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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF KERN

DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING, an agency of the State of California, Plaintiff, v. CATHY'S CREATIONS, INC. d/b/a TASTRIES, a California Corporation; and CATHY MILLER, an individual, Defendants. EILEEN RODRIGUEZ-DEL RIO and MIREYA RODRIGUEZ-DEL RIO, Real Parties in Interest.	CASE NO.: BCV-17-102855 **IMAGED FILE** **DEFENDANTS CATHARINE MILLER'S AND TASTRIES' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ANTI-SLAPP MOTION TO STRIKE THE COMPLAINING DOCUMENT** Reservation No. 29118 Date: March 14, 2018 Time: 8:30 a.m. Dept: 11 Judge: Hon. David R. Lampe Action Filed: December 13, 2017

I. INTRODUCTION.

The Court noted in denying the Department of Fair Employment and Housing's (DFEH) motion for a preliminary injunction that "[t]he State cannot succeed on the facts presented as a matter of law." (12/5/18 PI Ruling, p. 1.) In light of this statement, Defendants informed the DFEH that unless they dismissed their civil action, they would file an anti-SLAPP motion and seek their attorneys' fees. (Declaration of Charles S. LiMandri, Ex. 1.) The DFEH did not budge. As a result, Defendants brought the present anti-SLAPP motion to strike the DFEH's complaint. The Court should grant the motion, and dismiss this case. This case is a quintessential SLAPP because it was brought to infringe Defendants' free speech rights, and the DFEH cannot establish a probability of prevailing on the merits as a matter of law.

II. PROCEDURAL HISTORY.

On October 18, 2017, Mireya and Eileen Rodriguez-Del Rio filed a complaint against Defendants with the DFEH. On October 26, 2017, the DFEH informed Defendants about that complaint. On December 13, 2017, the DFEH filed the instant civil action and sought ex parte a temporary restraining order and order to show cause re preliminary injunction requiring Defendants to cease making wedding cakes or abandon their religious beliefs because "[t]he exercise of religious freedom should not be a justification for discrimination." (DFEH Memo., 2:3-4.) In later field papers, the DFEH stated that "the underlying cause of action [in this civil action is] respondents' violation of the Unruh Act." (Oppo. to Demurrer, 3:10-11)

On December 14, 2017, the Court denied the request for a temporary restraining order, and set an order to show cause hearing for February 2, 2018. The Court ordered that "the Petition is the complaining document in the action, which is equivalent to the Complaint." (12/14/17 Ruling.) The Court also ordered "Summons to Issue upon the Petition." (*Id*.) On December 22, 2017, Defendants were served with the complaint equivalent and the summons. On February 5, 2018, the Court ruled on the DFEH's motion for a preliminary injunction and Defendants' demurrer to the complaining document, and denied both motions.

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III. LEGAL STANDARD.

The anti-SLAPP statute is "a procedure for a court to dismiss at an early stage ***nonmeritorious*** litigation ***meant*** to chill the valid exercise of the constitutional rights of freedom of speech and petition[.]" (*Turner v. Vista Pointe Ridge Homeowners Ass'n* (2009) 180 Cal.App.4th 676, 684.)[1] "The purpose of the anti-SLAPP statute is to dismiss ***meritless*** lawsuits ***designed*** to chill the defendant's free speech rights at the earliest stage of the case." (*Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1535.)

Determination of an anti-SLAPP motion involves a two-part inquiry. First, the court decides whether the defendant has made a threshold showing that the "particular alleged acts giving rise to a claim for relief" are protected activity. (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384, 395.) In doing so, the court looks at the activity that has given rise to the alleged liability, not the cause of action itself, and determines whether that activity constitutes protected speech or petitioning. (*Delois v. Barrett Block Partners* (2009) 177 Cal.App.4th 940, 946-947.) The defendant need not prove the suit was intended to or actually did chill his speech. (*Id.*)

If the court finds that the moving defendant has made such a showing, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim for relief. (*Baral*, *supra*, 1 Cal.5th at 384.) "[T]he plaintiff must [then] demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." (*Delois*, *supra*, 177 Cal.App.4th at 946-947.) If a pleaded cause of action is based on multiple acts, each independently giving rise to a claim for relief, the plaintiff must demonstrate a prima facie case as to each act. (*Baral*, *supra*, 1 Cal.5th at 392.)

