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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 CATHARINE MILLER, an individual, Defendants. EILEEN RODRIGUEZ-DEL RIO and MIREYA RODRIGUEZ-DEL RIO, Real Parties in Interest.	CASE NO.: BCV-18-102633 **IMAGED FILE** **DEFENDANTS CATHARINE MILLER'S AND TASTRIES' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ANTI-SLAPP MOTION TO STRIKE THE COMPLAINT** Reservation No. 33978 Date: March 5, 2019 Time: 8:30 a.m. Dept: 11 Judge: Hon. David R. Lampe Action Filed: October 17, 2018

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INTRODUCTION

"Perhaps not surprising, this action has returned to this court for further consideration." (*Order re Mtn. to Enforce Judgment* (Sep. 13, 2018) Cal. Super. Ct. Case No. BCV-17-102855, at 1.)[1] Despite having a final judgment entered against it, Plaintiff Department of Fair Employment & Housing (DFEH) has re-filed its action with a new case number and a new case, ostensibly hoping that this Court will reverse itself due to alleged newly discovered facts. But nothing has changed in the intervening months—except that new national (and international) case law has continued to reaffirm the importance of protecting Defendants' Catharine Miller and Tastries' (collectively "Miller") constitutional rights. The last time Miller filed an anti-SLAPP motion, this Court denied it on the basis that "[t]his court cannot say that the DFEH's action failed the 'minimal merit' test under these circumstances" where "[t]he question of [Miller's] constitutional right at issue was unresolved at the time of the action, in that the U.S. Supreme Court had not yet ruled." (*Order re anti-SLAPP Mtn.* (May 1, 2018) Cal. Super. Ct. Case No. BCV-17-102855, at 4.) Regardless of whether that decision was right at the time, the situation has changed. Now, the DFEH has a judgment entered against it and knows full well that it should indeed lose this case. Based on the anti-SLAPP jurisprudence enunciated below, and this Court's prior constitutional rulings, the Court must grant this anti-SLAPP motion.[2]

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.) "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.*)

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[1] All orders from Cal. Super. Ct. Case No. BCV-17-102855 are attached to the Declaration of Charles S. LiMandri.

[2] Although not frequently used, a party has the option to use 37 lines per page, an option which Miller here exercises. (See Cal. Rules of Court, rule 2.108(1) ["The lines on each page must be one and one-half spaced or double-spaced"]; *Tiffany v. State Farm Mut. Auto. Ins. Co.* (1993) 14 Cal.App.4th 1763, 1767 [California Rules of Court permit "37-line pleading paper with one and one-half inch spacing"].) Unless otherwise noted, quotation marks, brackets, ellipses, and citations are always omitted; emphasis is always added.

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.) "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 by the plaintiff of] substantial evidence of each 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.) Importantly,

> In moving for section 425.16 relief, it [i]s not [the defendant's] burden to show [the plaintiff] could not demonstrate a probability of prevailing on its claims; its only burden [i]s to establish that the claims fell within the ambit of the statute. … In this way section 425.16 differs significantly from the summary judgment statute, which places the initial burden of production on the moving defendant to demonstrate the opposing plaintiff cannot establish one or more elements of his or her causes of action.

(*Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist.* (2003) 106 Cal.App.4th 1219, 1239.)

In addition, as part of the second prong, the plaintiff has the burden of overcoming the defendant's affirmative defenses. (*Id.*; 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).)

LEGAL ARGUMENT

1. First Prong: Miller's Conduct Falls within the Ambit of the Anti-SLAPP Statute

Under subdivision (e)(4) of the anti-SLAPP statute, the statute applies if the defendant can establish two factors. First, that she was engaged in "any … conduct in furtherance of … the constitutional right of free speech" and second, that the conduct was "in connection with … an issue of public interest." (Civ. Proc. Code § 425.16(e)(4).) Both aspects are met here. Indeed, as this Court has already held, "[a] fairly strong argument can be made that this was an act taken in furtherance of a right of free speech in connection with a public issue." (*Order re anti-SLAPP Mtn.* (May 1, 2018) Cal. Super. Ct. Case No. BCV-17-102855, at 3.)

1.1. Conduct in furtherance of the constitutional right of free speech

The conduct underlying the DFEH's complaint is Miller's decision not to create a wedding cake for the Rodriguez-Del Rios' same-sex wedding. (See generally FAC, ¶¶ 1-54.) As this Court has already determined, creating that wedding cake is 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." (*Order re Mtn. for Prelim. Inj.* (Feb. 5, 2018) Cal. Super. Ct. Case No. BCV-17-102855, at 4.) Conversely, not creating that cake is exercising the right to not engage in speech. (*Id.* at 1 ["The right of freedom of thought guaranteed by the First Amendment includes the right to speak, and the right to refrain from speaking. Sometimes the most profound protest is silence."].) The decision to not engage in speech is an act in furtherance of the right of free speech as understood by the anti-SLAPP statute. (*Kronemyer v. Internet Movie Database Inc.* (2007) 150 Cal.App.4th 941, 947.) Other cases which interpret the application of the anti-SLAPP statute to the Unruh Act agree that the underlying conduct here was not "discrimination," but protected speech. (See, e.g., *Ingels v. Westwood One Broadcasting Services, Inc.* (2005) 129 Cal.App.4th 1050, 1062; *Greater Los Angeles Agency on Deafness, Inc. v. Cable News Network, Inc.* (9th Cir. 2014) 742 F.3d 414, 422-425; *Hunter v. CBS Broadcasting, Inc.* (2013) 221 Cal.App.4th 1510, 1520-1526.) Based on the above case law, Miller's decision not to engage in speech was protected conduct in furtherance of the right of free speech under the anti-SLAPP statute.

