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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

ROB STUTZMAN, et al.,  
Plaintiffs,  
v.  
LANCE ARMSTRONG, et al.,  
Defendants.

No. 2:13-CV-00116-MCE-KJN

**MEMORANDUM AND ORDER**

Through this action, Plaintiffs Rob Stutzman, Jonathan Wheeler, Gloria Lauria, David Reimers, and Scott Armstrong (collectively “Plaintiffs”) seek redress for violations of California law arising from alleged misrepresentations contained in and related to Defendant Lance Armstrong’s books, including It’s Not About the Bike: My Journey Back to Life, published by Defendant Penguin Group, and Every Second Counts, published by Defendant Random House.<sup>1</sup> Generally, Plaintiffs allege that Defendant Armstrong and the Publisher Defendants, along with Defendants William Stapleton and Thomas Weisel, misled consumers by representing the Armstrong Books as truthful works of nonfiction biography, when in fact these books were works of fiction containing false and misleading statements.

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<sup>1</sup> Collectively, Defendants Penguin Group and Random House are referred to as “the Publisher Defendants.” Collectively, the books at issue are referred to as “the Armstrong Books” or “the Books.”

1 Plaintiffs, on behalf of themselves and others similarly situated, brought claims for  
2 violations of California’s Consumer Legal Remedies Act, Cal. Civ. Code §§ 1750 et seq.  
3 (“CLRA”); California’s Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200 et seq.  
4 (“UCL”); California’s False Advertising Law, Cal. Bus. & Prof. Code §§ 17500 et seq.  
5 (“FAL”); negligent misrepresentation; and fraud and deceit. (Pls.’ Compl., ECF No. 22.)  
6 Each Defendant filed an anti-SLAPP<sup>2</sup> Motion to Strike the First Amended Complaint, or  
7 portions thereof, pursuant to California Civil Procedure Code section 425.16. (Def.  
8 Random House Mot. Strike, April 26, 2013, ECF No. 36; Def. Penguin Mot. Strike, April  
9 26, 2013, ECF No. 42; Def. Armstrong Mot. Strike, April 26, 2013, ECF No. 47; Def.  
10 Weisel Mot. Strike, June 3, 2013, ECF No. 55; Def. Stapleton Mot. Strike, June 3, 2013,  
11 ECF No. 57.) Specifically, Defendants Random House, Penguin, Weisel, and Stapleton  
12 filed anti-SLAPP motions to strike each of Plaintiffs’ causes of action pursuant to section  
13 425.16 (ECF Nos. 36, 42, 55, 57), while Defendant Armstrong moves to strike only  
14 Plaintiffs’ CLRA, UCL, and FAL claims (ECF No. 47). Plaintiffs filed a timely opposition  
15 to each motion. (Pls.’ Opp’n to Armstrong Mot., June 17, 2013, ECF No. 64; Pls.’ Opp’n  
16 to Publisher Mots., June 17, 2013, ECF No. 65; Pls.’ Opp’n to Defs. Weisel & Stapleton  
17 Mots., July 8, 2013, ECF No. 76.) The Court held oral argument on the Motions to Strike  
18 on August 8, 2013, and took the matters under submission. (See ECF No. 102.)

19 For the reasons set forth below, Defendants’ Motions to Strike are GRANTED.

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27 <sup>2</sup> The anti-SLAPP (strategic lawsuits against public participation) statute allows for the “early  
28 dismissal of meritless first amendment cases aimed at chilling expression through costly, time-consuming  
litigation.” Metabolife Int’l, Inc. v. Wornick, 264 F.3d 832, 839 (9th Cir. 2001).

**BACKGROUND<sup>3</sup>**

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3 This class action arises from alleged misrepresentations contained in and  
4 disseminated about Defendant Lance Armstrong's books, It's Not About the Bike: My  
5 Journey Back to Life, published by Defendant Penguin Group beginning in May 2000  
6 and sold throughout California since that date, and Every Second Counts, published by  
7 Defendant Random House beginning in January 2003 and sold throughout California  
8 since that date. Also at issue are Defendant Lance Armstrong's books The Lance  
9 Armstrong Program: 7 Weeks to the Perfect Ride, published beginning in September  
10 2000 and sold throughout California since that date; Lance Armstrong: Images of a  
11 Champion, published beginning in June 2004 and sold throughout California since that  
12 date; and Comeback 2.0: Up Close and Personal, published beginning in December  
13 2009 and sold throughout California since that date. It's Not About the Bike: My Journey  
14 Back to Life was a number one best seller on the New York Times' best seller list, was  
15 on the hardcover best seller lists for twenty-four weeks, and was on the paperback best  
16 seller list for twenty-two weeks. Every Second Counts was also a best seller. According  
17 to Plaintiffs, the success of Every Second Counts and It's Not About the Bike permitted  
18 Armstrong to publish and sell, and thereby profit from, the other three books at issue.

19 Plaintiffs alleged that during the Class Period<sup>4</sup> the books were sold to consumers  
20 in hardback, paperback, electronic, and audio book editions. Throughout the Class  
21 Period, Defendants' advertising, marketing, publicity, and other promotional efforts for  
22 the books represented these books as truthful and honest works of nonfiction biography  
23 or autobiography when, in fact, Defendants knew or should have known that these  
24 books were works of fiction.

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27 <sup>3</sup> The following recitation of facts is taken, sometimes verbatim, from Plaintiffs' First Amended  
Complaint. (ECF No. 22 at 2-10.)

28 <sup>4</sup> The Class Period begins at the initial date of publication for each particular book and runs to the  
present.

1 Plaintiffs allege that they were misled by Defendants' statements and purchased the  
2 books based upon the false belief that the books were "truthful and honest works of  
3 nonfiction biography." (ECF No. 22 at 3.) Plaintiffs would not have purchased these  
4 books, or would have not paid as much money for the books, had Plaintiffs known the  
5 truth concerning Armstrong's lies and misconduct and his admitted involvement in a  
6 sports doping scandal that has led to his recent public exposure and fall from glory.

7 Plaintiffs further allege that prior to and during the Class Period, Defendants  
8 engaged in a scheme to defraud consumers, including Plaintiffs and Class Members, by  
9 creating and perpetuating the Lance Armstrong "brand" to enable Defendants to reap  
10 millions of dollars in unlawful profits. According to Plaintiffs, beginning in 1998, if not  
11 earlier, the Lance Armstrong "brand" was created by Defendant Armstrong, his financier  
12 and cycling team owner, Defendant Thomas W. Weisel, and his agent-manager,  
13 Defendant William J. Stapleton.

14 Plaintiffs allege that an integral part of the "multi-faceted scheme to defraud  
15 Plaintiffs" was the publication, advertising, marketing, and sale of the books throughout  
16 California. On the books' covers and flyleaves, as well as in advertisements, marketing,  
17 and promotional materials, Defendants portrayed Armstrong as a "regular, hardworking,  
18 motivated, complicated, occasionally pissed-off, T-shirt wearing guy," and as a devoted  
19 advocate for cancer patients. (ECF No. 22 at 22.) Plaintiffs claim that during the period  
20 from 1999 through 2012, Defendants knew that if the public believed that Armstrong had  
21 used performance enhancing drugs, Defendants would be unable to sell these books  
22 and the books would not be best sellers. Thus, according to Plaintiffs, another integral  
23 part of the scheme to defraud Plaintiffs, while maintaining and growing the Lance  
24 Armstrong "brand," was to vociferously and publicly deny any charge that Armstrong  
25 used performance enhancing drugs. Both Defendants Armstrong and Stapleton made  
26 such public denials from July 1999 through August 2012. Plaintiffs allege that such false  
27 and misleading denials were made during interviews broadcast on television worldwide,  
28 in print media, and in sworn testimony.

1 Furthermore, Plaintiffs claim that “another part of the scheme was the agreement,  
2 tacit or otherwise, on the part of the book publishers” Random House and Penguin “to  
3 ignore and/or avoid conducting a careful investigation into the merits of the doping  
4 charges that were repeatedly leveled against Armstrong during 1999 through 2012.”  
5 (ECF No. 22 at 5.) Plaintiffs allege that the Publisher Defendants refused to make such  
6 an investigation so that they could continue advertising, marketing, and selling It’s Not  
7 About the Bike and Every Second Counts and thereby continue to profit.

8 “Sometime between 2001 and 2003,” Plaintiff Stutzman “learned about the book  
9 It’s Not About the Bike.” (ECF No. 22 at 7.) Plaintiff Stutzman bought the book and read  
10 it cover to cover; he found the book compelling and recommended the book to several  
11 friends. Plaintiff Wheeler followed Defendant Armstrong’s early cycling career and his  
12 cancer diagnosis and treatment, and purchased a copy of It’s Not About the Bike shortly  
13 after it was published. Plaintiff Wheeler purchased the book after “learning through the  
14 media about [Defendant] Armstrong’s supposedly truthful and inspiring account of his  
15 triumphant return to dominate the world of cycling after his devastating bout with  
16 testicular cancer.” (Id. at 8.) Wheeler “was so impressed with It’s Not About the Bike . . .  
17 that he bought Armstrong’s follow-up book, Every Second Counts . . . .” (Id. at 8-9.)  
18 Plaintiff Lauria currently has breast cancer, and “was inspired by advertising featuring  
19 reports of Armstrong’s successful battle against cancer, which moved her to purchase  
20 [Defendant] Armstrong’s books.” (Id. at 9.) Having learned that Armstrong took  
21 performance enhancing drugs to win races has left Plaintiff Lauria “bitterly angry,” and  
22 she would not have purchased either book had she known that Defendant Armstrong  
23 had used such drugs. (Id.)

