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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

UNITED POULTRY CONCERNS,

Plaintiff,

v.

CHABAD OF IRVINE; ALTER TENENBAUM, IN HIS INDIVIDUAL, CAPACITY; DOES 1 THROUGH 50,

Defendants.

Case No.
8:16-CV-01810-AB-(GJS)

DEFENDANTS' MOTION TO STRIKE OR DISMISS COMPLAINT AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

HEARING
Date: 23 January 2017

Time: 10:00 AM

ASSIGNED TO HON. ANDRÉ BIROTTE JR., District Judge;
HON. GAIL J. STANDISH, Magistrate Judge

COMES NOW Defendants Chabad of Irvine and Rabbi Alter Tenenbaum, who hereby moves to dismiss and strike the Complaint filed against them in the above captioned case.

This motion is based on the Memorandum of Points and Authorities, and the attachments thereto, the Complaint, the complete files and records in this action, and upon such oral and documentary evidence as may be allowed at the hearing of this motion.

This motion is made following the conference of counsel pursuant to L.R. 7-3 which took place via email on October 24, 2016.

Dated this November 7, 2016.

Respectfully submitted,

M Jones and Associates, PC
Attorneys for Defendants

Michael Jones

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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SUMMARY OF ARGUMENT

This action was filed in order to circumvent the parallel proceeding in California state court, and that court remains the proper forum to resolve these issues. Although abstention is warranted here, the case must be dismissed for lack of subject-matter jurisdiction. The amount in controversy is insufficient to establish diversity jurisdiction, and the face of the complaint does not raise a federal question. Finally, the Complaint's allegations are insufficient to confer either Article III or statutory standing.

This Court need not reach the merits, but, if it does, the Complaint also fails to state a claim upon which relief should be granted. A religious ceremony performed by a synagogue is not a "business act or practice" under California's Unfair Competition Law ("UCL"). Cal. Bus. & Prof. Code § 17200. And the synagogue's alleged religious intent is not malicious under California Penal Code § 597(a).

Finally, even if Plaintiff could establish a *prima facie* case, the First Amendment's free exercise and speech clauses protect Chabad. Issuing an injunction against the synagogue would be an unconstitutional prior restraint on its religious expression.

For these many reasons, and for the reasons stated in the Anti-SLAPP motion filed concurrently, the Court must dismiss this action.

FACTUAL AND PROCEDURAL BACKGROUND

Except for contested jurisdictional facts regarding the amount in controversy, Chabad takes the allegations in the Complaint as true for the limited purposes of this motion.

Leading up to October 2014, Ronnie Kudlow Steinau ("Steinau") called Chabad of Irvine about its upcoming Kapparot ceremony.[1] Compl. ¶ 26, Dkt. No. 1. Steinau has been an employee of Plaintiff United Poultry Concerns ("Plaintiff") since 2006. *Id.* ¶ 24. Steinau is also a longtime volunteer and occasional independent contractor for the Animal Protection and Rescue League, Inc. ("APRL"). Am. Compl. ¶ 21, *Animal Prot. & Rescue League, Inc. v. Chabad of Irvine*, No. 30-2015-00809469-CU-BT-CJC (Cal. Super. Ct., Aug. 31, 2016) [hereinafter "*APRL* case"], Dkt. No. 189, Ex. B. Steinau asked how much it would cost to participate, and a representative of the Chabad allegedly told her it would cost $27. Compl. ¶ 26, Dkt. No. 1. Without participating or paying, Steinau watched the Kapparot ceremony in October of 2014. *Id.* ¶ 31.

Each year, Chabad holds a "Kapparot event," which is a ceremony that is "motivated by religion." *Id.* ¶¶ 15, 20, 22, 26, 27. Before the ceremony, Chabad orders and receives chickens. *Id.* ¶ 15. Participants

[1] This motion uses the "Kapparot" terminology, as given in the Complaint.

have a chicken killed at the event, and the chickens are not eaten. *Id.* ¶¶ 15-17. Chabad's "stated purpose in carrying out the killing described herein is to allow people to transfer their sins to the animal, and then kill the animal for their sins." *Id.* ¶ 22.