1.2. Conduct in connection with an issue of public interest

"'[A]n issue of public interest' within the meaning of section 425.16, subdivision (e)([4]) is *any issue in which the public is interested*. In other words, *the issue need not be 'significant' to be protected by the anti-SLAPP statute—it is enough that it is one in which the public takes an interest.*" (*Nygard, Inc. v. Uusi-Kerttula* (2008) 159 Cal.App.4th 1027, 1042.) As a result, media coverage of the at-issue conduct is prima facie evidence that it was conduct relating to "an issue of public interest." (See *Tamkin v. CBS Broadcasting, Inc.* (2011) 193 Cal.App.4th 133, 143 ["[T]he creation and broadcasting of CSI episode 913 is an issue of public interest because the public was demonstrably interested in the creation and broadcasting of that episode, as shown by the posting of the casting synopses on various Web sites and the ratings for the episode"]; *Seelig v. Infinity Broadcasting Corp.* (2002) 97 Cal.App.4th 798, 807 [issue was of public interest because "generated considerable debate within the media"].)

Here, the Rodriguez-Del Rios met with Miller on the morning of August 26, 2017, and Miller referred them to a rival bakery at that same meeting. Later that *same evening*, the local ABC and the local NBC television news stations ran stories on the encounter as part of their evening news coverage. LiMandri Decl., Ex. 8, Ex. 9. By August 28, 2017, the encounter was being reported both nationally and internationally. LiMandri Decl., Ex. 10, Ex. 11. The encounter also began inspiring public debates, with numerous published editorials. LiMandri Decl., Ex. 12. All of this occurred in August—over a month and a half before the Rodriguez-Del Rios filed their

administrative complaint with the DFEH on October 16, 2017. These news articles provide prima facie evidence that the conduct in furtherance of the exercise of free speech itself—not the DFEH's prosecution was a matter of public interest.

Further, as stated in Miller's declaration, she declined the Rodriguez-Del Rios' request for a wedding cake for a same-sex wedding because of Tastries' policy of not creating cakes that violate the sincerely held religious beliefs of its owner—Miller. It had nothing specifically to do with the Rodriguez-Del Rios themselves. Miller Decl., ¶¶ 7-17. The conduct that grabbed the attention of the media was not that the Rodriguez-Del Rios were unable to commission Miller to make a cake, but rather that Miller was referring the Rodriguez-Del Rios to a rival baker because she cannot make wedding cakes for same-sex weddings due to her religious beliefs. LiMandri Decl., Ex. 13.

2. Second Prong: The DFEH Cannot Prevail

Here, the DFEH cannot succeed for three reasons. First, its complaint is barred by principles of res judicata and collateral estoppel because the main issue has already been adjudicated. The issue of whether Miller's practice of referring individuals who seek a cake which would celebrate a message which Miller finds offensive to another bakery, has already been found constitutional. Second, intervening case law makes clear that Miller did not discriminate on the basis of *sexual orientation*, but rather refused to announce a specific message, which is not something prohibited by the Unruh Act. Third, if this Court were to look past res judicata, and re-examine its prior holding, its substance remains valid—Miller's decision not to make the cake is constitutionally protected.

* * *

Importantly, "[s]ection 425.16 … unambiguously makes subject to a special motion to strike any '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 or California Constitution in connection with a public issue' as to which the plaintiff has not 'established that there is a probability that [he or she] will prevail on the claim.'" (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 58.) "[T]here [is] [no]thing in section 425.16's operative sections implying or even suggesting an intent-to-chill proof requirement. The legislative concern, rather, is that the cause of action arise from an act in furtherance of the constitutional right to petition or free speech." (*Id.* at 59.) "[I]mposition on section 425.16 of an intent-to-chill proof requirement would contravene the legislative intent expressly stated in section 425.16, as well as that implied by the statute's legislative history." (*Id.*) "[J]udicial imposition of an intent-to-chill proof requirement would undermine the Legislature's expressed aim that public participation 'not be chilled' by SLAPP's. Obviously, not only when a plaintiff intends to chill speech may the filing of a lawsuit have that result." (*Id.* at 60.) "Considering the purpose of the anti-SLAPP provision, expressly stated, *the nature or form of the action is not what is critical* but rather that it is against a person who has exercised certain rights." (*Id.*)

Relying on the above stated principles, the California Supreme Court has expressly rejected the argument that a plaintiff's "pure intentions" can be a basis for denying an anti-SLAPP motion.

"While it may well be, as [the plaintiff] asserts, that it had *pure intentions* when suing the defendant], *such intentions are ultimately beside the point*. As demonstrated, [the plaintiff's] action for declaratory and injunctive relief expressly was based on [the defendant's] activity in furtherance of its petition rights. The Court of Appeal correctly held that [the defendant], having satisfied its initial burden under the anti-SLAPP statute of demonstrating that [the plaintiff's] action was one arising from protected activity, faced no additional requirement." (*Id*. at 67-68.)

