SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES – NORTH DISTRICT

RICHELLE OLSON;
LANCE OLSON

Plaintiffs,

V

SACHA BARON COHEN; NBC UNIVERSAL INC.; COLD STREAM PRODUCTIONS, LLC; MRC II DISTRIBUTION COMPANY, L.P.; MEDIA RIGHTS CAPITAL II, L.P.; EVERYMAN PICTURES; MONICA LEVINSON; and DOES 1-100, inclusive

Defendants

Case Number MC 020465

STATEMENT OF DECISION

Date of Hearing:
October 23, 2009
Dept. A-11
Judge Randolph A. Rogers

The Court bases the Order After Hearing of this date upon the following Statement of Decision:

1. This is an unlimited jurisdiction personal injury case in which Plaintiffs Richelle Olson and Lance Olson allege that on or about May 24, 2007, Defendant Sacha Baron Cohen went to the location of 2101 E. Palmdale Blvd. in Palmdale, California, where Richelle Olson was overseeing a charity bingo game. Plaintiffs allege Cohen began calling the second of two bingo games using vulgar and offensive language over the bingo hall's loudspeaker system, and that Olson entered the stage area and asked Cohen to leave the premises. Plaintiffs allege that after Cohen exited the bingo hall, Olson went into a side room to calm down but then lost consciousness, falling onto the ground and hitting her head on the concrete. Plaintiffs allege Olson was taken to the hospital where she was diagnosed with two brain bleeds, and has since been confined to the use of a wheelchair and walker.

2. On July 10, 2009, Plaintiffs filed their First Amended Complaint (FAC). The FAC alleges nine causes of action: (1) negligence (against all defendants); (2) intentional infliction of emotional distress (against all defendants); (3) negligent infliction of emotional distress (against all defendants); (4) conspiracy to defraud (against all defendants); (5) unfair competition in violation of Cal. Bus. & Prof. Code § 17200 et seq. (against all defendants); (6) intentional concealment (against

all defendants); (7) false promise (against all defendants); (8) fraudulent misrepresentation (against all defendants); and (9) loss of consortium (against all defendants).

3. On September 21, 2009, Defendants filed this motion to strike the FAC in its entirety or, in the alternative, certain causes of action in the FAC pursuant to CCP § 425.16 on the grounds that "this action is a 'strategic lawsuit against public participation' or 'SLAPP' and that Plaintiffs cannot demonstrate a reasonable probability of prevailing on their claims to recover for personal injuries." Defendants contend, "Plaintiffs' lawsuit falls within the ambit of the anti-SLAPP statute and thus the FAC must be dismissed with prejudice;" "Plaintiffs cannot meet their burden of showing a reasonable probability of prevailing on any of their claims;" "the executed release expressly relieves Defendants from liability;" "Plaintiffs' claim for conspiracy to defraud fails as a matter of law;" "Plaintiffs fail to plead any facts that would demonstrate an unfair business practice;" "plaintiffs' cause of action for concealment must fail as a matter of law, as plaintiffs cannot satisfy the specific elements of same;" "Plaintiffs fail to specifically allege what 'promise' Defendants made to them;" and "Defendants have established that Plaintiffs will not prevail on any of their alleged causes of action due, in part, to the Standard Consent Agreement signed by each plaintiff, and the fact that plaintiffs cannot establish the requisite elements of their causes of action. Thus, Mr. Olson's loss of consortium claim must also fail as a matter of law and Defendants are entitled to a dismissal." Defendants further contend they are entitled to an award of attorney fees under CCP § 425.16(c).

4. On October 06, 2009, Plaintiffs filed their opposition on the ground "the anti-SLAPP statute, as set forth in Code of Civil Procedure, was never intended to apply to negligence, intentional infliction of emotional distress, negligent infliction of emotional distress, conspiracy to defraud, unfair competition, intentional concealment, false promise, fraudulent misrepresentation or loss of consortium." Plaintiffs contend, "A two-step process must be followed to determine if a SLAPP motion should be granted;" "Defendants [sic] request for judicial notice by this court is improper and Defendants fail to state sufficient facts to support its SLAPP motion;" "Defendants' conduct does not fall under the protection of the anti-SLAPP statute and therefore Defendants' motion should be denied;" "Plaintiffs [sic] First Amended Complaint clearly establishes valid cause of actions [sic] not barred by the anti-SLAPP statute;" and "Plaintiffs are entitled to an award of attorneys' fees."

