Prepared By:
Michael Jones, CA Bar No. 271574
M. Jones & Associates, PC
505 North Tustin Ave, Suite 105
Santa Ana, CA 92705
Telephone: (714) 795-2346
Facsimile: (888) 341-5213
Email: mike@MJonesOC.com

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN 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-(GJSx)

DEFENDANTS' MOTION TO DISSOLVE TEMPORARY RESTRAINING ORDER; OPPOSITION TO PLAINTIFF'S PRELIMINARY INJUNCTION MOTION; AND MOTION TO STRIKE THE COMPLAINT

HEARING SCHEDULED
DATE: OCTOBER 13, 2016
TIME: 10:00 AM

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

Defendants Chabad of Irvine and Alter Tenenbaum (collectively, "Chabad") bring this emergency motion to dissolve the ex parte temporary restraining order ("TRO"), issued on October 7, 2016. The Chabad respectfully requests that the TRO be dissolved today ***in time for Yom Kippur this evening***, when the kaporos[1] ceremony takes place. As explained further, the kaporos ceremony is humanely performed in a manner consistent with federal and state animal slaughter laws and is a centuries-old religious practice that is constitutionally protected. The United States Supreme Court has held – unanimously – that laws may not permit the killing of animals for secular purposes while singling out for prohibition the killing of animals for religious purposes. *See Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 537-38 (1993) (holding that First Amendment precludes application of Florida's animal cruelty statute to religious sacrifice of animals). In the face of this holding, Plaintiff United Poultry Concerns ("Plaintiff") has not satisfied and cannot satisfy the requirements necessary for an ex parte TRO or a preliminary injunction to issue. To assist the Court, ***Chabad moves for a telephonic hearing to take place today*** on the request to lift the TRO.

Plaintiff has also failed to satisfy the requirements for obtaining a preliminary injunction. Plaintiff lacks standing to bring an action under California's Unfair Competition Law ("UCL"), as it alleges no cognizable injury

[1] Sometimes referred to as kaparot.

as a result of the Chabad's religious practices. What is more, the UCL, which is directed at business and commercial conduct, does not apply to religious ceremonies. And, more basically, Plaintiff has failed to demonstrate any of the traditional elements required to obtain injunctive relief, while the Chabad will suffer irreparable harm if they are precluded, on the eve of Yom Kippur, from practicing a ritual central to their faith. Accordingly, the Court should deny Plaintiff's motion for a preliminary injunction.

Finally, the Chabad moves to strike Plaintiff's Complaint as a violation of a California statute prohibiting strategic lawsuits against public participation (i.e., the Anti-SLAPP statute).

I. Motion to Dissolve Ex Parte Temporary Restraining Order

The ex parte TRO must be dissolved because Plaintiff cannot and has not satisfied its heavy burden for obtaining such extraordinary relief. Without any notice or opportunity to be heard, the Chabad has been restrained from engaging in a centuries' old religious practice on the eve of one their faith's most holy days. This affront to both First Amendment rights and basic due process principles cannot be allowed to stand.

To support an ex parte TRO, "the evidence must show that the moving party's cause will be irreparably prejudiced if the underlying motion is heard according to regular noticed motion procedures. Second, it must be established that the moving party is without fault in creating the crisis that requires ex parte relief, or that the crisis occurred as a result of excusable neglect." *Mission Power Eng'g Co. v. Cont'l Cas. Co.*, 883 F. Supp. 488, 492 (C.D. Cal. 1995). As the Ninth Circuit explained, "circumstances justifying the issuance of an ex parte order are extremely limited." *Reno Air Racing Ass'n v. McCord*, 452 F.3d 1126, 1131 (9th Cir. 2006) (citing *Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423 (1974)). Such orders are rare because they deny parties essential procedural safeguards. *Granny Goose*, 415 U.S. at 439 ("[O]ur entire jurisprudence runs counter to the notion of court action taken before reasonable notice and an opportunity to be heard has been granted both sides of a dispute.").