Here, the last time Miller filed an anti-SLAPP motion, this Court held that it could not say that the DFEH's action lacked minimal merit because "[t]he DFEH was put in the position of potentially 'sitting on its hands' and ignoring its statutory mandate while awaiting a high court decision. This court cannot say that the DFEH's action failed the 'minimal merit' test under these circumstances." (*Order re anti-SLAPP Mtn.* (May 1, 2018) Cal. Super. Ct. Case No. BCV-17-102855, at 4.) That holding is not applicable here. The DFEH has decided to re-file this action with full knowledge of the prior final judgment, with full knowledge of this Court's prior rulings, with a full knowledge of the Supreme Court's intervening ruling in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n* (2018) 138 S.Ct. 1719, and with full knowledge that Mr. Jack Phillips' litigation against the Colorado Civil Rights Commission is proceeding apace after surviving a motion to dismiss, *see Masterpiece Cakeshop, Inc. v. Elenis* (D. Colo. Jan. 4, 2019, No. 1:18-cv-02074), http://www.adfmedia.org/files/MasterpieceCakeshopMTDdenial.pdf. Moreover, "[o]bviously, not only when [the DFEH] intends to chill [Miller's] speech may the filing of [its] lawsuit have that result." (*Equilon*, *supra*, 29 Cal.4th at 60.) Thus, this Court should grant Miller's anti-SLAPP motion.

2.1. Principles of Res Judicata Bar the DFEH's action.

2.1.1. Claim preclusion (res judicata) bars the DFEH's action.

"The California Supreme Court has recognized that 'A valid final judgment on the merits in favor of a defendant serves as a complete bar to further litigation on the same cause of action.' This doctrine is commonly referred to as res judicata." (*Takahashi v. Board of Education* (1988) 202 Cal.App.3d 1464, 1473 [quoting *Slater v. Blackwood* (1975) 15 Cal.3d 791, 795].) "The doctrine of res judicata gives conclusive effect to a former judgment in subsequent litigation between the same parties involving the same cause of action…. A prior judgment for the defendant on the same cause of action is a complete bar to the new action." (*Murray v. Alaska Airlines, Inc.* (2010) 50 Cal.4th 860, 866–867.) "California's res judicata doctrine is based upon the primary right theory. The most salient characteristic of a primary right is that it is indivisible: the violation of a single primary right gives rise to but a single cause of action." (*Wade v. Ports America Management Corp.* (2013) 218 Cal.App.4th 648, 657.) Thus, "[r]es judicata applies when the earlier suit (1) involved the same 'claim' or cause of action as the later suit, (2) reached a final judgment on the merits, and (3) involved identical parties or privies." (*Mpoyo v. Litton Electro-Optical Systems* (9th Cir. 2005) 430 F.3d 985, 987.)

"A trial court has no authority to enter multiple final judgments determining multiple issues between the same parties to an action. 'A judgment is the final determination of the rights of the

parties in an action or proceeding.' Ordinarily only one final judgment in an action is authorized." (*Horton v. Jones* (1972) 26 Cal.App.3d 952, 958 [quoting Civ. Proc. Code § 577].) "'[F]inality' is an attribute of every judgment at the moment it is rendered; indeed, if a judicial determination is not immediately 'final' in this sense it is not a judgment…. *The Legislature has incorporated this meaning of finality into the very definition of a judgment: 'A judgment is the final determination of the rights of the parties in an action or proceeding.'*" (*Sullivan v. Delta Air Lines, Inc.* (1997) 15 Cal.4th 288, 304 [quoting Civ. Proc. Code § 577].)

Here, the DFEH already brought and lost a claim for violation of the Unruh Act based on Miller's refusal to make a wedding cake celebrating the Rodriguez-Del Rios' same-sex marriage. (*Judgment* (May 1, 2018) Cal. Super. Ct. Case No. BCV-17-102855.) The DFEH has now filed a new action concerning that same incident—Miller's refusal to make that same cake. This new action is barred by res judicata because it "(1) involve[s] the same 'claim' or cause of action as the [earlier action], (2) [the earlier action] reached a final judgment on the merits, and (3) [the earlier action] involved identical parties or privies." (*Mpoyo*, *supra*, 430 F.3d at 987.) It is undisputable that the "same claim" is at issue. It is also undisputable that under both the earlier action, and the present action, the same parties are present: the DFEH as the plaintiff; Catharine Miller and Tastries as the defendants; and Mireya and Eileen Rodriguez-Del Rio as the real parties in interest.

The only other factor is whether the earlier action "reached a final judgment on the merits." But it unequivocally did. In adjudicating a motion for a preliminary injunction, courts have inherent power to review the merits of the underlying claim, and if appropriate, enter judgment. If the trial court "intended a final adjudication of the issue involved," then the trial court's preliminary injunction decision will "amount to a decision on the ultimate rights in controversy." (*Bomberger v. McKelvey* (1950) 35 Cal.2d 607, 612 [double negative omitted].)

As the United States Supreme Court has explained,

> One of the principal questions pressed upon our attention related to the power of the court … to order the dismissal of the [action] before answer filed, or proofs taken, … [in] an order [regarding] a temporary injunction… If the showing made by the plaintiff be incomplete … then, clearly, the case should be remanded for a full hearing upon pleadings and proofs. But if the [action] be obviously devoid of equity upon its face, and such invalidity be incapable of remedy by amendment …, we know of no reason why, to save a protracted litigation, the court may not order the [action] to be dismissed.

(*Mast, Foos & Co. v. Stover Mfg. Co.* (1900) 177 U.S. 485, 494–495.)