5. On October 13, 2009, Defendants filed their reply. Defendants contend, "Plaintiffs misstate Defendants' burden of proof and erroneously characterize Defendants' speech;" "Plaintiffs fail to establish that their claims have a reasonable probability of prevailing;" and "Defendants [sic] motion is based upon sound legal and evidentiary grounds and Plaintiffs' request for sanctions should be denied as frivolous."

6. *Motion to strike* – The proper procedure to attack false allegations in a pleading is a motion to strike. CCP § 436(a). In granting a motion to strike made under CCP § 435, "[t]he court may, upon a motion made pursuant to Section 435 [notice of motion to strike whole or part of complaint], or at any time in its discretion, and upon terms it deems proper: [¶] (a) Strike out any irrelevant, false, or improper matter inserted in any pleading." CCP § 436(a). Irrelevant matters include immaterial allegations that are not essential to the claim or those not pertinent to or supported by an otherwise sufficient claim. CCP § 431.10. The court may also "[s]trike out all or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court." CCP § 436(b).

7. As a threshold matter, Defendants contend Plaintiffs' lawsuit falls within the purview of the anti-SLAPP statute, and that, in any case, Plaintiffs executed a consent/release form agreeing to relieve Defendants from liability. We address these issues first.

8. *Strategic Lawsuits against Public Participation (SLAPP)* – The anti-SLAPP statute allows a defendant to gain early dismissal of a SLAPP suit. *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055-56. The statute reflects the legislative recognition that SLAPP suit plaintiffs are not seeking to succeed on the merits but to use the legal system to chill the defendant's First Amendment rights. CCP § 425.16, the anti-SLAPP statute, provides in relevant part:

> "(b)(1) A 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 or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.
>
> (2) In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.
>
> . . .
>
> (e) As used in this section, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in

furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest."

9. In ruling on an anti-SLAPP motion, the trial court engages in a two-step process. "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue,' as defined in the statute. [Citation.] If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim." *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67; accord, *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 733. "Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute – i.e., that arises from protected speech or petitioning *and* lacks even minimal merit – is a SLAPP, subject to being stricken under the statute." *Navellier v. Sletten* (2002) 29 Cal.4th 82, 89 (emphasis original).

10. *Basis of the action* – Defendants contend Plaintiffs' action is based on acts by Defendants that would qualify for protection under the anti-SLAPP statute, as the alleged wrongdoing was conduct in furtherance of Defendants' right to free speech. Plaintiffs, on the other hand, contends the anti-SLAPP statute does not permit individuals to misrepresent facts, make false promises or inflict emotional distress, as Plaintiffs have alleged.

11. A cause of action arises from protected activity within the meaning of CCP § 425.16(b)(1) if the conduct of the defendant on which the cause of action is based was an act in furtherance of the defendant's right of petition or free speech in connection with a public issue. *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78. Subdivision (e) of anti-SLAPP statute defines four categories of acts taken "in furtherance of the person's right of petition or free speech." The two categories that are potentially applicable to this case are "any written or oral statement or writing in a place open to the public or a public forum in connection with an issue of public interest" and "any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." CCP § 426.16(e)(3), (4). A "statement or other conduct is 'in connection with an issue of public interest' [citation] if the statement or conduct concerns a topic of widespread public interest and contributes in some manner to a public discussion of the topic." *Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, 1347.

12. In this case, the conduct on which Plaintiffs are basing their lawsuit stems from actions taken by Defendants while filming the movie "Bruno," a faux documentary featuring a flamboyantly-homosexual Austrian fashion reporter portrayed by Sacha Baron Cohen. As an internationally-renowned entertainer

who has now appeared in many features, including the HBO series "Da' Ali G Show" and the films "Borat: Cultural Learnings of America for Make Benefit Glorious Nation of Kazakhstan" and "Talladega Nights: The Ballad of Ricky Bobby," Cohen is clearly a public figure. The portrayal of Cohen in "Bruno" thus constitutes an issue of public interest. Furthermore, the fact that "Bruno" does not portray Cohen the person, but rather a persona concocted by Cohen, does not preclude it from receiving constitutional protection. As the Supreme Court recognized, "celebrities' take on personal meaning," and the creative use of their images "can be an important avenue of individual expression." *Comedy III Productions, Inc. v. Gary Saderup, Inc.* (2001) 25 Cal.4th 387, 397. Moreover, "there is a public interest which attaches to people who, by their accomplishments, mode of living, professional standing or calling, create a legitimate and widespread attention to their activities. Certainly, the accomplishments and way of life of those who have achieved a marked reputation or notoriety by appearing before the public . . . may legitimately be mentioned and discussed in print or on radio or television." *Carlisle v. Fawcett Productions, Inc.* (1962) 201 Cal.App.2d 733, 746-47.