Critically, Plaintiff's application for a TRO did not put forth any reason justifying its late filing. This federal action and application for a TRO were filed on September 29, 2016, just a few days before Rosh Hashanah and less than two weeks before Yom Kippur, when kaporos ceremonies take place. Kaporos ceremonies have been taking place for decades in this state and for centuries around the world. Plaintiff alleges knowledge of the Chabad's kaporos practice dating back to 2014. Compl. ¶¶ 26-27, Doc. 1. It was also conceded that Plaintiff

has been monitoring the proceeding in state court against the Chabad, which has been pending since September 14, 2015. Decl. Bryan Pease ¶ 12, Doc. 13. These concessions alone show that Plaintiff could have raised its claims earlier, without prejudicing the Chabad or denying it an opportunity to be heard. To the extent there is a crisis requiring relief – and there is not – it was one of Plaintiff's own making in delaying the filing of their action until September 29th. At the same time, Plaintiff's conduct has precipitated a crisis, requiring the Chabad to retain counsel and prepare this briefing in less than 24 hours. In short, the ex parte TRO must be dissolved because Plaintiff created the crisis, prejudicing the Chabad.

Further, circumstances usually justifying ex parte TROs are absent here. Such orders are often issued where the defendants are likely to destroy evidence or take other actions to subvert the court system. *See Reno Air*, 452 F.3d at 1131. There are no such extraordinary circumstances here to justify this extraordinary order. The TRO must be dissolved. As explained in the following section, the TRO also must be dissolved for the reasons the Plaintiff's motion for a preliminary injunction must be denied.[2]

[2] The preliminary injunction legal standard is essentially the same as the standard for temporary restraining orders.

II. Opposition to Plaintiff's Motion for a Preliminary Injunction

Plaintiff's motion for a preliminary injunction must be denied. A preliminary injunction is also "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. NRDC, Inc.*, 555 U.S. 7, 22, (2008). It is "never awarded as of right." *Id.* at 24. "A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1115 (9th Cir. 2011) (quoting *Winter*, 555 U.S. at 24-25). Plaintiff cannot make any of these showings here.

A. LIKELIHOOD OF SUCCESS ON THE MERITS

Plaintiff has not demonstrated a likelihood of success on the merits for each of the reasons that follow. This list of reasons is non-exhaustive.

1. Plaintiff Lacks Standing.

As an initial matter, Plaintiff cannot succeed on the merits because it has failed to establish the standing requirements necessary to assert a UCL claim. In order to have standing to pursue a UCL claim, a plaintiff 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." *Kwitkset Corp. v. Superior Court*, 51 Cal. 4th 310, 322 (2011) (emphasis in original). Plaintiff's claim fails on both elements.

First, Plaintiff fails to identify any economic injury sufficient to qualify as injury in fact. The decision in *Animal Legal Defense Fund v. LT Napa Partners LLC* offers no support to Plaintiff. 234 Cal. App. 4th 1270 (2015).[3] In *Napa Partners*, the California Court of Appeal held that an organization has standing if it can show harm caused by a diversion of resources and the frustration of plaintiff's advocacy efforts. *Id.* at 1283. Plaintiff has made no allegation that it diverted resources from other activities. The only allegation is that "STEINAU's time working for Plaintiff was diverted to investigating and exposing these acts, and attempting to convince authorities to take action." Compl. ¶ 25. There is no reference to the other activities in which Steinau was engaged. Unlike the plaintiff in *Napa Partners* who paid a private investigator, there is no allegation that

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[3] *Napa Partners* potentially could provide an end run around the voter's wishes to restrict UCL claims were a plaintiff fails to establish an actual economic injury. Proposition 64 was enacted "to prohibit private attorneys from filing lawsuits for unfair competition where they have no client who has been *injured in fact under the standing requirements of the United States Constitution*." *Kwikset*, 51 Cal.4th at 322.

Steinau was compensated for the time spent at the ceremony. Nor is there any allegation that Steinau paid to attend the ceremony. In fact, Plaintiff fails to show any economic harm at all. Because of this, Plaintiff cannot establish any "loss or deprivation of money or property sufficient to qualify as injury in fact." *Kwitkset Corp.*, 51 Cal. 4th at 322.

