*
4 *Islamic Relations, Inc.*, 2008 WL 2951281 at *5 (N.D. Cal. 2008) (“Protection under
5 the doctrine of fair use extends to those [uses] with a political purpose”); *Hustler*, 796
6 F.2d at 1153 (Reverend Jerry Falwell sending his followers an entire copy of
7 plaintiff’s parody of him deemed a fair use because, in part, it was done to “make a
8 political comment about pornography”); *Keep Thompson Governor Committee v.*
9 *Citizens for Gallen Committee*, 457 F. Supp. 957, 961 (D.N.H. 1978) (use that was
10 “clearly part of a political campaign message” protected by fair use doctrine); *Nat’l*
11 *Rifle Ass’n*, 15 F.3d at 562 (use of work by political organization to exercise “First
12 Amendment speech rights to comment on public issues” protected because the “scope
13 of the fair use doctrine is wider when the use relates to issues of public concern”);
14 *Phoenix Hill Enters., Inc. v. Dickerson*, 1999 WL 33603127 at *3 (W.D.Ky. 1999)
15 (use of work “in the process of political debate” protected by fair use doctrine).

16 In *Keep Thompson Governor*, plaintiff was a political committee seeking the
17 reelection of the incumbent governor of New Hampshire. Defendant was a political
18 committee seeking to elect his challenger. A third party had produced and marketed a
19 song titled *Live Free or Die*. Plaintiff had acquired the copyright to that song and was
20 using it in its political advertisements. Defendant ran an opposing political television
21 spot that copied portions of plaintiff’s spot, including the song. Plaintiff sued for
22 copyright infringement, which the court held was barred by the fair use doctrine.

23 The court first noted the important First Amendment context in which plaintiff’s
24 copyright infringement claim was being asserted:

25
26 In the context of this case, the Court must be aware that it
27 operates in an area of the most fundamental First
28 Amendment activities. Discussion of public issues and
debate on the qualifications of candidates are integral to the
operation of the system of government established by the

1 Constitution. The First Amendment affords the broadest
2 protection to such political expression in order to assure the
3 unfettered interchange of ideas for the bringing about of
4 political and social change desired by the people. Although
5 First Amendment protection is not confined to the exposition
6 of ideas, there is practically universal agreement that the
7 major purpose of that Amendment was to protect the free
8 discussion of governmental affairs, including discussion of
9 candidates. This is a reflection on our profound national
10 commitment to the principle that debate on public issues
11 should be uninhibited, robust, and wide-open. In a republic
12 where the people are sovereign, the ability of the citizenry to
13 make informed choices among candidates for office is
14 essential, because the identities of those who are elected will
15 invariably shape the course we follow as a nation.

16 *Id.*, 457 F.Supp. at 959-60.

17 The court then evaluated plaintiff's copyright claim, which related to the use of
18 15 seconds of plaintiff's song in a political spot, under the fair use factors, noting that
19 "the exclusive right of a copyright holder must be weighed against the public's interest
20 in the dissemination of information affecting areas of universal concern." *Id.* at 960.
21 Regarding the first factor, the court found that the use was "clearly part of a political
22 campaign message, noncommercial in nature, and First Amendment issues of freedom
23 of expression in a political campaign are clearly implicated." *Id.* at 961. Thus, this
24 factor favored defendant. *See also Baraban v. Time Warner, Inc.*, 54 U.S.P.Q.2d 1759
25 (S.D.N.Y. 2000) (use of photo was fair use because it was "part of a newsworthy
26 advertisement that comments on an issue of public importance").

27 In *Savage*, plaintiff Michael Savage, host of the popular conservative radio
28 program *The Savage Nation*, filed a copyright infringement lawsuit against various
entities associated with the Council on American-Islamic Relations ("CAIR") after
CAIR posted to its website a four-minute audio clip of plaintiff's show. The court
granted CAIR's motion for judgment on the pleadings on the grounds that the
complaint was barred by the fair use doctrine. Regarding the first factor, the court held
that the purpose was to comment and criticize and thus this factor weighed "heavily in

1 favor of defendants.” *Savage*, 2008 WL 2951281 at *6. The court also rejected
2 plaintiff’s contention that the use was “commercial” because CAIR sought to raise
3 funds, holding that “[p]rotection under the doctrine of fair use extends to those with a
4 political purpose, even those engaged in fundraising activities.” *Id.* at *5.