13. In their opposition, Plaintiffs contend, "The specific nature of Mr. Baron Cohen's speech was not free speech because Mr. Baron Cohen verbally assaulted Mrs. Olson intentionally and directly. She was his target, not the public or the players. Unbeknown to Mrs. Olson, his intent was to elicit a specific response from her. For example, he told her to call him a 'faggot' and would not leave the stage when she asked. He spared [sic] with her directly for several minutes with the intent to elicit a specific reaction from her for entertainment value for his film. In fact, the sole purpose that he targeted Mrs. Olson was to elicit the type of frazzled and angry reaction that she displayed. Therefore, Defendants [sic] goal is not to further free speech. It is to frustrate their target to record a specific response for the sole purpose of making millions of dollars in the film industry." Plaintiffs then cite *Gallimore v. State Farm Fire & Casualty Ins. Co.* (2002) 102 Cal.App.4th 1388 for the proposition that a lawsuit will not fall within the ambit of CCP § 425.16 where a "defendant's wrongful acts [are] the actual basis for the plaintiffs [sic] suit and not defendant's allegedly protected activities."

14. In *Gallimore*, the plaintiff (an individual acting as a private attorney general) alleged the defendant insurer had engaged in the mishandling of insurance claims, constituting unfair business practices. The allegation was based on an investigation of the defendant insurer conducted by the California Department of Insurance, in which the defendant had supplied information to the Department. The insurer, in its CCP § 425.16 motion, asserted it was being sued for its having communicated with the Department in furtherance of its right of petition or free speech. The Court of Appeals rejected that argument, finding that the insurer was being sued for actions allegedly undertaken by it prior to such communications. The Court concluded that the insurer was confusing its allegedly wrongful acts with the evidence the plaintiff might use to prove the alleged misconduct, observing that just because the suit was filed shortly after a report from the

Department containing the information given by the defendant to the Department became public, that did not mean the suit arose from the defendant's supplying of information contained in the report. *Id.* at 1399-1400.

15. As *Gallimore* makes clear, CCP § 425.16 addresses itself to causes of action that *arise from* acts taken in furtherance of a defendant's right of petition or free speech in connection with a public issue; a plaintiff's cause of action does *not* necessarily *arise from* a defendant's CCP § 425.16 protected activity merely because the plaintiff's suit was filed after the defendant engaged in that activity. "The anti-SLAPP statute cannot be read to mean that 'any claim asserted in an action which arguably was filed in retaliation for the exercise of speech or petition rights falls under section 425.16, whether or not the claim is based on conduct in exercise of those rights.' [Citations.]" *Cashman*, 29 Cal.4th at 77. In *Cashman*, the Supreme Court recognized that the phrase "arising from" in CCP § 425.16 should not be construed as meaning "in response to." *Id.* "In short, the statutory phrase 'cause of action . . . arising from' means simply that the defendant's act underlying the plaintiff's cause of action must itself have been an act in furtherance of the right of petition or free speech. [Citation.]" *Id.* at 78. Stated differently, a cause of action may be "triggered by protected activity" without necessarily arising from such protected activity.

