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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

UNITED POULTRY CONCERNS,

Plaintiff,

v.

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

Defendants.

Magistrate Judge

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

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO STRIKE OR DISMISS COMPLAINT

HEARING
Date: 23 January 2017
Time: 10:00 AM

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

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

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SUMMARY OF ARGUMENT

This case must be dismissed because the Court has no jurisdiction. Plaintiff United Poultry Concerns ("UPC") continually proffers new arguments in an attempt to manufacture jurisdiction — each argument less convincing than the last. In its response brief, UPC wisely abandons federal question jurisdiction. UPC also seems to abandon on its primary diversity jurisdiction argument based on the value of the injunction, *i.e.* the cost of an injunction to Defendants ("Chabad"). After Chabad submitted evidence establishing that its Kapparot rite is not operated for profit, UPC cites no evidence or legal precedent to question Chabad's records.

Now, UPC focuses most of its jurisdictional argument on attorneys' fees. But because the attorneys' fees generated in this case as of the filing of the Complaint are insufficient to exceed the $75,000 amount in controversy threshold, UPC argues that the Court should include attorneys' fees generated in an ***entirely unrelated*** case not involving Chabad. The Court simply does not have jurisdiction over this matter.

UPC also lacks standing to pursue this matter. UPC's brief offers no response to Chabad's argument that it lacks Article III standing. This alone is fatal to its case. And UPC lacks unfair competition law ("UCL") standing for a variety of reasons: (1) UCL only applies to business acts, which does

not include accepting donations for a religious rite; (2) UCL requires the alleged wrongful act to have caused harm to UPC, and there is no causal link here; (3) UCL requires a loss of "money or property," and the Complaint alleges neither. The lack of either type of standing dooms UPC's case. Here, both are missing.

Turning to the merits, UPC fails to establish a Penal Code violation as a matter of law and the Constitution bars twisting the Penal Code to force Chabad to perform the Kapparot rite in the way that UPC prefers. UPC's efforts to stand in as a private attorney general targeting a particular religious practice for eradication violate the Free Exercise Clause.

UPC should not be permitted to harass this synagogue by filing a last minute duplicate lawsuit in federal court on the eve of the most holy days of year, just because the state court did not render the result UPC wanted. This case may belong in state court, but it certainly does not belong here.

ARGUMENT

I. THE COURT LACKS JURISDICTION.

A. UPC Concedes the Court's Lack of Federal Question Jurisdiction.

UPC's response brief makes no mention of federal question jurisdiction, and thus it waives this jurisdictional argument.

B. UPC Fails to Meet Its Burden of Establishing Diversity Jurisdiction.

i. UPC Concedes the Complaint's Failure to Allege Diversity of Citizenship.

UPC failed to allege diversity of citizenship in the Complaint. Instead, UPC supplies the necessary information about UPC's headquarters in a declaration. Pl.'s Opp'n Mot. Dismiss 2, Dkt. No. 70 (citing Davis Decl. ¶ 2, Dkt. No. 68-7). The Complaint must be dismissed, and for the reasons that follow, permitting amendment would be futile.

ii. UPC's First Attempt to Inflate the Amount in Controversy to Exceed $75,000 Fails Because the Value of the Injunction is Less than Zero.

The value of the injunction UPC seeks does not come anywhere near $75,000, even if it were permissible to forecast ten years in future. UPC's response brief asserts, without citing any evidence, that "Plaintiff has produced evidence that Defendants likely generate approximately $7,500 per year in revenue in using chickens for Kapparot." Pl.'s Opp'n Mot. Dismiss 2, Dkt. No. 70. However, Plaintiff's $7,500 figure is "speculation and conjecture" based on its unsupported guess that chickens cost "under $2" each. Compl. ¶ 16, Dkt. No. 1; *Lowdermilk v. United States Bank Nat'l Ass'n*, 479 F.3d 994, 1002 (9th Cir. 2007). By contrast, Chabad produced the actual 2014 records reflecting a net loss of $24 from