To invoke that inherent power, the question presented must be one of law. (*Camp v. Board of Supervisors* (1981) 123 Cal.App.3d 334, 357.) It is appropriate for a trial court to exercise its inherent authority to reach the merits of the underlying dispute where it "was made to appear at the hearing that the limited question before the court was one of law alone, that it was to be resolved without extrinsic or additional evidence, and that there was accordingly no purpose to be served by a 'trial' of either action in the future." (*Id.* at 358.) "In these circumstances, the hearing itself was the

'trial.'" (*Id*. at 357; see also 6 Witkin, Cal. Procedure (5th ed. 2008) Provisional Remedies, § 285 [discussing same].) A "wedding professional" case is one in which it is particularly appropriate for the court to pierce the preliminary injunction and reach the merits. (See *303 Creative LLC v. Elenis* (10th Cir., Aug. 14, 2018, No. 17-1344) 2018 WL 3857080, at *1 [in factually similar case, discussing district court's decision to request summary judgment motion alongside motion for a preliminary injunction because facts were undisputed and issue was solely one of law].)

Here, regardless of the fact that in the earlier action, the DFEH sought only provisional relief, the Court did reach the merits of the Unruh Act claim and denied it—*issuing a final judgment*. Since the DFEH did not appeal, permitting the adjudication of that claim to become final, res judicata applies. (See *In re Matthew C.* (1993) 6 Cal.4th 386, 393 ["If an order is appealable … and no timely appeal is taken therefrom, the issues determined by the order are res judicata."].)

2.1.2. Issue preclusion (collateral estoppel) bars the DFEH's action.

In contrast to claim preclusion, "[i]ssue preclusion prevents relitigation of *issues* argued and decided in prior proceedings." (*Castillo v. City of Los Angeles* (2001) 92 Cal.App.4th 477, 481.) The requirements are: "(1) the issue is identical to that decided in the former proceeding, (2) the issue was actually litigated in the former proceeding, (3) the issue was necessarily decided in the former proceeding, (4) the decision in the former proceeding is final and on the merits, and (5) preclusion is sought against a person who was a party … to the former proceeding." (*Id*.) "[F]or purposes of issue preclusion … ['final and on the merits'] includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect." (Rest.2d Judgments (1982) Requirement of Finality, § 13.) As a result, numerous cases have found specific interlocutory orders to be final for purposes of issue preclusion—even in the absence of a final judgment. (See, e.g., *Ayala v. Dawson* (2017) 13 Cal.App.5th 1319, 1332; *Bullock v. City and County of San Francisco* (1990) 221 Cal.App.3d 1072, 1086.)

In determining whether a prior order was "final and on the merits" for purposes of issue preclusion, even in the absence of an actual final judgment, courts apply "the following factors: (1) whether the decision was not avowedly tentative; (2) whether the parties were fully heard; (3) whether the court supported its decision with a reasoned opinion; and (4) whether the decision was subject to an appeal." (*Border Business Park, Inc. v. City of San Diego* (2006) 142 Cal.App.4th 1538, 1565; see also *Schmidlin v. City of Palo Alto* (2007) 157 Cal.App.4th 728, 774.)

In applying the above to the adjudication of a motion for a preliminary injunction, "[t]here is no inflexible rule as to the effect of the granting or denial of a preliminary injunction on subsequent litigation, but *[if] it appears that the court intended a final adjudication of the issue involved, a decision on an application for a preliminary injunction does [] amount to a decision on the ultimate rights in controversy*" such that issue preclusion applies. (*Bomberger*, 35 Cal.2d at 612 [double negative omitted].) From a practical perspective, issue preclusion is rarely applied based on a preliminary injunction order, but such an application has been recognized in many courts. "The fact that our

judgment … was rendered in an appeal from a preliminary injunction order does not preclude application of collateral estoppel…. [S]uch a judgment … *will be given preclusive effect if it is necessarily based upon a determination that constitutes an insuperable obstacle to the plaintiff's success on the merits.*" (*Miller Brewing Co. v. Joseph Schlitz Brewing Co.* (7th Cir. 1979) 605 F.2d 990, 995.)[3] One such context where applying issue preclusion is particularly appropriate is where an administrative agency initiates a prior action to obtain a preliminary injunction. Issues determined in that prior action are settled with respect to the latter action on the merits. (*Walsh v. International Longshoremen's Ass'n, AFL-CIO, Local 799* (1st Cir. 1980) 630 F.2d 864, 869 [In NLRB emergency preliminary injunction proceeding, the issues that the trial court adjudicates are later subject to collateral estoppel in a subsequent action on the merits].)

Here, even if claim preclusion does not apply, there are compelling reasons for applying issue preclusion because the Court's order on the DFEH's motion for a preliminary injunction (1) "was not avowedly tentative;" (2) "the parties were fully heard;" (3) "the court supported its decision with a reasoned opinion;" and (4) "the decision was subject to an appeal." (*Border Business Park, Inc.*, *supra*, 142 Cal.App.4th at 1565.)

First, the Court's decision was not "avowedly tentative" but the exact opposite. In adjudicating the DFEH's motion for a preliminary injunction, the Court did not rest its order on the balancing of the preliminary injunction factors. Rather, the Court stated that "[t]he State cannot succeed on the facts presented as a matter of law." (*Order re Mtn. for Prelim. Inj.* (Feb. 5, 2018) Cal. Super. Ct. Case No. BCV-17-102855, at 1.) In coming to that conclusion, the Court noted that "[a]n interest in preventing dignitary harms … is not a compelling basis for infringing free speech" because "the point of all speech protection is to shield just those choices of content that in someone's eyes are hurtful." (*Id*. at 6.) The Court also noted, citing *Obergefell v. Hodges* (2015) 135 S.Ct. 2584, that the belief that "marriage is a sacramental commitment between a man and a woman" is not "[s]mall-minded bigot[ry]," but rather "is part of the orthodox doctrines of all three world Abrahamic religions, if not also part of the orthodox beliefs of Hinduism and major sects of Buddhism." (*Id*. at 5.) It is clear that "the court intended a final adjudication of the issue involved." (*Bomberger*, *supra*, 35 Cal.2d at 612.)