5 In *Hustler*, defendants Jerry Falwell and a religious organization, in response to
6 a parody that appeared in *Hustler Magazine* that depicted Falwell having drunken
7 sexual relations with his mother in an outhouse, sent copies of the parody in mailings
8 to over 775,000 people. Falwell also displayed the *Hustler* parody on Falwell’s
9 television program. *Hustler* sued for copyright infringement, but the court dismissed
10 the case on the grounds that the uses were protected by the fair use doctrine.

11 The *Hustler* court found that the purpose and character of the use factor favored
12 defendants, even though the use was “in part to raise money,” because the use was
13 made also to “make a political comment about pornography.” 796 F.2d at 1152. Thus,
14 because the use served a “public interest” the first factor favored defendants. *Id.* at
15 1153; *see also Lennon v. Premise Media Corp.*, 556 F. Supp. 2d 310, 322 (S.D.N.Y.
16 2008) (first factor favored defendant because use “contribute[d] to the broader public
17 interest by stimulating debate on an issue of current political concern”); *Baraban*, 54
18 U.S.P.Q.2d at 1759 (use of photo as part of a “commentary on a political or social
19 issue paid for as advertising by an advocacy group” a fair use because it “criticize[d]
20 efforts by the power industry to promote a sunny view of nuclear energy”).

21 In addition to noting whether a use is made for political, critical or public
22 interest purposes, courts evaluate whether the use was “transformative.” *Perfect 10*,
23 508 F.3d at 1164 (“The central purpose of [the first fair use factor] inquiry is to
24 determine whether and to what extent the new work is ‘transformative’”). A work is
25 transformative when the use does not “merely supersede the objects of the original
26 creation” but rather “adds something new, with a further purpose or different
27 character, altering the first with new expression, meaning, or message.” *Campbell*, 510
28 U.S. at 579. A use is considered transformative where the defendant “changes a

1 plaintiff's copyrighted work or uses the plaintiff's copyrighted work in a different
2 context such that the plaintiff's work is transformed into a new creation." *Perfect 10*,
3 508 F.3d at 1165 (citation omitted); *Bill Graham Archives v. Dorling Kindersley Ltd.*,
4 448 F.3d 605, 609 (2nd Cir. 2006) (use of concert posters as historical artifacts in a
5 biography about the musical group Grateful Dead was transformative). Even the
6 making of an exact copy of a work "may be transformative so long as the copy serves
7 a different function than the original work." *Perfect 10*, 508 F.3d at 1165.

8 Here, all of these considerations noted above demonstrate that the first factor
9 overwhelmingly favors McCain. Browne concedes that the use was for a political and
10 critical purpose, *i.e.*, to "mock" Obama. Compl. ¶ 2. Moreover, Browne concedes that
11 the use related to a matter of utmost public interest, *i.e.*, the policies and qualifications
12 of candidates for President of the United States. Nor was the use "commercial." The
13 Political Video contains no request or call for political contributions to *anyone*,
14 including McCain. But the law is clear that, even if the Political Video *had* sought
15 contributions (which it clearly did not), that would not render the use "commercial."
16 *See Am. Family Life Ins. Co. v. Hagan*, 266 F. Supp. 2d 682 (N.D. Ohio 2002) (use of
17 mark in a political campaign ad that included "solicitation of contributions" was
18 "properly classified not as a commercial transaction at all, but completely
19 noncommercial, political speech"); *Mastercard Int'l Inc. v. Nader 2000 Primary*
20 *Comm., Inc.*, 70 U.S.P.Q.2d 1046 (S.D.N.Y. 2004) (even if candidate's ad resulted in
21 increased contributions, the ad would still not be "commercial"; under a contrary rule
22 "all political campaign speech would also be 'commercial speech' since all political
23 campaigns collect contributions").