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1 Plaintiff Reimers purchased It's Not About the Bike after seeing "advertisements  
2 regarding Armstrong's remarkable comeback to 'win' the Tour de France cycling race  
3 after conquering testicular cancer . . . ." (Id.) Finally, Plaintiff Scott Armstrong  
4 ("S. Armstrong") followed Defendant Armstrong's career, found Defendant Armstrong's  
5 career inspiring, and believed Defendant Armstrong's claims that he did not use  
6 performance enhancing drugs. "Relying on Defendant Armstrong's representations as  
7 to his drug-free life and cycling career, [Plaintiff] S. Armstrong purchased and read It's  
8 Not About the Bike." (Id. at 10.) Because Plaintiff S. Armstrong believed that Defendant  
9 Armstrong had told the truth in this book, Plaintiff S. Armstrong recommended the book  
10 to his friends. "[Plaintiff] S. Armstrong also read Every Second Counts due to his belief  
11 in Armstrong's false and misleading representations as to his drug-free life and cycling  
12 career." (Id.) Plaintiff S. Armstrong would not have purchased or read either book had  
13 he known that Armstrong's representations regarding his use of performance enhancing  
14 drugs were false.

15  
16 **STANDARD**  
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18 California's anti-SLAPP (strategic lawsuit against public participation) statute is  
19 designed to discourage suits that "masquerade as ordinary lawsuits but are brought to  
20 deter common citizens from exercising their political or legal rights or to punish them for  
21 doing so." Batzel v. Smith, 333 F.3d 1018, 1024 (9th Cir. 2003). The statute provides:

22 A cause of action against a person arising from any act of  
23 that person in furtherance of the person's right of petition or  
24 free speech under the United States Constitution or the  
25 California Constitution in connection with a public issue shall  
be subject to a special motion to strike, unless the court  
determines that the plaintiff has established that there is a  
probability that the plaintiff will prevail on the claim.

26 Cal. Civ. Proc. Code § 425.16(b)(1). The anti-SLAPP statute "was enacted to allow early  
27 dismissal of meritless first amendment cases aimed at chilling expression through costly,  
28 time-consuming litigation."

1 Metabolife Int'l, Inc. v. Wornick, 264 F.3d 832, 839 (9th Cir. 2001). In particular, the  
2 California Legislature found:

3           There has been a disturbing increase in lawsuits brought  
4           primarily to chill the valid exercise of the constitutional rights  
5           of freedom of speech and petition for the redress of  
6           grievances. The Legislature finds and declares that it is in  
7           the public interest to encourage continued participation in  
8           matters of public significance, and that this participation  
9           should not be chilled through abuse of the judicial process.

10 Cal. Civ. Proc. Code § 425.16(a). The California Legislature specifically provided that  
11 the anti-SLAPP statute should be “construed broadly.” Id.; see Briggs v. Eden Council  
12 for Hope & Opportunity, 19 Cal. 4th 1106, 1119 (1999).

13           The anti-SLAPP motion is available in federal court. Thomas v. Fry’s Elecs., Inc.,  
14 400 F.3d 1206 (9th Cir. 2005) (per curiam). The court must evaluate an anti-SLAPP  
15 motion in two steps. First, the defendant moving to strike must make “a threshold  
16 showing . . . that the act or acts of which the plaintiff complains were taken ‘in  
17 furtherance of the [defendant’s] right of petition or free speech under the United States or  
18 California Constitution in connection with a public issue,’ as defined in [subsection (e) of]  
19 the statute.” Hilton v. Hallmark Cards, 599 F.3d 894, 903 (9th Cir. 2010) (quoting Cal.  
20 Civ. Proc. Code § 425.16(b)(1)).

21           Second, “[i]f the court finds that such a showing has been made, it must then  
22 determine whether the plaintiff has demonstrated a probability of prevailing on the  
23 claim.” Navellier v. Sletten, 29 Cal.4th 82 (2002); see also U.S. ex rel. Newsham v.  
24 Lockheed Missiles & Space Co., Inc., 190 F.3d 963, 971 (9th Cir. 1999). “Put another  
25 way, the plaintiff must demonstrate that the complaint is both legally sufficient and  
26 supported by a sufficient prima facie showing of facts to sustain a favorable judgment if  
27 the evidence submitted by the plaintiff is credited.” Wilson v. Parker, Covert & Chidester,  
28 28 Cal. 4th 811, 821 (2002) (internal quotation marks omitted); Batzel v. Smith, 333 F.3d  
1018, 1024 (9th Cir. 2003).

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1 “[T]hough the court does not weigh the credibility or comparative probative strength of  
2 competing evidence, it should grant the motion if, as a matter of law, the defendant’s  
3 evidence supporting the motion defeats the plaintiff’s attempt to establish evidentiary  
4 support for the claim.” Wilson, 28 Cal. 4th at 821; Cal. Civ. Proc. Code § 425.16(b)(2).  
5 Thus, “[t]he statute ‘subjects to potential dismissal only those actions in which the  
6 plaintiff cannot state and substantiate a legally sufficient claim.’” Navellier, 29 Cal. 4th  
7 at 92.

8 “Only a cause of action that satisfies both prongs of the anti-SLAPP statute—i.e.,  
9 that arises from protected speech or petitioning and lacks even minimal merit—is a  
10 SLAPP, subject to being stricken under the statute.” Navellier, 29 Cal. 4th at 89.

11  
12 **ANALYSIS**

13  
14 In deciding the instant anti-SLAPP motions to strike, the Court must address three  
15 major issues. First, the Court must determine whether Defendants have met their  
16 burden by making a threshold showing that the acts of which Plaintiffs complain were  
17 taken in furtherance of Defendants’ right of free speech in connection with a public issue.  
18 Second, the Court must address Plaintiffs’ contention that the First Amended Complaint  
19 is exempt from anti-SLAPP motions pursuant to California Civil Procedure Code  
20 § 425.17. Finally, the Court must determine whether Plaintiffs have met their burden of  
21 making a threshold showing that Plaintiffs’ First Amended Complaint is legally sufficient  
22 and supported by a prima facie showing of facts. Each issue is addressed in turn,  
23 below.

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1           **A. Defendants' Burden**

2                   **1. Protected Conduct**

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4           First, the activity the plaintiff challenges must have been conducted "in  
5 furtherance" of the exercise of free speech rights. Hilton, 599 F.3d at 903. "By its terms,  
6 this language includes not merely actual exercises of free speech rights but also conduct  
7 that furthers such rights." Id. (citing Cal. Civ. Proc. Code § 425.16(e)(4); Navellier, 29  
8 Cal. 4th at 94 ("The [California] [l]egislature did not intend that in order to invoke the  
9 special motion to strike the defendant must first establish her actions are constitutionally  
10 protected under the First Amendment as a matter of law.")).

11           As used in the anti-SLAPP statute, an "act in furtherance of a person's right of  
12 petition or free speech under the United States or California Constitution in connection  
13 with a public issue" includes: (1) any written or oral statement or writing made before a  
14 legislative, executive, or judicial proceeding, or any other official proceeding authorized  
15 by law; (2) any written or oral statement or writing made in connection with an issue  
16 under consideration or review by a legislative, executive, or judicial body, or any other  
17 official proceeding authorized by law; (3) any written or oral statement or writing made in  
18 a place open to the public or a public forum in connection with an issue of public interest;  
19 (4) or any other conduct in furtherance of the exercise of the constitutional right of  
20 petition or the constitutional right of free speech in connection with a public issue or an  
21 issue of public interest. Doe v. Gangland Prods., Inc., 802 F. Supp. 2d 1116, 1119-20  
22 (C.D. Cal. 2011) (quoting Cal. Civ. Proc. Code § 425.16(e)).

23           Here, each Defendant contends that the activity alleged by Plaintiffs was "conduct  
24 in furtherance of the exercise of . . . the constitutional right of free speech in connection  
25 with a public issue or an issue of public interest," thus meeting the fourth type of act in  
26 furtherance of the right to free speech in connection with a public issue. See Cal. Civ.  
27 Proc. Code § 425.16(e)(4).

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1 “Section 425.16 does not define ‘public interest’ or ‘public issue.’ Those terms are  
2 inherently amorphous and thus do not lend themselves to a precise, all-encompassing  
3 definition.” E Clampus Vitus v. Steiner, 2:12-CV-01381-GEB, 2012 WL 6608612 (E.D.  
4 Cal. Dec. 18, 2012) (quoting Cross v. Cooper, 197 Cal. App. 4th 357, 371 (2011)).  
5 However, “[t]he California intermediate appellate courts have developed multiple tests to  
6 determine whether a defendant's activity is in connection with a public issue.” Hilton,  
7 599 F.3d at 906. In Hilton, the Ninth Circuit applied two tests: one from Rivero v.  
8 American Federation of State, County, and Municipal Employees, AFL–CIO, 105 Cal.  
9 App. 4th 913 (2003), a case from the Court of Appeal for the First District, and one from  
10 Weinberg v. Feissal, 110 Cal. App. 4th 1122 (2003), a case from the Court of Appeal for  
11 the Third District. Id.

12 In Rivero, the Court of Appeal for the First District surveyed the appellate cases  
13 and formulated three categories of public issues: (1) statements “concern[ing] a person  
14 or entity in the public eye”; (2) “conduct that could directly affect a large number of  
15 people beyond the direct participants”; (3) “or a topic of widespread, public interest.”  
16 Gangland Prods., 802 F. Supp. 2d at 1123 (citing Rivero, 105 Cal. App. 4th at 924;  
17 Commw. Energy Corp. v. Investor Data Exch., 110 Cal. App. 4th 26, 33 (2003)  
18 (describing Rivero as the first systematic treatment of the “public issue-public interest  
19 aspect” of the anti–SLAPP statute)).

20 Here, it is without question that statements concerning Lance Armstrong “concern  
21 a person or entity in the public eye” and/or are “a topic of widespread, public interest.”  
22 Lance Armstrong is a famous cyclist and his career is a topic of interest worldwide. See  
23 Hallmark, 599 F.3d at 907 (finding Paris Hilton a “person in the public eye” and a “topic  
24 of widespread, public interest,” and she was before the lawsuit began). The Armstrong  
25 Books also attained the status of New York Times Bestsellers. The Court therefore  
26 concludes that the Books, and Defendant Armstrong himself, were a topic of widespread  
27 public interest.