Plaintiff also lacks organizational standing because it fails to allege a frustration of Plaintiff's mission. An organization can only establish an injury when it suffers "both a diversion of its resources ***and*** a frustration of its mission." *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010) (emphasis added). The organization must show that "it would have suffered some other injury if it had not diverted resources to counteracting the problem." *Id.; see Scocca v. Smith*, 2012 WL 2375203 (N.D. Cal. June 22, 2012). The alleged practices must prevent the plaintiff "from pursuing other preferred avenues to advance their mission." *Animal Legal Defense Fund v. Great Bull Run, LLC*, No. 14-CV-01171-MEJ, 2014 WL 2568685, at *4 (N.D. Cal. June 6, 2014). Plaintiff has made no such showing. Plaintiff, instead, merely states that Steinau's "time working for Plaintiff was diverted to investigating and exposing these acts, and attempting to convince authorities to take action." Compl. ¶ 25. Just like the plaintiffs in *La Asociacion*, the complaint is devoid of any reference to "a frustration of its purpose." *La Asociacion*, 624

F.3d at 1089. The plaintiff in *Bull Run* alleged – unlike Plaintiff here – that the diverted employees "would have otherwise worked on projects to further Plaintiffs' missions." Without sufficient allegations showing that Steinau was diverted from other preferred avenues of advocacy, Plaintiff cannot establish an injury in fact.

Plaintiff also fails the second prong of *Kwitkset*. Plaintiff alleges no facts sufficient to show they have lost money or property caused by any alleged unfair competition. In fact, the complaint fails to identify any loss of money or property let alone a loss of money or property caused by the Chabad's conduct. Plaintiff's TRO application evidences the lack of harm because they fail to cite a single allegation supporting the organization's standing. Because Plaintiff fails to identify any loss of money or property, they must not be granted standing.

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

Plaintiff fails to establish the Chabad engages in any "business act or practice" as part of its kaporos ceremony. The UCL prohibits "any unfair competition, which means '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, et seq.). The UCL promotes "fair business competitions and governs both anti-competitive business practices and

consumer injuries." *Bull Run*, 2014 WL 2568685, at *6. Plaintiff must show that the act or practice was "committed pursuant to business activity." *Pinel v. Aurora Loan Servs., LLC*, 814 F. Supp. 2d 930, 937 (N.D. Cal. 2011). That is because the UCL is concerned with "wrongful conduct in commercial enterprises." *People v. Nat'l Research Co. of Cal.*, 201 Cal. App. 2d 765, 770 (1962). The complaint fails to allege that the Chabad was engaged in any business activity.

In an effort to assert a UCL claim, Plaintiff mischaracterizes a religious ceremony as a business practice to assert a UCL claim. The Chabad conducts the kaporos ceremony in accordance with centuries-long Jewish custom. The donations the Chabad receives for the ceremony are, contrary to Plaintiff's assertions, "given to the poor."[4] Plaintiff's allegation that the Chabad conducts the kaporos ceremony "for profit" is thus false, and in any event fails to establish that the ceremony is part of any "business activity" or "commercial enterprise" simply because money changes hands in the process. *See Pinel*, 814 F. Supp. 2d at 937; *Nat'l Research Co. of Cal.*, 201 Cal. App. 2d at 770.

Plaintiff offers no authority for the notion that a religious ceremony is a business practice subject to the UCL. In fact, the cases cited by Plaintiff in its

[4] Chabad of Irvine, Kaparot, *available at* http://www.chabadirvine.org/holidays/JewishNewYear/template_cdo/aid/989585/jewish/Kaparot.htm (last visited October 11, 2016).

TRO application establish that a religious institution may only be subject to the UCL when it actually engages in "business practices." *See* Pl.'s Ex Parte Application for TRO, Dkt. 2 at 8. Each case involves a practice that could regularly be engaged in by any business. *See Exec. Comm. Representing Signing Petitioners of Archdiocese of Western U.S. v. Kaplan*, 2004 WL 6084228 (C.D. Cal. Sept. 17, 2004) (involving fundraising solicitations); *Maktab Tarighe Oveyssi Shah Maghsoudi, Inc. v. Kianfar*, 179 F.3d 1244 (9th Cir. 1999) (involving intellectual property rights not a UCL claim); *Pines v. Tomson*, 160 Cal. App. 3d 370 (1984) (involving a business telephone directory). None of these cases stands for the broad proposition that a religious ceremony is a "business practice."

Plaintiff's proposed reading of the UCL would impermissibly broaden the definition of "business act or practice" beyond recognition. Invoking the UCL when "any pecuniary element" is involved, would read the statute's requirement that the conduct be a "business act or practice" out of the law. Even *People v. McKale*, cited by the Plaintiff, still requires the activity to be "business conduct." 25 Cal.3d 626, 632 (1979). The kaporos ceremony is a religious rite conducted in preparation for Yom Kippur. Clearly a religious ceremony of this nature cannot be "business conduct." Furthermore, a synagogue conducting a religious ceremony cannot be said to be engaged in a "commercial enterprise." Accordingly, Plaintiff fails to satisfy an essential element of its UCL claim.