24 Finally, the use of a brief snippet of the Song (used only because it contained the
25 words "running on empty") was transformative. The Song, which deals with the rigors
26 of a musician's day-to-day life touring on the road, was transformed into a political
27 commentary on the energy plan of a Presidential candidate. Thus, the Political Video
28 transforms the Song from a mood evoking-soft rock composition about the lifestyle of

1 a musician into a biting commentary on aspects of a Presidential candidate’s proposed
2 energy plan. *See Lennon*, 556 F. Supp. 2d at 324 (use in movie of portion of song was
3 transformative because defendant “put the song to a different purpose” than its original
4 purpose and “placed the excerpt in the context of a debate regarding the role of
5 religion in public life”). Thus, the purpose and character of the use factor
6 unquestionably favors McCain.

7 **2. The Second Factor, The Nature Of The Copyrighted Work,** 8 **Favors McCain**

9 The second factor concerns the nature of the work that was copied, *i.e.*, whether
10 the work was creative or factual/historical and whether it was previously published.
11 *Perfect 10*, 508 F.3d at 1167. Overall, however, the “second factor more typically
12 recedes into insignificance in the greater fair use calculus.” *Nimmer* § 13.05[A][2][a];
13 *Mattel*, 353 F.3d at 803 (second factor “typically has not been terribly significant in
14 the overall fair use balancing”). Here, the factor favors McCain.

15 First, the Song was published over thirty years ago. Compl. ¶ 13. Thus, the
16 Political Video certainly did not usurp the “first publication” right in the Song – at
17 least seven *million* copies of the Song have been sold to date. *Id.* Second, while the
18 entire Song itself might be creative, the limited portion of it used in the Political Video
19 was not particularly creative. Rather, the use consisted primarily of the words “running
20 on empty” which is not only a basic metaphor for remaining active despite being low
21 on energy (which is how the phrase is used in the Song – *see* RFJN ¶ 2) but which is a
22 phrase that has become part of the common political vernacular in discussing energy
23 policy. *See* RFJN ¶ 3. Indeed, politicians from both parties regularly used the phrase to
24 describe the opposition’s energy policies before the Political Video was created. *Id.*

25 Finally, even assuming that the handful of words used from Song in the Political
26 Video are creative, the second factor is “of limited usefulness where the creative work
27 of art is being used for a transformative purpose.” *Bill Graham*, 448 F.3d at 612
28 (reproductions of posters reduced in size and displayed with others throughout a book

1 was fair use); *Lennon*, 556 F. Supp. 2d at 325. Thus, limited weight is given to the
2 second fair use factor when the defendant uses the original work in a transformative
3 manner to make a social commentary rather than to exploit the work’s creative virtues.
4 *Blanch v. Koons*, 467 F.3d 244, 257 (2d Cir. 2006).

5 Here, because the Song was published long ago, the few words used from the
6 Song were not particularly creative, the use was transformative and the use was made
7 in the context of a political message about an interest of great public concern, the
8 second factor also favors McCain.

9 **3. The Third Factor, The Amount and Substantiality Of The Use,** 10 **Favors McCain**

11 The third factor requires courts to examine whether the amount and
12 substantiality of the portion used in relation to the work as a whole was “reasonable in
13 relation to the purpose of the copying.” *Campbell*, 510 U.S. at 586. “[T]he enquiry will
14 harken back to the first of the statutory factors, for ... the extent of permissible
15 copying varies with the purpose and character of the use.” *Id.* This involves a
16 quantitative and qualitative analysis. *Id.*

17 The quantitative analysis clearly favors McCain. The Political Video used only a
18 small portion of the Song; less than thirty seconds, and only nine seconds of lyrics,
19 from a song almost five minute long. RFJN ¶ 2. Indeed, the only discernible lyrical
20 portion used was Browne singing the words “running on empty” which, of course, was
21 used in the Political Video to criticize Obama’s campaign and energy policy. RFJN
22 ¶ 1. This focus only on the politically relevant portion of the Song weighs strongly in
23 McCain’s favor. *See Lennon*, 556 F. Supp. 2d at 325-26 (factor favored defendants
24 because defendants used portion of song that expresses idea they specifically wished to
25 critique “without copying other portions of the song that do not express that idea”).