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1 See Wallace v. Henderson, CIV 09CV1603-L(WMC), 2010 WL 1290911 (S.D. Cal. Mar.  
2 30, 2010) (finding book on New York Times best seller list a topic of widespread public  
3 interest) (citing Kronemyer v. Internet Movie Data Base, Inc., 150 Cal. App. 4th 941, 949  
4 (2007) (information about the motion picture “My Big Fat Greek Wedding” was a topic of  
5 widespread public interest because it was a successful independent motion picture)).

6 In Weinberg, the Court of Appeal for the Third District articulated a “somewhat  
7 more restrictive test, designed to distinguish between issues of ‘public, rather than  
8 merely private, interest.’” Hilton, 599 F.3d at 906 (quoting Weinberg, 110 Cal. App. 4th  
9 at 1132).

10 First, “public interest” does not equate with mere curiosity. Second,  
11 a matter of public interest should be something of concern to a  
12 substantial number of people. Thus, a matter of concern to the  
13 speaker and a relatively small, specific audience is not a matter of  
14 public interest. Third, there should be some degree of closeness  
15 between the challenged statements and the asserted public interest;  
16 the assertion of a broad and amorphous public interest is not  
17 sufficient. Fourth, the focus of the speaker's conduct should be the  
18 public interest rather than a mere effort to gather ammunition for  
19 another round of private controversy. Finally, . . . [a] person cannot  
20 turn otherwise private information into a matter of public interest  
21 simply by communicating it to a large number of people.”

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

23 In Hilton, the Ninth Circuit found that it need not decide between these two tests,  
24 as both were met. The same is true here. As in Hilton, there is no dispute that Lance  
25 Armstrong’s career, and the Books, which he wrote about his career and which  
26 Defendants published, are “something of concern to a substantial number of people.”  
27 Weinberg, 110 Cal. App. 4th at 1132. The connection between “the challenged  
28 statements”—portions of the Books and the promotional materials concerning the Books,  
as well as statements Armstrong and other Defendants made publicly denying his use of  
performance enhancing drugs—and “the asserted public interest”—Armstrong’s life,  
image, cycling career, and doping—is direct. See Hilton, 599 F.3d at 907.

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1 After all, the Books and statements concern Armstrong’s public image, career, and the  
2 doping issue. Because there was no preexisting controversy between any of  
3 Defendants and Plaintiffs, “the fourth and fifth considerations that the Weinberg court  
4 considered are inapposite.” See Hilton, 599 F.3d at 907 (citing Weinberg, 110 Cal. App.  
5 4th at 1132-33).

6 In Hilton, the Ninth Circuit emphasized that “‘public interest’ does not equate with  
7 mere curiosity.” 599 F.3d at 907 (citing 110 Cal. App. 4th at 1132). However, the Ninth  
8 Circuit observed that “this warning comes in the context of Weinberg’s insistence that  
9 courts apply the anti-SLAPP statute only to public, not to private matters. Thus,  
10 Weinberg elaborated that “a ‘public controversy’ does not equate with any controversy of  
11 interest to the public.” Id. (quoting 110 Cal. App. 4th at 1132). Accordingly, the Ninth  
12 Circuit “read this to mean that a private controversy, even between famous people, that  
13 interests the public is not enough. Under Weinberg, for the activities of celebrities to be  
14 a public issue, the activities, as well as the personages involved must be public.” Id. at  
15 907-08 (citing 110 Cal. App. 4th at 1132).

16 This limitation does not apply in this case, however, as the Armstrong Books do  
17 not concern only the personal details of Armstrong’s life—they concern his public cycling  
18 career and cheating in the Tour de France—public activities, “which are the very things  
19 that interest people about [him].” See Hilton, 599 F.3d at 908. While the Books do  
20 address certain aspects of Armstrong’s private life, such as his battle with cancer, his  
21 marriage, and the birth of his children, the books focus on Armstrong’s cycling career  
22 and his return to cycling to win the Tour de France. Thus, Weinberg also supports a  
23 finding that the conduct Plaintiffs allege was “in furtherance of the exercise of . . . the  
24 constitutional right of free speech in connection with a public issue or an issue of public  
25 interest.” Cal. Civ. Proc. Code § 425.16(a), (e)(4).

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1 As such, under both tests used by the Ninth Circuit, the alleged conduct—  
2 including the speech in the Books, about the Books, and the conduct in furtherance of  
3 that speech, such as the alleged aiding and abetting by Defendants Weisel and  
4 Stapleton—was in furtherance of the exercise of the constitutional right of free speech in  
5 connection with a public issue or an issue of public interest. The alleged conduct  
6 therefore meets the requirements of California Civil Procedure Code section  
7 425.16(e)(4). As such, Defendants meet their threshold burden under the anti-SLAPP  
8 statute.

9 Defendants also argue that the actions at issue are written or oral statements or  
10 writings made in a place open to the public or in a public forum in connection with an  
11 issue of public interest, thus meeting the requirements of section 425.16(e)(3).  
12 However, the Court need not analyze whether the requirements of subsection (e)(3) are  
13 satisfied, as the requirements of subsection (e)(4) are met. See supra.

## 14 15 **2. Illegal Conduct**

16  
17 Plaintiffs contend that California's anti-SLAPP statute does not provide a shield  
18 for speech made in furtherance of Armstrong's illegal activity. (ECF No. 64 at 15.) It is  
19 true that "the anti-SLAPP statute cannot be invoked by a defendant whose assertedly  
20 protected activity is illegal as a matter of law, and for that reason, not protected by  
21 constitutional guarantees of free speech and petition." Lauter v. Anoufrieve, 642 F.  
22 Supp. 2d 1060, 1108 (C.D. Cal. 2009) (citing Flatley v. Mauro, 39 Cal. 4th 299, 317  
23 (2006)). However, under California state law, conduct that would otherwise come within  
24 the scope of the anti-SLAPP statute does not lose its coverage simply because it is  
25 alleged to have been unlawful or unethical. Id. (citing Birkner v. Lam, 156 Cal. App. 4th  
26 275, 285 (2007)). The question of whether a defendant's underlying conduct was illegal  
27 as a matter of law is preliminary, and unrelated to the second prong question of whether  
28 the plaintiff has demonstrated a probability of prevailing.

1 Id. (citing Flatley, 39 Cal. 4th at 320). The asserted protected speech or petition activity  
2 loses protection only if it is established through defendant's concession or by  
3 uncontroverted and conclusive evidence that the conduct is illegal as a matter of law. Id.  
4 at 1109 (citing Flatley, 39 Cal. 4th at 320; Salma v. Capon, 161 Cal. App. 4th 1275, 1287  
5 (2008)).

6 In this case, there are two issues with respect to Plaintiffs' argument that the  
7 criminal exception to the anti-SLAPP statute applies. First, Plaintiff argues that the Court  
8 must accept as true Plaintiffs' allegations that Armstrong's underlying conduct is illegal.  
9 (ECF No. 64 at 16.). However, Plaintiffs fail to provide conclusive evidence that the  
10 conduct at issue—Armstrong's statements that he did not dope, the content of the book,  
11 and the promotional materials for the book—is criminally illegal. Second, the so-called  
12 "criminal exception" applies only if the underlying protected conduct at issue is itself  
13 criminal. Plaintiffs focus on Armstrong's illegal conduct in smuggling or trafficking drugs.  
14 (ECF No. 64 ("[T]here is already evidence of USADA's uncontested charges of drug  
15 trafficking and criminal conspiracy against Armstrong . . . and a national TV interview in  
16 which Armstrong confessed to years of lies.")) However, drug trafficking and criminal  
17 conspiracy is simply not the conduct at issue in this case. The conduct at issue is the  
18 speech about the book and Armstrong's speech about whether he used drugs.  
19 Armstrong's lies about his use of drugs are simply not criminal conduct.

20 Thus, Plaintiffs' argument that Defendants are not entitled to the protection of the  
21 anti-SLAPP statute because the underlying conduct is illegal is without merit.

## 22 23 **B. Statutory Exemptions**

24  
25 In 2003, the California Legislature enacted section 425.17 to curb the "disturbing  
26 abuse" of the anti-SLAPP statute. Cal. Civ. Proc. Code § 425.17(a). "This exception  
27 statute covers both public interest lawsuits, under subdivision (b), and "commercial  
28 speech," under subdivision (c)."

1 Club Members For An Honest Election v. Sierra Club, 45 Cal. 4th 309, 316 (2008). In  
2 this case, Plaintiffs contend that both section 425.17(b) and (c) exempt Plaintiffs' First  
3 Amended Complaint from an anti-SLAPP motion. However, Defendants respond that  
4 even if these statutory exemptions apply, Defendants meet the statutory exception to the  
5 exemptions, set out in section 425.17(d).

6 Under California Civil Procedure Code section 425.17(b), the anti-SLAPP  
7 procedure "does not apply to any action brought solely in the public interest or on behalf  
8 of the general public." Cal. Civ. Proc. Code § 425.17(b). The exemption of section  
9 425.17(b) applies only if each of the following conditions is met:

10 (1) the plaintiff does not seek any relief greater than or  
11 different from the relief sought for the general public or a  
class of which the plaintiff is a member;

12 (2) the action, if successful, would enforce an important right  
13 affecting the public interest, and would confer a significant  
14 benefit, whether pecuniary or nonpecuniary, on the general  
public or a large class of persons; and

15 (3) private enforcement is necessary and places a  
16 disproportionate financial burden on the plaintiff in relation to  
the plaintiff's stake in the matter.

17 Cal. Civ. Proc. Code § 425.17(b). To be exempt, the action must be "brought solely in  
18 the public interest or on behalf of the general public" and meet the three conditions set  
19 forth in section 425.17(b). Strathmann v. Acacia Research Corp., 210 Cal. App. 4th 487,  
20 499 (2012). "[T]he term 'public interest' is used to define suits brought for the public's  
21 good or on behalf of the public." Id. (quoting Club Members, 45 Cal. 4th at 318). The  
22 term "solely" as used in section 425.17(b) "expressly conveys the Legislative intent that  
23 section 425.17(b) not apply to an action that seeks a more narrow advantage for a  
24 particular plaintiff." Id. (quoting Club Members, 45 Cal. 4th at 316–17).

