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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SANTA CLARA

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This case is a SLAPP, a Strategic Lawsuit Against Public Participation. As one court has noted, "while SLAPP suits 'masquerade as ordinary lawsuits' the conceptual features which reveal them as SLAPP's are that they are generally meritless suits brought by large private interests to deter common citizens from exercising their political or legal rights or to punish them for doing so." *Wilcox v. Superior Court,* 27 Cal. App.4th 809, 816 (1984).

The plaintiff here is a defrocked rabbi, who has been expelled from the rabbinical council and fired by his congregation based on serious allegations of sexual abuse, who charges four bloggers with defaming him through their comments on the substantial public controversy surrounding his conduct. Rather than filing a defamation action in New York, where he lives, the rabbi found counsel in Dayton, Ohio who filed a conclusory "petition for prelitigation discovery," that alleged no more than that "false, misleading, and defamatory materials" about him had

appeared on three blogs, then obtained an ex parte order authorizing discovery to identify the bloggers. After that petition was dismissed for want of prosecution, the rabbi found a California attorney who filed an affidavit that attached the Ohio petition and order allowing discovery, while failing to acknowledged the fact that the petition had subsequently dismissed; the attorneys' affidavit additionally alleged, falsely, that the Ohio petition had sought discovery to identify four bloggers and not just three.

Defendant Does, a/k/a JewishSurvivors, JewishWhistleblower, and NewHem[psteadNews, have a First Amendment right to speak anonymously and remain anonymous. *McIntyre v. Ohio Elections Comm.* 514 U.S. 334, 341-342 (1995). See also *Rancho Publications v. Superior Court* 68 Cal. App.4th 1538, 1545, 1547, 1549 (1999) (quashing subpoena seeking the names of anonymous authors of nondefamatory advertorials). In addition, as the record will show, plaintiff's claims against defendants are without merit.

Therefore, defendant brings this special motion to strike plaintiff's action, pursuant to the California anti-SLAPP (Strategic Lawsuit Against Public Participation) law, Code of Civil Procedure section 425.16. As discussed below, the anti-SLAPP law clearly applies to the allegations in plaintiff's action, which arises from defendants' speaking out on their blogs about a matter of public interest – namely, the serious allegations of sexual abuse by the rabbi, his resulting expulsion from the rabbinical council and his synagogue, and the litigation that has followed

FACTS

This action has been brought over the speech on four web logs, or "blogs", that are devoted to issues of sexual and similar abuses directed by rabbis and other authority figures in the Orthodox Jewish community: www.jewishsurvivors.blogspot.com; www.jewishwhistleblower.blogspot.com, www.newshempsteadnews.blogspot..com, and www.rabbinicintegrity.blogspot.com. The plaintiff is Mordechai Tendler, an Orthodox rabbi who until this past spring served a congregation in New Hempstead, New York. Tendler is a scion of a very distinguished and world-renowned rabbinical family – his father is a world-renowned expert

on medical ethics who teaches at Yeshiva University in New York, and his grandfather was the outstanding scholar in Halachic (Jewish) law of this generation. Tendler himself has, according to his supporters in the controversy described below, made a name for himself by involvement in significant feminist issues in the Jewish community.

Over a period of years, Tendler was accused by some of the women in his congregation of abusing his position to have sex with them, such as by telling a woman who was having trouble finding a marriage partner that her problem was that she was too closed to men, and that she needed to have sex with him in order to learn how to open herself up. After several such accusers came forward, Tendler was investigated by a special ethics committee of the Rabbinical Council of America, which in turn hired a private investigations firm to help find the facts. Based on their detailed report, Tendler was expelled from the RCA and, after further controversy, fired by his congregation. Tendler was sued in 2005 by one of his congregants in New York state court; his motion to dismiss was recently denied in part and granted in part. Levy Affidavit Exhibit 14.

Tendler has fought back against the accusations, claiming that the accusations were brought forward in retaliation for his favorable views on feminist issues, and that he was denied due process; he also filed suit for libel in a rabbinical court in Israel. Tendler has sued his synagogue of reinstatement, and the debate between his supporters and detractors has raged for years. The controversy has been extensively reported both in the Jewish press and in mainstream media sources such as the New York Post and on television. *See* articles attached to the Dratch Affidavit. The controversy has also been extensively discussed on many blogs, including the four whose authors Tendler seeks to identify through this proceeding.

