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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.

21 Magistrate Judge

22 Case No.
 23 **8:16-CV-01810-AB-(GJS)**

24 **DEFENDANTS' REPLY IN**
 25 **SUPPORT OF MOTION TO**
 26 **STRIKE COMPLAINT**

27 HEARING
 28 **Date: 23 January 2017**
Time: 10:00 AM

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

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS’ REPLY IN SUPPORT OF MOTION TO STRIKE

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SUMMARY OF ARGUMENT

1
2 UPC’s goal is to “end the use of chickens in Kapparot nationally.”¹ It
3 targets Orthodox Jewish synagogues and rabbis across the United States
4 that perform this millennia-old religious rite in the traditional way, bringing
5 frivolous lawsuits designed to chill lawful First Amendment activity. This is
6 the definition of a SLAPP, strategic lawsuit against public participation.
7
8 UPC is free to peacefully protest or attempt to further its goal through
9 persuasion, but UPC has no right to coopt the force of the government to
10 compel its interpretation of Kapparot. Chabad brings its Anti-SLAPP
11 motion to deter UPC from continuing to harass synagogues with frivolous,
12 recycled litigation.
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16 Chabad’s Kapparot rite is expressive activity, fully covered by the
17 speech clauses of both the U.S. Constitution and the California
18 Constitution. Religious speech is fully protected under the Free Speech
19 clauses. Chabad’s Kapparot rite combines symbolic physical acts with
20 spoken words explaining the symbolism in the presence of others in the
21 community. This public, expressive religious ritual falls squarely within the
22 scope of activity that may seek refuge in the state’s Anti-SLAPP statute.
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27 ¹ Statement is from the sworn declaration of UPC founder Karen Davis.
28 Decl. Karen Davis ¶ 4, Dkt. No. 68-7.

1 The Court must strike the Complaint and shift attorneys' fees in order to
2 deter UPC's frivolous lawsuits.

3
4 UPC's response brief asserts two defenses. Both fail.

5 First, because Chabad's expressive activity falls within Anti-SLAPP's
6 protection, UPC bears the burden of establishing a "probability" that it will
7 ultimately succeed on its lawsuit. However, UPC cannot succeed on its
8 claim for all the reasons discussed in Chabad's Motion to Dismiss,
9 including fundamental jurisdictional and standing flaws.
10

11
12 Finally, UPC is not entitled to the public interest exception. The
13 injunction UPC seeks, instead of creating a significant, widespread benefit
14 to a large class of people, is guaranteed to cause harm to Orthodox
15 Jewish communities and will infringe on religious rights statewide.
16

17 18 **ARGUMENT**

19 **I. NOTICE OF MOTION**

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21 Chabad's Anti-SLAPP Motion was filed along with its Motion to
22 Dissolve the TRO on October 11, 2016. Dkt. No. 23. Motions filed in
23 connection with TROs are exempt from Local Rule 7-3. As the Court
24 deferred ruling on most of the parties' arguments at the hearing, Chabad
25 reasserted its Anti-SLAPP Motion along with its Motion to Dismiss on
26 November 7, 2016. Dkt. No. 51. The briefs were filed after a series of
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1 communications with Plaintiff discussing the time for filing responses to
2 Plaintiff's pleading. Counsel stated that the content would be similar to
3 what was previously filed. Counsel believed UPC to have been on notice
4 of the Anti-SLAPP motion. Decl. Michael Jones, Ex. A.²

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7 **II. COURT'S LOOK TO DEFENDANT'S ACTIVITY, NOT PLAINTIFF'S CLAIMS
8 TO DETERMINE WHETHER THE ANTI-SLAPP APPLIES.**

9 As a preliminary matter, courts look to the defendant's activity to
10 determine whether the Anti-SLAPP applies, not to plaintiffs' claims.
11 *Navellier v. Sletten*, 52 P.3d 703, 711 (Cal. 2002); *Birkner v. Lam*, 67 Cal.
12 Rptr. 3d 190, 198 (Cal. Ct. App. 2007). UPC argues that if the alleged
13 conduct is criminal, that the Anti-SLAPP does not apply. Pl.'s Opp'n Anti-
14 SLAPP Motion 6, Dkt. No. 71 (citing *Gerbosi v. Gaims, Weil, W. & Epstein,*
15 *LLP*, 122 Cal. Rptr. 3d 73, 82 (Cal. Ct. App. 2011)). However, this
16 exception is only for undisputed or admitted criminal conduct, rather than
17 conduct that "may or may not be" criminal. *Gerbosi*, 122 Cal. Rptr. 3d at
18 82; *Dwight R. v. Christy B.*, 151 Cal. Rptr. 3d 406, 416 (Cal. Ct. App. 2013)

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² As UPC received nearly two months to respond to the motion, UPC was not prejudiced if there was any unintentional miscommunication. By contrast, due to ambiguity in the emails, Chabad was unaware that UPC would file its Preliminary Injunction Motion on December 26, 2016, giving Chabad only one week over Chanukah to file a response. Dkt. No. 68. In the interest of a speedy resolution of the case, Chabad did not and does not object.