3. The Kaporos Ceremony Does Not Violate California's Law Against Animal Cruelty; the Religious Ritual Is Not Done With "Malicious" Intent.

Because the Chabad's kaporos ceremony is done in a humane manner for a religious purpose, Plaintiff cannot demonstrate a likelihood of success on its sole argument that the ceremony violates California's animal cruelty statue. The kaporos ceremony is a ritual in which participants seek atonement. Participants gently pass a chicken over one's head, reading the ceremonial text, and then slaughter the animal in the humane manner of all kosher slaughter.[5] As explained on Chabad's website, "It is of utmost importance to treat the chickens humanely, and not to, G-d forbid, cause them any pain or discomfort. Jewish law very clearly forbids causing any unnecessary pain to any of G-d's creations. The repugnance of such an unkind act would certainly be amplified on this day, the eve of the day when we beseech G-d for – perhaps undeserved – kindness and mercy."[6] The

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[5] *Id.*

[6] Chabad Irvine, *The Kaparot Ceremony*, *available at* http://www.chabadirvine.org/holidays/JewishNewYear/template_cdo/aid/989585/jewish/Kaparot.htm

chicken's "monetary worth [is] given to the poor, or, as is more popular today, the chicken itself is donated to a charitable cause."[7]

California and federal law both specifically approve of such kosher slaughtering practices as humane. Cal. Code Regs. tit. 3, § 1246.15(a) ("Where a method of slaughter is prescribed by Kosher or other rules of the Jewish faith, Islamic and other faiths and causes the poultry to lose consciousness through anemia of the brain resulting from the simultaneous severance of both carotid arteries with a sharp instrument, it shall be considered a humane method of slaughter."); Cal. Food & Agric. Code § 19501(b)(2) ("The animal shall be handled, prepared for slaughter, and slaughtered in accordance with ritual requirements of the Jewish or any other religious faith that prescribes a method of slaughter whereby the animal suffers loss of consciousness by anemia of the brain caused by the simultaneous and instantaneous severance of the carotid arteries with a sharp instrument."); 7 U.S.C. § 1902(b) (finding "slaughtering in accordance with the ritual requirements of the Jewish faith or any other religious faith that prescribes a method of slaughter whereby the animal suffers loss of consciousness by anemia of the brain caused by the simultaneous and instantaneous severance of the carotid arteries with a sharp instrument and handling in connection with such slaughtering" to be humane); 7 U.S.C. § 1906

[7] *Id.*

("Nothing in this Act shall be construed to prohibit, abridge, or in any way hinder the religious freedom of any person or group. Notwithstanding any other provision of this Act, in order to protect freedom of religion, ritual slaughter and the handling or other preparation of livestock for ritual slaughter are exempted from the terms of this Act."). The kaporos ceremony's slaughter is done in the humane way that all kosher meat is slaughtered.

California's animal cruelty statute, Penal Code Section 597(a), prohibits the *malicious* and intentional killing of an animal. Malice is an essential element of the crime of animal cruelty. *Ex parte Mauch*, 134 Cal. 500, 500 (1901). It is defined as an "intent to do a wrongful act." *People v. Dunn*, 39 Cal. App. 3d 418, 421 (1974). Acts of "willful and unlawful cruelty" satisfy the malice standard. *Ex parte Mauch*, 134 Cal. at 501.[8]

Participants in the kaporos ceremony do not have any intention to do a "wrongful act." As noted above, the chicken is slaughtered in a manner deemed humane under both California state and federal law. Plaintiff's philosophical disagreement with the ancient notion of substitutionary atonement that is central to the faith of those practicing the kaporos ritual (*see* Compl. ¶ 22, Doc. 1,

[8] In the homicide context, the "malice" standard can be satisfied when "the circumstances attending the killing show an abandoned and malignant heart." Cal. Penal Code § 188.

caricaturing the practice as "taking out vengeance on an innocent animal") does not render the practice inhumane or malicious. There is no cruelty or malice, as defined by law. Accordingly, there is no intention to do anything "wrongful" as a matter of law.