26 The qualitative analysis turns on whether the material used furthers the purpose
27 of the expressive work. *Campbell*, 510 U.S. at 588; *see also Lennon*, 556 F. Supp. 2d
28 at 326 (applying the Supreme Court’s analysis in *Campbell* to non-parodic uses; “this

1 Court is aware of no reason not to apply it equally to copying for purposes of criticism
2 and commentary”). In particular, in *Lennon*, defendants used a portion of the Beatles
3 song “Imagine” containing the lyrics “nothing to kill or die for, and no religion too” in
4 their documentary film to comment on the issue whether “intelligent design” should be
5 taught in schools. Given this context, the court found that the third factor weighed in
6 favor of the defendants. “Using an easily recognizable portion of ‘Imagine’ was
7 relevant to defendants’ commentary because they wished to demonstrate that the
8 negative views of religion expressed by their interview subjects were not new.”
9 *Lennon*, 556 F. Supp. 2d at 326. This is directly analogous to the instant case: the use
10 of the Song is relevant to comment on Obama’s campaign and energy policy. Thus,
11 both the quantitative and qualitative factors, and therefore the third factor, weigh
12 heavily in favor of McCain.

13 **4. The Fourth Factor, The Effect Of The Use On The Potential** 14 **Market For Or Value Of Plaintiff’s Work, Favors McCain**

15 The fourth factor focuses on the effect of the use on the market for the plaintiff’s
16 work. This factor reflects the copyright law’s condemnation of the “copier who
17 attempts to *usurp the demand* for the original work.” *Consumer Union of United*
18 *States, Inc. v. General Signal Corp.*, 724 F.2d 1044, 1050 (2d Cir. 1983) (emphasis
19 added). “The theory behind the copyright laws is that creation will be discouraged if
20 demand can be undercut by copiers. Where the copy does not compete with the
21 original, this concern is absent.” *Id.* at 1051; *see also* 4 *Patry* § 10:150 at 10-389
22 (“Harm arising from the ability of defendant’s use to substitute for plaintiff’s work in
23 the marketplace is the proper focus of the fourth factor”).

24 Moreover, when analyzing the fourth factor, courts examine “the impact on
25 potential licensing revenues for traditional, reasonable, or likely to be developed
26 markets.” *Bill Graham Archives*, 448 F.3d at 614. “The economic effect of [the use] ...
27 is not its potential to destroy or diminish the market of the original – any bad review
28 can have that effect – but rather whether it fulfills the demand for the original.” *Lewis*

1 *Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 780 F. Supp. 1283, 1294-95 (N.D. Cal.
2 1991).

3 Here, the fourth factor overwhelmingly favors McCain. The Political Video
4 does not usurp the demand for the Song. No one willing to pay to enjoy hearing the
5 Song would have his or her demand satiated by hearing a few words from it in a
6 political video about energy policy that includes out-of-order cuts from the Song
7 totaling less than thirty seconds, with politicians talking over the music for much of the
8 time the Song played. *See Hustler*, 796 F.2d at 1156 (use of portion of *Hustler*
9 magazine did not effect market because work was long since published, so use “did not
10 diminish the initial sales” and those interested in purchasing work would not lose such
11 interest because use was “only one page of a publication which would be purchased
12 for ‘its other attractions’”); *Keep Thomson Governor*, 457 F. Supp. at 961 (use of “15
13 seconds from a total recording of three minutes” a fair use; the recordings “have sold
14 and are continuing to sell without substantial commercial loss to the plaintiff”).