1 (holding the exception applies only to undisputed or uncontroverted
2 criminal activity). Here, there was no criminal activity.

3
4 As multiple city officials have found, Chabad’s Kapparot rite violates
5 no laws and is not criminal. In 2014, Mr. R. Dunn, a special investigator for
6 the California Department of Food and Agriculture, Ms. Kimberly Cherney,
7 Animal Services Supervisor from the Irvine Police Department, and other
8 uniformed Irvine Police Department officers were called to Chabad of
9 Irvine on the day of the Kapparot rite. Decl. Rabbi Tenenbaum ¶¶ 12-13,
10 Dkt. No. 69-2. Each of these city officials told Chabad that everything was
11 legal and done pursuant to the law. *Id.* ¶ 14. They let the rite continue,
12 while they watched, and then they left without finding any violation of law.
13
14 *Id.* Chabad’s activities are in full compliance with the law.

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18 **III. CALIFORNIA’S ANTI-SLAPP STATUTE PROTECTS CHABAD’S**
19 **RELIGIOUS EXPRESSION AGAINST UPC’S FRIVOLOUS LAWSUIT.**

20 The Anti-SLAPP statute protects free speech activity that is covered
21 under either the California or U.S. Constitutions. Cal. Civ. Proc. Code §
22 425.16(e)(4) (protecting “conduct in furtherance of . . . the constitutional
23 right of free speech”); *Hilton v. Hallmark Cards*, 599 F.3d 894, 903 (9th Cir.
24 2010) (holding conduct in furtherance of free speech rights includes “actual
25 exercises of free speech rights”); *U.S. W. Falun Dafa Ass’n v. Chinese*
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1 *Chamber of Commerce*, 77 Cal. Rptr. 3d 710, 720 (Cal. Ct. App. 2008)
2 (holding California's Anti-SLAPP protects Chinese Chamber's expressive
3 event from plaintiffs suing to alter its expression).
4

5 The Free Speech clause of the U.S. Constitution fully protects
6 religious speech. See *Capitol Square Review & Advisory Bd. v. Pinette*,
7 515 U.S. 753, 760 (1995).³ UPC implies that whenever a case involves
8 religious speech or can be brought under the Free Exercise clause, that
9 the Free Speech clause cannot apply. Pl.'s Opp'n Anti-SLAPP 5-6, Dkt.
10 71. This is not true. Many foundational free speech U.S. Supreme Court
11 cases involve religious speech. See, e.g., *Lamb's Chapel v. Ctr. Moriches*
12 *Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Bd. of Educ. of Westside*
13 *Cmty. Schs. (Dist. 66) v. Mergens*, 496 U.S. 226 (1990); *Widmar v.*
14 *Vincent*, 454 U.S. 263 (1981); *Heffron v. Int'l Soc. for Krishna*
15 *Consciousness, Inc.*, 452 U.S. 640 (1981).
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21 UPC relies on *Castillo v. Pacheco*, 58 Cal. Rptr. 3d 305, 307 (Cal.
22 Ct. App. 2007) to argue that religious expression is categorically not
23 protected by the Free Speech clause because it is covered by the Free
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26 ³ UPC criticizes Chabad's citation of *Capitol Square* because the cases are
27 not factually similar. Pl.'s Opp'n Anti-SLAPP 7, Dkt. 71. However, Chabad
28 cited the case for the well established proposition that religious speech is
as protected as secular speech.

1 Exercise clause. The state court in the parallel action erroneously denied
2 the Anti-SLAPP motion based upon this flawed *Castillo* case. Minute
3 Order, *Animal Prot. & Rescue League, Inc. v. Chabad of Irvine*, No. 30-
4 2015-00809469-CU-BTCJC (Cal. Super. Ct., filed Sept. 11, 2015)
5 [hereinafter “APRL case”], Dkt. No. 108; see also Chabad’s Anti-SLAPP
6 Brief, APRL case, Ex. B.⁴ However, this Court is not bound by an
7 intermediate state court as to the scope of the Free Speech clause of the
8 United States Constitution. On this issue, it is bound by Supreme Court
9 and Ninth Circuit precedent protecting religious expression. Chabad’s
10 religious speech and expressive conduct are shielded by the Anti-SLAPP.

