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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

ARTHUR WILLIAM BELL, III, an individual, and AIRYN RUIZ BELL, an individual,

Plaintiffs,

v.

MICHAEL ALAN WEINER a/k/a MICHAEL SAVAGE, an individual, WESTWOOD ONE, INC., a Delaware corporation, and CUMULUS BROADCASTING INC., a Delaware corporation,

Defendants.

Case No. 3:16-CV-6879 EDL

DEFENDANTS' NOTICE OF MOTION AND JOINT SPECIAL MOTION TO STRIKE (ANTI-SLAPP MOTION)

[Declaration of Kimberly Wildish and Proposed Order submitted separately and concurrently herewith]

DATE: March 14, 2017
TIME: 9:00 a.m.
PLACE: Courtroom E, 15th Floor

Honorable Elizabeth D. Laporte

TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on March 14, 2017 at 9:00 a.m., or as soon thereafter as the matter may be heard, in Courtroom E of the above-entitled Court, located at 450 Golden Gate Avenue, San Francisco, California 94102, the Honorable Elizabeth D. Laporte presiding, defendants Michael Alan Weiner a/k/a Michael Savage, Westwood One, Inc. and Cumulus Broadcasting LLC (improperly sued as Cumulus Broadcasting Inc.) (collectively, "Defendants") will and hereby do jointly and specially move pursuant to section 425.16 of the California Code of Civil Procedure to strike all causes of action against them in Plaintiffs' First Amended Complaint.

The Motion is made on the grounds that: 1) the claims for relief against Defendants arise from conduct in furtherance of speech protected by California's anti-SLAPP statute, namely, a joke Mr. Savage made during a broadcast of his call-in radio talk show *Savage Nation*, and 2) Plaintiffs cannot demonstrate a probability that they will prevail on the merits of their claims. Defendants reserve the right to move for an award of their attorneys' fees and costs incurred in bringing this Motion pursuant to section 425.16(c) of the California Code of Civil Procedure.

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This motion is based upon the Notice of Motion and Motion, the attached Memorandum of Points and Authorities, the declaration of Kimberly Wildish and exhibit thereto, the First Amended Complaint, the file and record in this matter, the Proposed Order, and any matters which the Court may consider at or in connection with the hearing on this Motion.

Respectfully submitted,

Dated: February 6, 2017

KATTEN MUCHIN ROSENMAN LLP
Tami Kameda Sims
Leah E.A. Solomon
Floyd A. Mandell
Carolyn M. Passen

Attorneys for Defendants Westwood One, Inc. and Cumulus Broadcasting LLC

By: /s/ Floyd Mandell
Floyd Mandell

Dated: February 6, 2017

LAW OFFICE OF DANIEL HOROWITZ
Daniel Horowitz

Attorney for Defendant Michael Alan Weiner a/k/a Michael Savage

By: /s/ Daniel Horowitz
Daniel Horowitz
(Per Local Rule 5-1(i)(3), Mr. Horowitz's concurrence in the filing of this document was obtained on February 3, 2017.)

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs' entire lawsuit arises from a single joke made by Defendant Michael Savage, a radio personality Plaintiffs themselves describe as a "shock jock." Mr. Savage made the joke during the September 23, 2016 broadcast of his call-in radio talk show *Savage Nation* in the context of discussing three subjects too controversial and risky to be discussed on talk radio. The conclusion that no listener would reasonably construe the joke as an assertion of fact is apparent when one listens to the broadcast, hears the joke in the context of the entire program, and hears Mr. Savage contemporaneously refer to it as a "joke." But even in isolation, the content of the joke that forms the basis of all of Plaintiffs' claims—"You say UFOs, you wind up in the Philippines with a 10-year-old hooker and you are off the radio after a number of years" (the "Joke")—is so blatantly exaggerated no listener would reasonably construe it in a literal sense.

This action falls squarely within California's anti-SLAPP statute, which is designed to prevent meritless lawsuits that chill the valid exercise of freedom of speech. Mr. Savage made statements in a public forum (his call-in radio talk show) in connection with issues of public interest, namely politics, the First Amendment, and pop culture topics such as controversial subjects to avoid on talk radio. There is also a public interest in Mr. Savage's radio program itself, as illustrated by the complaint; it alleges that *Savage Nation* has "an audience of over 5,000,000 listeners," is "routinely rated as one of the top five most popular terrestrial radio programs in the United States," is "broadcast on over 400 radio stations throughout the United States," and is "available throughout the world via online streaming services."

Plaintiffs cannot meet their burden of establishing a *probability* of success on the merits of their claims where, as here, the Joke is fair commentary and rhetorical hyperbole protected under the First Amendment, and incapable of sustaining a defamatory meaning *as a matter of law*. In addition, the Joke is not "of and concerning" Plaintiffs. Thus, Plaintiffs' defamation claims necessarily fail under California and federal law, as do Plaintiffs' derivative false light and emotional distress claims because they arise from and depend on the same statements as the defamation claims.