Kapparot. Aff. Rabbi Tenenbaum, Dkt. No. 50-1. The records clearly show the amount of donations received in connection with Kapparot ($1,701), the expenses incurred from the chickens ($1,475), and the cost of hiring the shochet Ely Tenenbaum ($250).[1] *Id.* UPC calls Chabad's evidence not "competent" because it does not list "how much they pay for each chicken." Pl.'s Opp'n Mot. Dismiss 2-3, Dkt. No. 70. Yet, the price per chicken is not the relevant inquiry. UPC's position is that the value of the injunction is the cost of an injunction to Chabad, which equals net profit or loss caused by the injunction.[2] *Cohn v. Petsmart, Inc.*, 281 F.3d 837, 840 (9th Cir. 2002). Here, there was a net loss of $24. UPC cites no evidence or law to call Chabad's factual record into question.[3] The value of the injunction is non-existent, and thus insufficient to support jurisdiction.

iii. UPC's Second Attempt to Inflate the Amount in Controversy to Exceed $75,000 Using Attorneys' Fees Fails.

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[1] Contrary to the response brief's assertion, Chabad disputes that it "charged $27 per chicken" because donations were optional and there was no set amount. Decl. Rabbi Tenenbaum ¶ 11, Dkt. No. 69-2.

[2] Because the amount in controversy allegations in the Complaint were based solely upon the events in 2014, Chabad produced evidence regarding the 2014 ceremony to rebut those allegations and establish the proper facts regarding jurisdiction.

[3] Although UPC asks the Court to multiply its guess at Chabad's net profit (and there was none) by ten to achieve the amount in controversy, UPC cites no precedent that would permit the Court to forecast net profits or losses out 10 years. Nevertheless, zero times ten is still zero.

UPC next attempts to inflate its attorneys' fees to reach $75,000, but it fails to provide sufficient evidence that the fees in this case exceed the threshold. Incredibly, UPC attempts to reach $75,000 using fees in an ***entirely unrelated*** case not involving Chabad. Further, UPC is not entitled to even a discretionary award of attorneys' fees under California Code of Civil Procedure § 1021.5 [hereinafter "§ 1021.5"] based upon the allegations in the Complaint.

Insufficient Evidence of Fees

For the purpose of establishing diversity jurisdiction, attorney's fees are calculated as of the date of filing the Complaint. "Attempting to estimate future attorneys' fees for the purposes of determining diversity jurisdiction, against the unpredictable backdrop of litigation, is ill-suited to the precision of jurisdictional analysis." *Prepuse v. Caliber Home Loans*, No. EDCV 16-00267-CJC(DTBx), 2016 U.S. Dist. LEXIS 34931, at *8 (C.D. Cal. Mar. 17, 2016). The "majority of district courts within this Circuit" follow this reasoning, holding that "attorneys' fees that are anticipated but unaccrued at the time of removal are not properly in controversy for jurisdictional purposes." *Dell v. ServiceMaster Glob. Holdings, Inc.*, No. C 15-3326 SBA, 2015 U.S. Dist. LEXIS 150585, at *7 (N.D. Cal. Nov. 5,

2015); *Prepuse*, 2016 U.S. Dist. LEXIS 34931, at *7 (noting "recent district court cases in this Circuit tend *not* to permit the inclusion of anticipated attorneys' fees"); *see also Blevins v. Republic Refrigeration, Inc.*, No. CV 15-04019 MMM (MRWx), 2015 U.S. Dist. LEXIS 130521, at *43 (C.D. Cal. Sep. 28, 2015). The Seventh Circuit Court of Appeals agrees with the majority of courts in this circuit that fees must be calculated as of the filing of the Complaint, because the contrary rule would be inconsistent with U.S. Supreme Court precedent. *Gardynski-Leschuck v. Ford Motor Co.*, 142 F.3d 955, 958 (7th Cir. 1998) (citing *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 286 (1938)).[4]

UPC provides absolutely no evidence of fees billed in this case. *See* Pl.'s Opp'n Mot. Dismiss 5, Dkt. No. 70. UPC cites the Complaint's assertion that fees as of filing the Complaint exceeded the threshold, but merely citing the Complaint is not sufficient to establish contested jurisdictional facts. *Id.*; *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936) (holding contested "jurisdictional facts [must] be established or the case [will] be dismissed"). UPC provides an estimate of