Second, it is also clear that "the parties were fully heard" and the court "supported its decision with a reasoned opinion." (*Border Business Park, Inc.*, *supra*, 142 Cal.App.4th at 1565.) Miller responded to comprehensive written discovery, and all parties submitted lengthy and

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[3] (See also *In re Holy Hill Community Church* (B.A.P. 9th Cir., Jan. 5, 2016, No. AP 2:14-AP-01744-WB) 2016 WL 80032, at *5; *Malahoff v. Saito* (2006) 111 Hawai'i 168, 181, fn. 16; *George Arakelian Farms, Inc. v. Agricultural Labor Relations Bd.* (1989) 49 Cal.3d 1279, 1298, fn. 2; *Gjertsen v. Board of Election Com'rs of City of Chicago* (7th Cir. 1984) 751 F.2d 199, 202; *Hawksbill Sea Turtle v. Federal Emergency Management Agency* (3d Cir. 1997) 126 F.3d 461, 474, fn. 11; *In re Brown* (3d Cir. 1991) 951 F.2d 564, 569.)

detailed declarations. Based on the undisputed facts, the Court issued a detailed, eight-page, single-spaced order. And based on the Court's analysis in that order, it is clear that no additional facts which the DFEH uncovered in its subsequent deposition of Miller (laid out in depth in its new complaint) change the result.

Third, and finally, not only could the DFEH have filed an appeal, it did so, and then abandoned that appeal. (*Order re Mtn. to Enforce Judgment* (Sep. 13, 2018) Cal. Super. Ct. Case No. BCV-17-102855, at 1, 3.) "[The DFEH] effectively acquiesced in the ruling by failing to … fil[e] an appeal…. Having decided not to pursue the remedy available to it, it should not now be able to contend that the order is not a final adjudication of the issues it addressed." (*Border Business Park, Inc.*, *supra*, 142 Cal.App.4th at 1565.)

Thus, either under claim or issue preclusion, the DFEH's action is barred and this anti-SLAPP motion should be granted in full.

2.2. Miller Did not Discriminate on the Basis of Sexual Orientation

There is no California case, or other case interpreting the Unruh Civil Rights Act, which has held that a business declining to facilitate and promote a same-sex wedding constitutes discrimination based on sexual orientation. Rather, the Unruh Act generally does not prohibit discrimination based on a "person's conduct, as opposed to his status" (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 96), and neither generally does the United States Constitution. (*Boy Scouts of America v. Dale* (2000) 530 U.S. 640, 653 [citing *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston* (1995) 515 U.S. 557, 574-75] [the event organizers did not "exclude the GLIB members because of their sexual orientations, but because they wanted to march behind a GLIB banner"]; *Bray v. Alexandria Women's Health Clinic* (1993) 506 U.S. 263, 269-70 [opposition to abortion is not akin to discrimination against women].)

More important, however, is the fact that recent case law suggests that the distinction between a person's conduct and his status is especially valid when applied in the wedding professional or cake situation.

> The important message from the *Masterpiece Bakery* case is that there is a clear distinction between refusing to produce a cake conveying a particular message, for any customer who wants such a cake, and refusing to produce a cake for the particular customer who wants it because of that customer's characteristics. One can debate which side of the line particular factual scenarios fall. But in our case there can be no doubt. The bakery would have refused to supply this particular cake to anyone, whatever their personal characteristics. So there was no discrimination on grounds of sexual orientation.

(*Lee v. Ashers Baking Co. Ltd.* [2018] UKSC 49 (appeal taken from N. Ir.).)[4]

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[4] In deciding human rights issues, courts typically understand that constitutional terms like "liberty," "equality," and "dignity" are universal, and so frequently look to foreign jurisdictions for aid. (See, e.g., *Malinski v. New York* (1945) 324 U.S. 401, 413 ["The safeguards of 'due process

This distinction is the grand compromise which the Supreme Court made when it legalized same-sex marriage nationwide. When it did so, the Supreme Court made clear that "[t]o [some], it would demean a timeless institution if the concept and lawful status of marriage were extended to two persons of the same sex. Marriage, in their view, is by its nature a gender-differentiated union of man and woman. This view long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world." (*Obergefell v. Hodges* (2015) 135 S.Ct. 2584, 2594.) And "many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here." (*Id.* at 2602.) "[T]hose who adhere to religious doctrines[] may … advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned." (*Id.* at 2607.) In light of the above case law, Miller's decision not to facilitate and promote same-sex weddings is not discrimination on the basis of sexual orientation, and therefore not a violation of the Unruh Civil Rights Act.

2.3. Miller's Speech or Conduct is Constitutionally Protected.

2.3.1. Creating a wedding cake is speech protected by the Free Speech clauses of both the Federal and California constitutions.