11
12 **A. Chabad’s Kapparot Rite Is Expressive Activity Fully**
13 **Protected by the Free Speech Clauses of the U.S. and**
14 **California Constitutions.**

15
16 Chabad’s Kapparot rite is a series of symbolic physical acts and
17 spoken words performed together in community to express expiation or
18 atonement. Decl. Rabbi Tenenbaum Supp. Reply, Ex. C. It involves gently
19 turning a chicken over one’s head for a total of nine rotations while reciting
20 an appropriate text. *Id.* ¶ 2. While holding the chicken, the participant says:
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27 ⁴ The state court did not find the Anti-SLAPP motion to be frivolous and
28 later concluded the plaintiff lacked standing on its original complaint. Minute Entry, APRL case (Cal. Super. Ct., Aug. 19, 2016), Dkt. No. 180.

1 Children of man who sit in darkness and the shadow of death,
2 bound in misery and chains of iron—He will bring them out of
3 darkness and the shadow of death, and will sunder their bonds.
4 Foolish sinners, afflicted because of their sinful ways and their
5 wrongdoings; their soul loathes all food and they reach the
6 gates of death—they cry out to the Lord in their distress; He
7 saves them from their afflictions. He sends forth his word and
8 heals them; He delivers them from their graves. Let them thank
9 the Lord for His kindness, and proclaim His wonders to the
10 children of man. If there be for a man even one interceding
11 angel out of a thousand accusers, to speak of his uprightness in
12 his behalf, then He will be gracious to him and say: Redeem
13 him from going down to the grave; I have found expiation for
14 him.

15 Males continue: This is my exchange, this is my substitute, this
16 is my expiation. This rooster shall go to its death and I shall
17 proceed to a good, long life and peace.

18 Females continue: This is my exchange, this is my substitute,
19 this is my expiation. This hen shall go to its death and I shall
20 proceed to a good, long life and peace.

21 *Id.* ¶ 5. The physical act of holding the chicken expresses the transfer of
22 one's sins to the chicken. *Id.* ¶ 3. The physical act of killing the chicken, in
23 a way that accords with halachic (Kosher) procedure, expresses expiation.
24 Each of the physical acts in the rite is expressive. *Id.* ¶¶ 2, 4. The Kapparot
25 rite is incomplete without both the physical, expressive acts and the
26 spoken word. *Id.* ¶ 6.

27 The physical acts of the Kapparot rite cannot be separated from the
28 accompanying spoken words any more than the exchange of rings can be

1 separated from the vows in a wedding ceremony. The Ninth Circuit has
2 held that wedding ceremonies, which involve both speaking and physical
3 acts, are protected expressive conduct because these ceremonies convey
4 messages to those in attendance. *Kaahumanu v. Hawaii*, 682 F.3d 789,
5 798 (9th Cir. 2012).
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8 The Free Speech clause protects “expressive conduct so long as
9 that conduct ‘convey[s] a particularized message’ and is likely to
10 be understood in the surrounding circumstances.” *Id.*; accord *Texas v.*
11 *Johnson*, 491 U.S. 397, 404 (1989).⁵ “A ‘narrow, succinctly articulable
12 message’ is not required.” *Kaahumanu*, 682 F.3d at 798 (quoting *Hurley v.*
13 *GLIB*, 515 U.S. 557, 569 (1995)). The threshold for conveying a
14 particularized message is not high. In *Kaahumanu*, the Ninth Circuit found
15 wedding ceremonies meet this standard because participants “express
16 their religious commitments and values” or “their beliefs and personal
17 commitments.” The Court found it relevant to the expressiveness inquiry
18 that these ceremonies are often led by “religious leaders.” *Id.* at 799. Here,
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24 ⁵ UPC criticizes Chabad’s citation of *Texas v. Johnson*. Pl.’s Opp’n Anti-
25 SLAPP 9, Dkt. No. 71. *Johnson* one of the foundational cases establishing
26 the expressive conduct or symbolic speech doctrine. As stated in the
27 original motion, *Johnson* holds that the speech clause protects physical
28 acts “imbued with elements of communication,” where there is intent to
“convey a particularized message” that “would be understood” by viewers.
As explained, the *Johnson* standard is met here. 491 U.S. at 404.

1 Chabad's Kapparot rite is led by a religious leader and expresses religious
2 commitments, beliefs, values that are likely to be understood by those
3 viewing the ceremony because the symbolism is explained through the
4 spoken portion of the rite. Decl. Rabbi Tenenbaum Supp. Reply, Ex. C.