16. Neither *Gallimore* nor *Cashman*, however, are of any assistance to Plaintiffs because Plaintiffs have not established that their claims arose merely in response to, but not from, Defendants' activities. We note that in the FAC, Plaintiffs allege, "As Defendant's verbal assault escalated, Plaintiff RICHELLE OLSON, alarmed by his vulgarity and concerned for the Bingo players, approached and entered the stage area where the bingo was being called by SACHA BARON COHEN and repeatedly asked him to stop, to get off the stage and leave the premises, which he ignored . . . . [¶] Simultaneously, several cameramen rushed to the edge of the stage where Defendants placed all the cameras in direct and close proximity to Plaintiff RICHELLE OLSON for a period of one to five minutes to intentionally capture the humiliating emotional reaction instigated by Defendants SACHA BARON COHEN against her. [¶] Defendants recorded Plaintiff RICHELLE OLSON'S humiliation, emotional distress and embarrassment." These allegations plainly establish that the action underlying Plaintiffs' causes of action was Defendants' act of interacting with Olson for the purpose of filming scenes for "Bruno," which, as we concluded above, is an act in furtherance of the exercise of the constitutional right of free speech in connection with a public issue or an issue of public interest.

17. Plaintiffs further contend, "It has been well established that there is a major distinction between conducting free speech in a public setting versus a private setting. Speech is only granted on private property for limited circumstances and by contract . . . . [¶] Here, Mrs. Olson was operating a private non-profit Bingo Hall, not used for a public forum but rather to conduct a bingo game. Their intent was to make a profit for charity, not to open the forum for free speech or public

issues per the legislative intent or statute." Contrary to Plaintiff's contention, the anti-SLAPP statute protects not merely statements or writings in a place open to the public or a public forum, but also any other conduct in furtherance of the exercise of the constitutional right of free speech in connection with a *public issue or an issue of public interest* (CCP § 425.16(e)(4)), regardless of the forum. Therefore, the issue is not the forum in which the alleged misconduct took place but whether, by choice or circumstance, Plaintiffs became involved in a public issue and/or a matter of public interest.

18. A public issue is implicated if the subject underlying the claim: (1) was a person in the public eye; (2) could directly affect a large number of people beyond the direct participants; or (3) was a topic of widespread public interest. *Commonwealth Energy Corp. v. Investor Data Exchange, Inc.* (2003) 110 Cal.App.4th 26, 33. In this case, Richelle Olson became involved in a public issue because her interaction with Cohen was something that had the potential to become a topic of widespread public interest and directly affect a large number of people beyond Olson and Cohen themselves.

19. *Hall*, 153 Cal.App.4th 1337 is instructive on this issue. In that case, the Court of Appeals held that a television interview with Marlon Brando's former housekeeper who had been named as a beneficiary in the late actor's will constituted protected activity under CCP § 425.16. *Id.* at 1347. While acknowledging that the plaintiff was not a public figure, the Court of Appeal reasoned that "[t]he public's fascination with Brando and widespread public interest in his personal life made Brando's decisions concerning the distribution of his assets a public issue or an issue of public interest. Although Hall was a private person and may not have voluntarily sought publicity or to comment publicly on Brando's will, she nevertheless became involved in an issue of public interest by virtue of being named in Brando's will." *Id.*

20. Similarly, in *M.G. v. Time Warner, Inc.* (2001) 89 Cal.App.4th 623, 629, the Court concluded that free speech rights under CCP § 425.16 were "unquestionably implicated" in the publication of a photograph of a Little League baseball team whose manager had been convicted of child molestation. The Court noted that while "plaintiffs try to characterize the 'public issue' involved as being limited to the narrow question of the identity of the molestation victims, that definition is too restrictive. The broad topic of the article and the program was not whether a particular child was molested but rather the general topic of child molestation in youth sports, an issue which . . . is significant and of public interest." *Id.*

21. The same reasoning applies here. We acknowledge that a "public figure is a person who has assumed a role of special prominence in the affairs of society, who occupies a position of persuasive power and influence, or who has thrust himself to the forefront of a particular public controversy in order to influence the resolution of the issues involved" (*Weinberg v. Feisel* (2003) 110 Cal.App.4th

1122, 1131) and that a "private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention" (*Wolstan v. Reader's Digest Assn., Inc.* (1979) 443 U.S. 157, 167). There is nothing to suggest Richelle Olson is or was transformed into a public figure through her interaction with Cohen. Nevertheless, she became involved in an issue of public interest when she interacted with Cohen and the members of the camera crew for "Bruno," which was ultimately shown in thousands of movie theaters across the world and created worldwide discourse on the topic of homophobia. Furthermore, unlike the plaintiffs in *Hall* and *M.G.*, Richelle Olson knowingly and freely appeared in public with Cohen as Cohen was being filmed for the movie (we acknowledge Olson contends that her consent was fraudulently obtained, which we address below). *Seelig v. Infinity Broadcasting Corp.* (2002) 97 Cal.App.4th 798 is instructive on this issue. In *Seelig*, the Court of Appeals held that CCP § 425.16 applied to disparaging comments made by radio talk show hosts about a contestant on the reality television show, "Who Wants to Marry a Millionaire." *Id.* at 808. In concluding that the on-air comments concerned a matter of public interest, the Court observed that the television show was "of significant interest to the public and the media" and that "[b]y having chosen to participate as a contestant in the [s]how, plaintiff voluntarily subjected herself to inevitable scrutiny . . . by the public and the media." *Id.* at 807-808.