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Accordingly, and for the reasons detailed below, Defendants respectfully request that this special motion be granted and that Plaintiffs' First Amended Complaint ("FAC") be stricken in its entirety.[1]

II. ISSUES TO BE DECIDED

This motion presents the following issues for decision:

1. Whether Plaintiffs' claims for defamation, defamation per se, false light invasion of privacy, intentional infliction of emotional distress, and negligent infliction of emotional distress arise out of protected activity within the meaning of California's anti-SLAPP statute.

2. Whether Plaintiffs' defamation claims have a probability of success on the merits.

3. Whether the Joke conveys the requisite factual imputation as a matter of law.

4. Whether the Joke is "of and concerning" Plaintiffs as a matter of law.

5. Whether Plaintiffs' false light invasion of privacy, intentional infliction of emotional distress, and negligent infliction of emotional distress claims have a probability of success on the merits where they arise from and depend on the same statements as Plaintiffs' defamation claims.

III. SALIENT FACTS

Defendant Michael Savage is a "shock jock" radio personality. FAC ¶¶ 31, 35. He is the host of the radio talk show *Savage Nation* (the "Radio Show"), which has an audience of over five million listeners and is routinely rated one of the top five most popular terrestrial radio programs in the United States. FAC ¶ 31.

All of Plaintiffs' claims arise from a single Joke Mr. Savage made during the Radio Show on September 23, 2016 (the "September 23 Program"). FAC ¶¶ 1-4. The Joke is quoted in the FAC, but Plaintiffs also provide a YouTube link to the entire September 23 Program.[2] FAC ¶ 38

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[1] Because this motion is based on purely legal arguments rather than factual challenges, discovery should be automatically stayed. Cal. Civ. Proc. Code § 425.16(g) (West 2015) (providing that all discovery proceedings should be stayed upon the filing of a notice of motion made pursuant to this section); *Nat'l Abortion Federation v. Center for Medical Progress*, No. 15-cv-03522-WHO, 2015 WL 5071977 at *5 (N.D. Cal. Aug. 27, 2015) (District courts will impose the requirements of 425.16(g) where the issues raised in an anti-SLAPP motion are clean legal issues that render discovery irrelevant to the resolution of the motion.).

[2] For ease of reference, a transcription of the entire September 23, 2016 program is attached as Exhibit A to the Declaration of Kimberly Wildish filed concurrently herewith. *See* Wildish Decl., Ex. A.

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(providing a URL linking to a video recording of the September 23 Program in its entirety: https://www.youtube.com/watch?v=gDVFQxKh6ks).

A. The September 23 Program

The September 23 Program begins with a "warning," advising listeners that the program "contains adult language. Adult content. Psychological nudity" and that "Listener discretion is advised." Wildish Decl., Ex. A at 1:2-6. The Joke was made approximately 36 minutes into the September 23 Program. FAC ¶ 38. Earlier in the program, Mr. Savage expressed his views on a variety of topics, including gun ownership, politics, and the First Amendment. Wildish Decl., Ex. A at 1-37. The following are just a few of his comments:

- On people who do not own guns: "They're afraid they'll kill themselves. Because they're usually medicated, and they're terrified of themselves. They're usually very liberal. They're afraid of themselves, so therefore they have projected upon the gun. . . But it's not the gun that will kill you, it's your own psycho behavior that will kill you." Wildish Decl., Ex. A at 12:19-25 and 13:1-5.
- On kids today: " . . . most of them are dummies. They stare at a computer. They don't know anything. They don't even know what an encyclopedia is. They hit Google for every answer on earth. The Google algorithm is run by a bunch of left wing fanatics, who feed them the same garbage that they want them fed." *Id*. at 16:23-25 and 17:1-4.
- On love: "They cried over love in my generation. It's unbelievable to me. Pounding hearts. Sleepless nights. Vomiting over love. Look what it is today. Nothing. A sneeze in the night, a Kleenex in the garbage. They go dancing and throw an embryo in the trash can and go back to the dance." *Id*. at 18:20-25 and 19:1.
- On immigration policy: "Who supports the military? Who will close the borders? Who will support the police more? Trump. She will rip the borders apart altogether like Obama has done, although she'll finish the job; where there is no border between us and Mexico. And it will be all over. We'll become a third world dictatorship. A garbage can." *Id*. at 24:19-25 and 25:1.

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These are only a few excerpts from the September 23 Program, but are representative of Mr. Savage's rhetorical style and of the type of subject matter routinely discussed on the Radio Show. All of these comments, and the many others Mr. Savage made prior to the Joke, set the tone for the Joke.

B. The Joke

Approximately 36 minutes into the September 23 Program, Mr. Savage made the Joke in discussing the "three things" that in his experience are too controversial and too risky to discuss on talk radio. He states:

> I generally avoid gun questions. I know this from the first day on radio. I learned: You never do certain topics where you can destroy your show. Third rail. You don't talk about three things. One: Guns. You say "Guns" you're finished. For three months, they'll talk about guns. *You say "UFOs" you wind up in the Philippines with a 10-year-old hooker. And you're off the radio after a number of years. You can't do UFOs. That's an IN joke, by the way, for people who understand the business.* There are other topics you can't do. But today I'm violating my own protocols of the history of talk radio, which is I'm doing guns.
>
> Because guns are in the news again.