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1 California Civil Procedure Code section 425.17(c) lays out the so-called  
2 “commercial speech exemption” to the anti-SLAPP procedure. Cal. Civ. Proc. Code  
3 § 425.17(c); see also TYR Sport Inc. v. Warnaco Swimwear Inc., 679 F. Supp. 2d 1120,  
4 1142 (C.D. Cal. 2009); Weiland Sliding Doors & Windows, Inc. v. Panda Windows &  
5 Doors, LLC, 814 F. Supp. 1033, 1036 (S.D. Cal. 2011). Under subsection (c), causes of  
6 action arising from commercial speech are exempt from the anti-SLAPP law when:

- 7 1) The cause of action is against a person primarily engaged  
8 in the business of selling or leasing goods or services;
- 9 2) The cause of action arises from a statement or conduct by  
10 that person consisting of representations of fact about that  
11 person’s or a business competitor’s business operations,  
12 goods, or services;
- 13 3) The statement or conduct was made either for the purpose  
14 of obtaining approval for, promoting, or securing sales or  
15 leases of, or commercial transactions in, the person’s goods  
16 or services or in the course of delivering the person’s goods  
17 or services; and
- 18 4) The intended audience is an actual or potential buyer or  
19 customer, or a person likely to repeat the statement to, or  
20 otherwise influence, an actual or potential buyer or customer.

21 Weiland Sliding Doors & Windows, Inc., 814 F. Supp. at 1037 (citing Simpson Strong-Tie  
22 Co. v. Gore, 49 Cal. 4th 12, 30 (2010)).

23 The exemptions of sections 425.17(b) and (c) do not apply to “any person  
24 engaged in the dissemination of ideas or expression in any book or academic journal,  
25 while engaged in the gathering, receiving, or processing of information for  
26 communication to the public.” Cal. Civ. Proc. Code § 425.17(d)(1). Likewise,  
27 subdivisions (b) and (c) do not apply to “[a]ny action against any person or entity based  
28 upon the creation, dissemination, exhibition, advertisement, or other similar promotion of  
any dramatic, literary, musical, political, or artistic work, including, but not limited to, a  
motion picture or television program, or an article published in a newspaper or magazine  
of general circulation.” Cal. Civ. Proc. Code § 425.17(d)(2). Thus, claims falling within  
the parameters of subsection (d) are “excepted from the section 425.16 exemption” of  
subsections (b) and (c).



1 Ingels v. Westwood One Broadcasting Services, Inc., 129 Cal. App. 4th 1050, 1067  
2 (2005); see also Club Members, 45 Cal. 4th at 320 n.9.

3 Few cases have dealt with the application of subsection (d), and the parties  
4 present no cases determining whether subsection (d) applies to publishers and  
5 individuals connected with the creation and distribution of a published book. Where  
6 there is no binding authority, a court must undertake to ascertain the meaning of the  
7 statute by use of statutory interpretation. See, e.g., Tello v. McMahon, 677 F. Supp.  
8 1436, 1441 (E.D. Cal. 1988). Thus, the issue before the Court is the proper  
9 interpretation of this statute. Major v. Silna, 134 Cal. App. 4th 1485, 1493 (2005) (citing  
10 R&P Capital Resources, Inc. v. Cal. State Lottery, 31 Cal. App. 4th 1033, 1036 (1995)).  
11 More specifically, the question before the Court is the scope of subsection (d)(2).

12 “Statutes must be interpreted, if possible, to give each word some operative  
13 effect.” Walters v. Metro Educ. Enters., Inc., 519 U.S. 202, 209 (1007). In the Ninth  
14 Circuit, a federal court applying state law must utilize the tools of statutory interpretation  
15 prescribed by the relevant state supreme court. See Or. Advocacy Ctr. v. Mink, 322  
16 F.3d 1101, 1114 n.7 (9th Cir. 2003) (applying interpretive framework announced by  
17 Oregon Supreme Court to Oregon statute); Nike, Inc. v. McCarthy, 379 F.3d 576, 581 n.  
18 4 (9th Cir. 2004) (same). The California Supreme Court has set forth the following  
19 principles of statutory construction:

20 Under settled canons of statutory construction, in construing  
21 a statute we ascertain the Legislature's intent in order to  
22 effectuate the law's purpose. We must look to the statute's  
23 words and give them their usual and ordinary meaning. The  
24 statute's plain meaning controls the court's interpretation  
25 unless its words are ambiguous. If the words in the statute  
26 do not, by themselves, provide a reliable indicator of  
27 legislative intent, statutory ambiguities often may be resolved  
28 by examining the context in which the language appears and  
adopting the construction which best serves to harmonize the  
statute internally and with related statutes. [...] If the statute  
is ambiguous, we may consider a variety of extrinsic aids,  
including legislative history, the statute's purpose, and public  
policy.

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1 People v. Arias, 45 Cal.4th 169, 177 (2008) (internal citations and quotations omitted).  
2 “To determine the most reasonable interpretation of a statute, we look to its legislative  
3 history and background.” Goodman v. Lozano, 47 Cal.4th 1327, 1332 (2010).

4  
5 **1. Plain Meaning**

6  
7 The Court’s interpretation begins with the text of the statute. Campbell, 6642 F.3d  
8 at 826 (citing Martinez, 109 Cal.Rptr.3d 514; Jimenez v. Quarterman, 555 U.S. 113, 129  
9 (2009)). The statute’s words must be assigned their “usual and ordinary meanings” and  
10 evaluated in context. Id. (quoting Martinez, 109 Cal. Rptr. 3d 514). “If this plain  
11 meaning is unambiguous, the inquiry ends there and we need not consider further  
12 interpretive aids (e.g., drafting history).” Id.

13 Here, the questions the Court must resolve in interpreting the statute is the  
14 meaning of the word “work” as it is used in subsection (d)(2), and whether the Armstrong  
15 Books are included within that meaning. In interpreting subsection (d)(2), the Second  
16 District for the California Court of Appeal stated that “[t]he word ‘work,’ as ordinarily  
17 understood, means ‘something produced or accomplished by effort, exertion, or exercise  
18 of skill,’ or ‘something produced by the exercise of creative talent or expenditure of  
19 creative effort.’” Major, 134 Cal. App. 4th at 1494 (quoting Merriam–Webster’s  
20 Collegiate Dict. (10th ed. 1995)) (analyzing whether (d)(2) applies to actions against  
21 individuals engaged in the distribution of political literature during an election campaign).

22 Under the plain meaning of the word “work,” that the Books at issue are “works”  
23 within the meaning of the statute. Both It’s Not About the Bike and Every Second  
24 Counts are books—literature—produced by the efforts and exercise of literary skill of  
25 Sally Jenkins and Lance Armstrong. Likewise, the Books were produced by the exercise  
26 of their authors’ creative talent or expenditure of their creative effort.

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1 This description fits the literary works at issue regardless of Plaintiffs' allegations that the  
2 Books are in fact works of fiction, since works of fiction, like works of non-fiction or  
3 biography, involve the expenditure of creative effort.

4 However, because the Legislature has accompanied the word 'work' with  
5 descriptive terms and illustrative examples, the Court's analysis does not end at  
6 considering the meaning of the word "work." Rather, the doctrine of ejusdem generis<sup>5</sup>  
7 must guide the Court's inquiry into the scope of the word 'work' as it is used in this  
8 statute. Id. The California Supreme Court explained in Kraus v. Trinity Management  
9 Services, Inc., 23 Cal.4th 116, 141 (2000), that "[e]jusdem generis applies whether  
10 specific words follow general words in a statute or vice versa. In either event, the general  
11 term or category is restricted to those things that are similar to those which are  
12 enumerated specifically." Id. (quoting Kraus). "The canon presumes that if the  
13 Legislature intends a general word to be used in its unrestricted sense, it does not also  
14 offer as examples peculiar things or classes of things since those descriptions then  
15 would be surplusage." Id.

16 Subdivision (d)(2) includes "any dramatic, literary, musical, political, or artistic  
17 work, including, but not limited to, a motion picture or television program, or an article  
18 published in a newspaper or magazine of general circulation." Cal. Civ. Proc. Code  
19 § 425.17(d)(2). "The phrase 'including, but not limited to' is a term of enlargement, and  
20 signals the Legislature's intent that subdivision (d)(2) applies to items not specifically  
21 listed in the provision." Major, 134 Cal. App. 4th at 1495.

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27 <sup>5</sup> "Meaning literally, 'of the same kind,' the doctrine of ejusdem generis is of ancient vintage."  
28 Major, 134 Cal. App. 4th at 1495 (quoting Engelmann v. State Bd. of Educ., 2 Cal. App. 4th 47, 56, n.11 (1991)).

1 Viewed in the context of the anti-SLAPP statute, the Armstrong Books are no  
2 different from the illustrative examples listed in subsection (d)(2). These books are  
3 “literary works” within the meaning of the statute; although “books” are not specifically  
4 listed in subsection (d)(2), books are similar to those things that are specifically  
5 enumerated in the statute—“a motion picture or television program, or an article  
6 published in a newspaper or magazine of general circulation.” Cal. Civ. Proc. Code  
7 § 425.17(d)(2); Kraus, 23 Cal.4th at 141 (definition of eiusdem generis). Indeed, a book  
8 is “conduct in furtherance of the exercise of . . . the constitutional right of free speech”  
9 just as is a motion picture, television program, or newspaper or magazine article. Cal.  
10 Civ. Proc. Code § 425.16(e)(4).