15 In fact, if the use of the Song in the Political Video will have any effect, it will
16 likely *increase* the popularity of this thirty year-old Song when those watching the
17 Political Video will be reminded of it and go out and purchase it. *See Hofheinz v. AMC*
18 *Prods., Inc.*, 147 F. Supp. 2d 127, 140 (E.D.N.Y. 2001) (holding that use of clips and
19 stills in show about monster films was a fair use and that “the Documentary may
20 increase market demand for plaintiff’s copyrighted works . . . defendants’ brief display
21 of the photographs, poster, and model monsters at issue should only increase consumer
22 demand as well as value of those items”); *see also Savage*, 2008 WL 2951281 at *9
23 (where plaintiff “fail[ed] to allege or suggest an impact on the actual or potential sale,
24 marketability, or demand for the original, copyrighted work,” fourth factor favored
25 defendants).

26 Browne will likely argue that this factor favors him because he was deprived of
27 a licensing fee for the use, or that he would *never* license the Song to a conservative
28 Republican like McCain. The bare assertion that plaintiff may have been deprived of a

1 licensing fee, however, does not stave off a finding of fair use: “a copyright holder
2 cannot prevent others from entering fair use markets merely by developing or licensing
3 a market for ... transformative uses of its own creative work ... Copyright owners may
4 not preempt exploitation of transformative markets.” *Bill Graham Archives*, 448 F.3d
5 at 614-615. And a *refusal* by Browne to license to McCain does not weigh against a
6 finding of fair use. As the Supreme Court has made clear, “[i]f the use is otherwise
7 fair, then no permission need be sought or granted. Thus, being denied permission to
8 use a work does not weigh against a finding of fair use.” *Campbell*, 510 U.S. at 585
9 n.18 (citing *Fisher*, 794 F.2d at 437). Indeed, a contention by Browne that he would
10 never license his work because the use would purportedly offend him *strengthens* the
11 fair use argument. *See Liebovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 114 n.3
12 (2d Cir. 1998) (fair use protection more important in cases where plaintiff would
13 refuse to license work).

14 A transformative use of a limited, non-creative and cliché portion of the Song to
15 make an important political commentary about issues of substantial public interest and
16 which does not supplant the market for the Song, is a paradigm fair use. All four fair
17 use factors point strongly in McCain’s direction, and thus Browne’s copyright claims
18 fail as a matter of law.

19 **B. Browne’s Lanham Act Claim Fails As A Matter Of Law**

20 Browne asserts a claim for “false association or endorsement” under the Lanham
21 Act, 15 U.S.C. § 1124(a). Compl. ¶¶ 32-38. That claim fails for a variety of reasons.

22 **1. The Lanham Act Does Not Apply To Political Speech**

23 The Lanham Act applies only to “commercial speech” and does *not* apply to
24 political speech. *New.Net, Inc. v. Lavasoft*, 356 F. Supp. 2d 1090, 1117 (C.D.Cal.
25 2004); *Wojnarowicz v. American Family Ass’n*, 745 F. Supp. 130, 141-42 (S.D.N.Y.
26 1990) (“Notwithstanding that the [Lanham] Act encompasses a broad range of
27 misrepresentations, it is clearly directed only against false representations in
28 connection with the sale of goods or services in interstate commerce”); S. 1883, *101st*

1 *Cong.*, 1st Sess., 135 Cong.Rec. 1207, 1217 (April 13, 1989) (Lanham Act “should not
2 be read in any way to limit political speech, consumer or editorial comment, parodies,
3 satires, or other constitutionally protected material”); *Oxycal Labs., Inc. v. Jeffers*, 909
4 F. Supp. 719, 723 (S.D.Cal. 1995) (“the Lanham Act can only reach commercial
5 speech”); *Proctor & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 552 (5th Cir. 2001)
6 (if the speech is not commercial, “there can be no Lanham Act claim”).

7 As the Ninth Circuit has made clear, “representations constitute commercial
8 advertising or promotion under the Lanham Act if they are: 1) commercial speech;
9 2) by a defendant who is in commercial competition with plaintiff; 3) for the purpose
10 of influencing consumers to buy defendant’s goods or services.” *Rice v. Fox Broad.*
11 *Co.*, 330 F.3d 1170, 1181 (9th Cir. 2003) (rejecting Lanham Act claims stemming
12 from statements in a television program that revealed the secrets of magicians because
13 the statements were not “commercial speech” for purposes of the Lanham Act).