Plaintiff alleges that Chabad makes a profit from the ceremony.[2] *Id.* ¶ 23. Plaintiff calculates the profit as $27 income, less an estimated $2 cost per chicken, and assumes 300 chickens. *Id.* ¶¶ 7, 15, 16, 26. Plaintiff alleges Chabad makes a yearly profit of $7,500 from the ceremony. *Id.* ¶ 7.

On September 11, 2015, APRL filed suit against Chabad in the Superior Court of California for the County of Orange, based upon Steinau's interactions with Chabad in 2014. Compl. ¶ 22, *APRL* case (Cal. Super. Ct., Sept. 11, 2015), Dkt. No. 1, Ex. C. APRL asserted standing as a private attorney general through the California's UCL. *Id.* In their suit, APRL alleged several violations, including under California's animal cruelty statute, California Penal Code § 597. *Id.* On August 19, 2016, the state court granted Chabad's motion for judgment on the pleadings "on the grounds that the Complaint lacks sufficient allegations to confer standing on Plaintiff." Minute Entry, *APRL* case (Cal. Super. Ct., Aug. 19, 2016), Dkt. No. 180, Ex. D. The state court permitted APRL to file an amended

[2] Chabad contests the alleged jurisdictional facts recited in this paragraph.

complaint, which it did on August 31, 2016. Am. Compl., *APRL* case (Cal. Super. Ct., Aug. 31, 2016), Dkt. No. 189, Ex. B.

Nearly one month later, on September 29, 2016, Plaintiff United Poultry Concerns filed the instant action in federal court. Compl., Dkt. No. 1. According to the Declaration of Bryan Pease, attorney for both APRL and UPC, "UPC was watching the state court action filed by APRL with interest and hoping the fact intensive inquiry raised would be settled at trial by the week of September 19, 2016, well ahead of this year's Kapparot activities. When this was delayed, UPC decided to bring the present federal court action." Pease Decl. ¶ 12, Dkt. No. 13.

Chabad now moves to dismiss the Complaint based upon Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Today, Chabad also files its motion to strike the Complaint under California's anti-SLAPP statute.

ARGUMENT

I. THE COURT LACKS SUBJECT-MATTER JURISDICTION.

Because the Court lacks diversity jurisdiction and federal question jurisdiction, this action must be dismissed under Federal Rule of Civil Procedure 12(b)(1). *See* Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

A. The Court Lacks Diversity Jurisdiction.

i. Standard of Review

Diversity jurisdiction requires complete diversity of citizenship and an amount in controversy exceeding $75,000. 28 U.S.C. § 1332. Plaintiff, as the party asserting federal jurisdiction, "bears the burden of establishing that the statutory requirements of federal jurisdiction have been met." *Rodriguez v. AT&T Mobility Servs. LLC*, 728 F.3d 975, 978 (9th Cir. 2013). "The party asserting jurisdiction has the burden of proving all jurisdictional facts." *Indus. Tectonics, Inc. v. Aero Alloy*, 912 F.2d 1090, 1092 (9th Cir. 1990); *Uston v. Grand Resorts, Inc.*, 564 F.2d 1217, 1218 (9th Cir. 1977). For cases originally brought in federal court, the court must dismiss the action if it "appear[s] to a legal certainty that the claim is really for less than the jurisdictional amount." *Naffe v. Frey*, 789 F.3d 1030, 1040 (9th Cir. 2015). The legal certainty standard can be met where damages are statutorily limited, as in the instant case. *Pachinger v. MGM Grand Hotel-Las Vegas, Inc.*, 802 F.2d 362, 364 (9th Cir. 1986).

ii. The Amount in Controversy Does Not Exceed $75,000.