As the rabbi of a congregation in New York, Tendler lived in New York, and so far as counsel have been able to determine, he still lives in that state. Levy Affidavit ¶ 5. However, on February 15, 2006, filed a petition for prelitigation discovery in the Common Pleas Court for Montgomery County, Ohio, invoking Ohio Revised Code § 2317.48 and Rule 34(D) of the Ohio Rules of Civil Procedure. Tendler Exhibit A. The petition was very barebones – it said there were false and defamatory statements about Tendler on three blogs:

www.jewishsurvivors.blogspot.com; www.rabbinicintegrity.blogspot..com, www.newshempsteadnews.blogspot..com. No specific defamatory statements were identified, and no evidence was supplied that any of the postings were, in fact, false. The petition did not reveal that Tendler was not from Ohio, and it gave no indication of why the petition was being filed in Ohio. Even though Rule 34(D) requires a party seeking prelitigation discovery to serve his request on the anticipated adverse party, no effort was made to notify the bloggers in question that Tendler was seeking to identify them, even though each of the blogs identified in the petition has a "comment" feature that would have allowed Tendler or his counsel to post a comment revealing the intention to seek discovery; and even though two of the blogs contain "profiles" that reveal the operators' email addresses. Nor was the Ohio court informed that this means of contacted the Does existed.[1/]

The Court granted the petition authorizing discovery, Tendler Exhibit B, and Tendler sent Ohio subpoenas to Google, a California company that owns and operates Blogspot. However, Google declined to respond to an Ohio subpoena. Meanwhile, on March 16, 2006, the Ohio court notified Tendler's counsel that his proceeding would be dismissed for want of prosecution unless Tendler explained the reasons for delay. Levy Affidavit, Exhibit 1. Tendler filed a status report on March 29, noting that Google was insisting on a California subpoena, and asserting that counsel had, therefore, obtained a commission for subpoenas in California. Levy Affidavit, Exhibit 2. On April 25, 2006, the Ohio court dismissed the case without prejudice to reopening. Levy Affidavit, Exhibit 3. The Ohio court's electronic docket reflects that the case was then closed on April 26, 2006. Levy Affidavit, Exhibit 4.

Nevertheless, on May 24, 2006, Tendler filed a new case in this Court, captioned Mordecai Tendler, Plaintiff, v. John Doe, Defendant, with an affidavit of his counsel, Patrick Guevara, requesting issuance of subpoenas to identify the operators of the four blogs, and averred,

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[1/] The comment feature has been disabled on jewishwhistleblower.blogspot.com. However, that blogger's email address is posted on his blog's profile; had Tendler alleged in his petition that Jewish Whistleblower had published defamatory material and petitioned for discovery to identify him, he could have notified the Doe of his petition that way.

incorrectly, that Tendler had petitioned in Ohio for leave to take discovery to identify all four bloggers. In fact, although Mr. Guevara obtained a subpoena to identify the operator of www.jewishwhistleblower.blogspot.com, that blog had never been identified in the Ohio petition. The affidavit attached the Ohio order allowing discovery, but made no mention of the fact that the case itself had been dismissed.