Wildish Decl., Ex. A at 36:24-25 and 37:1-14; *see* also FAC ¶ 38. As shown above, the Joke is contemporaneously identified during the radio broadcast as a "joke." Additionally, only three minutes after making the Joke, Mr. Savage advised that his show is not a source for "facts." Wildish Decl., Ex. A at 41:18-25 and 42:1-2. He said: "If you're new to radio, you don't know what I'm doing. You're saying: Who is this guy? What's he talking about? What's with the God and the doo wop and the "this" and "the wires" and "the thing"? Get down to facts, Guy. Who are you? Tell us about the debate. Tell us who's winning. Read the facts. That's not the kind of show I do. That's not what I do." *Id*.

C. The First Amended Complaint

Plaintiffs assert seven causes of action against all Defendants, each arising from the Joke: Defamation under Cal. Civ. Code §§ 44, 46 and 48.5 (alleged as claims 1 and 2 on behalf of Mr. Bell

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and Ms. Bell, individually); Defamation Per Se under Cal. Civ. Code §§ 44, 46 and 48.5 (alleged as claims 3 and 4 on behalf of Mr. Bell and Ms. Bell, individually); False Light Invasion of Privacy (alleged as claim 5 on behalf of Mr. Bell only); Intentional Infliction of Emotional Distress (alleged as claim 6 on behalf of both Plaintiffs); and Negligent Infliction of Emotional Distress (alleged as claim 7 on behalf of both Plaintiffs). FAC ¶¶ 55–119. The FAC charges Mr. Savage with making the Joke and Defendants Westwood One and Cumulus with permitting it to be broadcasted. FAC ¶¶ 38, 41.

As detailed next, the Joke was made in a public forum in connection with an issue of public interest. As such, it is Plaintiffs' burden to establish, by competent and admissible *evidence*, a probability that they will prevail on their claims. Plaintiffs cannot meet this burden because the Joke is protected commentary under the First Amendment and incapable of sustaining a defamatory meaning as a matter of law. Additionally, the Joke is not a statement "of and concerning" Plaintiffs as a matter of law. As such, all of Plaintiffs' claims should be stricken pursuant to California's anti-SLAPP statute.

IV. LEGAL STANDARD FOR ANTI-SLAPP MOTIONS

California's anti-SLAPP statute provides defendants with recourse against "Strategic Lawsuits Against Public Participation." The statute authorizes special motions to strike any "cause of action against a person arising from any act . . . in furtherance of the person's right of . . . free speech under the United States Constitution or the California Constitution in connection with a public issue." Cal. Civ. Proc. Code § 425.16(b)(1). Section 425.16 was enacted specifically "to provide for the early dismissal of unmeritorious claims filed to interfere with the valid exercise of the constitutional right[] of freedom of speech." *Club Members for an Honest Election v. Sierra Club*, 45 Cal. 4th 309, 315 (2008). The California legislature expressly provided that Section 425.16 "shall be construed broadly." *Id*. (quoting Cal. Civ. Proc. Code § 425.16(a)).[3] Accordingly, the California Supreme Court instructs that the statute shall be interpreted "in a manner 'favorable to the

[3] "Motions to strike a state law claim under California's anti-SLAPP statute may be brought in federal court." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1109 (9th Cir. 2003); *Mebo Int'l, Inc. v. Yamanaka*, 607 Fed. Appx. 768, 769 (9th Cir. 2015).

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exercise of freedom of speech, not its curtailment.'" *Briggs v. Eden Council for Hope & Opportunity*, 19 Cal. 4th 1006, 1119 (1999).

Anti-SLAPP motions require a two-step analysis. *Id*. First, the defendant must make a threshold showing that the challenged cause of action arises from protected activity, i.e., that the acts of which the plaintiff complains were taken in furtherance of the defendant's right of free speech in connection with a public issue. *Id*. The burden then shifts to the plaintiff to establish, by competent and admissible evidence, a probability that she will prevail on her claims. *Navellier v. Sletten,* 29 Cal. 4th 82, 95 (2002); *United Tactical Sys., LLC v. Real Action Paintball, Inc.,* 143 F.Supp.3d 982, 998 (N.D. Cal. 2015). Applying this two-step process to Plaintiffs' claims against the Defendants, this motion should be granted.

V. STEP ONE: DEFENDANTS HAVE MET THEIR BURDEN BECAUSE PLAINTIFFS' CLAIMS ARISE FROM PROTECTED ACTIVITY.

Under the first step of the analysis, the Court determines whether Plaintiffs' claims arise from an activity protected by the First Amendment. Under the statute, protected activities include:

> …(3) any written or oral statement[s] or writing[s] made in a place open to the public or a public forum in connection with an issue of public interest, [and] (4) 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.

Cal. Civ. Proc. Code § 425.16(e)(3)-(4). In making this determination, the merits are immaterial. *See City of Costa Mesa v. D'Alessio Invs.*, LLC, 214 Cal. App. 4th 358, 371 (2013). A defendant's burden is satisfied so long as the activity the plaintiff complains about falls within at least *one* of the four categories. In this case, the complained of activity falls within two protected categories, subdivisions 425.16(e)(3) and (e)(4).