Because there are no damages requested, and because the value of the requested injunction does not exceed $75,000, it is legally certain that

the amount in controversy is not sufficient for federal jurisdiction. 28 U.S.C. § 1332(a).

First, Plaintiff does not, and cannot, request relief in the form of damages under California's unfair competition statute. Cal. Bus. & Prof. Code § 17203. "It is well settled that private persons may not recover damages under the provisions of the unfair competition [statute]." *In re Am. Principals Holdings, Inc.*, M.D.L. No. 653, 1987 U.S. Dist. LEXIS 16945, at *57 (S.D. Cal., July 9, 1987); *see also Pachinger*, 802 F.2d at 364.

Next, the value of Plaintiff's requested injunctive and declaratory relief does not exceed $75,000. "In actions seeking declaratory or injunctive relief, it is well established that the amount in controversy is measured by the value of the object of the litigation." *Cohn v. Petsmart, Inc.*, 281 F.3d 837, 840 (9th Cir. 2002) (quoting *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 347 (1977)). The amount in controversy must be "reducible to monetary statement" and cannot be "intangible" or "speculative." *Whittemore v. Farrington*, 234 F.2d 221, 225 (9th Cir. 1956); *Jackson v. Am. Bar. Ass'n*, 538 F.2d 829, 831 (9th Cir. 1976); *see also Lowdermilk v. United States Bank Nat'l Ass'n*, 479 F.3d 994, 1002 (9th Cir. 2007) ("[W]e cannot base our jurisdiction on [a party's] speculation and conjecture.").

Plaintiff's calculation of the value of the injunction is erroneous because Chabad does not profit from the Kapparot ceremony. Plaintiff argues that the injunction should be valued based upon harm to Chabad, which it alleges is lost profits over ten years. However, as shown by the attached Affidavit of Rabbi Tenenbaum, Chabad does not perform the ceremony for profit, and in fact incurred a loss in 2014. Aff. Rabbi Tenenbaum ¶¶ 2-6, Ex. A; *Indus. Tectonics, Inc.*, 912 F.2d at 1092.[3]

Finally, Plaintiff attempts to reach the threshold amount using attorneys' fees. Compl. ¶ 8, Dkt. No. 1. However, the amount in controversy generally does not include attorneys' fees. *See* Order to Show Cause at 1, Dkt. No. 16. Attorneys' fees are only included "if authorized by statute or contract." *Kroske v. U.S. Bank Corp.*, 432 F.3d 976, 980 (9th Cir. 2005). Plaintiff relies on California Civil Procedure Code § 1021.5, which permits a discretionary award of fees only if certain criteria are met. The Complaint does not make any of the requisite allegations.[4]

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[3] Even under Plaintiff's alleged jurisdictional facts, Plaintiff's calculation for the amount in controversy is pure speculation. At an alleged profit of $7,500 per year, Plaintiff must forecast out ten years in order to even approach the amount in controversy requirement. Compl. ¶ 7, Dkt. No. 1.

[4] Under § 1021.5, the suit must enforce "an important right affecting the public interest"; there must be "a significant benefit" conferred "on the general public or a large class of persons"; *and* "the necessity and financial burden of private enforcement" must make the award appropriate.

Even if attorneys' fees could be included in the amount in controversy, Plaintiff's asserted calculation of fees is not credible. "[I]t is proper to consider only those fees incurred as of the date the complaint is filed." *Animal Prot. & Rescue League, Inc. v. Northridge Owner, L.P.*, No. 16-cv-01494-BLF, 2016 U.S. Dist. LEXIS 114232, at *7 (N.D. Cal., Aug. 24, 2016). Plaintiff alleges that its fees have "exceeded $75,000 as of the time of filing of this complaint." Compl. ¶ 8, Dkt. 1. However, because the federal Complaint alleges claims and facts that are nearly identical to ones alleged in state court, it is difficult to see how Plaintiff UPC could have incurred this amount. *Compare with* Compls., *APRL* case, Exs. B and C.

iii. Plaintiff Fails to Establish Diversity of Citizenship.