5
6 Other Supreme Court, Ninth Circuit, and California state court
7 precedents confirm that the doctrine of expressive conduct or symbolic
8 speech covers activities whose messages are far less clear than the
9 clearly stated message of Chabad's Kapparot rite. See, e.g., *City of Erie v.*
10 *Pap's A.M.*, 529 U.S. 277, 289 (2000) (nude dancing); *Berger v. City of*
11 *Seattle*, 569 F.3d 1029, 1035-37 (9th Cir. 2009) (en banc) (balloon art);
12 *U.S. W. Falun Dafa Ass'n*, 77 Cal. Rptr. 3d at 716-17 (Chinese faire). By
13 contrast, Kapparot expresses a clear message of expiation to those
14 attending the ceremony.

15
16 The religious expressive activity in the Kapparot ritual could also be
17 protected as pure speech. See *Int'l Soc'y for Krishna Consciousness, Inc.*
18 *v. Lee*, 505 U.S. 672, 677-78 (1992) (holding First Amendment protects
19 public ritual of disseminating religious material and soliciting funds for
20 support); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (First Amendment
21 protects door-to-door religious evangelism).

1 UPC seems willing to concede that the spoken word portion of the
2 rite is protected speech. Its brief states that it does not intend to stop the
3 “attendant ceremonies around the practice” of killing chickens. Pl.’s Opp’n
4 Anti-SLAPP 7, Dkt. No. 71. However, the physically symbolic portions of
5 the ceremonies involving chickens cannot be separated from the spoken
6 words that are connected to them. Decl. Rabbi Tenenbaum Supp. Reply,
7 Ex. C. The Kapparot rite, like a wedding ceremony, must be taken as a
8 whole.
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12 Finally, the Anti-SLAPP statute protects expressive activity
13 connected to “a public issue or an issue of public interest” in order to
14 encourage “participation in matters of public significance.” Cal. Civ. Proc.
15 Code § 425.16(e)(4); *Blanchard v. DIRECTV, Inc.*, 20 Cal. Rptr. 3d 385,
16 391 (Cal. Ct. App. 2004). Courts have broadly construed this provision as
17 including anything that is “of concern to a substantial number of people.”
18 *Weinberg v. Feisel*, 2 Cal. Rptr. 3d 385, 392 (Cal. Ct. App. 2003). It
19 includes events that limit participation, but permit viewing of the event.
20 *U.S. W. Falun Dafa Assn.*, 77 Cal. Rptr. 3d at 721. The expression at issue
21 here directly involves a community event at which participants engage in
22 expressive religious conduct that has been practiced for thousands of
23 years by a substantial number of people worldwide.
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1 Because the Kapparot rite is shielded by the Anti-SLAPP, the burden
2 shifts to UPC to prove a probability of success on its claim.

3
4 **B. UPC’s Lawsuit is a Frivolous Attempt to Chill First
5 Amendment Rights.**

6 Contrary to UPC’s assertions, Chabad’s motion reaches the heart of
7 the problem the Anti-SLAPP law was designed to address. The purpose of
8 California’s Anti-SLAPP statute is to ensure that First Amendment rights
9 are not “chilled through abuse of the judicial process.” Cal. Civ. Proc. Code
10 § 425.16(a); *Navellier v. Sletten*, 52 P.3d 703, 718 (Cal. 2002). A
11 defendant seeking refuge in the statute has “no obligation to demonstrate
12 that the plaintiff’s subjective intent was to chill the exercise of constitutional
13 speech or p[e]tition rights, or that the action had the effect of chilling such
14 rights.” *Ingels v. Westwood One Broad. Servs., Inc.*, 28 Cal. Rptr. 3d 933,
15 939 (Cal. Ct. App. 2005). A defendant may prevail on its Anti-SLAPP
16 motion without evidence of subjective intent. However, when such
17 evidence exists, as it does here, it guarantees success on the motion. A
18 court “must consider the actual objective of the suit,” and it must “grant the
19 motion if the true goal is to interfere with *and burden* the defendant’s
20 exercise of his free speech and petition rights.” *Id.* at 941.
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1 UPC’s true reason for this lawsuit is to improperly pressure Chabad
2 into stopping a lawful religious practice — “the use of chickens in
3 Kapparot.” Decl. Karen Davis ¶ 4, Dkt. No. 68-7. Repeatedly throughout
4 this case, UPC has sought to force Chabad to use coins rather than
5 chickens, without any lawful basis for this unconstitutional argument. Pl.’s
6 Ex Parte Appl. TRO 7, Dkt. No. 2 (“Many other entities have stopped killing
7 chickens and instead perform the ceremony by swinging small bags of
8 coins overhead.”); *Id.* at 10 (“As Defendants can easily perform their same
9 ceremonies using bags of coins . . . there is no harm to Defendants in
10 granting this TRO.”); TRO Hr’g 40:2-6, Dkt. No. 64 (“[T]hey have not
11 shown that they are going to suffer irreparable harm by performing the
12 ritual with coins.”); Decl. Rabbi Klein, Dkt. No. 68-10 (“[N]o practitioner to
13 my knowledge has claimed that using coins instead of chickens would be
14 impermissible.”); Pl.’s Mot. Prelim. Inj. 1, Dkt. No. 68-1 (asserting that
15 Kapparot “usually” involves coins and questioning the practice of using
16 chickens in America); *Id.* at 2 (“[U]sing chickens in these rituals is not
17 required by any religious teaching.”). As this Court recognized in dissolving
18 the TRO, it would be unconstitutional for a court to require Chabad to use
19 coins rather than chickens based upon the religious beliefs of others.
20
21 *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 716 (1981);