22. Plaintiffs further contend "wrongful conduct is not shielded by the anti-SLAPP statute" and that *Gallimore* "made clear that 'wrongful acts' do not merit the protection of Code of Civil Procedure § 425.16." First, *Gallimore* said nothing of the kind. Second, this argument makes absolutely no sense because *all* lawsuits allege wrongful acts of one kind or another. To contend that CCP § 425.16 does not apply to allegations of wrongful conduct is akin to saying that CCP § 425.16 has no applicability in any case whatsoever. We acknowledge that Plaintiffs allege Richelle Olson was deceived into consenting to Cohen's appearance at the bingo hall, and Plaintiffs will have an opportunity to establish a prima facie case if the burden shifts to Plaintiffs to demonstrate a probability of prevailing on their claims. Those claims, however, cannot be considered by this court as dispositive of whether Defendants satisfy their burden of proof here, given that this burden is concerned specifically with whether the challenged causes of action are ones arising from protected activity. To conclude that a particular activity is not entitled to constitutional protection simply because Plaintiffs have alleged certain causes of action, as Plaintiffs would have us do, would be to misconstrue the standard for ruling on an anti-SLAPP motion.

23. "Bruno" presents a satirical perspective on homosexuality, gay culture and same-sex marriage, all of which are hot-button topics, particularly in this state. Our judicial system is certainly no stranger to these issues. The issue of same-sex marriage, for example, was examined in one of the most hotly-debated California cases in recent memory, *In re Marriage Cases* (2008) 43 Cal.4th 756, wherein our

Supreme Court held that state statutes denying same-sex couples the right to marry violated the California Constitution.

24. The origin of the *Marriage Cases* can be traced back to February 12, 2004, well before Defendants began filming "Bruno," when the City and County of San Francisco (City) began issuing marriage licenses to same-sex couples. *Marriage Cases*, 43 Cal.4th at 785. The following day, the organization Campaign for California Families filed an action in San Francisco Superior Court, originally entitled *Thomasson v. Newsom* and subsequently retitled as *Campaign for California Families v. Newsom* (*Campaign*) (Super. Ct. S.F. City & County, No. 428794). Campaign sought a writ of mandate and immediate stay to prohibit the issuance of marriage licenses to same-sex couples. On the same day Campaign filed its lawsuit, the Proposition 22 Legal Defense and Education Fund filed a separate lawsuit seeking the same relief as Campaign in *Proposition 22 Legal Defense and Education Fund v. City and County of San Francisco* (*Fund*) (Super. Ct. S.F. City & County, No. 503943).

25. After the trial court declined to grant an immediate stay in the *Campaign* and *Fund* actions, the California Attorney General and a number of taxpayers filed two separate writ petitions in the Supreme Court requesting that court's immediate intervention to halt the issuance of marriage licenses to same-sex couples. *Marriage Cases*, 43 Cal.4th at 785. On March 11, 2004, the Supreme Court agreed to intervene in the case, which ultimately resulted in the decision handed down in *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055 (*Lockyer*). At the time it agreed to take the case, the Court issued an order directing City officials to refrain from issuing marriage licenses to same-sex couples. The court's order also stayed all proceedings in the *Campaign* and *Fund* cases then pending in the San Francisco Superior Court. Id. at 785-86. However, the Supreme Court indicated that its stay order did not preclude the filing of a separate action raising a direct challenge to the constitutionality of California's marriage statutes. *Id.* at 786.