Plaintiff also fails to allege the state of its principal place of business, which is necessary to establish complete diversity of citizenship. 28 U.S.C. § 1332(c)(1). "In a diversity action, the plaintiff must state all parties' citizenships such that the existence of complete diversity can be confirmed." *Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 857 (9th Cir. 2001). For the foregoing reasons, there is no diversity jurisdiction.

Conservatorship of Whitley v. Maldonado, 241 P.3d 840, 846 (Cal. 2010). The Complaint has not alleged that any person or class of persons would benefit from the injunction it seeks, nor has it alleged that private enforcement is necessary because public enforcement is "not sufficiently available." *Id.* at 848-53.

B. This Court Lacks Federal Question Jurisdiction.

Plaintiff's alternative argument that this Court has federal question jurisdiction fails under the *Mottley* rule, which has been the standard for federal question jurisdiction for over a century. *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149 (1908). Under *Mottley*, "a suit arises under the Constitution and laws of the United States only when the plaintiff's statement of *his own cause of action* shows that it is based upon those laws or that Constitution." *Id.* at 152 (emphasis added). "A defense that raises a federal question is inadequate to confer federal jurisdiction." *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804, 808 (1986) (citing *Mottley*, 211 U.S. 149). Thus, Chabad's anticipated constitutional defense is not sufficient to confer federal question jurisdiction.[5]

C. The Court Should Abstain From Hearing This Action In Light of the Parallel State Court Case.

Even if this Court could exercise subject-matter jurisdiction, the Court should abstain from hearing this action in light of the nearly identical, pending state court case. *See* Am. Compl., *APRL* case (Cal. Super. Ct.,

[5] *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.*, 545 U.S. 308 (2005) lends no support. In *Grable*, the plaintiff's state-law claim was based entirely on the meaning of a federal tax provision. 545 U.S. at 315. Thus, resolution of a federal question was *essential to the state-law claim itself*. Conversely, here, federal questions arise only under Chabad's constitutional defenses, not Plaintiff's state-law claim.

Aug. 31, 2016), Dkt. No. 189, Ex. B. Both actions arise from the same incident — Steinau witnessing Chabad's Kapparot ceremony in 2014. *See id.* Both actions involve the same state-law claim under California's UCL and Penal Code § 597, and both request the same injunctive relief. *See id.* Plaintiff concedes that it only filed this federal action because it believed that the state court would not issue an injunction as soon as Plaintiff wanted. Pease Decl. ¶ 12, Dkt. 13. Considering the totality of the circumstances, the state forum is the proper court to resolve the matter because this federal action (1) was filed in order to circumvent the state court; (2) was filed over one year after the state action; (3) involves fewer claims than the state action; (4) involves nearly identical parties; (5) arises from the same incident; and (6) turns on novel interpretations of state law.

These factors establish that abstention is warranted under the *Colorado River* doctrine. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). The Ninth Circuit recognizes the following factors weighing in favor of abstention:

> (1) [W]hich court first assumed jurisdiction over any property at stake; (2) the inconvenience of the federal forum; (3) the desire to avoid piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether federal law or state law provides the rule of decision on the merits; (6) whether the state court proceedings can adequately protect the rights of the federal litigants; (7) the desire to avoid forum shopping; and (8)

whether the state court proceedings will resolve all issues before the federal court.

R.R. St. & Co. v. Transp. Ins. Co., 656 F.3d 966, 978-79 (9th Cir. 2011). Not all factors need be present to justify abstention. *See id.* at 979 (dismissing case after holding the first two factors irrelevant). As explained above, all relevant factors weigh in favor of abstention.