[4] As the California Supreme Court emphasized in a different context, § 1021.5 "authorizes a trial court at the *end* of litigation to determine" fees; it does not "come[] into play at the *outset* of litigation" or determine the "viability of the underlying action itself." *Club Members for an Honest Election v. Sierra Club*, 196 P.3d 1094, 1100 (Cal. 2008).

the rate charged in other cases, but no statement of the actual rate charged and no estimate of the number of hours it spent on this case as of the filing of the Complaint. UPC has failed to provide any record of fees that have accrued in this case, let alone one that is reasonable and supported by credible evidence. Therefore, UPC has failed to prove that fees have exceeded $75,000.[5]

Instead of offering evidence about the fees in this case, UPC argues that the Court should include attorneys' fees incurred in a case ***entirely unrelated*** to Chabad. In *United Poultry Concerns v. Bait Aaron*, No. BC592712, (Cal. Super. Ct., Aug. 26, 2015), UPC sued Orthodox Jewish organizations and rabbis located in Los Angeles. *See* Attached Opinion, Ex. A. These organizations are separate and distinct from Chabad of Irvine and Rabbi Alter Tenenbaum. The complaints arise out of different Kapparot ceremonies. There is no factual intertwining of these two actions. Only the *legal issues* are similar.[6]

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[5] Because UPC's Complaint is essentially a simplified version of the parallel state court complaint, the evidence of the actual fees incurred by UPC at the time of the federal filing could not approach $75,000.

[6] On June 20, 2016, the state court held against UPC, dismissing the case on multiple grounds: (1) UPC could not sue to enforce California's Penal Code because it does not grant a private right of action; (2) UPC lacks UCL standing because the Jewish organizations caused UPC no injury or monetary harm; (3) UCL does not cover rabbis or synagogues; and (4) the

UPC argues that *Animal Protection & Rescue League v. City of San Diego*, 187 Cal. Rptr. 3d 598, 601 (Cal. Ct. App. 2015), allows it to claim fees for "services rendered in a related case" as long as the tasks "were inextricably intertwined with the present action." Unlike here, the *San Diego* case was factually and legally related to *Animal Protection & Rescue League v. Sanders*, No. 37-2012-00103629-CU-MC-CTL (Super. Ct. San Diego County 2012), Ex. B, because both arose from the same facts involving the installation of the same guideline rope at the same beach. In *San Diego*, the plaintiff produced "detailed time records" and a "chart" demonstrating inextricable overlap. 187 Cal. Rptr. 3d at 601. By contrast, here, not only are the cases not factually related at all, UPC produced nothing demonstrating "inextricably intertwined" work.

UPC cannot claim fees for a separate case that ***only*** involves similar issues of law. *Bait Aaron* and the instant case involved "[b]riefing some of the same issues," specifically UCL and constitutional issues; and, on this basis alone, UPC attempts to shift "no fewer than $71,000" in fees from that unrelated case onto Chabad. Opp'n Mot. Dismiss. 5-6, Dkt. No. 70.

First Amendment protects the synagogues because "Plaintiffs are, in fact, seeking recourse of the secular courts to end a religious practice on the grounds that Plaintiffs do not like it, and do not believe it is essential to use chickens for the religious ritual." *Id.* at 19.

This is outrageous and wholly inappropriate. Hours spent researching a legal issue in one case cannot be billed to an attorney's next client just because the issues involve the same area of law. Several ethics opinions prohibit this practice, called bill padding with recycled work product or canned briefs. *See, e.g.*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 93-379 (Dec. 6, 1993)[7] (noting when a subsequent case can benefit from previous work, a lawyer "is obliged to pass the benefits of these economies on to the client," and doing otherwise risks violating Model Rule 1.5); Cal. State Bar Comm. on Mandatory Fee Arbitration, Arbitration Advisory 2016-02 (Mar. 25, 2016)[8] ("[A]ttorneys billing on an hourly basis cannot properly add additional hours to a client's bill when revising such an 'in-house' form to reflect the time spent preparing the original (template) form.") (citing Orange County Bar Ass'n Form. Opn. 99–001). This practice is even more improper when, as here, the attorney seeks to compel an unrelated, non-party to pay for those fees. Thus, the hours UPC's attorneys previously spent researching or briefing the UCL or the Constitution are not billable in this case. Because UPC cannot meet

[7]Available at http://www.americanbar.org/content/dam/aba/migrated/genpractice/resources/costrecovery/ABA_CommEthics_Opinion.authcheckdam.pdf.