1 see also *Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015); *Burwell v. Hobby*
2 *Lobby Stores, Inc.*, 134 S. Ct. 2751, 2779 (2014); *Hernandez v. Comm'r*,
3 490 U.S. 680, 699 (1989).
4

5 The timing of the filing of this action further evidences UPC's attempt
6 to place improper pressure on Chabad to alter its religious practice.
7 Although the events cited in the Complaint occurred in 2014, UPC brought
8 this lawsuit a few days before Rosh Hashanah in 2016, creating an
9 unnecessary emergency. Compl., Dkt. 1. Finally, Chabad was in the
10 process of defending itself against the related lawsuit filed by a related
11 party in state court.
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15 UPC used the same technique of creating an unnecessary
16 emergency instead of pursuing an existing case in New York State Court.
17 UPC's "Alliance to End Chickens as Kaporos" project sued several Jewish
18 organizations in New York. *All. to End Chickens as Kapparat v. N.Y.C.*
19 *Police Dep't*, No. 156730/2015, slip op. at *3-6 (N.Y. Sup. Ct. Sept. 16,
20 2015), Ex. D. There, the defendant Jewish organizations argued that the
21 plaintiffs, which included UPC, "deliberately engaged in brinkmanship by
22 bringing the application in the middle of the summer with responsive
23 papers due on the eve of Yom Kippur." *Id.* at *4. The plaintiffs "fail[ed] to
24 inform the court" that plaintiffs had a pending similar action in Supreme
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1 Court, Kings County, since September 2014. *Id.* at *4-5. The pending
2 action had two of the same plaintiffs, and they were represented by the
3 same attorneys. *Id.* at 6. The state court issued decisions against the
4 plaintiffs on September 14, 2015 and November 13, 2015. *Id.*

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6 UPC has a pattern of pursuing and filing frivolous lawsuits against
7 synagogues that use chickens in Kapparot, regardless of the lawfulness of
8 the ceremony. In *United Poultry Concerns v. Bait Aaron*, No. BC592712,
9 (Cal. Super. Ct., Aug. 26, 2015), UPC sued seven Los Angeles Jewish
10 organizations and multiple Rabbis who used chickens in their Kapparot
11 ceremonies. The court dismissed the lawsuit on multiple grounds and
12 concluded that UPC was “in fact, seeking recourse of the secular courts to
13 end a religious practice on the grounds that Plaintiffs do not like it, and do
14 not believe it is essential to use chickens for the religious ritual.” *Bait*
15 *Aaron*, at 19, Ex. E.

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20 In an October 19, 2015 statement written by Rabbi Jonathan Klein,
21 one of UPC’s declarants, and publicized by UPC’s Alliance to End
22 Chickens as Kaporos, Rabbi Klein details strategies to pressure Jewish
23 organizations to stop performing the ritual with chickens. Rabbi Jonathan
24 Klein, “This Year’s Los Angeles Kapparot Activities and Next Steps,”
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1 Alliance to End Chickens as Kaporos (Oct. 19, 2015), Ex. F.⁶ He wrote of
2 UPC's *Bait Aaron* lawsuit against the Rabbi Netanel Louie and the Hebrew
3 Discovery Center, saying "surely the lawsuit served to curb Rabbi Louie's
4 efforts to perform the ritual. We do, still, have work to do there." *Id.*

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6 Similarly, the statement states that David Simon of the Animal
7 Protection and Rescue League, one of UPC's attorneys in this case, sent
8 cease and desist letters and sued entities engaged in "chicken-based
9 Kapparat." *Id.* Rabbi Klein wrote that the lawsuit filed by David Simon
10 "certainly sent a chill over those who do this ritual." *Id.* These cease and
11 desist letters are confirmed in a declaration submitted in the parallel state
12 litigation to this case. The Simon Law Group "threatened the Hebrew
13 Academy [in Huntington Beach] with a legal action if it did not agree to sign
14 a certification stating that it would *never engage in the Jewish ceremony of*
15 *Kaporos.*" Decl. Ronan Cohen ¶ 3, Defs.' Anti-SLAPP Motion, *APRL* case,
16 Ex. B (emphasis added).
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22 Rabbi Klein's statement continues, "Hasidic Jews are ideologically
23 driven to perform this tradition. As a result, it will take much more work,
24 greater sophistication, and wiser tactics to tackle this eight hundred year-