14 None of the requirements for a valid Lanham Act claim set forth by the court in
15 *Rice* are met here: (1) the Political Video is not “commercial speech”; (2) McCain is
16 clearly not “in commercial competition” with Browne; and (3) the Political Video was
17 not aimed at influencing consumers to buy any goods or services. Rather, the Political
18 Video discussed important political issues and matters of great public concern. *See*
19 *Am. Family Life Ins. Co. v. Hagan*, 266 F. Supp. 2d 682, 697 (N.D. Ohio 2002)
20 (speech used during a political campaign, including speech utilized for the “solicitation
21 of contributions” is “properly classified not as a commercial transaction at all, but
22 completely noncommercial, political speech”); *Mastercard Int’l Inc. v. Nader 2000*
23 *Primary Comm., Inc.*, 70 U.S.P.Q.2d 1046 (S.D.N.Y. 2004) (“The legislative history
24 of the Lanham Act clearly indicates that Congress did not intend for the Act to chill
25 political speech ... political advertising and promotion are not meant to be covered by
26 the term ‘commercial’”).

27 Accordingly, because the Political Video is not subject to the Lanham Act,
28 Browne’s claim fails as a matter of law.

1 **2. Browne’s Lanham Act Claim Is Barred By The “Artistic**
 2 **Relevance” Test Imposed By The First Amendment**

3 Even assuming that the Lanham Act applies to the Political Video, the claim is
 4 barred as a matter of law under the “artistic relevance” test. In a standard trademark
 5 infringement action, the court looks to whether there is a “likelihood of consumer
 6 confusion” as demonstrated by a multi-factor test. *See, e.g., AMF Inc. v. Sleekcraft*
 7 *Boats*, 599 F.2d 341 (9th Cir. 1979). This “likelihood of confusion” test, however, is
 8 not applied in the context of expressive works because that test “fails to account for the
 9 full weight of the public’s interest in free expression.” *Mattel, Inc. v. MCA Records,*
 10 *Inc.*, 296 F.3d 894, 900 (9th Cir. 2002) (“trademark rights do not entitle the owner to
 11 quash an unauthorized use of the mark by another who is communicating ideas or
 12 expressing a point of view”); *Walking Mountain*, 353 F.3d at 807 (when claim
 13 involves use of mark that raises First Amendment issues, likelihood of confusion test
 14 is not used); *E.S.S. Entertainment 2000 v. Rock Star Videos*, --- F.3d ---, 2008 WL
 15 4791705 at *3 (9th Cir. Nov. 5, 2008) (“intersection of trademark law and the First
 16 Amendment” requires different test).² Rather, courts have adopted a different test for
 17 expressive uses of a celebrity’s identity: the “artistic relevance” test.

18 In *MCA*, defendants produced a song named “Barbie Girl” in which a band
 19 member impersonates the Mattel doll Barbie and which contains numerous uses of the
 20 name “Barbie.” Mattel claimed that the song would likely confuse consumers into
 21 thinking Mattel was affiliated with it. *MCA*, 296 F.3d at 899. The Ninth Circuit
 22 concluded, however, using a two-part test established by *Rogers v. Grimaldi*, 875 F.2d
 23

24 _____
 25 ² *See also ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915, 926-28 (6th Cir. 2003)
 26 (likelihood of confusion test is not appropriate “where the defendant has articulated a
 27 colorable claim that the use of a celebrity’s identity is protected by the First
 28 Amendment” because the test “fails to adequately consider the interests protected by
 the First Amendment”); *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989) (rejecting
 likelihood of confusion test in case involving use of celebrity’s name in title of movie).

1 994, 999 (2d Cir. 1989), that the use of the mark by defendants was protected by the
2 First Amendment because (1) it was artistically relevant to the work (*i.e.*, a song that
3 “pokes fun at Barbie and the values that [defendant] contends she represents”) and
4 (2) it was not specifically misleading as to sponsorship or endorsement (*i.e.*, the song
5 did not “explicitly or otherwise, suggest that it was produced by Mattel”). *MCA*, 296
6 F.3d at 901-902. Similarly, in *Walking Mountain*, a photographer sold various
7 photographs of Mattel’s Barbie doll in precarious situations. Mattel sued, claiming
8 trademark infringement. The Ninth Circuit applied the same two-part test and held that
9 the trademark claims were barred: the use of the Barbie mark was protected because
10 (1) it was artistically relevant to help defendant “depict Barbie and target the doll with
11 [defendant’s] parodic message” and (2) defendant did not do anything to “explicitly
12 mislead as to Mattel’s sponsorship of the works.” *Walking Mountain*, 353 F.3d at 807.