11 Other cases analyzing the scope of subsection (d)(2) have reached results that  
12 support the Court’s conclusion. In Ingels v. Westwood One Broadcasting Services, Inc.,  
13 the Court of Appeal for the Second District concluded that subsection (d)(2)  
14 encompassed an action against a radio broadcasting corporation and its employees  
15 based on allegations that the plaintiff had been improperly excluded from participating in  
16 a call-in talk show. 129 Cal. App. 4th at 1067-68. The Ingels court held that “radio  
17 stations,” although not specifically listed in subsection (d), are included in the group of  
18 “news media and other media defendants” listed therein. Id. at 1068. The court noted  
19 that the radio show at issue “is designed and produced to elicit viewpoints from members  
20 of the public on issues of public interest which are contemporaneously aired to the public  
21 at large. We see no distinction in this and the gathering and dissemination of news by  
22 other media organizations which are identified in the exception.” Id. In Major v. Silna,  
23 discussed above, the Court of Appeal for the Second District held that letters and  
24 advertisements, mailed by the defendant, which advocated support for certain political  
25 candidates on the basis of their political positions, and which were distributed by mail in  
26 Malibu, were “political works” within the meaning of subsection (d)(2). 134 Cal. App. 4th  
27 at 1495.

28 ///

1           Accordingly, under the plain meaning of the statute, this case falls within the ambit  
2 of subsection (d)(2).

3  
4                           **2.       Legislative History and Public Policy**

5  
6           An examination of the legislative history further supports the Court's conclusion  
7 that this action is within the ambit of section 425.17(d). The California Senate bill  
8 analysis includes the following explanation for subsection (d):

9                           Proposed subdivision (d) of newly added section 425.17  
10 would exempt the news media and other media defendants  
11 (such as the motion picture industry) from the bill when the  
12 underlying act relates to news gathering and reporting to the  
13 public with respect to the news media or to activities involving  
the creation or dissemination of any works of a motion picture  
or television studio. For claims arising from these activities,  
the current SLAPP motion would remain available to these  
defendants.

14 Ingels, 129 Cal. App. 4th at 1067-68 (quoting Sen. Com. on Judiciary, Analysis of Sen.  
15 Bill No. 515 (2003–2004 Reg. Sess.)). “[T]he reason for these exemptions is simple.  
16 Newspapers and other media are in the business of disseminating information to the  
17 public.” Sen. Com. on Judiciary, Analysis of Sen. Bill No. 515 (2003–2004 Reg. Sess.)

18           In the Assembly Committee on the Judiciary hearing analyzing the proposed  
19 subsection (d) amendment, the Assembly Committee stated:

20                           [t]he bill exempts, and thereby continues to allow, the anti-  
21 SLAPP motion to be used by all persons and entities  
22 engaged in the press or broadcast media, publishing of books  
23 and journals, and all those who are sued for protected  
activities based upon creative and promotional activities  
regarding dramatic, literary, musical, political, or artistic  
works.

24 Assembly Com. on Judiciary, Anti-SLAPP Motions: Ensuring Appropriate Use of the  
25 Procedure, Sen. Bill No. 789 (2001-2002 Reg. Sess.). The Assembly Committee on the  
26 Judiciary's analysis also states:

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1 In order to preserve the anti-SLAPP motion for the protection  
2 of those frequent targets it was intended to protect, this bill  
3 excludes from the foregoing exemptions [subsections (b) and  
4 (c)] specified persons and entities, such as those engaged in  
5 speech-related activities, specified nonprofits, and actions  
6 against persons or entities based on the creation or  
7 promotion of constitutionally protected artistic works and the  
8 like.

6 Assembly Com. on Judiciary, Anti-SLAPP Motions: Appropriate Use of the Procedure,  
7 Sen. Bill No. 515 (2003-2004 Reg. Sess.).

8 This legislative history makes clear that subsection (d) was intended to ensure  
9 that anti-SLAPP motions remained available to persons or entities engaged in the  
10 “publishing of books” and “all those . . . sued for protected activities based upon creative  
11 and promotional activities regarding . . . literary . . . works.” Assembly Com. on  
12 Judiciary, Anti-SLAPP Motions: Ensuring Appropriate Use of the Procedure, Sen. Bill  
13 No. 789 (2001-2002 Reg. Sess.). Although the legislative history specifically discusses  
14 the motion picture industry as a “media defendant,” this statement does not preclude  
15 publishers from being counted as “media defendants,” as Plaintiffs suggest. Indeed, the  
16 legislative history from the Assembly Committee on the Judiciary makes clear that those  
17 engaged in publishing books are considered media defendants for purposes of this  
18 statute. As such, the Publisher Defendants are protected from the application of  
19 subsections (b) and (c), and may still bring an anti-SLAPP motion. Likewise, the  
20 individual Defendants in this case—Armstrong, Stapleton, and Weisel—are “sued for  
21 [their] protected activities based upon creative and promotional activities regarding . . .  
22 literary . . . works.” *Id.* More specifically, Defendant Armstrong is sued based on his  
23 creative and promotional activities regarding the Armstrong Books, which are literary  
24 works under the meaning of the statute, while Defendants Stapleton and Weisel are  
25 sued for their alleged promotional activities regarding these literary works.

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1 Public policy also weighs in favor of allowing Defendants to bring an anti-SLAPP  
2 motion. As the legislative history notes, these Defendants are specifically the type of  
3 defendants that the Legislature sought to protect by enacting subsection (d)—“those  
4 engaged in speech-related activities.” See supra.

5 Thus, the instant action is an “action” against “person[s] or entit[ies] based upon  
6 the creation, dissemination, . . . advertisement, or other similar promotion of” a “literary”  
7 “work.” Cal. Civ. Proc. Code § 425.17(d)(2). As such, the Court need not determine  
8 whether the action also falls within the ambit of subsections (b) and (c), as the action is  
9 exempt from these statutory exemptions to the anti-SLAPP statute. Defendants are  
10 therefore entitled to bring an anti-SLAPP motion, and have met their initial burden under  
11 the statutory framework.<sup>6</sup>

### 13 C. Plaintiffs’ Burden

14  
15 “[T]he [anti-SLAPP] statute does not bar a plaintiff from litigating an action that  
16 arises out of the defendant's free speech or petitioning; it subjects to potential dismissal  
17 only those actions in which the plaintiff cannot state and substantiate a legally sufficient  
18 claim.” Hilton, 599 F.3d at 908 (quoting Navellier, 29 Cal. 4th 82). Accordingly, “[o]nce it  
19 is determined that an act in furtherance of protected expression is being challenged, the  
20 plaintiff must show a ‘reasonable probability’ of prevailing in its claims for those claims to  
21 survive dismissal.” Metabolife Int’l, 264 F.3d at 840 (citing § 425.16(b)). “To do this, the  
22 plaintiff must demonstrate that ‘the complaint is legally sufficient and supported by a  
23 prima facie showing of facts to sustain a favorable judgment if the evidence submitted by  
24 the plaintiff is credited.’” Id. (quoting Wilcox, 33 Cal. Rptr. 2d at 454).

25  
26  
27  
28 <sup>6</sup> Contrary to Plaintiffs’ contention, Defendants do not argue, and the Court does not hold, that because subsection (d) applies, Defendants may bypass the first step of the Anti-SLAPP analysis. The fact that this action falls within the meaning of subsection (d) merely allows Defendants to bring the anti-SLAPP motion; it’s application does not exempt Defendants from meeting the requirements of section 425.16. However, as set forth in Section A of the Court’s Order, Defendants have met the requirements of section 425.16(e)(4). Thus, the burden shifts to Plaintiffs to show a reasonable probability of prevailing on their claims.

1 Thus, a defendant's anti-SLAPP motion should be granted when a plaintiff presents an  
2 insufficient legal basis for the claims or “when no evidence of sufficient substantiality  
3 exists to support a judgment for the plaintiff.” Metabolife Int'l, 264 F.3d at 840 (citing  
4 Wilcox, 33 Cal. Rptr.3d at 457). “At this second step of the anti-SLAPP inquiry, the  
5 required probability that [Plaintiffs] will prevail need not be high.” Hilton, 599 F.3d at 908.  
6 “The California Supreme Court has sometimes suggested that suits subject to being  
7 stricken at step two are those that ‘lack even minimal merit.’” Id. (quoting Navellier,  
8 29 Cal. 4th 82).

9 Here, because Defendants have met their initial burden under the anti-SLAPP  
10 statute, and because the action is not subject to a statutory exemption, the burden shifts  
11 to Plaintiffs to show a reasonable probability of prevailing on their claims. Defendant  
12 Armstrong contends only that Plaintiffs cannot establish a probability of proving their  
13 UCL, FAL, and CLRA claims. All other Defendants move to strike each of Plaintiffs’  
14 claims.

### 15 16 **1. UCL, FAL, and CLRA Claims**

17  
18 Defendants raise the First Amendment as a defense to Plaintiffs UCL, FAL, and  
19 CLRA claims, arguing that their alleged conduct is protected by the First Amendment.  
20 “California's consumer protection laws, like the unfair competition law, govern only  
21 commercial speech.” Rezec v. Sony Pictures Entm't, Inc., 116 Cal. App. 4th 135, 140  
22 (2004) (discussing UCL, FAL, and CLRA claims) (citing Kasky, 27 Cal.4th at 953–956,  
23 962, 969–970; Keimer v. Buena Vista Books, Inc., 75 Cal. App. 4th 1220, 1230–31  
24 (1999); O'Connor v. Super. Ct., 177 Cal. App. 3d 1013, 1018–20 (1986)).

25 “Noncommercial speech is beyond their reach.” Id. Thus, “lawsuits premised on section  
26 17200 are subject to being stricken because they are barred by the First Amendment  
27 where the speech complained of is not commercial speech.” New.Net, Inc. v. Lavasoft,  
28 356 F. Supp. 2d 1090, 1110 (C.D. Cal. 2004).



