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10 UNITED STATES DISTRICT COURT
 11 CENTRAL DISTRICT OF CALIFORNIA
 12 SOUTHERN DIVISION

13 **UNITED POULTRY CONCERNS,**

14 Plaintiff,

15 v.

16 **CHABAD OF IRVINE; ALTER**
 17 **TENENBAUM, IN HIS**
 18 **INDIVIDUAL, CAPACITY; DOES 1**
 19 **THROUGH 50,**

20 Defendants.

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

DEFENDANTS' ANTI-SLAPP
MOTION TO STRIKE COMPLAINT

HEARING
Date: 23 January 2017

Time: 10:00 AM

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

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1 Defendants Chabad of Irvine and Rabbi Alter Tenenbaum
2 (collectively, “Chabad”) hereby move to strike Plaintiff’s Complaint under
3 California’s anti-Strategic Lawsuit Against Public Participation (“anti-
4 SLAPP”) statute, found at California Code of Civil Procedure § 425.16. The
5 purpose of the anti-SLAPP statute is to deter lawsuits like this one that
6 seek to chill lawful First Amendment activity.
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10 **I. FACTUAL AND PROCEDURAL BACKGROUND**

11 Chabad incorporates the factual and procedural background from its
12 Motion to Dismiss the Complaint filed concurrently.
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15 **II. STANDARD OF REVIEW**

16 California’s anti-SLAPP statute may be invoked in federal court.
17 *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190
18 F.3d 963, 971-72 (9th Cir. 1999). Because this anti-SLAPP motion is
19 based upon deficiencies in the Complaint, the Federal Rule of Civil
20 Procedure 12(b)(6) standard of review applies. *Rogers v. Home Shopping*
21 *Network, Inc.*, 57 F. Supp. 2d 973, 984 (C.D. Cal. 1999).
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25 **III. ARGUMENT**
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1 Under the anti-SLAPP statute, this Court must strike a “cause of
2 action against a person arising from any act of that person in furtherance
3 of the person’s right of . . . free speech under the United States
4 Constitution or the California Constitution in connection with a public
5 issue,” unless “the plaintiff has established that there is a probability that
6 the plaintiff will prevail on the claim.” Cal. Code Civ. P. § 425.16(b)(1).
7

8
9 The Ninth Circuit’s analysis of California’s anti-SLAPP motion
10 involves two steps. First, “the moving defendant must make a prima facie
11 showing that the plaintiff’s suit arises from an act in furtherance of the
12 defendant’s constitutional right to free speech.” *Makaeff v. Trump Univ.,*
13 *LLC*, 715 F.3d 254, 261 (9th Cir. 2013). Then, the burden shifts to the
14 plaintiff “to establish a reasonable probability that it will prevail on its claim
15 in order for that claim to survive dismissal.” *Id.* Here, Plaintiff’s claim
16 implicates Chabad’s free speech rights under both the United States
17 Constitution and the California Constitution, and Plaintiff cannot meet its
18 burden of establishing a likelihood of prevailing on its sole cause of action.
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24 **A. Plaintiff’s Suit Arises From Chabad’s Constitutionally**
25 **Protected Religious Speech.**
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1 Plaintiff's claim implicates Chabad's constitutionally protected
2 speech. Courts must "construe the anti-SLAPP statute broadly to protect
3 the constitutional rights of petition and free speech." *Anderson v. Geist*,
4 186 Cal. Rptr. 3d 286, 290 (Cal. Ct. App. 2015). For a cause of action to
5 be considered "arising from" an act in furtherance of free speech rights,
6 courts look to the *defendant's activity*, rather than the *plaintiff's claims*. See
7 *Navellier v. Sletten*, 52 P.3d 703, 711 (Cal. 2002) ("The anti-SLAPP
8 statute's definitional focus is not on the form of the plaintiff's cause of
9 action but, rather, the defendant's *activity* that gives rise to his or her
10 asserted liability—and whether that activity constitutes protected speech or
11 petitioning."); *Birkner v. Lam*, 67 Cal. Rptr. 3d 190, 198 (Cal. Ct. App.
12 2007) (holding that the analysis focuses on defendant's activity regardless
13 of whether plaintiff alleges it to be "unlawful or unethical"); *Lauter v.*
14 *Anoufrieva*, 642 F. Supp. 2d 1060, 1108 (C.D. Cal. 2008) (same). Thus,
15 the question before the Court is whether Chabad's religious Kapparot
16 ceremony is "in furtherance" of the exercise of free speech rights, which
17 includes "actual exercises of free speech rights" and "also conduct that
18 furthers such rights." *Hilton v. Hallmark Cards*, 599 F.3d 894, 903 (9th Cir.
19 2010).