26. Shortly after the Supreme Court issued a stay in the *Lockyer* action, the City filed a writ petition and complaint for declaratory relief in the trial court, seeking a declaration that California statutory provisions limiting marriage to unions between a man and a woman violate the California Constitution. *Marriage Cases*, 43 Cal.4th at 786. A number of same-sex couples filed similar actions challenging the constitutionality of California's marriage statutes. *Id.* A judge appointed by the Chair of the Judicial Council ordered that a total of six actions, including the *Campaign* and *Fund* lawsuits as well as the lawsuits challenging the constitutionality of California's marriage statutes, be coordinated into a single proceeding entitled *In re Marriage Cases* (JCCP No. 4365). *Id.*

27. While the *Marriage Cases* coordination proceeding was pending in the trial court, the Supreme Court issued its decision in *Lockyer*, concluding that City officials lacked authority to issue marriage licenses to same-sex couples in the absence of a

judicial determination that statutory provisions limiting marriage to a union between a man and a woman were unconstitutional. *Lockyer*, 33 Cal.4th at 1069. The court issued a writ of mandate directing the City to comply with the marriage statutes then in effect and to notify all same-sex couples who had been married before the Supreme Court issued its stay that their marriages were invalid and a legal nullity. *Id.* at 1069, 1120.

28. Following issuance of the remittitur in *Lockyer*, Campaign and Fund moved to amend their complaints in the *Marriage Cases* to include claims for declaratory relief. The City and other parties opposed the request and moved to dismiss the *Campaign* and *Fund* actions as moot, arguing that the Supreme Court's decision in *Lockyer* had granted all the relief sought in the lawsuits and that the plaintiffs in those actions lacked standing to pursue bare claims for declaratory relief. The trial court denied the request to amend but also denied the motion to dismiss, concluding that the *Campaign* and *Fund* complaints adequately stated claims for declaratory relief concerning the constitutionality of the marriage laws.

29. On April 13, 2005, the trial court issued a decision in the Marriage Cases, ruling that California statutes defining marriage as a union between a man and a woman violated the California Constitution. *Marriage Cases*, 43 Cal.4th at 787. Campaign, along with other losing parties, appealed the trial court's decision to the Court of Appeals. In the appellate proceedings, Campaign filed an opening and a reply brief, and was permitted to participate in oral argument as a party. The Court of Appeals reversed the trial court on the substantive constitutional issue presented, holding that the marriage statutes then in effect did not violate the California Constitution. *Marriage Cases*, 43 Cal.4th at 788. However, the Court also held that the *Campaign* and *Fund* cases should have been dismissed by the trial court following the decision in *Lockyer* because Campaign and Fund lacked standing to seek purely declaratory relief. *Id.* at 790.

30. The Supreme Court granted review in the *Marriage Cases*. Before the Supreme Court voted to grant review, Campaign had filed an answer brief opposing review. After review was granted, Campaign filed an opening brief addressing justiciability issues, an answer brief on the merits, a supplemental brief on justiciability issues, a supplemental reply brief on the merits, and an answer to amicus curiae briefs. As in the Court of Appeals, Campaign was permitted to argue as a party on the merits as well as on the issue of its standing.

31. On May 15, 2008, the Supreme Court issued its opinion in the *Marriage Cases*, holding that marriage statutes violated the California Constitution to the extent they limited marriage to opposite-sex couples. *Marriage Cases*, 43 Cal.4th at 785. (Subsequently, at the general election held on November 4, 2008, a majority of the voters approved Proposition 8, an initiative measure that amended the California Constitution to provide that "[o]nly marriage between a man and woman is valid or recognized in California." Cal. Const., art. I, § 7.5.) Although the Supreme Court reversed the Court of Appeals on the substantive constitutional

question, it affirmed that court's holding that Campaign and Fund lacked standing, concluding that "once [the Supreme Court's] decision in *Lockyer* granted the mandamus relief sought by the Fund and the Campaign in their previously filed lawsuits against the City and its officials, the superior court should have dismissed those actions as moot." *Id.* at 791-92 (footnote omitted). The Supreme Court further indicated that the prevailing parties were entitled to recover their costs. *Id.* at 857.

32. The prohibition of benefits to same-sex spouses under the federal Defense of Marriage Act (DOMA), 1 U.S.C. § 7, is another closely-watched issue in this state. In *In re Levenson*, 560 F.3d 1145 (9th Cir. 2009), the Ninth Circuit Court of Appeals ruled that the denial of federal health, dental and vision benefits to the same-sex spouse of a deputy federal public defender in the Office of the Federal Public Defender (FPD) for the Central District of California violated the Ninth Circuit's Employment Dispute Resolution Plan for Federal Public Defenders and Staff ("EDR Plan"), which expressly prohibits discrimination on the basis of sex and sexual orientation. Although not precedential, the decision further concluded that the denial of benefits violated the Constitution.