Plaintiff has not cited any cases holding that kosher or other religious slaughter violates California's animal cruelty statute. The facts are distinctly different from other actions brought under the animal cruelty statute. Courts have concluded that the malice standard is satisfied by: beating and torturing a dog, *Ex parte Mauch*, 134 Cal. at 500; filming mice being tortured and crushed to death, *People v. Thomason*, 84 Cal. App. 4th 1064, 1066 (2000); stabbing an ex-girlfriend's dog to death out of spite, *People v. Smith*, 150 Cal. App. 4th 89, 94 (2007); or throwing rocks and shooting guns at animals to get them off one's land, *Dunn*, 39 Cal. App. 3d at 421. Plaintiff cites no cases using "malicious" to describe participation in a religious atonement ceremony in accordance with federal and state law regarding the kosher slaughter of animals. This Court cannot condemn the state of mind of asking for atonement as "malicious" nor can it categorize the practice of kosher slaughter as "inhumane."

4. Enjoining the Chabad's Kaporos Ceremony Violates the Free Exercise Clause.

California already recognizes that "[w]here a method of slaughter is prescribed by Kosher or other rules of the Jewish faith, Islamic and other faiths and causes the poultry to lose consciousness through anemia of the brain resulting from the simultaneous severance of both carotid arteries with a sharp instrument, it shall be considered a humane method of slaughter." Cal. Code Regs. tit. 3, § 1246.15(a). Plaintiff's failure to bring this regulation to the Court's attention in its application for the TRO casts a shadow over that proceeding. More importantly, that regulation precludes the granting of a preliminary injunction, as Plaintiff's cannot prevail on their claim in the face of that law. What is more, enjoining the kaporos ceremony would violate the Free Exercise Clause of the First Amendment to the United States Constitution.

a) Strict Scrutiny Applies

By its terms, the First Amendment protects the "free exercise" of religion. Plaintiff's request relief runs headlong into the First Amendment's protection, seeking prohibit an activity that is at the core of the "exercise" of Defendants' faith.

It is true that an "across-the-board criminal prohibition on a particular form of conduct" does not violate the Free Exercise Clause simply because it has an adverse impact on a religious practice. *Employment Division v. Smith*, 494 U.S. 872, 884 (1990). But California Penal Code Section 597(a) on which Plaintiff

premises its UCL action is not an "across-the-board criminal prohibition" on the killing on animals. As one would expect, there are a host of exceptions to Section 597(a) found in California Penal Code Section 599(c). As the Supreme Court has explained, when a law, "on what seems to be a per se basis, deems hunting, slaughter of animals for food, eradication of insects and pests" as exemptions to the supposed general rule, then the law is not generally applicable. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 537 (1993). This is so because exceptions to the general rule "require[e] an evaluation of the particular justification for the killing" and thus "represent[t] a system of 'individualized governmental assessment of the reasons for the relevant conduct.'" *Id.* at 537 (quoting *Smith*, 494 U.S. at 884). Thus, "in circumstances in which 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." *Id.* (internal quotations and citations omitted).

Section 599c exempts all "game laws" within California – a robust set of regulations allowing for the killing of various species. Second, Section 599c exempts "laws for or against the destruction of certain birds." Third, Section 599c exempts the killing of animals known to be dangerous. Fourth, Section 599c exempts the killing of all animals used for food. Fifth, Section 599c exempts animals slaughtered for scientific experiments or investigations for academic

purposes. Any of these exceptions to Section 597(a) undermine Plaintiff's argument that *Smith*'s general rule applies.

The Chabad is not challenging Section 597(a) on its face and need not prove a discriminatory intent. *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."). Instead, the Chabad is challenging Plaintiff's request that this Court enforce Section 597(a) in a manner that prohibits the killing of animals in a humane manner for religious purposes pursuant to a law that permits the humane killing of animals for any number of secular reasons. As the Supreme Court has noted, "[a]ll laws are selective to some extent, but categories of selection are of paramount concern when a law as the incidental effect of burdening a religious practice." *Church of Lukumi*, 508 U.S. at 542. For the Court to determine that Section 597(a) prohibits Chabad's kaporos ceremony but not other secularly motivated animal killings, the Court 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, Inc. v. Wiesman*, 794 F.3d 1064, 1079 (9th Cir. 2015) ("A law is not generally applicable if its prohibitions substantially

underincluded non-religiously motivated conduct that might endanger the same governmental interest that the law is designed to protect.").