13 Finally, in *E.S.S. Entertainment*, defendant created the popular GRAND THEFT
14 AUTO series of games in which players engage in various criminal exploits that take
15 place in one or more cities modeled after actual cities. The GRAND THEFT AUTO: SAN
16 ANDREAS edition (the “Game”) took place in virtual cities based on California cities.
17 The “Los Santos” city (based on Los Angeles) featured, among other things, a strip
18 club called the “Pig Pen.” Plaintiff, who operated an actual strip club in Los Angeles
19 called the “Play Pen,” alleged that the “Pig Pen” infringed plaintiff’s trademarks. The
20 Ninth Circuit affirmed the District Court’s holding that plaintiff’s trademark claims
21 were barred by the First Amendment and the artistic relevance test. In particular, the
22 Court in *E.S.S.* held that this “artistic relevance” test applies not only to the use of a
23 celebrity’s identity in the title of a work, but also the use in the contents of the work:
24 “Although this [artistic relevance] test traditionally applies to uses of a trademark in
25 the title of an artistic work, there is no principled reason why it ought not also apply to
26 the use of a trademark in the body of the work.” *E.S.S.*, 2008 WL 4791705 at *3; *see*
27 *also Romantics v. Activision Publ.*, 532 F.Supp.2d 884, 889 (E.D.Mich. 2008) (use of
28 plaintiffs’ identities in expressive work is “protected under the First Amendment

1 where it is related to the content of the work”). Furthermore, “the level of relevance
2 merely must be above zero” to warrant First Amendment protection. *E.S.S., supra*.
3 Thus, the two-prong test used in *Walking Mountain, MCA* and *E.S.S.* is directly
4 applicable here and fatal to Browne’s claim: Browne *concedes* that the use was
5 artistically relevant to “mock[]” Obama and his energy policy as “running on empty.”
6 Compl. ¶ 2. Moreover, the Political Video did not explicitly suggest affiliation or
7 endorsement. Thus, the Lanham Act claim fails.

8 **3. As A Matter Of Law, There Can Be No Likelihood Of** 9 **Confusion Stemming From The Political Video**

10 Even assuming that the “likelihood of confusion” test applied (which it clearly
11 does not), the Political Video clearly labels its source as the ORP on the Political
12 Video itself and thus there is no likelihood that it would cause any confusion as to its
13 origin. Moreover, there is no possible likelihood that people could have been confused
14 into believing that Browne supported McCain. Browne concedes as much; in his
15 Complaint, he goes to great length to highlight his well-known liberal and Democratic
16 political beliefs. To wit: Browne has written “politically and socially charged songs
17 [that] have reached audiences since the 1960s” (Compl. ¶ 1); he has an “influential and
18 enduring ... legacy as an advocate for social and environmental justice” (*id.*); he has
19 “closely associated himself with liberal causes and Democratic political candidates”
20 and “spent significant time throughout his career raising public awareness of such
21 causes” (*id.*); he and John Mellencamp are “well-known supporter[s] of Democratic
22 ideals” (*id.* ¶ 3); he has “maintain[ed] a long-standing position in favor of liberal
23 causes and Democratic candidates” and “often performed at political rallies for
24 Democratic Party candidates” (*id.* ¶ 15); his “public support for the Democratic Party”
25 and Obama “is well-known” (*id.*); and he is “internationally renowned” and “equally
26 respected nationally for his political and social activism, including his longstanding
27 association with liberal causes and Democratic candidates.” *Id.* ¶ 33. Indeed, the Ninth
28 Circuit, in recognizing that “the musical expression of some performers reflects a

1 particular political view and that some performers may, apart from their music,
2 represent a particular ideology or way of life,” specifically cited *Jackson Browne* as
3 an artist who was well-known for his songs’ “political or social messages.” *Cinevision*
4 *Corp. v. City of Burbank*, 745 F. 2d 560, 568-69 (9th Cir. 1984). Given the explicit
5 statement of the source of the Political Video in the video itself, and Browne’s
6 pervasive association with liberal causes and Democratic candidates, there was no
7 possibility of confusion, and thus Browne’s claim fails.