1           “As a general matter, the First Amendment means that government has no power  
2 to restrict expression because of its message, its ideas, its subject matter, or its content.”  
3 Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 65 (1983) (quoting Police Dep’t v.  
4 Mosley, 408 U.S. 92, 95 (1972)). The Supreme Court has repeatedly held that civil  
5 liability for speech, even in the context of private civil litigation, is an interference with  
6 speech and therefore must meet First Amendment scrutiny. See New York Times v.  
7 Sullivan, 376 U.S. 254 (1964). “The First Amendment affords protection to both  
8 commercial and noncommercial speech.” Dex Media W., Inc. v. City of Seattle, 696 F.3d  
9 952, 956-67 (9th Cir. 2012) (citing Bigelow v. Virginia, 421 U.S. 809 (1975)). However,  
10 the strength of First Amendment protection afforded “depends on whether the activity  
11 sought to be regulated constitutes commercial or noncommercial speech.” Bolger, 463  
12 U.S. at 65; Dex Media, 696 F.3d at 957. Commercial speech that is false or misleading  
13 is afforded no First Amendment protection at all. Hoffman v. Capital Cities/ ABC, Inc.,  
14 255 F.3d 1180, 1184 (9th Cir. 2011) (citing Florida Bar v. Went For It, Inc., 515 U.S. 618,  
15 623-24 (1995)).

16           The Ninth Circuit has adopted a three-pronged analysis based on Supreme Court  
17 precedent to determine whether speech is commercial. First, the court considers  
18 whether the publication fits within the “core notion of commercial speech.” Dex Media,  
19 696 F.3d at 957. “Core” commercial speech is “speech which does no more than  
20 propose a commercial transaction.” Id. at 957 (quoting Bolger, 463 U.S. at 66).

21           If speech does more than propose a commercial transaction, but contains “mixed  
22 content”—that is, both commercial and non-commercial elements—the Ninth Circuit  
23 applies the Supreme Court’s Bolger test. Dex Media, 696 F.3d at 957. In Bolger, “the  
24 Supreme Court held that speech could properly be characterized as commercial when  
25 (1) the speech is admittedly advertising, (2) the speech references a specific product,  
26 and (3) the speaker has an economic motive for engaging in the speech.”

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28 ///

1 Am. Acad. of Pain Mgmt. v. Joseph, 353 F.3d 1099, 1106 (9th Cir. 2004) (citing Bolger,  
2 463 U.S. at 66-67; Assoc. of Nat'l. Advertisers, Inc. v. Lungren, 44 F.3d 726, 728 (9th  
3 Cir. 1994) (stating Bolger factors)). The Supreme Court made clear that these three  
4 factors are not dispositive, but the “combination of all these characteristics . . . provides  
5 strong support for the . . . conclusion that the [publication at issue is] properly  
6 characterized as commercial speech.” Dex Media, 696 F.3d at 958 (quoting Bolger, 463  
7 U.S. at 67).

8 Finally, even if the publication meets this threshold commercial speech  
9 classification, courts must determine whether the speech still receives full First  
10 Amendment protection, because the commercial aspects of the speech are “inextricably  
11 intertwined” with otherwise fully protected speech, such that the publication sheds its  
12 commercial character and becomes fully protected speech. Id. at 958 (citing Riley v.  
13 Nat'l Fed'n of the Blind, 487 U.S. 781, 796 (1988)). “In other words, the inextricably  
14 intertwined test operates as a narrow exception to the general principle that speech  
15 meeting the Bolger factors will be treated as commercial speech.” Id.

16 In this case, the speech at issue can be divided into three types or categories.  
17 The first type includes those statements contained within the Books themselves. The  
18 second type includes statements relating to the Books, including promotional statements  
19 made by Defendants about the book and the statements contained on the flyleaves and  
20 covers of the Books. The third type contains those statements made by Armstrong and  
21 Stapleton relating to Armstrong’s use of performance enhancing drugs, but which do not  
22 specifically reference the Books or promote the Books.

### 23 Statements Contained Within the Books

24 First, the Court must ask whether the statements contained within the Armstrong  
25 Books fit within the “core notion of commercial speech.” Dex Media, 696 F.3d at 957. It  
26 is obvious that the statements contained within the book do more than propose a  
27 commercial transaction.

28 ///

1 The content of the Armstrong Books is not an advertisement for a product; rather, the  
2 statements are Armstrong’s account, albeit partially untruthful, of his life and cycling  
3 career. The Books discuss, among other things, Defendant Armstrong’s childhood, his  
4 personal relationships, his battle with cancer, and his cycling career. The Court need not  
5 go further in analyzing the commercial nature of this speech, as the first prong of the  
6 Ninth Circuit’s analysis is not met, and the statements contained within the Books are not  
7 “mixed content.” See Dex Media, 696 F.3d at 957.

8 Indeed, as the Court of Appeal noted in Keimer v. Buena Vista Books, Inc., which  
9 Plaintiffs heavily relied upon in both their briefs and oral argument, “no one involved in  
10 modern jurisprudence can reasonably dispute [that] the content of [the] books is entitled  
11 to the full protection of the First Amendment.” 75 Cal. App. 4th 1220, 1231 (1999).

12 Keimer reached this conclusion although it found that the statements made about the  
13 book in promotional materials were unprotected commercial speech. See id. at 1230-31.

14 While Plaintiffs in this case do not go so far as to ignore “modern jurisprudence”  
15 and dispute that the content of the Books is entitled to full First Amendment protection,  
16 they come quite close. During oral argument, the Court asked Plaintiffs’ counsel a very  
17 basic and direct question about whether, in general, a book standing alone is entitled to  
18 the protections of the First Amendment. Plaintiffs’ counsel either could not or would not  
19 answer the Court’s question as to whether in general, a book is entitled to full First  
20 Amendment protection. Plaintiffs’ counsel chose instead to avoid answering the Court’s  
21 direct question with a direct answer, and said instead: “Your hypothetical is interesting,  
22 but the fact of the matter is that’s not how books are sold nowadays.” (Mot. Hr’g Tr. 33,  
23 Aug. 8, 2013.) As defense counsel then observed, “[The Court’s] hypothetical and the  
24 way it was responded to [by Plaintiffs] is telling because you get the same tap dance that  
25 we got in the papers.” (Id. at 37.) Defense counsel is correct; Plaintiffs’ inability to  
26 respond to a direct and very basic question from the Court on the First Amendment  
27 illuminates the glaring lack of merit in Plaintiffs’ position on this point.

28 ///

1           Thus, the Court concludes, despite Plaintiffs’ allegations that the Armstrong  
2 Books contained false and misleading statements, that the content of the Books is  
3 afforded full First Amendment protection. As stated in Keimer, “no one involved in  
4 modern jurisprudence can reasonably dispute” this conclusion. 75 Cal. App. 4th at  
5 1231. The Court reaches this conclusion in keeping with the strong protections afforded  
6 of the First Amendment, by which courts give “near absolute protection . . . to false but  
7 nondefamatory statements of fact outside the commercial realm.” See United States v.  
8 Alvarez, 638 F.3d 666, 670 (9th Cir. 2011) (Smith, J., concurring in denial of rehearing  
9 petition) (quoting Elena Kagan, Private Speech, Public Purpose: The Role of  
10 Governmental Motive in First Amendment Doctrine, 63 U. Chi. L. Rev. 413, 477 (1996)).

11           Accordingly, with respect to the statements contained within the Books, the  
12 analysis ends here—the speech is not commercial, and is afforded full First Amendment  
13 protection. The UCL, FAL, and CLRA claims targeted at this speech therefore fail as a  
14 matter of law, and Plaintiffs cannot show a likelihood of success on these claims.

15           Statements About Defendant Armstrong’s Use of Performance Enhancing Drugs

16           Likewise, the statements related to Defendant Armstrong’s use of PEDs do more  
17 than propose a commercial transaction. Simply put, these statements propose no  
18 commercial transaction at all. As such, under the Ninth Circuit’s analysis, the inquiry  
19 should end here.

20           However, assuming, for the sake of thorough analysis, that the statements  
21 contain “mixed content”—that is, contain both commercial and non-commercial  
22 elements—the Court must next consider the three Bolger factors. First, Armstrong’s and  
23 other Defendants’ public statements regarding his use of performance enhancing drugs  
24 are clearly not advertisements, and do not refer to a specific product. While it appears  
25 that Plaintiffs ask the Court to find that Lance Armstrong himself is a “brand” or “product”  
26 (see ECF No. 22), the Court declines to stretch the meaning of “product” this far.

27       ///

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1 Cf. Bolger, 463 U.S. at 66 (“products” referred to were contraceptives available at drug  
2 stores); Hunt v. City of L.A., 638 F.3d 703, 714-15 (9th Cir. 2011) (“products” referred to  
3 by speech at issue were shea butter and incense). Thus, the first two Bolger factors  
4 weigh against finding that the speech, outside of the book, related to Defendant  
5 Armstrong’s use of performance enhancing drugs, is commercial. However, Armstrong  
6 and the other individual defendants quite likely had underlying economic motives when  
7 making comments denying that Armstrong used performance enhancing drugs. To this  
8 end, Plaintiffs allege that Defendants financially benefitted from convincing the public  
9 that Armstrong did not use performance enhancing drugs. Thus, at best, these public  
10 statements satisfy only one of the three Bolger factors, which is insufficient to meet the  
11 threshold commercial speech classification.

12 Accordingly, the Court finds that Defendants’ public statements regarding  
13 Armstrong’s use of performance enhancing drugs do not constitute commercial speech.  
14 Thus, the UCL, FAL, and CLRA claims targeted at this speech fail as a matter of law,  
15 and Plaintiffs therefore fail to show a likelihood of success on these claims as to this  
16 particular type of speech.

17 Promotional Statements Relating to the Armstrong Books

18 Finally, the Court must assess the commercial nature of the statements on the  
19 flyleaves, covers, and book jackets of the Armstrong Books, as well as other promotional  
20 materials for the Books. According to Plaintiffs, Defendants made promotional  
21 statements about the Armstrong Books, including the representations that each of the  
22 Books is a “nonfiction ‘biography’” about the “Tour De France Winner” or the “Five Time  
23 Tour de France Winner.” (ECF No. 22 at 17-18.) Plaintiffs allege that these “false and  
24 misleading statements” were made “in media press kits, during television and newspaper  
25 interviews, on Internet websites, and at personal appearances made by Armstrong.” (Id.  
26 at 18.)