Google notified the bloggers that subpoenas had been received seeking their identities, and three of the four bloggers – JewishSurvivors; JewishWhistleblower, and NewHempsteadNews – asked undersigned counsel Mr. Levy to represent them in seeking to quash the subpoenas. Mr. Levy contacted Mr. Guevara to notify him of his involvement, and by both voicemail and email told Mr. Guevara that, presumably unknown to Mr. Guevara, the Ohio case had actually been dismissed and hence he had no basis for seeking subpoenas from this Court based on an Ohio order. Levy Affidavit ¶ 3 and Exhibit 5. Mr. Guevara never responded to either the telephone call or the email, but when Mr. Levy called to follow up, he was advised by an assistant that Mr. Guevara was just local counsel and had forwarded Mr. Levy's messages to lead counsel in Ohio. Accordingly, Mr. Levy contacted the Ohio attorney, James Fleisher, to explain his concern. Mr. Levy suggested that Tendler withdraw the subpoenas because they had been obtained through misrepresentation of the status in Ohio, without prejudice to having the Ohio case reopened and new subpoenas being sought. However, Mr. Levy asked for notice so that his clients could oppose such a motion. Levy Affidavit, Exhibit 6. Mr. Fleisher represented that the Ohio court's dismissal of the case had been "inadvertent," and that the Court had reopened the case; he therefore claimed that the procedural problem was "moot." Levy Affidavit, Exhibit 7. Despite the fact that Mr. Fleisher was aware that the Does were represented by counsel and wanted the opportunity to oppose, he did not give notice before seeking reopening, a request submitted **after** Mr. Fleisher represented to Mr. Levy that the case had already been reopened. Levy Affidavit, ¶ 5 and Exhibits 10, 11. Mr. Fleisher granted two extensions of time for compliance with the subpoena, through July 14, 2006. Levy Affidavit, Exhibit 9. Levy Affidavit, Exhibit 9. Because Tendler has

nevertheless failed to withdraw his subpoenas voluntarily, defendants have now moved to strike them as a SLAPP.

I. THE ALLEGATIONS OF THE DEPOSITION SUBPOENA AND THE UNDERLYING PETITION ARE COVERED BY C.C.P. § 425.16, BECAUSE THEY ARISE FROM DEFENDANT'S ACTS IN FURTHERANCE OF THE FIRST AMENDMENT RIGHT TO SPEAK OUT ON A PUBLIC ISSUE.

A. The California Anti-SLAPP Law Was Enacted to Protect the Fundamental Constitutional Rights of Petition and Speech and Is to Be Construed Broadly.

In 1992, in response to the "disturbing increase" in meritless lawsuits brought "to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances," the Legislature overwhelmingly enacted California's anti-SLAPP law, Code of Civil Procedure section 425.16, to protect against these SLAPPs. (Subsequent section references herein are to the Code of Civil Procedure unless otherwise indicated.). In 1997, the Legislature unanimously amended the anti-SLAPP statute to mandate expressly that it "shall be construed broadly." Stats. 1997, ch. 271, § 1; amending § 425.16(a). This amendment also added subdivision (e)(4) to the statute, making clear that section 425.16 covers any other conduct that furthers petition or speech rights, in addition to statements and writings. In 1999, the Supreme Court issued its first opinion construing the anti-SLAPP law, directing that courts, "whenever possible, should interpret the First Amendment and section 425.16 in a manner 'favorable to the exercise of freedom of speech, not to its curtailment.'" *Briggs v. Eden Council for Hope and Opportunity* 19 Cal.4th 1106, 1119 (1999), quoting *Bradbury v. Superior Court*, 49 Cal. App.4th 1170, 1176 (1996).

The Supreme Court has repeatedly reaffirmed the principle of broad construction of the SLAPP statute. In *Jarrow Formulas v. LaMarche*, 31 Cal.4th 728, 3 Cal. Rptr.3d 636 (2003), a unanimous Court held that malicious prosecution claims were not exempt from the anti-SLAPP law. The opinion emphasized the plain language of the statute, noting that "[n]othing in the statute excludes any particular type of action" and "the express statutory command that this section shall be construed broadly." *Jarrow Formulas*, *supra*, 31 Cal.4th at 742. The statute expressly

excludes "any enforcement action brought in the name of the people of the State of California [by one of enumerated officials] acting as a public prosecutor." Every other form of action is included in the scope of the SLAPP law. This action, in which plaintiff seeks an order stripping defendants of their right to speak anonymously because of allegedly defamatory speech, is covered by the SLAPP statute.

B. The Procedure and Standards for Determining Applicability of the Anti-SLAPP Statute.

The Supreme Court has explained the defendant's burden on a special motion to strike:

> Section 425.16 posits . . . a two-step process for determining whether an action is a SLAPP. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. (§ 425.16, subd. (b)(1).) "A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in section 425.16, subdivision (e)" *(Braun v. Chronicle Publishing Co.* (1997) 52 Cal. App.4th 1036, 1043). If the court finds that such a showing has been made, it must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim.