[8] Available at http://www.calbar.ca.gov/Portals/0/documents/mfa/2016/2016-02_Bill-Padding_r.pdf.

the amount in controversy threshold based upon attorneys' fees *in this case*, there is no diversity jurisdiction.

Insufficient Allegations for a Discretionary Fee Award Under § 1021.5

Because the Complaint does not make the required allegations to satisfy § 1021.5's four-part test for attorneys' fees, UPC cannot invoke this statute to manufacture $75,000 in controversy. *See Bay Area Surgical Mgmt., LLC v. Blue Cross Blue Shield of Minn. Inc.*, No. 12-CV-0848-LHK, 2012 U.S. Dist. LEXIS 99968, at *30 (N.D. Cal. July 17, 2012) (holding the amount in controversy was insufficient for diversity jurisdiction because § 1021.5 attorneys fees could not be awarded based on the allegations in the complaint). Litigants do not receive fees under § 1021.5 as a matter of course. They instead must establish each of the four prongs, and even then, courts may deny fees in the interest of justice. *Grimsley v. Bd. of Supervisors*, 213 Cal. Rptr. 108, 111 (Cal. Ct. App. 1985) (holding § 1021.5 is discretionary). Based on the allegations in the Complaint, UPC cannot establish all necessary elements of § 1021.5.

First, because UPC cannot name one person who would benefit by the relief it seeks, it fails § 1021.5's first requirement. *Baxter v. Salutary Sportsclubs, Inc.*, 19 Cal. Rptr. 3d 317, 322 (Cal. Ct. App. 2004) (refusing

to grant fees where there is "no showing of any harm to anyone"). Under § 1021.5(a), a plaintiff must show that requiring Chabad to perform its religious rite in the way UPC wants — with coins or with chickens as food — would confer a "significant public benefit" on "the general public or a large class of persons." Cal. Civ. Proc. Code § 1021.5(a). Trial courts are instructed to "determine the significance of the benefit and the size of the class receiving that benefit by realistically assessing the gains that [would result] in a particular case." *Baxter*, 19 Cal. Rptr. 3d at 321. The benefit gained must be both "significant" and "widespread." *Concerned Citizens of La Habra v. City of La Habra*, 31 Cal. Rptr. 3d 599, 603 (Cal. Ct. App. 2005). Plaintiffs must assert more than a mere statutory violation. *Baxter*, 19 Cal. Rptr. 3d at 321; *Woodland Hills Residents Assn., Inc. v. City Council*, 593 P.2d 200, 212 (Cal. 1979) ("[T]he Legislature did not intend to authorize an award of attorney fees in every case involving a statutory violation."). Here, the injunction UPC seeks would not create a significant, widespread benefit affecting a large class of people. It would not stop a practice that has caused harm to even one person. *Angelheart v. City of Burbank*, 285 Cal. Rptr. 463, 467 (Cal. Ct. App. 1991) (overturning the trial court as there was no evidence that the action affected people other than the plaintiffs, let alone "affected a large class of persons"); *Flannery v. Cal.*

Highway Patrol, 71 Cal. Rptr. 2d 632, 636 (Cal. Ct. App. 1998) (holding sending a "cautionary message to the defendant" is "insufficient to satisfy the significant public benefit requirement"). Instead, the injunction UPC seeks would infringe on the religious exercise of an Orthodox Jewish community, and threaten the free religious exercise of similarly situated people statewide. Far from creating a widespread, significant benefit, compelling Chabad to change its religious practice would cause irreparable harm to Chabad's religious rights. *Hobby Lobby*, 723 F.3d at 1145 ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights."); *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *see also Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 973 (9th Cir. 2002); *Warsoldier v. Woodford*, 418 F.3d 989, 1001-02 (9th Cir. 2005).