8 **C. Browne’s Fourth Claim For Common Law Violation Of Right Of**
9 **Publicity Fails As A Matter Of Law**

10 As set forth in greater detail in McCain’s concurrently-filed Anti-SLAPP
11 Motion”), which is incorporated by reference, Browne’s California common law right
12 of publicity claim fails as a matter of law because (a) the Political Video is non-
13 commercial political speech that relates to a matter of public interest; (b) the Political
14 Video is subject to full and stringent protection under the First Amendment; and (c)
15 the use of Browne’s voice in the Political Video was transformative.

16 **V. CONCLUSION**

17 For the reasons set forth above, McCain respectfully request that the Court grant
18 the Motion and dismiss Browne’s Complaint with prejudice.

19
20
21 Dated: November 17, 2008

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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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 10 401 U.S. 265 (1971)..... 16
 11 *Mowles v. Commission of Governmental Ethics and Election Practices*,
 12 --- A.2d ---, 2008 WL 4683722 (Me. 2008) 6
 13 *National Endowment for the Arts v. Finley*,
 14 524 U.S. 569 (1998)..... 15
 15 *New Kids on the Block v. News America Publ’g, Inc.*,
 16 971 F.2d 302 (9th Cir. 1992)..... 12, 13, 15
 17 *New York Times Co. v. Sullivan*,
 18 376 U.S. 254 (1964)..... 16
 19 *Newcombe v. Adolf Coors Co.*,
 20 157 F.3d 686 (9th Cir. 1998) 19
 21 *Paulsen v. Personality Posters, Inc.*,
 22 299 N.Y.S.2d 501 (N.Y.Sup. 1968)..... 11, 13, 14, 15
 23 *Polydoros v. Twentieth Century Fox Film Corp.*,
 24 67 Cal. App. 4th 318 (1997) 12
 25 *Robertson v. Rodriguez*,
 26 36 Cal. App. 4th 347 (1995) 9
 27 *Rosenaur v. Scherer*,

1	88 Cal. App. 4th 260 (2001).....	10
2	<i>Roth v. United States,</i>	
3	354 U.S. 476 (1957).....	16
4	<i>Rusheen v. Cohen,</i>	
5	37 Cal. 4th 1048 (2006).....	8
6	<i>Sammartano v. First Judicial District Court for the County of Carson</i>	
7	<i>City,</i>	
8	303 F. 3d 959 (9th Cir. 2002).....	16
9	<i>Slauson Partnership v. Ochoa,</i>	
10	112 Cal. App. 4th 1005 (2003).....	8
11	<i>Sweezy v. New Hampshire,</i>	
12	354 U.S. 234 (1957).....	16
13	<i>Varian Medical Sys., Inc. v. Delfino,</i>	
14	35 Cal. 4th 180 (2005).....	9
15	<i>Wilson v. Parker, Covert & Chidester,</i>	
16	28 Cal. 4th 811 (2002).....	8
17	<i>Winter v. DC Comics,</i>	
18	30 Cal.4th 881 (2003).....	17
19	<u>RULES</u>	
20	C.C.P. § 425.16.....	1, 20
21	C.C.P. § 425.16 (b)(1).....	7, 9
22	C.C.P. § 425.16(b)(2).....	9
23	Cal. Civil Code § 3344(d).....	13
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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
(1983); F. Kaid Benfield, *Running on Empty: The Case for a Sustainable National*
28 *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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27
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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*
28

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)

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

SPI LI ANE SHAEFFER ARONOFF BANDLOW LLP

20
21 By: 

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

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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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