Navellier v. Sletten, 29 Cal.4th 82, 88 (2002).

To invoke the protection of the anti-SLAPP statute, a defendant must merely make a prima facie showing that plaintiff's cause of action arises from any act of defendant in furtherance of the right of petition, and/or the right of free speech in connection with a public issue. § 425.16(b)(1);*Braun v. Chronicle Publishing Co.* ,52 Cal. App.4th 1036, 1042-43 (1997) . In deciding whether the initial "arising from" requirement is met, a court considers "the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." § 425.16(b). *Navellier*, *supra*, 29 Cal.4th at 89. The statute's definitional focus is not on the form of the plaintiff's cause of action, but rather on the defendant's activity giving rise to his or her asserted liability and whether that activity constitutes protected speech or petitioning. *Id.* at 92.

Subdivision (e) of the anti-SLAPP statute sets forth four illustrations of the types of acts covered under the statute:

(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an

issue of public interest; (4) or 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.

Perusal of the four blogs in question reveal that this action arises from statements covered under subdivisions (e)(2), (e)(3) and (4) of the anti-SLAPP law. First, the charges against Tendler are the subject of a lawsuit brought by one of his alleged victims against Tendler, and by Tendler against his synagogue over his dismissal. There are also proceedings before a rabbinical court, but this Court need not decide whether such a court is a "judicial body" within the meaning of the SLAPP law because the blogs not only discuss issues that are the subject of litigation in the courts of New York state, but the blogs discuss those cases themselves. Accordingly, the case is a SLAPP under subsection (e)(2).

Second, the Internet is a vast public forum, *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), and the issue of sexual abuse by members of the clergy is a matter of intense public interest. The Tendler scandal on which defendants' blogs comment plainly relates to this broader issue. Even taken by itself, the extent of public interest in the Tendler controversy is shown by repeated coverage by both the secular media, such as the New York Post, the Journal News, and New York area television stations, and by various Jewish publications including the Forward and Jewish Week. Moreover, a Google search for "Mordechai Tendler" reveals the large number of web sites and blogs that have devoted considerable attention to the Tendler scandal, further evidence of the extent to which this controversy has been a matter of public interest for the past two years.

As one court has noted, "The definition of 'public interest' within the meaning of the anti-SLAPP statute has been broadly construed to include not only governmental matters, but also private conduct that impacts a broad segment of society..." *Damon v. Ocean Hills Journalism Club,* 85 Cal. App.4th 468, 479 (2000) . Among the matters that have been judicially accepted as within the "public interest" are statements and a letter regarding a landlord-tenant dispute, *Dowling v. Zimmerman*, 85 Cal. App.4th 1400, 1420 (2001); communication to city officials and employees about a proposed development, *Tuchscher Development Enterprises v. San Diego*

Unified Port District, 106 Cal. App.4th 1219, 1234 (2003); views about the safety of dental amalgam, *Kids Against Pollution v. California Dental Association,* 108 Cal. App.4th 1003, 1015(2003); and communications about possible legislation concerning mail order contact lens sales. *1-800-Contacts v. Steinberg,* 107 Cal. App.4th 568, 583 (2003). Accordingly, defendants' blogs about the Tendler Tendler's sexual abuse scandal is covered by subsections (e)(3) and (e)(4) of the anti-SLAPP law.

Moreover, the abusive way in which Tendler has pursued this litigation makes it a very typical SLAPP. First, instead of filing suit in his home jurisdiction of New York, where he would have had to file a libel complaint that specifically identified the allegedly defamatory words, *Erlitz v. Segal, Liling, & Erlitz*, 142 App. Div.2d 710, 712, 530 N.Y.S.2d 848 (2nd Dept.1988); New York Civil Practice Law and Rules ("CPLR"), Rule 3016(a), Tendler went forum shopping to Ohio, where state law apparently allows him to obtain an ex parte order to discovery after filing a petition for prelitigation discovery in entirely conclusory terms. In defiance of the requirement of Ohio law that requires that the adverse party be served, Rule 34(D) of the Ohio Rules of Civil Procedure, Tendler overlooked the parts of the blogs that revealed defendants' contact information.[2/] Then, after the Ohio proceeding was dismissed for want of prosecution, Levy Affidavit, ¶ 2 and Exhibit 3, Tendler filed the present action, representing that he was proceeding on the basis of an order of the Ohio court while hiding from the Court the fact that the Ohio case had already been dismissed. The affidavit requesting issuance of subpoenas also misstated the scope of the Ohio action, because Tendler decided that he wanted to identify the operators of four blog and represented that he had been given such broad authority, even though his Ohio petition actually alleged false or misleading statements on **three** blogs. And, after the Does' counsel alerted Tendler's counsel to the misrepresentation in his affidavit seeking subpoenas from this