Abstention is also warranted under the *Pullman* doctrine because this action involves "a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law.'" *Colo. River*, 424 U.S. at 814 (explaining *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941)). This action involves multiple novel interpretations of state-law, such as whether religious ceremonies can be considered business acts under California's UCL, and whether the intent involved in a religious atonement ceremony is "malicious" under California's Penal Code. The state court is better positioned to resolve these issues, and its resolution is likely to resolve the matter without the necessity of reaching Chabad's federal constitutional defenses. Abstention is an extraordinary remedy justified by this extraordinary situation. The federal Complaint must be dismissed.

II. PLAINTIFF LACKS STANDING.

A. Standard of Review

Because federal courts cannot issue advisory opinions, they may only hear a plaintiff's case if it has standing to bring a case or controversy. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). Standing requires a plaintiff to have suffered an "injury in fact," which is an invasion of a "concrete and particularized" legally protected interest. *Id.* at 560. That interest must be "actual or imminent," rather than "conjectural" or "hypothetical." *Id.* Crucial here, there must also be "a causal connection between the injury and the conduct complained of" such that the injury is "fairly . . . trace[able] to the challenged action of the defendant.'" *Id.* Finally, the injury must be redressable. *Id.* at 561.

B. Plaintiff Lacks Article III Standing.

Chabad did nothing to cause any injury to Plaintiff UPC, and therefore this case must be dismissed for lack of standing. Plaintiff alleges that its employee Steinau voluntarily chose to expend time trying to stop Chabad from performing a Kapparot ceremony.[6] Compl. ¶ 25, Dkt. No. 1. However, self-inflicted injuries are not sufficient to confer standing in

[6] Both Plaintiff UPC and state court plaintiff APRL allege that Steinau's pursuit of Chabad diverted Steinau's time away from its organization. *See* Am. Compl. ¶ 23, *APRL* case, Ex. B. It is unclear how the same act could divert resources from both organizations if the organizations are distinct.

federal court, regardless of whether they could suffice in state court. *See Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1152 (2013) (holding "respondents' self-inflicted injuries are not fairly traceable to the [defendant's] activities"); *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010) (holding an organization "cannot manufacture the injury by incurring litigation costs or simply choosing to spend money fixing a problem that otherwise would not affect the organization at all"); *Abigail All. for Better Access to Dev. Drugs v. Von Eschenbach*, 469 F.3d 129, 133 (D.C. Cir. 2006) ("[W]e do not recognize such self-inflicted harm."); *Nat'l Family Planning & Reprod. Health Ass'n v. Gonzales*, 468 F.3d 826, 831 (D.C. Cir. 2006) ("[T]he association's asserted injury appears to be largely of its own making. We have consistently held that self-inflicted harm doesn't satisfy the basic requirements for standing. Such harm does not amount to an 'injury' cognizable under Article III."). Plaintiff fails to allege that Chabad caused it any injury.

C. Plaintiff Lacks Statutory Standing Under the UCL.

Plaintiff also lacks standing to assert a UCL claim. In 2004, the California electorate heightened the UCL's standing requirements through Proposition 64 to prevent un-injured people from bringing suit. *Kwikset*

Corp. v. Superior Court, 246 P.3d 877, 881 (Cal. 2011). It eliminated standing "for those who have not engaged in any business dealings with would-be defendants and thereby strip[s] such unaffected parties of the ability to file 'shakedown lawsuits,' while preserving for actual victims of deception and other acts of unfair competition the ability to sue and enjoin such practices." *Id.* Under the revised text, standing only exists where plaintiffs have lost "money or property." *Id.* This means plaintiffs must "(1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., *economic injury*, and (2) show that the economic injury was the result of, i.e., *caused by*, the unfair business practice or false advertising that is the gravamen of the claim." *Id.* at 885 (emphasis in original). Plaintiff's claim fails on both elements. Plaintiff makes no allegation that it engaged in business dealings with Chabad nor that Chabad caused any economic injury to Plaintiff.