1 As the Supreme Court has consistently held, religious speech and
2 expression are protected under the free speech clause of the U.S.
3 Constitution. See *Capitol Square Review & Advisory Bd. v. Pinette*, 515
4 U.S. 753, 760 (1995) (“Our precedent establishes that private religious
5 speech, far from being a First Amendment orphan, is as fully protected
6 under the Free Speech Clause as secular private expression.”). Moreover,
7 the Ninth Circuit regards religious ceremonies that convey religious
8 messages to be clearly expressive activity protected under the First
9 Amendment. *S. Or. Barter Fair v. Jackson Cty.*, 372 F.3d 1128, 1135 (9th
10 Cir. 2004) (listing “religious ceremonies” as an example of clearly
11 expressive activity); *Kaahumanu v. Hawaii*, 682 F.3d 789, 799 (9th Cir.
12 2012) (holding wedding ceremonies are “protected expression” because
13 they always convey messages). Religious ceremonies are by definition
14 expressive because they are “imbued with elements of communication.”
15 *Texas v. Johnson*, 491 U.S. 397, 404 (1989). Even under the limited facts
16 plead in the Complaint, it is clear that “an intent to convey a particularized
17 message [i]s present,” and the likelihood is great that “the message would
18 be understood by those who viewed it.” *Id.* at 404; see *Hilton*, 599 F.3d at
19 904 (holding this *Johnson* test to be sufficient, but not necessary for the
20 anti-SLAPP). The Complaint alleges that participants gather together each

1 year with a spiritual leader to perform the Kapparot religious ceremony in
2 which they “transfer their sins to the animal.” Compl. ¶¶ 4, 22, Dkt. No. 1.
3
4 Thus, Chabad’s ceremony is speech protected under the federal
5 Constitution.

6
7 Chabad’s religious expression is also protected under California’s
8 free speech clause, which is “more definitive and inclusive than the First
9 Amendment.” *Golden Gateway Ctr. v. Golden Gateway Tenants Ass’n*, 29
10 P.3d 797, 801 (Cal. 2001) (quoting *Wilson v. Superior Court*, 532 P.2d
11 116, 120 (Cal. 1975)). The clause protects every person’s right to “speak,
12 write and publish his or her sentiments *on all subjects*.” Cal. Const., art. I §
13 2(a) (emphasis added). Religious expression is protected in the same way
14 as political or other ideological expression. *Savage v. Trammell Crow Co.*,
15 273 Cal. Rptr. 302, 310 (Cal. Ct. App. 1990). As the California Supreme
16 Court held, free speech protects “[a]ll ideas having even the slightest
17 redeeming social importance, including those concerning the advancement
18 of truth, science, morality, and arts.” *DVD Copy Control Ass’n, Inc. v.*
19 *Bunner*, 75 P.3d 1, 10, 19 (Cal. 2003) (internal quotation marks omitted).
20
21 The California Supreme Court maintains this broad view of speech in the
22 anti-SLAPP context as well. The Ninth Circuit noted that “[i]t seems to
23 suffice” for the purpose of the statute “that the defendant’s activity is
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1 communicative.” *Hilton*, 599 F.3d at 904. Thus, under either Constitution,
2 Chabad’s religious ceremony is protected as speech or as conduct in
3 furtherance of speech.
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5 Finally, Chabad’s expression was exercised in connection with a
6 public issue. See Cal. Civ. P. Code § 425.16(e)(3)-(4). The Ninth Circuit
7 has affirmed that courts must construe the anti-SLAPP statute’s “public
8 issue or issue of public interest” element “broadly.” *Hilton*, 599 F.3d at 906.
9 The fact that an issue does not involve a public official or “pertai[n] to the
10 heart of self-government” does not mean that it is not in the public interest.
11 *Id.* at 905. The statute can apply even to “events that transpire between
12 private individuals.” *Id.*
13

14 California intermediate courts have adopted different tests to
15 distinguish between “merely private” and “public” matters. *Id.* at 906; see
16 *e.g.*, *Nygaard, Inc. v. Uusi-Kerttula*, 72 Cal. Rptr. 3d 210, 220 (Cal. Ct. App.
17 2008) (defining public interest as “any issue in which the public is
18 interested”) (emphasis removed); *Rivero v. Am. Fed’n of State, Cty. &*
19 *Mun. Emps., AFL-CIO*, 130 Cal. Rptr. 2d 81, 90 (Cal. Ct. App. 2003)
20 (defining public interest as involving a public figure, affecting “a large
21 number of people,” or concerning “a topic of widespread, public interest”);
22 *Weinberg v. Feisel*, 2 Cal. Rptr. 3d 385, 392 (Cal. Ct. App. 2003) (listing a
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1 variety of requirements for distinguishing between “merely private” and
2 “public” speech). These tests aim to protect speech that is not purely
3 private, but would be of concern to the public.
4