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27 ⁶ Available at http://www.endchickensaskaporos.com/2015la_activities_and_next_steps.html.
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1 old tradition.” Rabbi Jonathan Klein, “Next Steps,” Ex. F. He concludes,
2 “the Hasidic community is very concerned with following the law of the
3 land, so if the laws somehow outlaw this ritual, they will bend to follow the
4 law (for the most part). As a result, I am beginning to see if there are ways
5 we can both enforce current laws and pass new ones that *will make this*
6 *ritual virtually impossible to perform, at least at an affordable cost.” Id.*
7 (emphasis added).
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11 Speaking on behalf of UPC after the TRO was issued in this case,
12 Attorney Bryan Pease told the Orange County Register that “the group is
13 now considering action against other Jewish centers that use live
14 chickens.” Kelly Puente, “Judge Blocks Slaughter of Chickens in Jewish
15 Holiday Ritual in Irvine with Temporary Restraining Order,” Orange County
16 Register (Oct. 7, 2016), Ex. G.⁷
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19 The Court should not allow UPC to abuse the judicial process to put
20 improper pressure on synagogues nationwide. See *Schwarzburd v.*
21 *Kensington Police Prot. & Cmty. Servs. Dist. Bd.*, 170 Cal. Rptr. 3d 899,
22 905 (Cal. Ct. App. 2014) (holding that “petitioners’ motivation in filing this
23 lawsuit was, at least in part, to intrude upon the First Amendment rights of
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27 ⁷ Available at <http://www.ocregister.com/articles/irvine-731472-chabad-chickens.html>.
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1 the individual Board members. This is the kind of conduct section 425.16
2 was intended to discourage.”).

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4 **C. UPC Has Not Established a Probability of Prevailing.**

5 As UPC cannot meet the essential jurisdictional or standing
6 requirements to bring a claim in federal court, UPC cannot meet its burden
7 of proving that there is a probability that it will ultimately prevail on its
8 claim. All the deficiencies in UPC’s claim are detailed in Chabad’s Motion
9 to Dismiss and Response to UPC’s Preliminary Injunction Motion. Dkt.
10 Nos. 50, 69.
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13 **D. Chabad Is Entitled to Fees and Costs.**

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15 If the Court grants the instant motion, fee shifting is statutorily
16 required. Cal. Civ. Proc. Code § 425.16(c)(1). This award of fees is
17 essential to deter future frivolous and harassing filings against other
18 Orthodox Jewish congregations. Chabad’s motion is not frivolous and UPC
19 is not entitled to fees under California Civil Procedure Code § 425.16(c).
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22 **IV. UPC IS NOT ENTITLED TO A PUBLIC INTEREST DEFENSE UNDER**
23 **CALIFORNIA CODE OF CIVIL PROCEDURE § 425.17(B).**

24 For the reasons UPC is not entitled to attorneys’ fees under
25 California Civil Procedure Code § 1021.5 as explained in Chabad’s Motion
26 to Dismiss Reply, UPC is also not entitled to the public interest defense to
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1 the Anti-SLAPP statute given in California Code of Civil Procedure §
2 425.17(b). See *Blanchard*, 20 Cal. Rptr. 3d at 392 (noting the elements of
3 the 425.17(b) defense “mirror the three elements for determining the
4 eligibility for a fee award under the private attorney general doctrine as
5 codified in section 1021.5.”).

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8 The § 425.17(b) defense does not apply to all plaintiffs who merely
9 assert that their claims are in the public interest. Instead, the California
10 Supreme Court has “repeatedly emphasized that the exemptions [to the
11 Anti-SLAPP statute] are to be ‘narrowly construed.’” *City of Montebello v.*
12 *Vasquez*, 376 P.3d 624, 631 (Cal. 2016) (citing *Club Members for an*
13 *Honest Election v. Sierra Club*, 196 P.3d 1094 (2008)). A plaintiff must
14 establish several mandatory conditions to be eligible for the exemption.
15 *Simpson Strong-Tie Co., Inc. v. Gore*, 230 P.3d 1117, 1125 (2010) (noting
16 the party seeking the exemption bears the burden of establishing
17 entitlement to it). UPC cannot meet its burden.