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A. The Joke Was Made in a Public Forum in Connection with an Issue of Public Interest Satisfying Section 425.16(e)(3).

Each of Plaintiffs' claims arises from the same Joke made by Mr. Savage in a public forum in connection with an issue of public interest. As such, these statements meet both the public forum test and the public interest test; step one of the anti-SLAPP analysis is therefore easily satisfied.

1. Mr. Savage's Popular, Call-in Radio Talk Show Is a Public Forum.

The statutory phrase "public forum" is not limited to physical settings, but is interpreted broadly to include "other forms of public communication." *Damon v. Ocean Hills Journalism Club*, 85 Cal. App. 4th 468, 476 (2003). Mr. Savage's Radio Show is broadcast on public radio stations to a listener base of approximately five million people. FAC ¶¶ 31, 32. As the transcript of the September 23 Program evidences, listeners frequently call in to express on-air their opinions on various topics of interest to the public, e.g., gun ownership. Wildish Decl., Ex. A at 10:16-20 and 46:4-10. Accordingly, the Radio Show qualifies as a "public forum" within the act. *See, e.g., Ingels v. Westwood One Broad. Servs., Inc.*, 129 Cal. App. 4th 1050, 1070 (2005) ("We have no trouble concluding that respondents' activity in providing an open forum by means of a call-in radio talk show fits within the scope of section 425.16 . . . .").

The first element of section 425.16(e)(3) is thus satisfied.

2. Mr. Savage's Radio Show and the September 23 Program Concern Issues in which the Public Has an Interest.

An issue of public interest "is *any issue in which the public is interested*." *Tamkin v. CBS Broad., Inc.*, 193 Cal. App. 4th 133, 143 (2011) (quoting *Nygård, Inc. v. Uusi-Kerttula*, 159 Cal. App. 4th 1027, 1042 (2008)). The issue need not be a "significant" one; "it is enough that it is one in which the public takes an interest." *Id*. (quoting *Nygård*, 159 Cal. App. 4th at 1042). The "public interest" requirement, "like all of Section 425.16, is to be 'construed broadly' so as to encourage participation by all segments of our society in vigorous public debate related to issues of public interest." *Seelig v. Infinity Broad. Corp.*, 97 Cal. App. 4th 798, 808 (2002).

Under these standards, Mr. Savage's popular Radio Show and the September 23 Program concern issues in which the public has an interest. Plaintiffs allege in the FAC that Mr. Savage's

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Radio Show: (i) is routinely rated as one of the top five most popular terrestrial radio programs in the U.S.; (ii) has an audience of over five million listeners; (iii) is broadcast on over 400 radio stations throughout the U.S.; and (iv) is available throughout the world via online streaming services. FAC ¶¶ 31–32. The September 23 Program involved a variety of political issues, pop culture topics, and current events, including gun ownership, politics, love, the First Amendment, and controversial radio show topics. *See* Wildish Decl., Ex. A. Courts applying California's anti-SLAPP law have previously found the public broadcast of a show featuring discussion on matters of public interest to be conduct "in connection with a public issue." *See*, *e.g.*, *Wilder v. CBS Corp.*, No. 2:12-cv-8961-SVW-RZ, 2016 WL 693070 at *11 (C.D. Cal. Feb. 13, 2016) (finding CBS's broadcast of a show called *The Talk*, which discussed motherhood, pop culture, and current events, to be conduct in connection with a public issue). Further, California courts have consistently found the public interest requirement to be met upon a defendant's showing that an appreciable part of the public is interested in the defendant's activity that gives rise to plaintiff's claims. *See, e.g., Tamkin*, 193 Cal. App. 4th at 143 (finding that the creation and broadcast of an episode of the television program *CSI* was an issue of public interest in part based upon the ratings for the episode); *Kronemyer v. Internet Movie Database Inc.,* 150 Cal. App. 4th 941, 945 (2007) (holding that "the motion picture My Big Fat Greek Wedding was a topic of widespread public interest" because defendant's evidence demonstrated the movie was a "very successful motion picture").

The fact that Mr. Savage's radio show covers pop culture topics and current events alongside political issues, in an entertaining and, at times, provocative manner does not make it any less deserving of protection under the anti-SLAPP statute. The anti-SLAPP statute is not limited to those issues that have particular social or political importance to society; an "issue need not be 'significant' to be protected by the anti-SLAPP statute – it is enough that it is one in which the public takes an interest." *Nygård*, 159 Cal. App. 4th at 1042 (statute applies to "tabloid" issues). The anti-SLAPP statute therefore applies equally to entertainment shows and hard-hitting news reports alike. *See Kronemyer*, 150 Cal. App. 4th at 949 (applies to popular movie). Indeed, the California Supreme Court has instructed, "the constitutional guarantees of freedom of expression apply with equal force to [a] publication whether it be a news report or an entertainment feature."

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Shulman v. Group W Prods., Inc., 18 Cal. 4th 200, 225 (1998); *see also Polydoros v. Twentieth Century Fox Film Corp.*, 67 Cal. App. 4th 318, 324 (1997) ("Popular entertainment is entitled to the same constitutional protection as the exposition of political ideas[.]").