"The second prong is considered under a standard similar to that employed in determining nonsuit[.]" (*Sweetwater Union High School Dist. v. Gilbane Building Co.* (2016) 245 Cal.App.4th 19, 31.) That burden of proof "requir[es] th[e] introduc[tion of] substantial evidence of each

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[1] Unless otherwise noted, quotation marks, brackets, ellipses, and citations are always omitted; emphasis is always added.

element" of each claim. (*Young v. CBS Broadcasting, Inc.* (2012) 212 Cal.App.4th 551, 559.) That standard requires the presentation of more than a "scintilla" of evidence, and more than mere "speculation." (*Newing v. Cheatham* (1975) 15 Cal.3d 351, 359, 365.)

In addition, as part of the second prong, the plaintiff has the burden of overcoming the defendant's affirmative defenses. (*Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 824, disapproved on another ground in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68; see also *Bently Reserve LP v. Papaliolios* (2013) 218 Cal.App.4th 418, 434.) In other words, the Court must look to a defendant's declarations for "a determination that they do not, as a matter of law, defeat [the plaintiff's] evidence." (*Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 37 Cal.App.4th 855, 867.) "The burden imposed on a plaintiff by this [] is very similar to that imposed on a plaintiff who responds to a [motion for] summary judgment[.]" (*Rowe v. Superior Court* (1993) 15 Cal.App.4th 1711, 1724.) Thus, when looking at a defendant's declarations, a court shall grant an anti-SLAPP motion "if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Civ. Proc. Code § 437c(c).)

II. LEGAL ARGUMENT.

A. First Prong: The Complaint is Covered by the Anti-SLAPP Statute.

"A cause of action against a person ***arising from*** any act of that person in ***furtherance*** of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue [is] subject to [an Anti-SLAPP] special motion to strike." (Civ. Proc. Code § 425.16(b)(l).) "'[A]ct in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: . . . (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (*Id.* at subd. (e).) "The acts in furtherance of a person's right to free speech specified by the statute is preceded by the word 'includes.' The word 'includes' is ordinarily a term of enlargement rather than limitation. The use of 'includes' implies that other acts which are not mentioned are also protected under the statute." (*Averill v. Superior Court* (1996) 42 Cal.App.4th 1170, 1175.)

The defendant does not have to "establish its actions are constitutionally protected under the First Amendment as a matter of law." (*Wilcox, supra*, 27 Cal.App.4th at 820.) "The statute requires a defendant to make only a prima facie showing that plaintiffs' causes of action arise from an act in furtherance of defendant's constitutional rights of petition or free speech." (*Birkner v. Lam* (2007) 156 Cal.App.4th 275, 281.)

Here, there is only one act which underlies the DFEH's petition, the fact that Defendants were unwilling to design and create a custom wedding cake for the Rodriguez-Del Rios' same-sex wedding ceremony. The Court has already ruled that this allegation concerns Defendants' speech:

> A wedding cake is not just a cake in a Free Speech analysis. It is an artistic expression by the person making it that is to be used traditionally as a centerpiece in the celebration of a marriage. There could not be a greater form of expressive conduct. Here, Rodriguez-Del Rios plan to engage in speech. They plan a celebration to declare the validity of their marital union and their enduring love for one another. The State asks this court to compel Miller against her will and religion to allow her artistic expression in celebration of marriage to be co-opted to promote the message desired by same-sex marital partners, and with which Miller disagree.

(See 2/5/18 PI Ruling, pp. 4-5.)

> No public commentator in the marketplace of ideas may be forced by law to publish any opinion with which he disagrees in the name of equal access. No person may be forced by the State to stand and recite the Pledge of Allegiance against her will. The law cannot compel anyone to stand for the National Anthem. No persons may be forced to advertise state-sponsored slogan on license plates against their religious beliefs. . . .The State cannot meet the test that its interest outweighs the Free Speech right at issue in this particular case[.]