This Court has already found that creating a wedding cake is speech. (*Order re Mtn. for Prelim. Inj.* (Feb. 5, 2018) Cal. Super. Ct. Case No. BCV-17-102855, at 4.) Therefore, strict scrutiny must be satisfied to restrict that speech. (*Id.* at 5; *Pacific Gas and Elec. Co. v. Public Utilities Com'n of California* (1986) 475 U.S. 1, 19-20; *Riley v. National Federation of the Blind of North Carolina, Inc.* (1988) 487 U.S. 781, 795.) Nothing has changed in the intervening months—if anything, this Court's conclusions have been reaffirmed

In *Masterpiece Cakeshop*, a case factually similar to the present one, the United States Supreme Court did not address the Christian baker's Free Speech claim because of some "uncertainties about the record." (*Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n* (2018) 138 S.Ct. 1719, 1740 [Thomas, J., concurring].) "Specifically, the parties dispute[d] whether the baker had refused to create a *custom* wedding cake for the [same-sex couple] or whether he refused to sell them *any* wedding cake (including a premade one)." (*Id.*)

Without this dispute, the Supreme Court likely would have reached the Free Speech claim and came down along the same lines as this Court. As Justice Thomas said:

> Accordingly, [the Christian baker's] creation of custom wedding cakes is expressive. The use of his artistic talents to create a well-recognized symbol that

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of law' and 'the equal protection of the laws' summarize the history of freedom of English-speaking peoples"]; *Rast v. Van Deman & Lewis Co.* (1916) 240 U.S. 342, 366 [Constitutions embody "relatively fundamental rules of right, as generally understood by all English-speaking communities"]; *Lawrence v. Texas* (2003) 539 U.S. 558, 576.)

> celebrates the beginning of a marriage clearly communicates a message—certainly more so than nude dancing, *Barnes v. Glen Theatre, Inc.* (1991) 501 U.S. 560, 565–566, or flying a plain red flag, *Stromberg v. People of State of Cal.* (1931) 283 U.S. 359, 369. By forcing [the baker] to create custom wedding cakes for same-sex weddings, [the] public-accommodations law "alters the expressive content" of his message. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston* (1995) 515 U.S. 557, 572. The meaning of expressive conduct, this Court has explained, depends on "the context in which it occurs." *Texas v. Johnson* (1989) 491 U.S. 397, 405. Forcing [the baker] to make custom wedding cakes for same-sex marriages requires him to, at the very least, acknowledge that same-sex weddings are "weddings" and suggest that they should be celebrated—the precise message he believes his faith forbids. The First Amendment prohibits Colorado from requiring [the baker] to "bear witness to these facts," *Hurley*, *supra*, 515 U.S. at 574, or to "affirm a belief with which he disagrees," *id.* at 573.

(*Id.* at 1743–1744 [Thomas, J., concurring] [citations corrected].) Because compelling Miller to make a wedding cake would be compelling her to speak, strict scrutiny must be satisfied.

2.3.2. Forcing Miller to make same-sex wedding cakes or stop making all wedding cakes substantially burdens her religious liberty rights in violation of the California constitution.

Due to a watershed federal Supreme Court decision in 1990, the Free Exercise Clause of the Federal Constitution no longer "relieve[s] 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.) Nevertheless, the California Supreme Court has observed that "the high court's decision in [*Smith*] does not control [its] interpretation of the state Constitution's free exercise clause." (*Catholic Charities of Sacramento, Inc. v. Superior Court* (2004) 32 Cal.4th 527, 548.) As a result, "California courts have typically construed the provision to afford the same protection for religious exercise as the federal Constitution before [*Smith*]," i.e., strict scrutiny (*Smith v. Fair Employment & Housing Com.* (1996) 12 Cal.4th 1143, 1177; *see also North Coast Women's Care Medical Group, Inc. v. San Diego County Superior Court* (2008) 44 Cal.4th 1145, 1158; *Catholic Charities*, *supra*, 32 Cal.4th at 562; *Roman Catholic Archbishop of Los Angeles v. Superior Court* (2005) 131 Cal.App.4th 417, 438.)

Under strict scrutiny, a law cannot substantially burden an individual's right to free exercise of religion unless the law "represents the least restrictive means of achieving a compelling interest." (*North Coast*, *supra*, 44 Cal.4th at 1158.) Under this analysis, "a law substantially burdens a religious belief if it conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs." (*Catholic Charities, supra*, 32 Cal.4th at 556 [quoting *Thomas v. Review Bd. of Indiana Employment Sec. Division* (1981) 450 U.S. 707, 717–718]; see also *Valov v. Department of Motor Vehicles* (2005) 132 Cal.App.4th 1113, 1126; *Burwell v. Hobby Lobby Stores, Inc.* (2014) 134 S.Ct. 2751, 2770 ["[A] law that

operates so as to make the practice of religious beliefs more expensive in the context of business activities imposes a burden on the exercise of religion"].)

As this Court has already found, "Miller is a practicing Christian and considers herself a woman of deep faith. Miller is a creative artist and participates in every part of the custom cake design and creation process. While Miller generally offers her services and products without distinction, including her pre-made wares, she will not design or create any custom cake that expresses or celebrates matters that she finds to offend her heartfelt religious principles. Thus, she refuses to create or design wedding cakes for same-sex marriage celebrations, because of her belief that such unions violate a Biblical command that marriage may only occur between a man and a woman." (*Order re Mtn. for Prelim. Inj.* (Feb. 5, 2018) Cal. Super. Ct. Case No. BCV-17-102855, at 3.) It also cannot meaningfully be contested that requiring Miller to cease making wedding cakes altogether burdens her religious liberty rights. If Miller were to stop selling wedding cakes, she would be forced to give up 25-30% of Tastries' gross revenue—a substantial portion of her income. Miller Decl., ¶ 21. More acutely, to compel Miller to perform an action she sincerely believes is abhorrent to her sovereign God or risk community ostracization and effective expulsion from her industry manifests the very same substantial and impermissible pressure to modify behavior as described by the rule in *Catholic Charities*. (*Catholic Charities, supra*, 32 Cal.4th at 556). Thus, strict scrutiny must be satisfied.