Plaintiff relies on *Animal Legal Defense Fund v. LT Napa Partners LLC*, a California Court of Appeals case that permitted a self-inflicted injury to proceed under the UCL. 184 Cal. Rptr. 3d 759 (Cal. Ct. App. 2015). First, even if California courts would have standing over self-inflicted injuries, federal courts do not. Second, *Napa Partners*' holding is inconsistent with California Supreme Court's *Kwikset* case, and this Court

is bound to follow the state's highest court on matters of state law. *Kwikset*, 246 P.3d at 887 (holding that "plaintiff's economic injury [must] come 'as a result of' the unfair competition," which "requires a showing of a causal connection or reliance on the alleged misrepresentation.").[7] Plaintiff does not have standing under the UCL.

III. PLAINTIFF FAILS TO STATE A CLAIM UNDER THE UCL.

A. Chabad's Religious Ceremony is Not a "Business Act or Practice" That Would Subject it to California's UCL.

California's UCL prohibits "unfair competition," which is defined as "any unlawful, unfair or fraudulent business act or practice." *In re Pomona Valley Med. Grp., Inc.*, 476 F.3d 665, 674 (9th Cir. 2007) (quoting Cal. Bus. & Prof. Code § 17200). Because the UCL is concerned with "wrongful conduct in commercial enterprises," *People v. Nat'l Research Co. of Cal.*, 20 Cal. Rptr. 516, 520 (Cal. Ct. App. 1962), Plaintiff must show that the act or practice at issue was "committed pursuant to business activity." *Pinel v. Aurora Loan Servs., LLC*, 814 F. Supp. 2d 930, 937 (N.D. Cal. 2011).

[7] Even if *Napa Partners* is good law, it is distinguishable. The *Napa Partners* plaintiff alleged a specific economic harm from its choice to pay a private investigator. Plaintiff here makes no allegation that it compensated Steinau nor that Steinau paid Chabad. *See* Compl. ¶ 25, Dkt. No. 1. There is no alleged *economic* injury of any kind, let alone one caused by Chabad's conduct.

Plaintiff does not allege that Chabad is a "business" and cannot demonstrate that a religious ceremony performed at a place of worship can be a "business act or practice" as a matter of law.[8] A religious ceremony performed by a synagogue is not a business act or practice; it is performed for a spiritual, not economic, reason. Plaintiff's allegation that Chabad makes a small annual profit from the Kapparot ceremony does not transform the synagogue into a business. A synagogue is inherently a spiritual and religious organization, and not a commercial enterprise.

A synagogue's religious ceremony simply cannot be a commercial enterprise subject to the UCL.[9] Accordingly, Plaintiff cannot bring a private attorney general action against Chabad under the UCL.

IV. PLAINTIFF FAILS TO STATE A VIOLATION UNDER THE CALIFORNIA PENAL CODE.

A. Plaintiff Failed to Allege a "Malicious" *Mens Rea* Sufficient to State a Criminal Violation.

[8] The Complaint concedes that Kapparot is a religious event and that Chabad is religiously motivated. Compl. ¶¶ 20, 22, 27, Dkt. No. 1.

[9] To hold the contrary would risk violating the First Amendment, which guarantees places of worship "independence from secular control" in "matters of church government as well as those of faith and doctrine." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 186 (2012) (quoting *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952)).

Plaintiff's underlying allegation, that Chabad's conduct violates California Penal Code § 597(a), fails because the Complaint does not allege the requisite *mens rea*. Section 597(a) prohibits the *malicious* and intentional killing of an animal. *See Ex parte Mauch*, 134 Cal. 500, 500 (1901). Malice is an essential *mens rea* element, requiring a *culpable state of mind* from the person committing the crime. *See id.*; *Morissette v. United States*, 342 U.S. 246, 252 (1952) (holding *mens rea* requirements important to convict only those who are "blameworthy"). California's criminal code defines "malice" as "a wish to vex, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law." Cal. Penal Code § 7(4). In the context of harm to an animal, the malice standard can be defined as an "intent to do a wrongful act." *People v. Dunn*, 114 Cal. Rptr. 164, 165 (Cal. Ct. App. 1974).[10]