(*Id*. at pp. 1, 5.) Moreover, that speech concerned an issue of great public debate. Courts all across the country, including our country's highest court, are currently grappling with the interplay between religious and homosexual rights. (*Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n* (2017) 137 S.Ct. 2290 ["Petition for writ of certiorari to the Court of Appeals of Colorado granted."].) Defendants entered that debate, and in turn, received a lawsuit.

B. <u>Second Prong, Part One: The Pseudo Motion for Non-Suit.</u>

As stated above, once a defendant meets its burden of proof on the first prong, the burden shifts to the plaintiff to "demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." (*Delois, supra*, 177 Cal.App.4th at 946-947.) "The second prong is

considered under a standard similar to that employed in determining nonsuit[.]" (*Sweetwater, supra,* 245 Cal.App.4th at 31.) On this prong, there is no "initial burden of production on the moving defendant." (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 675, fn. 10; see also *Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist.* (2003) 106 Cal.App.4th 1219, 1239 ["[I]t was not respondents' burden to show TDE could not demonstrate a probability of prevailing on its claims; its only burden was to establish that the claims fell within the ambit of the statute."].) Here, because Defendants bear no burden on this prong, Defendants will make no argument.

C. Second Prong, Part Two: The Pseudo Motion for Summary Judgment.

As stated above, as part of the second prong of an anti-SLAPP motion, a defendant can also raise affirmative defenses which will then be adjudicated using a summary judgment standard. (See *Lafayette, supra*, 37 Cal.App.4th at 867; *Rowe, supra*, 15 Cal.App.4th at 1724.) Here, Defendants are raising two affirmative defenses: (1) freedom of speech under the federal constitution, and (2) freedom of religion under the California constitution – not the federal constitution.

1. *Freedom of speech under the federal constitution.*

To avoid unnecessary duplication, Defendants incorporate by reference the arguments made in their opposition to the DFEH's motion for a preliminary injunction at sections IV.A.3.c and IV.A.3.d. Those sections are titled "Free Speech Under the Federal Constitution" and "The DFEH Cannot Satisfy Strict Scrutiny." Defendants also incorporate by reference the declaration of Cathy Miller filed in support of her opposition to the DFEH's motion for a preliminary injunction, dated January 16, 2018.[2]

Relying on the argument in those sections, and on the previously filed Miller declaration, the Court has already ruled that due to the freedom of speech clause of the federal constitution, "[t]he State cannot succeed on the facts presented as a matter of law." (12/5/18 PI Ruling, p. 1.) The Court further stated "[t]he state cannot meet the test that its interest outweighs the Free Speech

[2] That declaration is attached to the LiMandri declaration as Exhibit 2 with the portions to which the Court previously sustained an objection redacted.

right at issue in this particular case, or that the law is being applied by the least restrictive means," and therefore "[t]he State cannot succeed upon the merits[.]" (*Id*. at pp. 5, 7.) For these reasons, using a summary judgment style standard, the DFEH cannot establish a probability of prevailing on its claim for violation of the Unruh Act.

2. *Freedom of religion under the California constitution.*

"Free exercise and enjoyment of religion without discrimination or preference are guaranteed" by the California constitution. (Cal. Const. Art. 1, §4.) The religious protections under the California constitution are greater than those afforded by the federal constitution. Under the federal constitution, the free exercise of religion clause "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." (*Employment Div., Dept. of Human Resources of Oregon v. Smith* (1990) 494 U.S. 872, 879 [*Smith*].) But this weak test is not used when interpreting the California constitution. Under the California constitution, "a law [can] not be applied in a manner that substantially burdens a religious belief or practice unless the state shows that the law represents the least restrictive means of achieving a compelling interest." (*North Coast Women's Care Medical Group, Inc. v. San Diego County Superior Court* (2008) 44 Cal.4th 1145, 1158.) This is the "strict scrutiny" analysis. (*Id*.) No case interpreting the California constitution free exercise clause has ever applied any test other than strict scrutiny. (*North Coast*, *supra*, 44 Cal.4th 1145 [applying strict scrutiny]; *Roman Catholic Archbishop of Los Angeles v. Superior Court* (2005) 131 Cal.App.4th 417 [applying strict scrutiny]; *Catholic Charities of Sacramento, Inc. v. Superior Court* (2004) 32 Cal.4th 527 [applying strict scrutiny]; *Smith v. Fair Employment & Housing Com.* (1996) 12 Cal.4th 1143 [applying strict scrutiny] [*FEHC*]; *Walker v. Superior Court* (1988) 47 Cal.3d 112 [applying strict scrutiny].)