In analogous contexts, California courts have found programs involving current events and pop culture issues to constitute issues of public interest. *See*, *e.g.*, *Seelig*, 97 Cal. App. 4th at 807–08 (finding that defendants satisfied the public interest requirement where the offending comments concerning the propriety of being a contestant on the television show *Who Wants to Marry a Multimillionaire* "arose in the context of an on-air discussion between the talk-radio cohosts and their on-air producer about a television show of significant interest to the public and the media"); *Ingels*, 129 Cal. App. 4th at 1055 (finding a radio host's comments concerning his refusal to allow an elderly man to give opinions about dating on a radio show to concern a public issue).

Thus, the second element of section 425.16(e)(3) is also met, and Defendants have met their burden of establishing that Plaintiffs' claims arise from protected activity under California's anti-SLAPP Statute.

B. Section 425.16(e)(4) is Also Satisfied Because the Joke Was in Connection with an Issue of Public Interest.

Because the activity Plaintiffs complain about satisfies section 425.16(e)(3), it also satisfies section 425.16(e)(4). Subsection (e)(4) dispenses with the public forum requirement and focuses on any conduct in furtherance of the right of free speech in connection with an issue of public interest. The subsection therefore applies to such conduct even if it involves private communications, as long as they concern an issue of public interest. *Terry v. Davis Cmty. Church*, 131 Cal. App. 4th 1534, 1545–46 (2005). It also protects not only pure speech, but conduct in furtherance of speech. *See, e.g., Lieberman v. KCOP Television, Inc.*, 110 Cal. App. 4th 156, 166 (2003) (newsgathering is conduct in furtherance of the right of free speech). Accordingly, under section 425.16(e)(4), it does not matter whether the statements at issue were public or private (though here they were public). All that matters is whether they were conduct in furtherance of free speech that involved an issue of public interest. As analyzed above, Mr. Savage's popular Radio Show and the September 23

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Program constitute First Amendment activity concerning issues of public interest making the challenged activity protected under section 425.16(e)(4) as well.

The Defendants have therefore met their burden under step one of the anti-SLAPP analysis.

VI. STEP TWO: PLAINTIFFS CANNOT ESTABLISH A PROBABILITY OF PREVAILING ON THE MERITS OF THEIR CLAIMS.

As this action falls squarely within the anti-SLAPP statute, Plaintiffs must establish a "probability that [they] will prevail" on the merits. Cal. Civ. Proc. Code § 425.16(b)(1). To meet this burden, Plaintiffs must demonstrate that the FAC is both "legally sufficient and supported by a sufficient *prima facie* showing of facts to sustain a favorable judgment." *Gilbert v. Sykes*, 147 Cal. App. 4th 13, 26 (2007) (internal quotations omitted). Plaintiffs "cannot rely on the allegations of the complaint, but must produce evidence that would be admissible at trial." *HMS Capital, Inc. v. Lawyers Title Co.*, 118 Cal. App. 4th 204, 212 (2004); *Greensprings Baptist Christian Fellowship Trust v. Miller,* No. 09-1054 SC, 2009 WL 2252113 at *6 (N.D. Cal. July 28, 2009). Plaintiffs cannot meet their burden because all of Plaintiffs' causes of action arise from the Joke, which is protected commentary under the First Amendment, not a statement "of and concerning" the Plaintiffs, and not actionable under the various other legal theories referenced in the FAC.

A. The Joke Is Protected by the First Amendment and Is Not Capable of Sustaining a Defamatory Meaning As a Matter of Law.

The First Amendment protects "statements that cannot 'reasonably [be] interpreted as stating actual facts' about an individual." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990) (quoting *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988)). Courts have extended First Amendment protection to such statements in recognition of "the reality that exaggeration and non-literal commentary have become an integral part of social discourse." *Levinsky's, Inc. v. Wal–Mart Stores, Inc.*, 127 F.3d 122, 128 (1st Cir. 1997); *Seelig*, 97 Cal. App. 4th at 807–08 ("'rhetorical hyperbole,' 'vigorous epithet[s],' 'lusty and imaginative expression[s] of . . . contempt,' and language used 'in a loose, figurative sense' have all been accorded constitutional protection."). By protecting speakers whose statements cannot reasonably be interpreted as allegations of fact, courts "provide[] assurance that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole'

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which has traditionally added much to the discourse of our Nation." *Milkovich*, 497 U.S. at 20 (quoting *Falwell*, 485 U.S. at 53–55).

Importantly, the question of whether a statement is reasonably capable of sustaining a defamatory meaning or whether it is protected commentary under the First Amendment is a question of law for the court—not the factfinder—to resolve, and therefore capable of being resolved even on a motion to dismiss. *Knievel v. ESPN*, 393 F.3d 1068, 1074 (9th Cir. 2005); *Seelig*, 97 Cal. App. 4th at 810 ("This crucial question of whether challenged statements convey the requisite factual imputation is ordinarily a question of law for the court."). In resolving this question, the Court must consider the full context in which the statement appeared, including "all parts of the communication that are ordinarily heard or read with it." *Knievel*, 393 F.3d at 1076.