The purpose and intent of Section 597(a) is irrelevant. What is relevant is that there are secular exceptions, and because there are secular exemptions, strict scrutiny applies. *See Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 168 (3d Cir. 2002) ("Just as the exemptions for secularly motivated killings in *Lukumi* indicated that the city was discriminating against Santeria animal sacrifice, and just as the medical exemption in Fraternal Order of Police indicated that the police department was discriminating…the Borough's invocation [of the ordinance] against conduct motivated by Orthodox Jewish beliefs…[leads to the conclusion] that we must apply strict scrutiny."). Thus, "[f]or laws that are not neutral or not generally applicable, strict scrutiny applies." *Stormans*, 794 F.3d at 1076; *see Lukumi*, 508 U.S. at 531-32 ("A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.").

b) There is no compelling governmental interest to ban the kaporos ceremony.

Plaintiff bears the burden of justifying the enforcement of Section 597(a) against the Chabad as a matter of law. 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." *Church of Lukumi*, 508 U.S. at 547 (internal quotation and citation omitted). The exceptions listed in Section 599c simply doom any claim that enforcing Section 597(a) is a compelling interest. Plaintiff has not and cannot explain the difference between the humane killing of an animal as part of a religious ceremony and the robust list of permitted animal killings in Section 599c.

c) Banning the traditional kaporos ceremony practiced for at least 1,100 years is not the least restrictive means for furthering any interest.

In order to satisfy the strict scrutiny applicable to laws that burden religious practice, Plaintiff bears the burden of demonstrating that there is no less restrictive means of accomplishing the governmental interest at issue. Plaintiff attempts to flip this analysis on its head by claiming the Defendants can exercise their faith in another manner, pointing to some Jewish congregations that do not use chickens as part of kaporos. This analysis misplaces 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."). Defendants are entitled to exercise their religion in the manner they deem appropriate, not in the manner that other religious adherents or the Plaintiffs would prefer. *See Lukumi Babalu*, 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)).

Here, Plaintiff has failed to demonstrate that there is no other means to achieve any purportedly compelling governmental interest short of a Preliminary Injunction prohibiting a ceremony that produces a result (the humane death of a animal) that is no different than if the chicken were killed under one of the permitted purposes under Section 599c. That other congregations may engage in a different ceremony is irrelevant. The Court may not assess the merits of Chabad's claim that it must adhere to at least 1100 years of religious tradition.

5. **Enjoining the Chabad's Kaporos Ceremony Violates the Free Speech Clause.**

As explained further in Part III, enjoining the Chabad's kaporos ceremony also violates other First Amendment rights, such as the right to free speech.

B. **LIKELIHOOD OF IRREPARABLE HARM**

Plaintiff cannot demonstrate that it would be harmed without a preliminary injunction, and Plaintiff cannot meet its burden of showing a likelihood of irreparable harm. In Plaintiff's Ex Parte Application for a TRO, Plaintiff alleges that harm to the animals is irreparable harm. However, the legal standard is

whether "[the *plaintiff*] is likely to suffer irreparable injury." *Klein v. City of San Clemente*, 584 F.3d 1196, 1207 (9th Cir. 2009) (emphasis added). Plaintiff next asserts that it and the public are subjected to "significant public health risks" and "thousands of dollars in unnecessary costs." Pl.'s Ex Parte App. at 10, Doc. 2. The TRO does not clarify either of those unsupported allegations. It nowhere else mentions health risks, and it is unclear why Plaintiff alleges "thousands of dollars" in costs. In any event, monetary damages alone are not irreparable. *L.A. Mem'l Coliseum Com. v. Nat'l Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980). Plaintiff has not demonstrated that it would be injured, and any harm caused is far outweighed by the guaranteed irreparable harm that the TRO or a preliminary injunction would inflict on the Chabad's religious exercise.