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1           The speech at issue does more than merely propose a commercial transaction,  
2 because it describes the contents of the Books, the Books' classification as a biography,  
3 and describes one of the Books' authors, Lance Armstrong. Given that the speech does  
4 more than propose a commercial transaction, the Court must consider whether the  
5 speech contains mixed content—that is, both commercial and non-commercial elements.  
6 Dex Media, 696 F.3d at 957. In this case, it is readily apparent that the promotional  
7 statements regarding the Armstrong Books, along with the flyleaves to the Armstrong  
8 Books, contain components of both commercial and noncommercial speech, as these  
9 materials and statements both seek to inform and seek to promote the Books for sale.

10           Thus, the Court examines these statements under the three Bolger factors. First,  
11 the statements on the flyleaves and other promotional materials made by Defendants  
12 about the Books are by no means “admittedly an advertisement.” Am. Acad. of Pain  
13 Mgmt., 353 F.3d at 1106. Indeed, Defendants vehemently deny that these statements  
14 constitute advertisements or commercial speech. The first prong of the Bolger analysis  
15 is therefore not met. Second, these promotional statements reference specific products,  
16 as they clearly refer to, and describe, the Armstrong Books. Accordingly, the second  
17 Bolger factor is met. Third, these promotional statements have an underlying economic  
18 motive—while Defendants contend that these statements are made merely to inform  
19 readers about the Armstrong Books, these statements are also undoubtedly made to sell  
20 the Books. That being said, the Court is mindful that the fact that “books, newspapers,  
21 and magazines are published and sold for profit does not prevent them from being a  
22 form of expression whose liberty is safeguarded by the First Amendment.” Joseph  
23 Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952). Indeed, “economic motive in itself is  
24 insufficient to characterize a publication as commercial . . . .” Dex Media, 696 F.3d at  
25 960 (citing Bolger, 463 U.S. at 67). Thus, while the third Bolger factor is satisfied, the  
26 Court, in order to balance the concerns of the First Amendment, does not afford this  
27 factor great weight.

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1           The Court therefore assumes that two of the three Bolger factors are met, which  
2 weighs in favor of finding that this speech is commercial speech. Bolger, 463 U.S. at 67  
3 (the “combination of all these characteristics provides strong support for the . . .  
4 conclusion that the [speech is] properly characterized as commercial speech.”).  
5 However, the Court need not decide whether the speech at issue is definitively  
6 commercial speech under the Bolger test, as the third prong of the Bolger analysis  
7 operates to afford these promotional statements full protection. See infra.

8           The third prong of the Bolger framework requires the Court to examine whether  
9 this speech may “still receive[] full First Amendment protection because the commercial  
10 aspects of the speech are ‘inextricably intertwined’ with otherwise fully protected speech,  
11 such that [it] sheds its commercial character and becomes fully protected speech.” Dex  
12 Media, 696 F.3d at 958 (citing Riley, 487 U.S. at 795-96 (finding that speech does not  
13 “retain its commercial character when it is inextricably intertwined with otherwise fully  
14 protected speech.”)).

15           Here, the commercial aspects of the book, and the promotional statements made  
16 about the book, are inextricably bound to the non-commercial contents of the books.  
17 See Riley, 487 U.S. at 796 (refusing to separate commercial components of charitable  
18 speech from the fully protected whole); Dex Media, 696 F.3d at 963 (finding yellow  
19 pages’ commercial content inextricably intertwined with noncommercial content). In Dex  
20 Media, the Ninth Circuit stated that “[t]he full First Amendment protection of newspapers,  
21 magazines, television shows, radio programs, and the like demonstrates that the  
22 inclusion of commercial material does not support treating those publications and  
23 broadcasts as commercial speech entitled to less First Amendment protection.”  
24 696 F.3d at 963. Although the Ninth Circuit was concerned in that case with the  
25 economic reality that advertising is required to keep newspapers, magazines, and  
26 telephone directories afloat, the same is true of books and publishers. See id.

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1 In short, the economic reality in this age of technology is that publishing companies and  
2 authors must promote the books they publish and write in order to sell them, if publishing  
3 houses are to continue to operate and books are to continue to be sold in paper and  
4 hard copies. As Plaintiffs themselves suggested at oral argument, it is nearly impossible  
5 to separate the promotional materials for the Books from the Books themselves.<sup>7</sup> (Mot.  
6 Hr'g Tr. 33, Aug. 8, 2013.)

7 As such, the promotional materials relating to the Books are inextricably  
8 intertwined with the Books' contents, which is non-commercial speech. Thus, these  
9 promotional materials are also entitled to full First Amendment protection as non-  
10 commercial speech. As set forth above, UCL, FAL, and CLRA claims targeting non-  
11 commercial speech fail as a matter of law. Plaintiffs therefore cannot show a likelihood  
12 of success on the merits as to these causes of action.

13 Defendants' anti-SLAPP motions to strike Plaintiffs' UCL, FAL, and CLRA claims  
14 are therefore GRANTED.

## 15 16 **2. Fraud**

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18 The Publisher Defendants, Stapleton, and Weisel also move to strike Plaintiffs'  
19 fraud claims. Under California law, the elements of fraud are: "(a) misrepresentation  
20 (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or  
21 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and  
22 (e) resulting damage." Tom Trading, Inc. v. Better Blue, Inc., 26 F. App'x 733, 736 (9th  
23 Cir. 2002) (citing Lovejoy v. AT & T Corp., 92 Cal. App. 4th 85, 93 (2001)).

24 The Publisher Defendants contend that there is no misrepresentation on their  
25 part, as the only statements specifically attributed to the Publisher Defendants are that  
26 the book is a "biography" and "nonfiction" and Armstrong is the Tour de France "winner."

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27 <sup>7</sup> When asked whether the Books, standing alone, were entitled to full First Amendment protection,  
28 Plaintiffs' counsel responded, "The fact of the matter is that's not how books are sold nowadays." (Mot.  
Hr'g Tr. 33, Aug. 8, 2013.)



1 Defendants contend that these statements are in fact true—Defendant Armstrong did  
2 win the Tour de France, even though these victories were later taken away from him,  
3 and the book is a biography and nonfiction, even though it is now apparent that the book  
4 contains false statements.

5 Other courts have held that “the term nonfiction only means that the literature is  
6 based on true stories or events, not that every statement is in fact demonstrably true.”  
7 Greenspan v. Random House, Inc., 859 F. Supp. 2d 206, 220 (D. Mass. 2012), aff’d,  
8 2012 WL 5188792 (1st Cir. 2012). Indeed, “[s]peaking about oneself is precisely when  
9 people are most likely to exaggerate, obfuscate, embellish, omit key facts, or tell tall  
10 tales.” Alvarez, 638 F.3d at 674 (Kozinski, C.J., concurring in denial of rehearing  
11 petition). Plaintiffs here provide absolutely no authority for the notion that the words  
12 “biography” and “nonfiction” are guarantees that the work contains only statements that  
13 are one hundred percent factual, and the Court is aware of none. Plaintiffs therefore  
14 have not shown that they can meet even the first prong of the fraud analysis as to the  
15 Publisher Defendants. Thus, Plaintiffs fail to satisfy the second prong of the anti-SLAPP  
16 procedure, and the fraud claims against the Publisher Defendants are stricken.

17 As to Defendants Stapleton and Weisel, the Court addresses only the most  
18 glaring issue at this point. First, nowhere do Plaintiffs plead that they relied on  
19 Stapleton’s allegedly fraudulent statements in purchasing the Books. Moreover,  
20 Plaintiffs do not allege a single statement by Defendant Weisel, much less allege that  
21 Plaintiffs relied on a statement by Defendant Weisel in purchasing the Books. Plaintiffs  
22 instead allege that Plaintiff Stutzman “learned about the book It’s Not About the Bike”  
23 “sometime between 2001 and 2003.” (ECF No. 22 at 7.) Plaintiff Wheeler alleges that  
24 he purchased the book after “learning through the media about [Defendant] Armstrong’s  
25 supposedly truthful and inspiring account of his triumphant return to dominate the world  
26 of cycling after his devastating bout with testicular cancer.” (ECF No. 22 at 8.) Wheeler  
27 “was so impressed with It’s Not About the Bike . . . that he bought Armstrong’s follow-up  
28 book, Every Second Counts . . . .” (Id. at 8-9.)

1 Plaintiff Lauria “was inspired by advertising featuring reports of Armstrong’s successful  
2 battle against cancer, which moved her to purchase [Defendant] Armstrong’s books.”  
3 (Id. at 9.) Plaintiff Reimers purchased It’s Not About the Bike after seeing  
4 “advertisements regarding Armstrong’s remarkable comeback to ‘win’ the Tour de  
5 France cycling race after conquering testicular cancer . . . .” (Id.) Plaintiff S. Armstrong  
6 “rel[ie]d on Defendant Armstrong’s representations as to his drug-free life and cycling  
7 career, [and] purchased and read It’s Not About the Bike.” (Id. at 10.) “[Plaintiff] S.  
8 Armstrong also read Every Second Counts due to his belief in Armstrong’s false and  
9 misleading representations as to his drug-free life and cycling career.” (Id.)

10 Reliance must be pled to state a claim for fraud. Tom Trading, Inc., 26 F. App’x at  
11 736. As set forth above, Plaintiffs make no allegations that in purchasing the Books,  
12 they relied on Defendant Stapleton’s statements about Defendant Armstrong or the  
13 Armstrong Books. Plaintiffs therefore fail to state a claim for fraud.