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22 **A. UPC Has Not Established That The Relief It Seeks Would**
23 **Significantly Benefit One Person – Let Alone A Large**
24 **Class of Persons.**

25 UPC seeks to compel Chabad to perform its religious rite in the way
26 UPC wants — with coins or, if chickens must be used, with chickens as
27 food. Because UPC cannot point to one person who would benefit if the
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1 Court were to grant this injunction, UPC has not established that the
2 injunction would “confer a significant benefit” on “the general public or a
3 large class of persons.” Cal. Code Civ. Proc. § 425.17(b)(2).
4

5 First, Chabad’s Kapparot ritual is humane, and multiple government
6 officials who witnessed Chabad’s Kapparot ritual in 2014 concluded that it
7 did not violate any laws. Decl. Rabbi Tenenbaum ¶¶ 6, 12-14, Dkt. No. 69-
8 2. UPC’s assertions to the contrary are without merit. Pl.’s Opp’n Anti-
9 SLAPP 3-4, Dkt. No. 71. Chabad’s injunction would confer no public
10 benefit, let alone a significant one.
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14 Next, several California courts have found that actions seeking to
15 limit opportunities for expressive activities do not confer a significant
16 benefit on the public. *Schwarzburd*, 170 Cal. Rptr. 3d at 905 (holding
17 changing the time or shortening the duration of board meetings is not a
18 “significant benefit” because it would limit public debate); *Holbrook v. City*
19 *of Santa Monica*, 51 Cal. Rptr. 3d 181, 186-87 (Cal. Ct. App. 2006)
20 (similarly holding “cutting off public comment and input, ending member
21 debate, and preventing the city council from further legislative action” does
22 not benefit the public); see also *Save Westwood Vill. v. Luskin*, 182 Cal.
23 Rptr. 3d 328, 335 (Cal. Ct. App. 2014) (holding “[t]here is no benefit
24 conferred on the public by restraining the [an individual] from donating
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1 money”). Similarly, limiting the opportunity or ability for free religious
2 expression would not confer a significant benefit on the public.

3
4 UPC’s brief misattributes Chabad’s statement that this case involves
5 a dispute that is not about money, but is rather about “public policy.” Pl.’s
6 Opp’n Anti-SLAPP. As the context of the statement clarifies, Chabad was
7 stating that this case is about UPC trying to stop a religious ritual that it
8 finds disagreeable, and thereby infringing on the religious rights of the
9 Orthodox Jewish community. Defs.’ Mot. Strike 11, Dkt. No. 51. Chabad
10 made no concessions that UPC’s interests would benefit the public. *Id.*

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12
13 Finally, because the language of § 1021.5(a) and § 425.17(b)(2) are
14 identical, the following § 1021.5(a) cases are persuasive authority in
15 interpreting the “significant benefit” to the “general public” element. In the §
16 1021.5(a) context, trial courts are instructed to “determine the significance
17 of the benefit and the size of the class receiving that benefit by realistically
18 assessing the gains that [would result] in a particular case.” *Baxter v.*
19 *Salutary Sportsclubs, Inc.*, 19 Cal. Rptr. 3d 317, 321 (Cal. Ct. App. 2004)
20 The benefit gained must be both “significant” and “widespread.”
21 *Concerned Citizens of La Habra v. City of La Habra*, 31 Cal. Rptr. 3d 599,
22 603 (Cal. Ct. App. 2005). Plaintiffs must assert more than a mere statutory
23 violation. *Baxter*, 19 Cal. Rptr. 3d at 321. Here, the injunction UPC seeks

1 would not create a significant, widespread benefit affecting a large class of
2 people. It would not stop a practice that has caused harm to even one
3 person. *Angelheart v. City of Burbank*, 285 Cal. Rptr. 463, 467 (Cal. Ct.
4 App. 1991) (overturning the trial court as there was no evidence that the
5 action affected people other than the plaintiffs, let alone “affected a large
6 class of persons”); *Flannery v. Cal. Highway Patrol*, 71 Cal. Rptr. 2d 632,
7 636 (Cal. Ct. App. 1998) (holding sending a “cautionary message to the
8 defendant” is “insufficient to satisfy the significant public benefit
9 requirement”); *Baxter v. Salutory Sportsclubs, Inc.*, 19 Cal. Rptr. 3d 317,
10 322 (Cal. Ct. App. 2004) (refusing to find a “significant benefit” on the
11 “general public” because there was “no showing of any harm to anyone”).
12 Rather, the injunction UPC seeks would infringe on the religious exercise
13 of an Orthodox Jewish community, and threaten the free religious exercise
14 of similarly situated people statewide. Far from creating a widespread,
15 significant benefit, compelling Chabad to change its religious practice
16 would cause irreparable harm to Chabad’s religious rights. *Hobby Lobby*,
17 723 F.3d at 1145 (“[I]t is always in the public interest to prevent the
18 violation of a party’s constitutional rights.”); *Elrod v. Burns*, 427 U.S. 347,
19 373 (1976) (“The loss of First Amendment freedoms, for even minimal
20 periods of time, unquestionably constitutes irreparable injury.”); see also
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1 *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 973 (9th Cir.
2 2002); *Warsoldier v. Woodford*, 418 F.3d 989, 1001-02 (9th Cir. 2005).