C. BALANCE OF EQUITIES

Because the kaporos ceremony occurs once per year during Yom Kippur, the ex parte TRO threatens to bar this ceremony completely, without granting the Chabad opportunity to be heard. The preliminary injunction could similarly bar this constitutional religious practice in future years. The Ninth Circuit has repeatedly held that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Thalheimer v. City*

of San Diego, 645 F.3d 1109, 1128 (9th Cir. 2011) (quoting *Klein*, 584 F.3d at 1208; *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

Even the mere threat to constitutional rights can constitute irreparable injury. "[T]he fact that a case raises serious First Amendment questions compels a finding that there exists 'the potential for irreparable injury, or that at the very least the balance of hardships tips sharply in [Appellants'] favor." *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 973 (9th Cir. 2002) (quoting *Viacom Int'l, Inc. v. FCC*, 828 F. Supp. 741, 744 (N.D. Ca. 1993)). In the Ninth Circuit, "a party seeking preliminary injunctive relief in a First Amendment context can establish irreparable injury sufficient to merit the grant of relief by demonstrating the existence of a colorable First Amendment claim." *Id.*

Plaintiff argues that the harm to the Chabad is minimal because Judaism, properly construed, does not require slaughtering of chickens. *See* Pl.'s Motion Ex Parte TRO at 7 ("Defendants' religion does not actually require them to kill and dispose of chickens. . . The only real harm to Defendants would be economic."). It is wholly inappropriate for Plaintiff to dictate to the Chabad what the Chabad's religion commands. And it would be even more inappropriate for the Court to put its seal of approval on Plaintiff's interpretation of the Chabad's religion. It would be unconstitutional for the Court to dismiss the burden on the Chabad by disagreeing about the proper interpretation of religious doctrine. *See Hernandez*,

490 U.S. at 699 ("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.").

D. PUBLIC INTEREST

Because the TRO threatens to eliminate the Chabad's ability to perform a religious rite on Yom Kippur this year and the preliminary injunction threatens this right in future years, they conflict with the public's interest in protecting the free exercise of religion. "Courts considering requests for preliminary injunctions have consistently recognized the significant public interest in upholding First Amendment principles." *Thalheimer*, 645 F.3d at 1129 (quoting *Sammartano*, 303 F.3d at 974). "[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *Sammartano*, 303 F.3d at 974 (quoting *G&V Lounge, Inc. v. Mich. Liquor Control Com'n*, 23 F.3d 1071, 1079 (6th Cir. 1994)). Therefore, Plaintiff's motion for a preliminary injunction must be denied.

III. Chabad's Motion to Strike the Complaint Under California's Anti-Strategic Lawsuit Against Public Participation Statute

The Chabad further moves to strike Plaintiff's complaint under California's anti-Strategic Lawsuit Against Public Participation ("Anti-SLAPP") statute, found

at California Code of Civil Procedure § 425.16. California's Anti-SLAPP statute provides that the Court should strike any "cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." Cal. Code Civ. P. § 425.16(b)(1). Because Plaintiff's claim implicates the Chabad's free speech rights under both the United States Constitution and the California Constitution, the burden shifts to the Plaintiff to show that it will likely prevail on the merits, which it cannot do.

The Anti-SLAPP statute is meant to dismiss actions that "masquerade as ordinary lawsuits but are intended to deter ordinary people from exercising their political or legal rights or to punish them for doing so." *Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 261 (9th Cir. 2013) (internal quotation marks omitted). "To prevail on an anti-SLAPP motion, the moving defendant must make a prima facie showing that the plaintiff's suit arises from an act in furtherance of the defendant's constitutional right to free speech." *Id.* "The burden then shifts to the plaintiff … to establish a reasonable probability that it will prevail on its claim in order for that claim to survival dismissal." *Id.* Although framed as a rule of state procedure,

California's Anti-SLAPP statute protects substantive rights and thus applies in federal court. *Newsham v. Lockheed*, 190 F.3d 963, 973 (9th Cir. 1999).

Courts do not take a formalistic approach as to what causes of action "arise from" acts in furtherance of petition or free speech rights, because they "construe the anti-SLAPP statute broadly to protect the constitutional rights of petition and free speech." *Anderson v. Geist*, 236 Cal. App. 4th 79, 84 (2015). Thus, for a cause of action to be considered "arising from" an act in furtherance of free speech rights, courts look to the *defendant's activity*, rather than the *plaintiff's claims*. *See Navellier v. Sletten*, 52 P.3d 703, 711 (Cal. 2002) ("The anti-SLAPP statute's definitional focus is not on the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning."). It is thus legally irrelevant that Plaintiff brought a claim for Illegal Business Practices in Violation of the Unfair Competition Law. The underlying conduct in Plaintiff's complaint is the ritual sacrifice of chickens in the Kaparot ceremony. If that act is done in furtherance of free speech rights, then Plaintiff's complaint puts forward a cause of action against Defendants that arises from an act in furtherance of Defendants' free speech rights for purposes of the anti-SLAPP statute.