When determining whether a statement can reasonably be interpreted as a factual assertion—as opposed to commentary, hyperbole, or a joke—the court undertakes a "totality of the circumstances" test that takes three factors into account. First, the court "look[s] at the statement in its broad context, which includes the general tenor of the entire work, the subject of the statements, the setting, and the format of the work." *Id*. at 1075. Second, it "turn[s] to the specific context and content of the statements, analyzing the extent of figurative or hyperbolic language used and the reasonable expectations of the audience in that particular situation." *Id*. And third, it "inquire[s] whether the statement itself is sufficiently factual to be susceptible of being proved true or false." *Id*.

1. The Joke Was Made in the Context of a "Shock-Jock" Radio Show and Was Preceded and Followed by Many Other Satirical, Exaggerated Statements.

The context in which the statement appears, is "paramount in [the court's] analysis, and in some cases it can be dispositive." *Knievel*, 393 F.3d at 1075 (noting the "lighthearted" and "jocular" nature of a website as a whole, as well as the use of youth slang throughout, and finding that a reasonable viewer encountering the "broad context" of the website would expect to find non-literal language there). Especially in cases in which a joke is alleged to be defamatory, the "full context" in which the joke appears is often central to the court's analysis. If, considering the "full context" in which a statement is made, "a reasonable reader or hearer of the statement[] would understand that

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1 [it] could not have been intended to convey a provably false assertion of fact, but [was] clearly a
2 mere joke or parody, there is no defamation as a matter of law." *Couch v. San Juan Unified Sch.*
3 *Dist.*, 33 Cal. App. 4th 1491 (1995). For example, in *San Francisco Bay Guardian, Inc. v. Superior*
4 *Court*, 17 Cal. App. 4th 655, 659–60 (1993), the court examined the "totality of the circumstances"
5 in deciding whether a fake letter printed in a newspaper would be recognized by the average reader
6 as a joke. After examining the newspaper as a whole, the court concluded that it would be
7 recognized as a joke. *Id.* at 660. Although some of the content printed near the fake letter was not
8 obviously a joke, other material in the newspaper was obviously not serious such as to "raise reality
9 questions" for the average reader. *Id.*

10 Here, Plaintiffs admit that Mr. Savage is known as a "shock jock." FAC ¶ 35. This
11 reputation is borne out by the content of the September 23 Program. *See generally* Wildish Decl.,
12 Ex. A. Even a casual listener unfamiliar with Mr. Savage would, after listening to any portion of the
13 September 23 Program for a few minutes, observe that it consists primarily of satirical, risqué
14 commentary on topics of public interest. *Id.* Much of Mr. Savage's commentary is so obviously
15 over-the-top, priming the listener not to interpret that commentary as literal fact. *See supra* at 3–4
16 (quoting just a few of the many examples of loose, figurative language and rhetorical hyperbole in
17 the September 23 Program). These signals to the listener are made explicit at several points during
18 the September 23 Program. The program begins with a "warning" that it contains adult content and
19 "psychological nudity"; and only three minutes after the Joke, Mr. Savage advises listeners of the
20 program that "get[ting] down to the facts" or "read[ing] the facts" is "not the kind of show I do."
21 Wildish Decl., Ex. A at 1:2-6; 41:18-25 and 42:1-2.

22 This context alone is enough for the Court to find that no reasonable listener would interpret
23 the Joke as a factual assertion. However, the content of the statement also supports this conclusion.

24 2. <u>The Joke Identifies No Person by Name, Contains Slang, Loose Language,</u>
25 <u>Blatant Exaggeration, and is Referred to as a "Joke."</u>

26 The second consideration relevant to whether a statement is protected commentary under the
27 First Amendment is "the specific context and content of the statement[], . . . the extent of figurative
28 or hyperbolic language used and the reasonable expectations of the audience in that particular

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situation." *Knievel*, 393 F.3d at 1075. Plaintiffs admit that Mr. Bell is not named in the Joke (FAC ¶ 42) and it is beyond dispute that Ms. Bell is not named, supporting the conclusion that the Joke would not be interpreted as a literal statement about any particular person. *See infra* Section V.B, at 14–15. And according to Plaintiffs, the Joke does not literally describe them. The FAC states that Ms. Bell was 22 when she met Mr. Bell, that she has never been a prostitute, and that Mr. Bell was not forced to retire from radio because of his on-air discussion of UFOs. FAC ¶ 46. Finally, the Joke contains numerous signals to the listener that it is meant as satirical expression and not literal fact, including:

- The use of slang ("hooker" rather than "prostitute");
- The use of loose language ("You can't do UFOs");
- The use of blatant exaggeration ("You say 'UFOs,' you wind up in the Philippines with a 10-year-old hooker. And you're off the radio");
- A contemporaneous statement that the Joke is a "joke"; and
- The fact that the Joke, if interpreted literally, makes no sense (there is no logical causal connection between discussing UFOs on the radio and "wind[ing] up in the Philippines with a 10-year-old hooker").

Thus, the content of the Joke also supports the conclusion that no listener would construe it as a statement of fact.