3 4 **B. UPC Seeks Relief to Advance Its Own Interests.**

5 To invoke the public interest exception to the Anti-SLAPP, the
6 lawsuit must be brought “solely” in the public interest. *Club Members*, 196
7 P.3d at 1100 (2008) (“[A]n *action*, as opposed to a cause of action, must
8 be brought *solely* in the public interest.”) (emphasis in original). The
9 plaintiff cannot seek any “personal advantage by advancing plaintiffs' own
10 interests” above those of the public. *Id.* at 1099. The term “personal
11 advantage” includes “an individual or particular advantage sought by a
12 group.” *Id.* at 1099 n.7. This advantage does not have to be monetary.
13 *Cruz v. City of Culver City*, 205 Cal. Rptr. 3d 736, 743 (Cal. Ct. App. 2016)
14 (seeking to protect “long-standing parking restrictions” would benefit
15 plaintiff); *Club Members*, 196 P.3d at 1099 (seeking to give members
16 unfair political advantage in elections would benefit plaintiff).

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22 UPC purportedly seeks relief for the general public in the form of
23 requiring Chabad to use the Kapparot chickens for food under California
24 Penal Code § 597(a). However, the multiple inappropriate arguments
25 suggesting that Chabad should be required to use coins instead of
26 chickens make it clear that UPC is truly seeking to end the use of chickens
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1 in Kapparat because it involves killing chickens. *See supra* Part III.B. This
2 relief is beyond the relief it purportedly seeks for the others. *See Holbrook*,
3 51 Cal. Rptr. 3d at 186-87 (citing evidence from declarations to show that
4 plaintiffs' motivations were not solely in the public interest).
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6
7 **C. UPC Has Not Established That The Relief It Seeks Would
8 Vindicate an Important Right Affecting the Public Interest.**

9 Next, UPC has not established that its lawsuit vindicates an
10 important right. Cal. Code Civ. Proc. § 425.17(b)(2). UPC's brief does not
11 specify any "right" that it is vindicating. UPC also cannot cite rights relating
12 to statutes or causes of action that it did not choose to bring in its
13 Complaint, such as environmental statutes. *Schwarzburd*, 170 Cal. Rptr.
14 3d at 905 (holding plaintiff was not vindicating an important right by
15 enforcing the Brown Act because the Brown Act did not apply in the case).
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18 Cases interpreting § 1021.5's "enforce[ing] an important right
19 affecting the public interest" element are persuasive. *Cal. Sch. Emps.*
20 *Ass'n v. Del Norte Cty. Unified Sch. Dist.*, 4 Cal. Rptr. 2d 35, 40 (Cal. Ct.
21 App. 1992) (holding "no important right was vindicated as the judgment
22 simply declared that district had not complied with a statute"); *Grimsley*,
23 213 Cal. Rptr. at 111 (holding "plaintiff's success did not result in the
24 enforcement of an important public right but alerted the Board of
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1 Supervisors to a procedural necessity”). Alleging a mere statutory violation
2 is not sufficient. *Baxter*, 19 Cal. Rptr. 3d at 321. UPC seeking to change
3 Chabad’s religious rite does not further an “important right,” and it is not in
4 the public interest to compel places of worship to change their practices.
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7 **D. UPC Has Not Established That Private Enforcement is
8 Necessary or that UPC Is Disproportionately Burdened.**

9 Private enforcement is not necessary because several public officials
10 attended the Kapparot ritual and determined it to be lawful. Decl. Rabbi
11 Tenenbaum ¶¶ 6, 12-14, Dkt. No. 69-2. Because UPC is the entity that
12 would gain from this action, it is not “disproportionate” to have UPC bear
13 the cost of the litigation. *Holbrook*, 51 Cal. Rptr. 3d at 187 (holding where
14 plaintiff “stand chiefly to benefit” from the lawsuit, it is not disproportionate
15 for plaintiff to pay). UPC is not entitled to the narrow public interest
16 defense, and the Court must grant Chabad’s motion to strike.
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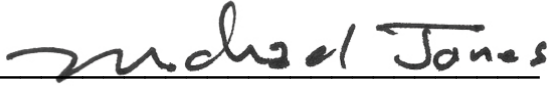
20 **Conclusion**

21 For the foregoing reasons, Chabad respectfully requests that the
22 Court strike the Complaint pursuant to California’s Anti-SLAPP Law.
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24 Dated this January 9, 2016. Respectfully submitted,
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