Plaintiff fails to allege Chabad intended to do wrong. In fact, the Complaint affirmatively alleges the opposite. It is undisputed that Chabad's intention in performing the Kapparot ceremony is *religious*. Compl. ¶¶ 20, 22, 27, Dkt. No. 1. According to the Complaint, Chabad's intent is to "allow

[10] Plaintiff erroneously implied in the TRO hearing that "malicious" only means "intentional." However, if the terms are identical, then the statute would be redundant. Cal. Penal Code § 597(a). Where possible, "courts should disfavor interpretations of statutes that render language superfluous." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992).

people to transfer their sins to the animal, and then kill the animal for their sins." Id. ¶ 22. An intent to "transfer" or be free from "sins" is certainly not an intent to do wrong. Moreover, federal and state statutes widely recognize Kosher killings to be humane, rather than malicious. *See, e.g.*, Cal. Code Regs. tit. 3, § 1246.15(a); Cal. Food & Agric. Code § 19501(b)(2); 7 U.S.C. § 1902(b); 7 U.S.C. § 1906. The alleged intent is not criminally culpable as a matter of law.

V. THE CONSTITUTION BARS THIS COURT FROM ENJOINING CHABAD'S KAPPAROT CEREMONY.

A. Enjoining Chabad's Kapparot Ceremony Here Would Violate the Free Exercise Clause.

Defendants believe that California Penal Code § 597(a) can be interpreted in a constitutional manner. However, if the Court adopts Plaintiff's novel and incorrect application of this state statute, that interpretation as applied to the facts here *would* violate the free exercise clause.

i. Strict Scrutiny Applies to the Free Exercise Analysis.

Chabad does not assert a right to be free from generally applicable laws. However, Chabad urges this Court to protect its right to equal treatment. Under *Church of Lukumi Babalu Aye v. City of Hialeah*, the government cannot afford secular exemptions to a broad bad on certain

conduct while at the same time denying religiously-motivated exemptions from the ban. 508 U.S. 520 (1993). Such laws, regardless of the motivation of the lawmakers,[11] are not generally applicable, and thus the application of those laws to religiously-motivated conduct is subject to strict scrutiny. *Id.* at 537; *accord Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1076 (9th Cir. 2015) ("For laws that are not neutral or not generally applicable, strict scrutiny applies.").

A "neutral" and "generally applicable" law, such as an "across-the-board criminal prohibition on a particular form of conduct," would not violate the free exercise clause simply because it adversely impacts a religious practice. *Emp't Div. v. Smith*, 494 U.S. 872, 884 (1990). However, Section 597(a) is not an "across-the-board criminal prohibition" on the killing of animals. There are a host of secular exceptions, making the statute not generally applicable. *Compare* Cal. Penal Code § 599c (listing exemptions for game laws, destroying certain birds, killing dangerous animals, and using animals for food, scientific experiments, or investigations) *with Lukumi*, 508 U.S. at 537 (listing exemptions for

[11] *See* Laurence H. Tribe, American Constitutional Law § 5-16, at 956 (3d ed. 2000) ("Under *Smith*, a law that is not neutral or that is not generally applicable can violate the Free Exercise Clause without regard to the motives of those who enacted the measure.").

"hunting, slaughter of animals for food, eradication of insects and pests" but denying exemption for religious sacrifice). When "individualized exemptions from a general requirement are available, the government may not refuse to extend that system to cases of religious hardship without compelling reason." *Lukumi*, 508 U.S. at 537 (internal quotations and citations omitted).