3. Even if the Joke is Susceptible to Being Proven True or False, No Listener Would Reasonably Interpret it as a Factual Assertion.

The final consideration in determining whether a statement is non-actionable as non-literal commentary under the First Amendment is whether the statement is sufficiently factual to be capable of being proven true or false; but even a statement that is capable of being proven true or false can be non-actionable as a matter of law if a reasonable reader or listener would not interpret the statement as a factual assertion.

For example, in the *Knievel* case, the court found it "immaterial" that the alleged defamatory term "pimp" was capable of being proved true or false, given the context in which it was used. *Knievel*, 393 F.3d at 1078. In that case, ESPN was sued by the motorcycle stuntman Evel Knievel

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and his wife Krystal for publishing a photo of them on ESPN's "extreme sports" website. *Id.* at 1070. The photo depicted Evel wearing a motorcycle jacket and sunglasses with one arm around his wife and his other arm around another young woman. *Id.* The caption read "Evel Knievel proves that you're never too old to be a pimp." *Id.* The Knievels alleged that the photograph and caption were defamatory because they accused Evel of soliciting prostitution and implied that his wife was a prostitute. *Id.* In analyzing whether the photograph and caption were reasonably capable of a defamatory meaning, the Court acknowledged, that taken in isolation and given a literal interpretation, ESPN's suggestion that Evel is a pimp is "sufficiently factual to be susceptible of being proved true or false." *Id.* at 1078. Nevertheless, when "read in the context of the satirical, risqué, and sophomoric slang found on the rest of the [ESPN] site, the word "pimp" cannot be reasonably interpreted as a criminal accusation." *Knievel*, 393 F.3d at 1078 (affirming the District Court's dismissal on the basis that the photograph and its caption were not defamatory as a matter of law).

Indeed, the context can also render an otherwise provably true or false statement merely rhetorical. In a highly analogous case, *Seelig*, the plaintiff sued a radio station based on allegedly derogatory comments its hosts made about her during a broadcast. The Court of Appeals considered "defendants' entire radio broadcast," and concluded that, in that context, "the term skank constitutes rhetorical hyperbole which no listener could reasonably have interpreted to be a statement of actual fact." *Seelig*, 97 Cal. App. 4th at 811.

Thus, even if this Court found that the content of the Joke is capable of being proven true or false, considered in the context of the entire radio broadcast as analyzed above (*supra,* at II.A-B), no listener would reasonably interpret it as stating provable facts about any particular person. Accordingly, Plaintiffs' defamation claims must fail. *See, e.g., Seelig,* 97 Cal. App. 4th at 809 ("Statements . . . cannot form the basis of a defamation claim if they cannot reasonably be interpreted as stating actual facts about an individual") (internal quotations omitted).

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B. Plaintiffs' Defamation Claims Also Fail Because the Joke Is Not a Statement "Of and Concerning" Plaintiffs As a Matter of Law.

In defamation actions, the First Amendment requires that statements on which the claim is based must specifically refer to, or be "of and concerning," the plaintiff in some way. *Tamkin*, 193 Cal. App. 4th at 145 (quoting *Blatty v. N.Y. Times Co.*, 42 Cal. 3d 1033, 1042 (1986)). The "of and concerning" requirement can be met even where the plaintiff is not mentioned by name in the defendant's statement; but in that case there must be evidence that the statement refers to the plaintiff by reasonable implication. *See Peper v. Gannett Co.*, No. 2002061753, 2003 WL 22457122, at *3 (Cal. Super. Ct. Apr. 4, 2003), *aff'd*, No. A102831, 2004 WL 2538839 (Cal. Ct. App. Nov. 10, 2004). Whether a defamatory statement can reasonably be interpreted as referring to the plaintiff is a question of law for the court. *Tamkin,* 193 Cal. App. 4th at 145. At least one California court has found, in the context of an anti-SLAPP motion to strike, that the plaintiff's defamation claim was not actionable where the plaintiff failed to present "*evidence* demonstrating that the [defendant's statement] was understood by anyone as referring" to the plaintiff. *Peper,* 2003 WL 22457122, at *3 (emphasis added).

Here, Plaintiffs concede that the Joke "did not specifically identify Mr. Bell by name," FAC ¶ 42, and it is beyond dispute that Ms. Bell is not mentioned by name in the Joke. It is Plaintiffs' burden to produce "competent and admissible evidence" that the Joke refers to Plaintiffs by reasonable implication. Plaintiffs cannot do so. As the FAC points out, Mr. Bell did not "wind up in the Philippines with a 10-year-old-hooker," so it is not clear why a listener would believe the Joke to refer to him. And Ms. Bell is not even a radio personality, raising the question—unaddressed in the FAC—why any listener of the Radio Show would know who she is or know anything about her such that they would believe the Joke to refer to her. As such, Plaintiffs' defamation claims fail to satisfy the "of and concerning" requirement, and cannot proceed under the First Amendment.