2.3.3. The DFEH cannot satisfy strict scrutiny.

Under strict scrutiny, "a law c[an] not be applied in a manner that substantially burdens [freedom of speech rights or] 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.) The burden of showing this rests with the government and the government does not get "the benefit of the doubt." (*U.S. v. Playboy Entertainment Group, Inc.* (2000) 529 U.S. 803, 818.) Further, strict scrutiny "look[s] beyond broadly formulated interests justifying the general applicability of government mandates" to see whether that standard "is satisfied through application of the challenged law" to "the particular" party. (*Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal* (2006) 546 U.S. 418, 430-31; see also *Attorney General v. Desilets* (1994) 418 Mass. 316, 325 ["The general objective of eliminating discrimination of all kinds … cannot alone provide a compelling State interest"].) Therefore, the Court must focus not on the Unruh Act's general purpose of preventing "all forms of stereotypical discrimination" (*Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 36), but on its "apparent object" when "applied to expressive activity in the way it was done here." (*Hurley*, *supra*, 515 U.S. at 578.) Thus, the DFEH must show that it has a compelling interest in forcing cake artists who otherwise serve homosexual customers to violate their consciences by creating custom wedding cakes that celebrate same-sex marriages.

Here, with respect to compelled speech, this Court has already found that "[t]he State cannot meet the test that its interest outweighs the Free Speech right at issue in this particular case,

or that the law is being applied by the least restrictive means." (*Order re Mtn. for Prelim. Inj.* (Feb. 5, 2018) Cal. Super. Ct. Case No. BCV-17-102855, at 5.) "The fact that Rodriguez-Del Rios feel they will suffer indignity from Miller's choice is not sufficient to deny constitutional protection. *Hurley* established that the State's interest in eliminating dignitary harms is not compelling where, as here, the cause of the harm is another person's decision not to engage in expression. The Court there recognized that 'the point of all speech protection … is to shield just those choices of content that in someone's eyes are … hurtful.' An interest in preventing dignitary harms thus is not a compelling basis for infringing free speech." (*Id.* at 6.) Again, nothing has changed except the publication of intervening case law which supports this court's Conclusions.

This Court, however, has not yet addressed whether strict scrutiny would be satisfied (as required by Miller's right to the free exercise of religion guaranteed by the California constitution) were a wedding cake not speech—and mere conduct. (*Id.* at 6.) What if neither "nude dancing," "flying a plain red flag," nor "creat[ing] custom wedding cakes" were speech? (*Masterpiece Cakeshop*, *supra,* 138 S.Ct. at 1743–1744 [Thomas, J., concurring].) *Masterpiece Cakeshop* provides the answer. In *Masterpiece Cakeshop* (decided on freedom of religion grounds) the United States Supreme Court did not engage in any strict scrutiny analysis. Without overruling its precedents, that analysis is necessary. This was commented upon by the concurring opinion of Justice Gorsuch, and it necessarily leads to the conclusion that, based on the facts in *Masterpiece Cakeshop*, strict scrutiny would not have been satisfied. (*Masterpiece Cakeshop*, *supra*, 138 S.Ct. at 1734 [Gorsuch, J., concurring] ["[W]hen the government fails to act neutrally toward the free exercise of religion, it tends to run into trouble. Then the government can prevail only if it satisfies strict scrutiny…. Today's decision respects these principles."].)

Some courts have found that stopping all sexual orientation discrimination is itself a compelling interest—divorced from any actual inability to obtain goods—but neither the California nor United States Supreme Courts have gone that far. (Contrast *North Coast*, *supra*, 44 Cal.4th at 1162 [Baxter, J., concurring] [the state "do[es] not … ha[ve] a compelling interest in eradicating every difference in treatment based on sexual orientation."]; see also *Ashers Baking Co.*, *supra*, UKSC 49 ["[N]o justification has been shown for the compelled speech which would be entailed for imposing civil liability for refusing to fulfil the order."].)

More importantly, the United States Supreme Court has stated that "the religious and philosophical objections to gay marriage are *protected views* and in some instances protected forms of expression. As this Court observed in *Obergefell v. Hodges*, '[t]he First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths.'" (*Masterpiece Cakeshop*, *supra*, 138 S.Ct. at 1727.) Thus, in *Masterpiece Cakeshop*, the United States Supreme Court made clear that the proper way to read *Obergefell v. Hodges* is similar to Justice Baker's concurring opinion in *North Coast*. To explain, the government may have a compelling interest in eradicating sexual orientation

discrimination—but not where the discrimination (if it can even be called that) is nothing but private parties' religious belief in traditional marriage. "[I]t can be assumed that [there can be] … an exercise of religion … that gay persons could recognize and accept without serious diminishment to their own dignity and worth," which would be legally permissible. (*Id.*)

Wherever the line is distinguishing permissible "exercise[s] of religion" from impermissible ones, the wedding cake designer must be on the right side of the line when, as here: (a) there is no actual hardship to the individual suffering alleged discrimination since the objector offered to connect them with another wedding cake designer; (b) the alleged discrimination is motivated by a sincere and good-faith religious belief that marriage can only be the union of one man and one woman; and (c) that expression of religious belief was done respectfully and politely.