33. The plaintiff Brad Levenson had been a deputy federal public defender in the FPD since July 11, 2005; he and his partner Tony Sears had been together for 15 years. 560 F.3d at 1145-46. They registered their domestic partnership on March 16, 2000, and were married in California on July 12, 2008, at a time when the law in this state permitted persons to marry individuals of the same sex. On July 15, 2008, Levenson requested that his husband be added as a family member beneficiary of his federal benefits. That request was denied on the basis that the provision of benefits to same-sex spouses is prohibited by DOMA. Levenson challenged that denial as a violation of his rights under the EDR Plan and the Constitution. *Id.*

34. The Court recognized that FPD employees and their family members have the right to the specified benefits pursuant to the Federal Employee Health Benefits Act, 5 U.S.C. §§ 8901-8914 (FEHBA), and FEDVIP, the federal employee dental and vision insurance program. 560 F.3d at 1146, fn. 2; see 5 U.S.C. §§ 8951-62, 8981-92; 5 C.F.R. §§ 894.101 et seq. Before Levenson joined the FPD, he was employed in the California Attorney General's Office, which provided Sears with full medical, dental, and vision benefits. Since Levenson joined the FPD, he and Sears had paid the full cost of Sears's health insurance premiums as well as his dental and vision care. 560 F.3d at 1146, fn. 2.

35. The Court ruled that the denial of benefits to Levenson's spouse violated the anti-discrimination provisions of the EDR Plan as well as the Due Process Clause of the Fifth Amendment. 560 F.3d at 1147. The Court then directed the Director of the Administrative Office of the United States Courts ("AOC") to submit Levenson's Health Benefits Election form 2809 to the appropriate health insurance carrier, and to process his request for FEDVIP coverage. The Court

further retained jurisdiction over the matter in order to ensure that Levenson's spouse received the benefits to which he was entitled. *Id.* at 1151.

36. The purpose of "Bruno" was to show audiences what would happen when a film crew followed a blatantly-homosexual character portrayed by a celebrity as the character interacted with members of the public, raising issues of homosexuality, gay culture and same-sex partnerships in an attempt to craft a sly commentary on the state of homophobia in our society. Richelle Olson became a part of those activities when she agreed to allow Cohen to participate in the bingo game while making a film. As *In re Marriage cases* and *In re Levenson* establish, the issues raised by "Bruno" – whether inadvertently or not – are topics of public interest. Furthermore, those cases are merely two of the more recent events in the lengthy public discourse of these issues that originated well before "Bruno" was conceived and has been ongoing for decades. Thus, by interacting with Cohen as the cameras were rolling, Richelle Olson interjected herself into an issue of public interest. Accordingly, Defendants have met their burden of establishing that Plaintiffs' claims arise from constitutionally protected activity within the meaning of CCP § 425.16.

37. *Probability of success* –Defendants have met their burden to demonstrate that the act or acts of which Plaintiffs complain were taken in furtherance of their right to free speech under the United States or California Constitution in connection with a public issue, as defined in CCP § 425.16. As a result, the burden of proof shifts to Plaintiffs to demonstrate a probability of prevailing on their claims.

38. "'In order to establish a probability of prevailing on the claim [citation], a plaintiff responding to an anti-SLAPP motion must "'state[ ] and substantiate[ ] a legally sufficient claim.'" [Citation.] Put another way, the plaintiff "must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." [Citations.] In deciding the question of potential merit, the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant [citation]; though the court does not weigh the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim.'" *Vargas v. City of Salinas* (2009) 46 Cal.4th 1, 19-20; see also *DuPont Merck Phamaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562, 568 (to establish a probability of prevailing, a plaintiff must substantiate each element of the alleged cause of action through competent, admissible evidence).