5 Regardless of the test chosen, this lawsuit transcends the normal
6 private party dispute over monetary matters — this is a public policy case.
7
8 The expression at issue here directly involves religious speech, the rights
9 of places of worship, the performance of the Kapparot ceremony, and the
10 rights of the Orthodox Jewish community at large. Plaintiff seeks to bar a
11 religious ceremony through this lawsuit. These issues are topics of
12 “concern to a substantial number of people” beyond the parties in this suit.
13
14 *Hilton*, 599 F.3d at 906 (quoting *Weinberg*, 2 Cal. Rptr. 3d at 392); see
15 also *Church of Scientology v. Wollersheim*, 49 Cal. Rptr. 2d 620, 633 (Cal.
16 Ct. App. 1996) (holding issues concerning the Church of Scientology to be
17 “of public interest” as the Church “may impact the lives of many
18 individuals”), *disapproved in part on other grounds by Equilon Enter. v.*
19 *Consumer Cause, Inc.*, 52 P.3d 685, 694 (Cal. 2002).
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23 As reported in *Cross v. Cooper*, California courts have held speech
24 or expression concerning the following topics to be of interest to the public:
25

26 [T]he look, sound, and lifestyles of indie rock bands; the pros
27 and cons of plastic surgery; the survival of local hospitals;
28 inappropriate relationships between adults and minors;

1 relationships between men and women; animal testing; second-
2 parent adoptions, particularly in the gay and lesbian community;
3 unlawful dispensing of prescription drugs; molestation of child
4 athletes by coaches; and domestic violence.

5 127 Cal. Rptr. 3d 903, 913 n.10 (Cal. Ct. App. 2011) (parenthetical text
6 included, citations omitted). Here, as alleged in the Complaint, the
7 Kapparot ceremony is not a purely private matter; it is a public ceremony
8 that allows religious individuals in the community to celebrate together.
9 The Complaint alleges that up to 300 people participate each year and that
10 Chabad would permit non-members of the congregation such as Steinau
11 to participate. Compl. ¶¶ 7, 26, Dkt. No. 1. Religious ceremonies concern
12 far more people than the Chabad's yearly participants. For all the
13 foregoing reasons, the anti-SLAPP statute protects Chabad's expression.
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18 **B. Plaintiff Cannot Meet Its Burden of Establishing a**
19 **Likelihood of Prevailing on Its Sole Claim.**

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21 Because Chabad has met the first prong of the anti-SLAPP statute,
22 the burden shifts to the Plaintiff to prove that there is a probability that it
23 will prevail on its claim. As demonstrated by Chabad's Motion to Dismiss,
24 Plaintiff's Complaint is legally deficient. Chabad incorporates that motion
25 by reference here, including the arguments that Plaintiff's claim must fail
26 for lack of subject-matter jurisdiction and Plaintiff has failed to state a claim
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1 under California Penal Code § 597(a) and California Business and
2 Professions Code § 17203. The Court must strike the Complaint.
3

4 **C. If Successful on the Anti-SLAPP Motion, Chabad is**
5 **Entitled to Fees.**
6

7 If Chabad is successful on this anti-SLAPP motion, fee shifting is
8 statutorily required. Cal. Civ. P. Code § 425.16(c)(1) (“[A] prevailing
9 defendant on a special motion to strike shall be entitled to recover his or
10 her attorney’s fees and costs.”).
11
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13 **IV. CONCLUSION**
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18 For the foregoing reasons, Plaintiff respectfully requests that the
19 Court strikes the Complaint and award attorneys’ fees to Chabad.
20

21 Dated this November 7, 2016.

22 Respectfully submitted,
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24 **M Jones and Associates, PC**
25 Attorneys for Defendants
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CERTIFICATE OF NOTICE

Plaintiff was on notice of Chabad’s intention to file this Anti-SLAPP motion because Chabad raised this motion initially in its Opposition to Plaintiff’s Preliminary Injunction Motion on October 11, 2016.

Dated this November 7, 2016.

M Jones and Associates, PC
Attorneys for Defendants