Next, UPC cannot meet § 1021.5(b), which states that fees can only be awarded when "the necessity and financial burden of private enforcement" makes the award appropriate. According to the California Supreme Court, an award is only appropriate "when the cost of the claimant's legal victory transcends his personal interest, that is, when the necessity for pursuing the lawsuit placed a burden on the plaintiff 'out of

proportion to his individual stake in the matter.'" *Woodland Hills*, 593 P.2d at 213. The court remanded for the lower court to consider evidence of the litigants' fiscal resources. *Id.* UPC argues that because it is not seeking damages, it automatically meets this requirement. Pl.'s Opp'n Mot. Dismiss 5, Dkt. No. 70. However, this argument was rejected in *Torres v. City of Montebello*, 183 Cal. Rptr. 3d 801, 820 (Cal. Ct. App. 2015). UPC must still show that it is actually burdened by the cost of litigation. Even when a litigant was not seeking damages, if a litigant's cost of litigating is zero, such as when another is paying his fees or when an attorney is operating on a pro-bono basis, this factor is not met. *Id.* at 407 ("[I]f the litigant bears no financial burden, [§ 1021.5] attorney fees are inappropriate, regardless of the existence or nonexistence of a financial interest."). Here, UPC has made no allegation that it will be the entity paying fees.[9]

Finally, UPC is not vindicating any "important right." The Complaint makes no mention of the "right" that it is vindicating. *Cal. Sch. Emps. Ass'n v. Del Norte Cty. Unified Sch. Dist.*, 4 Cal. Rptr. 2d 35, 40 (Cal. Ct. App. 1992) (holding "no important right was vindicated as the judgment simply

[9] Additionally, the Complaint does not allege that bringing this action was "necessary" under § 1021.5(b). The Court must "determine that private enforcement was sufficiently necessary to justify the award." *Vasquez v. State of Cal.*, 195 P.3d 1049, 1054 (Cal. 2008).

declared that district had not complied with a statute"); *Grimsley*, 213 Cal. Rptr. at 111 (holding "plaintiff's success did not result in the enforcement of an important public right but alerted the Board of Supervisors to a procedural necessity"). Alleging a mere statutory violation is not sufficient. *Baxter*, 19 Cal. Rptr. 3d at 321. UPC seeking to change Chabad's religious rite does not further an "important right." UPC is not entitled to attorneys' fees and has not exceeded the amount in controversy threshold.

II. UPC LACKS ARTICLE III STANDING.

UPC's response brief does not address Article III standing. *See* Opp'n Mot. Dismiss, Dkt. No. 70 (instead arguing about UCL standing). However, Article III standing is necessary to bring a case in federal court and without it this action must be dismissed. The U.S. Supreme Court has "consistently held that a plaintiff raising only a generally available grievance . . . claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large — does not state an Article III case or controversy." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573-74 (1992). *Lujan* precisely describes what UPC is attempting here.

Chabad did nothing to cause injury to UPC, and therefore UPC does not have Article III standing. According to the Complaint, a UPC employee chose to expend time trying to stop Chabad from performing a Kapparot rite. Compl. ¶ 25, Dkt. No. 1. If there is any injury in that, it is purely self-inflicted harm and not sufficient to confer federal standing. Under *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010), an organization "cannot manufacture the injury by incurring litigation costs or simply choosing to spend money fixing a problem that otherwise would not affect the organization at all." Instead, it must show that "it would have suffered some other injury if it had not diverted resources to counteracting the problem." *Id.*; *see also Valle Del Sol Inc. v. Whiting*, 732 F.3d 1006, 1019 (9th Cir. 2013). Here, UPC does not allege that it would have suffered any injury if it had not chosen to divert its recourses. There is no injury.

Other courts considering similar Kapparot cases have come to the same conclusion — that the plaintiffs did not have standing because there was no injury-in-fact. *Bait Aaron*, at 16, Ex. A (finding no actual damages sufficient for standing because, among other reasons, plaintiffs "paid no money to any of the rabbis or synagogues to participate in the Kapparot ritual"); *All. to End Chickens as Kapparot v. N.Y.C. Police Dep't*, No.

156730/2015, slip op. at *6 (N.Y. Sup. Ct. Nov. 13, 2015) (dismissing claims because "the harm that they suffered as a result of the . . . Kapparot ritual was [not] any different from that experienced by other members of the communities"). Choosing to pursue a synagogue because you do not like its religious practices is not harm sufficient for standing.