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[2/] Each of the blogs identified in the petition has a working "comment" feature that would have allowed Tendler or his counsel to post a comment revealing the intention to seek discovery. The "Jewish Whistleblower" blog's commentary capability has been disabled; however, that blog, like the Jewish Survivors blog, has a "profile" page that contains the blogger's email address; and even though two of the blogs contain "profiles" that reveal the operators' email addresses. The Ohio court was not informed that this means of contacting the Does existed.

Court, and asked for notice if Tendler sought further relief, Tendler deliberately went back to the Ohio court to request reopening of the case without either notifying the Does counsel or notifying the Ohio court that the Does were now represented by counsel. This is precisely the sort of abusive tactic, manipulating the court system to secure the identification of the Does in violation of their right to speak anonymously, at which the SLAPP statute was aimed.

II. BECAUSE PLAINTIFF CANNOT ESTABLISH A PROBABILITY OF PREVAILING ON ITS CLAIM, THIS SLAPP SHOULD BE STRICKEN AND ATTORNEY FEES AWARDED TO THE DOES' COUNSEL.

The California Supreme Court has stated that "because unnecessarily protracted litigation would have a chilling effect upon the exercise of First Amendment rights, speedy resolution of cases involving free speech is desirable." *Good Government Group of Seal Beach v. Superior Court* (1978) 22 Cal.3d 672, 685. To this end, the anti-SLAPP law was enacted to provide "a fast and inexpensive dismissal of SLAPP's." *Wilcox v. Superior Court*, *supra*, 27 Cal. App.4th at 823. Such speedy dismissal also serves the ends of judicial economy, by reducing the time and resources that courts and litigants must spend on meritless SLAPPs.

The policy favoring early disposition applies squarely to this action because plaintiff's action arises from statements that a prominent religious figure has taken advantage of his position of trust by soliciting the women he was counseling for sexual favors. Once a defendant has made a prima facie showing that the lawsuit arises from petition or speech activity covered by section 425.16, as defendants have here, the burden shifts to the plaintiff to establish a probability of prevailing on its claims, which must be done by competent and admissible evidence. *Navellier v. Sletten*, *supra*, 27 Cal.4th at p. 88; *Ludwig v. Superior Court* (1995) 37 Cal. App.4th 8, 15-16, 21 fn. 16, 25.

Moreover, defendants John Doe a/k/a JewishSurvivors, JewishWhistleblower, and NewHempsteadNews have a First Amendment right to speak anonymously and remain anonymous. *McIntyre v. Ohio Elections Comm*. 514 U.S. 334, 341-342 (1995) *See also Rancho Publications v. Superior Court* (1999) 68 Cal. App.4th 1538, 1545, 1547, 1549 (quashing subpoena seeking the names of anonymous authors of nondefamatory advertorials). The

consensus standard of federal and state courts requires a detailed showing an Internet speaker can be deprived of the right to remain anonymous, *e.g.*, *Highfields Capital Mgmt. v. Doe*, 385 F. Supp.2d 969 (N.D. Cal. 2005), and plaintiff has not even begun to meet those requirements. For reasons set forth in the accompanying memorandum in support of the Does' motion to quash the subpoena, plaintiff cannot meet this burden. Therefore, defendant's special motion to strike should be granted under section 425.16, and this action should be struck and dismissed.

CONCLUSION

The special motion to strike this action should be granted, and the Court should award defendants' counsel their reasonable attorney fees as provided by section 425.16(c).

Respectfully submitted,

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