Although strict scrutiny is no longer used in adjudicating an affirmative defense based upon the free exercise of religion clause of the federal constitution, it is still widely used in other contexts. (See *Smith*, *supra*, 494 U.S. 872.) For example, it is used in adjudicating the affirmative defense of the federal Religious Freedom Restoration Act, and in adjudicating the affirmative defense of the free exercise of religion clause of the California constitution. (See *Burwell v. Hobby Lobby Stores, Inc.*

(2014) 134 S.Ct. 2751 [federal RFRA]; *North Coast*, *supra*, 44 Cal.4th 1145 [Cal. Const.] [*FEHC*].) The California Constitution, however, has been tied to the federal strict scrutiny cases, and so all federal RFRA strict scrutiny cases remain relevant here. (See *FEHC*, *supra*, 12 Cal.4th at 1177 ["California courts have typically construed the provision to afford the same protection for religious exercise as the federal" strict scrutiny cases].)

Here, the religious activity at issue is Cathy's decision not to design and create a wedding cake for a same-sex wedding ceremony, in ostensible violation of the Unruh Act. (See LiMandri Decl., Ex. 2 [Miller Decl.].) This is analogous to *Hobby Lobby*, a case in which the religious activity was the corporation's decision not to provide health insurance which included contraceptives to their employees, in violation of the Affordable Care Act. (See *Hobby Lobby*, *supra*, 134 S.Ct. at 2775.) As already found by the Court, this activity is protected speech, but even if it were not speech, it would be protected conduct under the free exercise clause of the California constitution. As a result, the Unruh Act "could not be applied" to Defendants "unless the state shows that the law represents the least restrictive means of achieving a compelling interest." (*North Coast, supra,* 44 Cal.4th at 1158.) In this analysis, the Court must "look[] beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize[] the asserted harm of granting specific ***exemptions*** to particular religious claimants." (*Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal* (2006) 546 U.S. 418, 430-31.)

Here, Defendants note that the Court has already found strict scrutiny not satisfied with respect to Defendants' free speech interests. (2/5/18 PI Ruling, p. 6 ["An interest in preventing dignitary harms thus is not a compelling basis for infringing free speech."].) This same analysis should apply here. However, to the extent that a slightly different analysis is needed, Defendants also incorporate by reference the strict scrutiny arguments made in their opposition to the DFEH's motion for a preliminary injunction, located at section IV.A.3.d, particularly the fact that an exemption from the Unruh Act would be appropriate here because Defendants were prepared to facilitate an accommodation so that the Rodriguez-Del Rios would still be provided with a wedding cake. (Compare 2/5/18 PI Ruling, p. 6 ["[T]he State minimizes the fact that Miller has provided for an alternative means for potential customers to receive the product they desire through the services

of another talented baker who does not share Miller's belief. Miller is not the only wedding cake creator in Bakersfield."]; with *North Coast*, *supra*, 44 Cal.4th at 162-63 [Baxter, J., concurring] ["[T]he state's interest in full and equal medical treatment would [not] compel a physician in solo practice to provide treatment to which he or she has sincere religious objections," "where the patient could be referred with relative ease and convenience to another practice"].)

IV. CONCLUSION.

Defendants invited the DFEH to dismiss this case, and the DFEH refused. The Court should grant Defendants' anti-SLAPP motion and dismiss this case with prejudice.

Respectfully submitted,

FREEDOM OF CONSCIENCE DEFENSE FUND

Dated: February 9, 2018 By: _____

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