III. UPC CANNOT BRING THIS ACTION AGAINST A SYNAGOGUE UNDER CALIFORNIA'S UNFAIR COMPETITION LAW.

Because there is no private right of action to sue under the Penal Code directly, UPC attempts to invoke a law designed to deter business fraud in order to compel a synagogue to perform a religious ritual in the way it prefers. *See Animal Legal Def. Fund v. Mendes*, 72 Cal. Rptr. 3d 553, 556 (Cal. Ct. App. 2008); *Animal Legal Def. Fund v. Cal. Exposition & State Fairs*, 192 Cal. Rptr. 3d 89, 96 n.1 (Cal. Ct. App. 2015). However, under the UCL, as amended by Proposition 64, "only the Attorney General and certain other public officials can sue on behalf of the public at large." *Mendes*, 72 Cal. Rptr. 3d at 559. Others may sue only if they have "suffered injury in fact and ha[ve] lost money or property as a result of [the] unfair competition." *Id.* at 559 n.7; *Kwikset Corp. v. Superior Court*, 246 P.3d 877, 881 (Cal. 2011); Cal. Bus. & Prof. Code § 17204.

This Court is bound by the California Supreme Court's holding on UCL standing in Kwikset. *See United States Fid. & Guar. Co. v. Lee Invs., LLC*, 641 F.3d 1126, 1134 (9th Cir. 2011). The intermediate state court case on which UPC relies cannot overrule conflicting holdings given by the state's highest court. *See Animal Legal Def. Fund v. LT Napa Partners LLC*, 184 Cal. Rptr. 3d 759 (Cal. Ct. App. 2015). To the extent *Napa Partners* does not require injury-in-fact, it is not good law.[10]

UPC has not shown that accepting donations in connection with the religious rite of a synagogue could be considered a "business act." Cal. Bus. & Prof. Code § 17200. The cases UPC cites do not stand for the proposition that whenever a place of worship accepts a donation, it transforms into a business act subject to regulation. *See Exec. Comm. v. Kaplan*, No. CV 03-8947 FMC (MANx), 2004 U.S. Dist. LEXIS 31799, at *18 (C.D. Cal. Sep. 16, 2004) (alleging individuals solicited money for a non-church charity and fraudulently pocketed the money); *Pines v. Tomson*, 206 Cal. Rptr. 866, 869, 879 (Cal. Ct. App. 1984) (finding phonebook company engaged in "secular commercial conduct performed for profit"); *see also Bait Aaron*, at 12-13, Ex. A (holding UCL does not

[10] UPC fails even under *Napa Partners*, because the Complaint alleges no specific loss of money or property caused by the diversion of resources. 184 Cal. Rptr. 3d at 766.

apply to churches, synagogues, temples, or mosques).[11] Under UPC's reasoning, any religious service that accepts donations would be considered a business activity. Regulating synagogues, mosques, and churches as businesses carries a strong likelihood of interfering with the principle of separation of church and state. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 186 (2012).

Moreover, even if a synagogue accepting voluntary donations somehow could be a business practice, it would not be a practice that *caused* UPC harm because UPC does not allege that it donated any money to Chabad. *See Mendes*, 72 Cal. Rptr. 3d at 559-560. Under the UCL, there must be a causal link between the alleged "unfair competition" and the injury. *Id.*; Cal. Bus. & Prof. Code § 17204. This is absent. The Complaint points to no loss of money or property and no injury-in-fact. UPC only alleges a self-imposed "diversion of resources,"[12] but choosing to spend time in pursuit of a synagogue on the other side of the country is not harm sufficient to confer standing under the UCL or Article III.

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[11] UPC oddly cites *Maktab Tarighe Oveyssi Shah Maghsoudi, Inc. v. Kianfar*, 179 F.3d 1244 (9th Cir. 1999), which involves intellectual property rights, not a UCL claim. Pl.'s Opp'n Mot. Dismiss 13, Dkt. No. 70.

[12] It is unclear why pursuing Chabad would be a "diversion of resources," because according to UPC founder Karen Davis, one of UPC's goals is "working to end the use of chickens in Kapparot nationally." Decl. Karen Davis ¶ 4, Dkt. No. 68-7.