39. Both parties have separately submitted video footage – film footage from Defendants, amateur video from Plaintiffs – which the parties contend document the incident in question. This court has reviewed the footage in its entirety and observes that the incident as depicted on screen stands in stark contrast to the incident as alleged by Plaintiffs. The sum and substance of Plaintiffs' First

Amended Complaint is that Defendants' alleged misconduct – in particular, the actions of Cohen – was comprised of vulgar and offensive verbal assaults directed at Richelle Olson in order to elicit and capture on camera a humiliating emotional reaction. The footage, however, shows nothing of the kind.

40. Defendants' footage, which is more than twenty minutes long, shows Cohen (or Bruno, if you will) interviewing Plaintiff Lance Olson in a back room and asking questions about how to call a bingo game. Occasionally, Cohen talks to his producer, camera crew and makeup artist in rudimentary German, ostensibly in an effort to maintain Bruno's Austrian persona. The video then shows Cohen calling bingo games on stage for the benefit of the players – first with assistance from Lance Olson and then on his own – while telling ribald stories about his (former) gay lover. At times, laughter from the audience is clearly audible. While Cohen is calling these games, Richelle Olson is not on stage with him. She can be seen from time to time in various corners of the bingo hall holding a microphone.

41. Contrary to Plaintiffs' implication, Defendants' footage further establishes that it was Richelle Olson who initiated the controversy with Cohen and not vice versa. At one point, Olson, perhaps agitated with Cohen's/Bruno's description of his sexual travails, calls Bruno an "it" and tells security to get "it" offstage and out of the building. Olson proceeds to the top of the stage, where she tries to a pull a chair out from under Cohen/Bruno while he is still seated. She then asks the participants whether they would prefer Cohen/Bruno to stay or for him to leave and for her to call the games. Cohen/Bruno calls Olson a "faggot" at one point after he stands up. Up to that point, however, Cohen/Bruno does not address Olson directly on camera. Cohen and crew are then escorted out of the bingo hall.

42. Plaintiff's video, which is about one minute long and appears to have been shot by one of the bingo players, shows two things. First, we see a shot of a person who appears to be Richelle Olson walking toward a room with another individual walking beside her; only the individuals' backsides are visible as they are walking away from the camera. The video then cuts to a shot of Richelle Olson lying face down on the floor, either asleep, unconscious or merely with her eyes closed, as several individuals try to turn her over. While jump cuts are a fun and interesting stylistic technique when used in dramatizations (movie purists may differ on this subject), Plaintiffs' video is a prime example of why jump cuts in amateur videos purporting to substantiate a litigant's "side of the story" are generally unhelpful.

43. In summary, Plaintiffs have offered no evidence in opposition to Defendant's anti-SLAPP motion. Plaintiffs' video does not substantiate their claims. Indeed, it does not even depict any part of the alleged encounter between Cohen and Richelle Olson. The only other citations to the record Plaintiffs provide to support the contention that their causes of action are not barred by the anti-SLAPP statute are to their arguments in opposition to this motion – which are not evidence – and to the declaration of their counsel Kyle K. Madison, which is evidence but does not address any of the elements of Plaintiffs' causes of action.

That Plaintiffs may have alleged facts sufficient to constitute causes of action against Defendants is not sufficient to meet their burden of proof under the second prong of the anti-SLAPP analysis, because that prong requires Plaintiffs' claims to be *both* legally sufficient *and* substantiated by an evidentiary basis sufficient to establish a prima facie entitlement to those claims. Therefore, we need not conduct a demurrer analysis to determine whether Plaintiffs' causes of action are legally sufficient, because even if they were, Plaintiffs have not adduced any evidence in support of them. Thus, Plaintiffs cannot demonstrate a probability of prevailing on their claims.

44. Based on the foregoing, both prongs of the anti-SLAPP statute have been met: Defendants have established that Plaintiffs' claims that arise from protected speech or petitioning, and Plaintiffs have failed to establish that their claims have even a minimum of merit. As a result, Plaintiffs' lawsuit is a SLAPP, subject to being stricken under CCP § 425.16.

45. In light of these circumstances, we need not consider the applicability of the consent/release form allegedly signed by Plaintiffs.

46. Accordingly, the motion of Defendants to strike Plaintiffs' First Amended Complaint is GRANTED.

47. The motion of Defendants to strike certain causes of action in Plaintiffs' First Amended Complaint in the alternative is MOOT.

SO ORDERED AND ADJUDGED this the 24th day of November, 2009.

RANDOLPH A. ROGERS, JUDGE