In this action, applying § 597(a) to prohibit Chabad's Kapparot ceremony, but not comparable secularly motivated animal killings, would be engaging in the prohibited act of "deciding that secular motivations are more important than religious motivations." *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999); *see also Stormans*, 794 F.3d at 1079 ("A law is not generally applicable if its prohibitions substantially underinclude non-religiously motivated conduct that might endanger the same governmental interest that the law is designed to protect."). Therefore, strict scrutiny applies.

ii. There Is No Compelling Government Interest.

Plaintiff cannot satisfy its burden of showing a compelling government interest. It is clearly "established in our strict scrutiny jurisprudence that a law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that

supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547 (internal quotation and citation omitted). Consequently, the host of exceptions listed in Section 599c dooms Plaintiff's compelling interest argument.

iii. Banning the Kapparot Ceremony Is Not the Least Restrictive Means for Furthering any Interest.

Plaintiff bears the burden of demonstrating that there is no less restrictive means of accomplishing a compelling governmental interest. Plaintiff cannot flip this analysis on its head by claiming that Chabad and its members can exercise their faith in another manner, by pointing to some Jewish congregations that do not use chickens as part of Kapparot. This analysis would misplace the burden of proof and was flatly rejected by the Supreme Court. *See Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."). Chabad is entitled to exercise its religion in the manner it deems appropriate, not in the manner others prefer. *See Lukumi*, 508 U.S. at 531 ("Although the practice of animal sacrifice may seem abhorrent to some, religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.") (internal quotation marks omitted). Plaintiff cannot

demonstrate that there is no other means to achieve any purportedly compelling governmental interest short of an injunction prohibiting Chabad's religious ceremony.

B. Enjoining the Chabad's Kapparot Ceremony Would Be an Unconstitutional Prior Restraint on Speech.

Granting an injunction against Chabad, as Plaintiff requests, would be an unconstitutional prior restraint on speech because it would prevent the synagogue from engaging in religious expression.

Prior restraint of speech is the "essence of censorship," and cannot be countenanced by the Constitution absent "exceptional" circumstances that are not present in this case. *Near v. Minnesota*, 283 U.S. 697, 713, 716 (1931) (reversing a judicial injunction). As the Supreme Court explained, "[p]rior restraints on speech are the most serious and least tolerable infringement on First Amendment rights. . . . If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) (unanimously invaliding a judicial gag order). The Court unanimously concluded that prior restraint of speech bears "a heavy presumption against its constitutional validity" and the proponent of a prior restraint "carries a heavy burden of showing justification for the

imposition of such a restraint." *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam) (reversing lower court injunction); *see also Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (same). The landmark Supreme Court cases prohibiting prior censorship of speech all involve striking down improperly granted judicial injunctions. *See, e.g.*, *Near*, 283 U.S. at 713; *New York Times Co.*, 403 U.S. at 714; *Keefe*, 402 U.S. 419; *Nebraska Press Ass'n*, 427 U.S. at 559.

The speech inherent in any religious ceremony is protected under the First Amendment. *S. Or. Barter Fair v. Jackson County*, 372 F.3d 1128, 1135 (9th Cir. 2004) (stating that "religious ceremonies" are expressive); *Kaahumanu v. Hawaii*, 682 F.3d 789, 798 (9th Cir. 2012) (wedding ceremonies often contain religious elements and are "protected expression" because they convey messages); *see also Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 677-78 (1992) (holding First Amendment protects public ritual disseminating religious material). Prior restraint on Chabad's expression would be unconstitutional.

Conclusion

For the foregoing reasons, Plaintiff respectfully requests that the Court dismiss the Complaint.

Dated this November 7, 2016.

Respectfully submitted,

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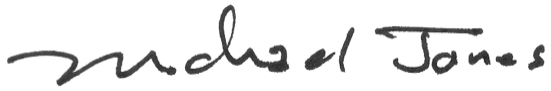

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CERTIFICATE OF CONFERENCE

This motion is made following the conference of counsel pursuant to L.R. 7-3 which took place via email on October 24, 2016.

Dated this November 7, 2016.

Respectfully submitted,

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