IV. ABSTENTION IS WARRANTED

In the alternative, the Court may exercise its discretion to abstain in light of the parallel state proceeding. *See A&T Siding, Inc. v. Capitol Specialty Ins. Corp.*, 637 F. App'x 393, 394 (9th Cir. 2016). Both actions arise from the same person viewing Chabad's 2014 Kapparot ceremony. Am. Compl. ¶¶ 21-25, *Animal Prot. & Rescue League, Inc. v. Chabad of Irvine*, No. 30-2015-00809469-CU-BT-CJC (Cal. Super. Ct., Sept. 17, 2015), Dkt. No. 189. Both plaintiffs argue standing under the UCL, and the actions include substantially similar claims under the penal code.[13] *Id.* ¶¶ 14(d), 30-34. At issue in state court is whether the Kapparot ceremony involves "cruelly killing" chickens under Penal Code § 597(b), which closely mirrors the "malicious" killing prohibited under § 597(a).[14]

For *Colorado River* Abstention, the Court may consider the factors laid out in *R.R. St. & Co. v. Transp. Ins. Co.*, 656 F.3d 966, 978-79 (9th Cir. 2011), to dismiss this action. Not all factors are present here, and not all need to be present to grant abstention. *Id.* at 979. Ultimately, the

[13] The state court action includes additional claims that are not at issue here. Am. Compl., *APRL* case, Dkt. No. 189.

[14] As an example, during a hearing on September 18, 2015, the court accepted Chabad's argument that because kosher slaughter is humane, Kapparot did not involve "cruel killing," and the court declined to issue a temporary restraining order against the synagogue. *See* Minute Entry, Sept. 18, 2015, *APRL* case, Dkt. No. 36.

question is equitable, and the court should consider the totality of the circumstances. The state forum is the proper court to resolve the matter because this federal action (1) was filed in order to circumvent the state court; (2) was filed over one year after the state action; (3) involves fewer claims than the state action; (4) involves nearly identical parties; (5) arises from the same incident; and (6) turns on novel interpretations of state law.

V. UPC HAS NOT ALLEGED A VIOLATION OF THE PENAL CODE BECAUSE CHABAD'S RELIGIOUS RITE IS HUMANE, AND NOT MALICIOUS.

Section 597(a) prohibits the *malicious* and intentional killing of an animal. "Malicious" is a *mens rea* element necessary so that only those with the culpable "intent" to do something "wrongful" can be punished under the criminal code. Cal. Penal Code § 7(4). The earlier portion of the definition includes "a wish to vex, annoy, or injure another person." *Id.* Although this portion does not fit neatly onto the statute at issue, it shows that "malice" requires a culpable state of mind or a wish to do something because of its wrongfulness.

UPC argues, citing nothing, that "malicious" means having "no legal justification." However, applying this definition, it is circular to try to ascertain whether someone violates a statute by doing an act (*i.e.* whether

there is legal justification for the act) by first asking whether the act is done maliciously (*i.e.* whether there is legal justification for the act).[15]

Under either definition, numerous state and federal laws regard Kosher killings as humane acts and not malicious. *See, e.g.*, Cal. Code Regs. tit. 3, § 1246.15(a); Cal. Food & Agric. Code § 19501(b)(2); 7 U.S.C. § 1902(b); 7 U.S.C. § 1906.[16] Simply stated, conducting a kosher killing of chickens during a synagogue's Kapparot atonement ceremony is not malicious. UPC's claim fails.

VI. ENJOINING KAPPAROT VIOLATES THE FREE EXERCISE CLAUSE.

UPC seeks to target a particular religious practice for extinction. UPC's founder issued a sworn declaration in this case, stating that it is one of UPC's missions to "end the use of chickens in Kapparot nationally." Decl. Karen Davis ¶ 4, Dkt. No. 68-7. If UPC is permitted to stand in the shoes of the government, wielding the force of law as a private attorney general and targeting synagogues that perform Kapparot with chickens, it will violate the Free Exercise clause.

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[15] Similarly, UPC argues that "[i]f there is no exception to Penal Code section 597(a) to allow [an act], then doing [the act] is by definition intentional and malicious." Pl.'s Opp'n Mot. Dismiss 13, Dkt. No. 70. It is illogical to define what constitutes a *prima facie* violation of a statute by reference to a lack of exceptions.