Moreover, due to the evidence that the Rodriguez-Del Rios were setting Miller up—either because of an earnest (but misplaced) desire to expose her alleged discrimination to the public, or merely as part of a crass scheme to receive free wedding services from other vendors—it appears that the only harm to which the DFEH can truly point is the harm of having the Rodriguez-Del Rios' dignity offended by coming into contact with Miller and her religious beliefs. But the dignity analysis cuts both ways. This Court previously properly refused the DFEH's invitation to brand Miller's core religious beliefs as unlawful, compel her to stop creating her wedding designs, and ostracize her as a member of the community, because to do so would inflict untold dignitary harm not only on her, but also on any fellow believers. (*Burwell v. Hobby Lobby Stores, Inc.* (2014) 134 S.Ct. 2751, 2785 [Kennedy, J., concurring] [explaining that "free exercise is essential in preserving the[] … dignity" of religious adherents]; cf. *North Coast*, *supra*, 44 Cal.4th at 1162 [Baxter, J., concurring] ["[T]he state's interest [in eradicating sexual orientation discrimination] must be balanced, in appropriate cases, against the fundamental constitutional right to the free exercise of religion"].) In balancing the dignity interests, the Supreme Court has made completely clear that the Rodriguez-Del Rios' merely being offended by Miller's existence is not enough to ruin her life and run her out of business. (See *Masterpiece Cakeshop*, *supra*, 138 S.Ct. at 1727; *Obergefell*, *supra*, 135 S.Ct. at 2607.)

3. Miller is Entitled to Receive Her Attorneys' Fees.

"[P]revailing defendant[s] on a special motion to strike *shall* be entitled to recover [their] attorneys' fees and costs." (Civ. Proc. Code § 425.16(c)(1).) The California Supreme Court has made clear that this fee-shifting provision is mandatory. In *Ketchum v. Moses*, the Court emphasized that *"[a]ny* SLAPP defendant who brings a successful motion to strike is entitled to mandatory attorney fees" ((2001) 24 Cal.4th 1122, 1131-32.) The fee provision of the anti-SLAPP statute is not a discretionary sanction, but rather a mandatory fee-shifting provision designed to protect First Amendment rights. (*Id.*) In contingency anti-SLAPP cases, applying a multiplier to the fee award is also necessary. (*Id.* at 1134-1136.) It is particularly important to apply a contingency multiplier because "[t]he adjustment to the lodestar figure, e.g., to provide a fee enhancement reflecting the risk that the attorney will not receive payment if the suit does not succeed, constitutes earned

compensation; unlike a windfall, it is neither unexpected nor fortuitous. Rather, it is intended to approximate market-level compensation for such services, which typically includes a premium for the risk of nonpayment or delay in payment of attorney fees." (*Id*. at 1138 [2.0 multiplier]; see also *Melbostad v. Fisher* (2008) 165 Cal.App.4th 987, 992 ["In general, the party prevailing on a special motion to strike may seek an attorney fees award through three different avenues: simultaneously with litigating the special motion to strike, by a subsequent noticed motion, or as part of a cost memorandum at the conclusion of the litigation."].)

"[T]he general rule [is] that the anti-SLAPP statute's fee provision applies only to the motion to strike, and not to the entire action." (*Graham-Sult v. Clainos* (9th Cir. 2014) 756 F.3d 724, 752.) However, "attorney's fees for work on [a prior] motion" can be awarded "based on [a] finding that the work relating to the two motions overlapped and that the [earlier] motion was integral to Defendants' eventual success." (*Manufactured Home Communities, Inc. v. County of San Diego* (9th Cir. 2011) 655 F.3d 1171, 1181 [awarding fees for earlier anti-SLAPP motion]; see also *Graham-Sult*, *supra*, 756 F.3d at 752 [awarding fees for concurrent motion to dismiss, and adding "other filings, document review, and preparing initial disclosures"].) "In short, the award of fees is designed to reimburse the prevailing defendant for expenses incurred *in extracting* herself from a baseless lawsuit rather than to reimburse the defendant for all expenses incurred *in* the baseless lawsuit." (*569 East County Boulevard LLC v. Backcountry Against the Dump, Inc.* (2016) 6 Cal.App.5th 426, 433 [identifying tasks which are compensable and which are not].) The reasonable attorney rate is determined by looking to "the range of reasonable rates charged by and judicially awarded comparable attorneys for comparable work." (*Children's Hosp. and Medical Center v. Bonta* (2002) 97 Cal.App.4th 740, 783.)

A chart containing all of defense counsel's time, along with the specific entries for which Miller seeks her attorneys' fees highlighted in blue, is attached to the LiMandri declaration. That declaration also substantiates the attorney rates and hours requested. As stated in that declaration, Miller seeks currently $208,230 in attorney time, and will update that amount with her reply brief to include time incurred post-filing. (Compare *Clifford v. Trump* (C.D. Cal., Dec. 11, 2018, No. CV1806893SJOFFMX) 2018 WL 6519029, at *5 [in high-profile anti-SLAPP case, awarding $292,052.33 in attorneys' fees].) In addition, Miller seeks a 2.0 defense contingency multiplier, for a total amount of $416,460.

CONCLUSION

For the foregoing reasons, the Court should grant Miller's anti-SLAPP motion and award her all of her requested attorneys' fees, including with a defense contingency multiplier.

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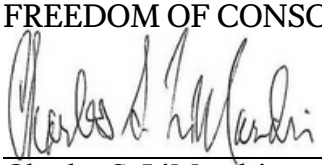
Respectfully submitted,

FREEDOM OF CONSCIENCE DEFENSE FUND

Dated: January 22, 2019 By: 

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