And Supreme Court precedent is clear that Defendants' act here does in fact implicate free speech rights. The Supreme Court has recognized that while the

"First Amendment literally forbids the abridgement only of 'speech,'" conduct "may be 'sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.'" *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974)). "In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play," the Court looks at whether "an intent to convey a particularized message was present, and whether the likelihood was great that the message would be understood by those who viewed it." *Id.* (internal quotation marks and alterations omitted). The kaporos ceremony meets both prongs: the ceremony is meant to communicate substitutionary atonement, *see* Chabad Irvine, *The Kaparot Ceremony*, *available at* http://www.chabadirvine.org/holidays/JewishNewYear/template_cdo/aid/989585/jewish/Kaparot.htm ("We ask of G-d that if we were destined to be the recipients of harsh decrees in the new year, may they be transferred to this chicken in the merit of this mitzvah of charity."), and assists any viewers by communicating that message with certain spoken language, *see id.* ("[W]ave the chicken over your head in circular motions three times—once while saying, 'This is my exchange,' again when saying 'This is my substitute,' and again when saying, 'This is my expiation.'"). The ceremony is thus expressive conduct, meaning that Plaintiff's

cause of action arises from an act by Defendants in furtherance of their free speech rights.[9]

Finally, in order to qualify under the anti-SLAPP statute, these free speech rights must be exercised in connection with a public issue. California courts distinguish between "wholly private matter[s]" and matters that are connected to a "public issue." *Moore v. Shaw*, 116 Cal. App. 4th 182, 196 (2004). The kaporos ceremony is not a wholly private matter; it is a public ceremony that allows members of a religious community to celebrate together. The Plaintiff's complaint thus is a SLAPP action of exactly the type against which the anti-SLAPP statute is meant to protect against.

Because Defendants have met the first prong of the anti-SLAPP statute, the burden shifts to the Plaintiff to prove that there is a probability that it will prevail on the claim. The Plaintiff "must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a

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[9] There is no appreciable difference between the kaporos ceremony and other ceremonies, such as a wedding ceremony, in that they both are a form of speech conveying messages. *See Kaahumanu v. Hawaii*, 682 F.3d 789, 799 (9th Cir. 2012) ("We have no difficulty concluding that wedding ceremonies are protected expression under the First Amendment"). Thus, the kaporos ceremony is equally protected.

favorable judgment if the evidence submitted by the plaintiff is credited." *D'Arrigo Bros. of Ca. v. United Farmworkers of Am.*, 224 Cal. App. 4th 790, 800 (2014) (internal quotation marks omitted; emphasis added). As shown above, the Plaintiff's complaint is legally deficient. Plaintiff thus cannot meet its burden under the anti-SLAPP statute and its complaint must be struck.

IV. **Conclusion**

For the foregoing reasons, the Chabad moves for the TRO to be dissolved immediately to enable its constitutional kaporos ceremony to continue. Additionally, the Chabad requests that the Court deny Plaintiff's motion for a preliminary injunction and the Court strike the Complaint as a violation of California's anti-SLAPP statute.

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M Jones and Associates, PC
Attorneys for Defendants

Michael Jones

Matthew T. Martens*
matthew.martens@wilmerhale.com
Gregory Boden
gregory.boden@wilmerhale.com
California Bar Number 301779
Kevin Gallagher*
kevin.gallagher@wilmerhale.com
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Avenue, NW
Washington, DC 20006
Telephone: (202) 663-6921
Fax: (202) 663-6363

Attorneys for Defendants

Hiram S. Sasser, III*
hsasser@firstliberty.org
Jeremy Dys*
jdys@firstliberty.org
Stephanie N. Phillips
staub@firstliberty.org
California Bar No. 301324
FIRST LIBERTY INSTITUTE
2001 West Plano Parkway,
Suite 1600
Plano, TX 75075
Telephone: (972) 941-4444
Facsimile: (972) 941-4457

Attorneys for Defendants

*To be admitted Pro Hac Vice