[16] Whether the practice is humane does not depend upon whether the chickens are ultimately eaten. *See* Opp'n Mot. Dismiss 13-14, Dkt. No. 70.

UPC has a pattern of pursuing frivolous litigation in an attempt to chill First Amendment freedoms. In *Bait Aaron*, the court held that UPC's action against a group of synagogue's Kapparot rites would violate the Free Exercise clause. *Bait Aaron*, at 19, Ex. A. The court held that UPC was "in fact, seeking recourse of the secular courts to end a religious practice on the grounds that Plaintiffs do not like it, and do not believe it is essential to use chickens for the religious ritual." *Id.*; *see also All. to End Chickens as Kapparot v. N.Y.C. Police Dep't*, No. 156730/2015, slip op. at *3 (N.Y. Sup. Ct. Sept. 16, 2015) (brought by UPC's "Alliance to End Chickens as Kaporos"), Ex. C.

Permitting UPC to assume the role of government criminal prosecutor, and thereby allowing it to target synagogues, would violate the First Amendment. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 534 (1993) (holding official action that "targets religious conduct for distinctive treatment" unlikely to withstand strict scrutiny); *Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (3d Cir. 1999) (holding strict scrutiny applies to *applications* of the law that target religious beliefs, and not merely to the lawmakers who first drafted the law); *see also Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 165-67 (3d Cir.

2002) (holding "selective application" of an otherwise neutral and generally applicable law triggers strict scrutiny).

Repeatedly throughout this litigation, UPC has sought to compel Chabad to change its religious practice by abandoning its use of chickens. Pl.'s Ex Parte Appl. TRO 7, Dkt. No. 2 ("Many other entities have stopped killing chickens and instead perform the ceremony by swinging small bags of coins overhead."); *Id.* at 10 ("As Defendants can easily perform their same ceremonies using bags of coins . . . there is no harm to Defendants in granting this TRO."); TRO Hr'g 40:2-6, Dkt. No. 64 ("[T]hey have not shown that they are going to suffer irreparable harm by performing the ritual with coins."); Decl. Rabbi Klein, Dkt. No. 68-10 ("[N]o practitioner to my knowledge has claimed that using coins instead of chickens would be impermissible."); Pl.'s Mot. Prelim. Inj. 1, Dkt. No. 68-1 (asserting that Kapparot "usually" involves coins and questioning the practice of using chickens in America); *Id.* at 2 ("[U]sing chickens in these rituals is not required by any religious teaching."). However, it is well established that UPC may not rely on the beliefs of others to dictate what Chabad's religion requires or how it should practice its religious rites. As the Supreme Court has consistently held, "[I]t is not within the judicial function and judicial competence to inquire [which of two people has] more correctly perceived

the commands of their common faith. Courts are not arbiters of scriptural interpretation." *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981); *see also Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2779 (2014); *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989).[17] Although Orthodox Jews may hold different beliefs about how Kapparot should be performed, the Court may not make any holding as to which perspective in the religious debate is correct. The Court may not allow UPC to coopt the government's power to compel its preferred interpretation.

Selective application of an animal cruelty statute against the religious rite of a synagogue triggers strict scrutiny. The specific injunction UPC seeks – using coins or eating the chickens – is not narrowly tailored to be the least restrictive means of furthering *any* permissible compelling interest. Requiring Chabad to perform the Kapparot rite in the way UPC prefers would violate the Free Exercise clause.

VII. ENJOINING CHABAD'S KAPPAROT RITE WOULD BE AN UNCONSTITUTIONAL PRIOR RESTRAINT ON SPEECH.

[17] UPC criticizes Chabad's citation to *Hernandez*. Pl.'s Mot. 12, Dkt. No. 68-1. However, Chabad did not cite *Hernandez* because of any particular factual similarity, but instead because it follows in this line of clearly established Supreme Court cases holding that secular courts are not arbiters of religious disputes.

The Kapparot rite involves symbolic physical acts of holding in conjunction with a spoken prayer. As explained in the accompanying Anti-SLAPP Reply, the rite is expressive. Granting an injunction against Chabad would be an unconstitutional prior restraint on speech preventing the synagogue from engaging in future religious expression.

Conclusion

For the foregoing reasons, Chabad requests that the Court dismisses or strikes the Complaint.

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Respectfully submitted,

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