14 Finally, Plaintiffs make only vague allegations regarding Defendants Weisel and  
15 Stapleton. Plaintiffs allege that Defendant Stapleton, along with Defendant Weisel,  
16 “counseled, assisted, and encouraged . . . Armstrong” for the purpose of “building and  
17 maintaining the Lance Armstrong ‘brand’ that this trio conceived during 1997-1999.”  
18 (ECF No. 22 at 22.) Plaintiffs cite to interviews that Defendant Stapleton gave in which  
19 he discusses the Lance Armstrong brand. However, these interviews do not discuss the  
20 Armstrong Books. Plaintiffs make the generalized, repeated allegation that Defendants  
21 Armstrong, Weisel, and Stapleton “built, expanded, maintained, and defended” the  
22 “Lance Armstrong brand.” (ECF No. 22 at 24.) Plaintiffs also allege that Defendant  
23 Weisel conspired with, or aided and abetted, his co-Defendants in writing, publishing,  
24 and marketing the Armstrong Books. The majority of the allegations regarding  
25 Defendant Weisel individually concern Defendant Weisel’s involvement with the United  
26 States Postal Service cycling team as a financial backer.

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1 Plaintiffs fail to allege sufficient facts showing that Defendants Weisel or Stapleton  
2 engaged in any fraudulent conduct. Under Federal Rule of Civil Procedure 9(b), a  
3 plaintiff pleading a claim of fraud, or any claim that is “grounded in fraud” must “state with  
4 particularity the circumstances constituting fraud or mistake.” Fed. R. Civ. P. 9(b). Rule  
5 9(b) requires the plaintiff to set forth with particularity the “who, what, when, where, and  
6 how of the misconduct charged.” Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106  
7 (9th Cir. 2003). The Rule 9(b) standard applies to assessing claims under an anti-  
8 SLAPP motion. Tuck Beckstoffer Wines LLC v. Ultimate Distributors, Inc., 682 F. Supp.  
9 2d 1003, 1019 (N.D. Cal. 2010). Because Plaintiffs fail to state a legally cognizable  
10 claim against Defendants Stapleton and Weisel, their motions to strike Plaintiffs’ fraud  
11 claims are GRANTED.

### 12 13 **3. Negligent Misrepresentation**

14  
15 California’s cause of action for “negligent misrepresentation” requires: (1) “a  
16 misrepresentation of a past or existing material fact”; (2) “without reasonable grounds for  
17 believing it to be true”; (3) “with intent to induce another’s reliance on the fact  
18 misrepresented”; (4) “justifiable reliance thereon by the party to whom the  
19 misrepresentation was directed”; and (5) “damages.” Petersen v. Allstate Indem. Co.,  
20 281 F.R.D. 413, 417 (C.D. Cal. 2012).

21 The Publisher Defendants assert that Plaintiffs cannot state a viable claim against  
22 them for negligent misrepresentation because the Ninth Circuit has held that publishers  
23 “owe[] no duty to investigate the accuracy of the contents of the books it publishes.”  
24 Winter v. G.P. Putnam’s Sons, 938 F.2d 1033, 1037 (9th Cir. 1991) (finding that claims  
25 of copyright, libel, misrepresentation, negligent misrepresentation, negligence, and  
26 mistake failed because publisher had no duty to investigate the accuracy of book on  
27 mushrooms) (citing numerous cases holding publishers not required to guarantee truth  
28 or accuracy of books).

1 Other courts have observed that “[t]o require a book publisher to check, as a matter of  
2 course, every potentially defamatory reference might raise the price of nonfiction works  
3 beyond the resources of the average man. This result would, we think, produce just  
4 such a chilling effect on the free flow of ideas as First Amendment jurisprudence has  
5 sought to avoid.” Barden v. Harpercollins Publishers, Inc., 863 F. Supp. 41, 45 (D.  
6 Mass. 1994). Similarly, in Lacoff v. Buena Vista Publishing, Inc., the court stated that  
7 “[t]o promote society's overriding interest in the untrammelled dissemination of  
8 knowledge and free expression, the First Amendment strictly limits the imposition of  
9 liability on publishers for the contents of books.” 705 N.Y.S.2d 183 (Sup. Ct. 2000).  
10 Indeed, to protect the right to free speech and the free flow of ideas that the First  
11 Amendment seeks to guard, even some falsehoods—including those published in a  
12 book—must be protected. See id. (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 340  
13 (1974)); see also Sullivan, 376 U.S. at 278-79 (“If the bookseller is criminally liable  
14 without knowledge of the contents . . . he will tend to restrict the books he sells to those  
15 he has inspected . . . and the bookseller’s burden would become the public’s burden, for  
16 by restricting him the public’s access to reading matter would be restricted.”)

17 Thus, “the gentle tug of the First Amendment and the values embodied therein . . .  
18 . remind us of the social cost” were the Court to create such a duty for publishers, and  
19 allow publishers to be held liable for allegedly false statements contained within a book.  
20 Winter, 938 F.2d at 1037. To this end, although Plaintiffs assert that the public interest  
21 in this case weighs in favor of protecting consumers from books that contain false  
22 statements, the case law makes clear that the public interest swings in the opposite  
23 direction, towards closely guarding the right to free speech and the free flow of ideas that  
24 the First Amendment seeks to protect.

25 As such, Plaintiffs cannot show that they have a probability of success on their  
26 claim for negligent misrepresentation against the Publisher Defendants. Thus, the  
27 Publisher Defendants’ anti-SLAPP motion to strike the claim for negligent  
28 misrepresentation is GRANTED.

1 Plaintiffs also fail to state a legally cognizable negligent misrepresentation claim  
2 against Defendants Weisel and Stapleton. As set forth above, Plaintiffs do not allege a  
3 single statement made by Defendant Weisel. Rather, Plaintiffs make conclusory  
4 allegations that Defendant Weisel aided and abetted the actions of the other  
5 Defendants. Defendant Weisel therefore has made no “misrepresentation of a past or  
6 existing material fact.” Petersen, 281 F.R.D. at 417. Plaintiffs likewise make no prima  
7 facie showing of facts to even suggest that this element of the claim is met as to  
8 Defendant Weisel.

9 Moreover, the First Amended Complaint is devoid of allegations that Plaintiffs  
10 relied on misrepresentations by either Defendant Weisel or Defendant Stapleton. See  
11 supra (discussing allegations by Plaintiffs regarding their motives for purchasing the  
12 Armstrong Books). Plaintiffs therefore fail to plead “justifiable reliance thereon by the  
13 party to whom the misrepresentation was directed . . . .” See Petersen, 281 F.R.D. at  
14 417.

15 Therefore, it is clear that Plaintiffs have not shown a likelihood of success on this  
16 claim against either Defendant Weisel or Defendant Stapleton. As such, their motion to  
17 strike Plaintiffs’ claim for negligent misrepresentation is GRANTED.

18  
19 **D. Leave to Amend**

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21 The Ninth Circuit has clearly stated that “granting a defendant's anti-SLAPP  
22 motion to strike a plaintiff's initial complaint without granting the plaintiff leave to amend  
23 would directly collide with Federal Rule of Civil Procedure 15(a)'s policy favoring liberal  
24 amendment.” Verizon Del., Inc. v. Covad Commc’ns Co., 377 F.3d 1081, 1091 (9th Cir.  
25 2004). Accordingly, Plaintiffs are granted leave to amend their complaint.

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1 Each Defendant has requested attorneys' fees and costs incurred in bringing their  
2 respective anti-SLAPP motions. California's anti-SLAPP statute provides a mechanism  
3 for a defendant to strike civil actions or claims brought primarily to chill the exercise of  
4 free speech. Cal. Civ. Proc. Code § 425.16(b)(1). In order to deter such chilling, "a  
5 prevailing defendant on a special motion to strike shall be entitled to recover his or her  
6 attorney's fees and costs." *Id.* § 425.16(c). However, when a plaintiff is granted leave to  
7 amend the complaint, a defendant whose anti-SLAPP motion is granted is not a  
8 "prevailing party" for purposes of the anti-SLAPP statutory framework. See Thornbrough  
9 v. W. Placer Unified Sch. Dist., 2:09-CV-02613-GEB, 2010 WL 3069321 (E.D. Cal. Aug.  
10 3, 2010) (citing Brown v. Electronic Arts, Inc., 2010 WL 2757774, at \*6-8 (C.D. Cal. July  
11 13, 2010) (holding that defendant was not a prevailing party where anti-SLAPP motion  
12 was granted but plaintiff was provided leave to amend complaint)).

13 Accordingly, Defendants' requests for attorneys' fees are DENIED.

## 14 15 CONCLUSION

16  
17 For the reasons set forth above, it IS HEREBY ORDERED THAT:

- 18 1. Defendant Random House's Anti-SLAPP Motion Strike is GRANTED as to  
19 each of Plaintiffs' causes of action (ECF No. 36);
- 20 2. Defendant Penguin's Anti-SLAPP Motion to Strike is GRANTED as to each  
21 of Plaintiffs' causes of action (ECF No. 42);
- 22 3. Defendant Armstrong's Anti-SLAPP Motion to Strike is GRANTED as to  
23 Plaintiffs' First, Second, Third, Fourth, Fifth, and Sixth causes of action  
24 (ECF No. 47);
- 25 4. Defendant Weisel's Anti-SLAPP Motion to Strike is GRANTED as to each  
26 of Plaintiffs' causes of action (ECF No. 55);
- 27 5. Defendant Stapleton's Anti-SLAPP Motion to Strike is GRANTED as to  
28 each of Plaintiffs' causes of action (ECF No. 57);

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6. The pending Motions to Dismiss by Defendant Random House (ECF No. 37), Defendant Penguin (ECF No. 41), Defendant Weisel (ECF No. 53), and Defendant Stapleton (ECF No. 56) are DENIED AS MOOT;
7. The pending Motion to Dismiss by Defendant Lance Armstrong (ECF No. 46) is DENIED AS MOOT as to Plaintiffs' First, Second, Third, Fourth, Fifth, and Sixth causes of action; and
8. Plaintiffs may file an amended complaint within twenty-one (21) days of the date of this Memorandum and Order. If no amended complaint is filed, the causes of action stricken by this Order shall be dismissed with prejudice without further notice to the parties.

IT IS SO ORDERED.

Dated: September 9, 2013

  
MORRISON C. ENGLAND, JR., CHIEF JUDGE  
UNITED STATES DISTRICT COURT