Since all of Plaintiffs' remaining claims arise from and depend on the same statements as the defamation claims, those claims should be stricken too. *See, e.g.*, *Blatty*, 42 Cal. 3d at 1042 ("Although the limitations that define the First Amendment's zone of protection for the press were established in defamation actions, they are not peculiar to such actions but apply to all claims whose

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gravamen is the alleged injurious falsehood of a statement: [t]hat constitutional protection does not depend on the label given the stated cause of action.") (internal quotations omitted).

C. The Court Must Strike Derivative False Light and Emotional Distress Claims Where, as Here, They Are Based on the Same Statements as the Defamation Claims.

As explained above, the Joke is not defamatory as a matter of law. See *supra* pp. 11–15. Thus, Plaintiffs cannot prevail on their defamation and defamation per se claims (Claims 1-4). Because Plaintiffs' remaining claims for false light invasion of privacy, intentional infliction of emotional distress and negligent infliction of emotional distress arise from the same conduct as their defamation claims, those claims must be stricken along with the defamation claims under California and federal law.

"When a false light claim is coupled with a defamation claim, the false light claim is essentially superfluous, and stands or falls on whether it meets the same requirements as the defamation cause of action." *Eisenberg v. Alameda Newspapers, Inc.*, 74 Cal. App. 4th 1359, 1387 n.13 (1999); *see also Couch*, 33 Cal. App. 4th at 1504 (stating, "[w]hen claims for invasion of privacy . . . are based on the same factual allegations as those of a simultaneous libel claim, they are superfluous and must be dismissed," citing several supporting cases, and summarily dismissing a claim for false light invasion of privacy after dismissing a defamation claim predicated on the same factual allegations); *Seelig*, 97 Cal. App. 4th at 812 (dismissing a claim for false light invasion of privacy along with the plaintiff's defamation claim because it "depend[ed] upon her claims of defamation"). Therefore, Plaintiffs' false light invasion of privacy claim falls with their defamation claims.

Similarly, Plaintiffs' claim for intentional infliction of emotional distress falls with their defamation claims because it is based on the same conduct as the defamation claims. *See*, *e.g.*, *Couch*, 33 Cal. App. 4th at 1504 (stating, "[w]hen claims for . . . emotional distress are based on the same factual allegations as those of a simultaneous libel claim, they are superfluous and must be dismissed," citing several supporting cases, and summarily dismissing a claim for intentional infliction of emotional distress after dismissing a defamation claim predicated on the same factual

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allegations); *Seelig*, 97 Cal. App. 4th at 812 (dismissing a claim for intentional infliction of emotional distress along with the plaintiff's defamation claim because it "depend[ed] upon her claims of defamation"); *Scott v. McDonnell Douglas Corp.*, 37 Cal. App. 3d 277, 291–92 (1974) (dismissing an intentional infliction of emotional distress claim after dismissing a defamation claim because both were premised on the publication of the same statements and the conduct charged was not sufficiently outrageous, as a matter of law, as would distress a man of ordinary sensibilities).

Plaintiffs' negligent infliction of emotional distress claim also falls with their defamation claims. Under California law, negligent infliction of emotional distress is not a separate tort but a form of the ordinary tort of negligence. *Doe v. Gangland Productions, Inc.,* 730 F.3d 946, 961 (2013) ("[T]here is no independent tort of negligent infliction of emotional distress."); *Brahmana v. Lembo*, No. C-09-00106 RMW, 2010 WL 290490, at *2 (N.D. Cal. Jan. 15, 2010). Thus, [a] plaintiff must establish each of the following elements of negligence: (1) duty, (2) breach of duty, (3) causation, and (4) damages. *Brahmana*, 2010 WL 290490, at *2. Further, "[u]nless the defendant has assumed a duty to plaintiff in which the emotional condition of the plaintiff is an object, recovery is available only if the emotional distress arises out of the defendant's breach of some other legal duty and the emotional distress is proximately caused by that breach of duty." *Doe,* 730 F.3d at 961 (finding that plaintiff failed to establish a reasonable probability of prevailing on claim for negligent infliction of emotional distress where he failed to demonstrate that defendants had a legal duty not to reveal private facts about him during the television broadcast). And "[e]ven then, with rare exceptions, a breach of the duty must threaten physical injury, not simply damage to property or financial interests." *Brahmana*, 2010 WL 290490, at *2.

Defendants have not assumed a duty to Plaintiffs in which Plaintiffs' emotional condition is an object. Further, where, as here, the claim for negligent infliction of emotional distress is based on the same conduct as a claim for defamation, it will fall with the defamation claim because there is no independent source of a legal duty that would make the Defendant's speech actionable. *See Jacques v. Bank of Am. Corp.*, No. 1:12-CV-0821-LJO-SAB, 2014 WL 7272769, at *10 (E.D. Cal. Dec. 18, 2014) ("Plaintiff cites no case which recognizes the existence of a legal duty, in the context of a simple negligence cause of action, apart from Early Warning's duty to not commit acts which would

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give rise to a cause of action for defamation under California law . . . Accordingly, Plaintiff's negligence cause of action is duplicative of his defamation cause of action and the Court recommends that the claim be dismissed"), report and recommendation adopted, No. 1:12-CV-00821-LJO, 2015 WL 224736 (E.D. Cal. Jan. 15, 2015).

Thus, Plaintiffs cannot meet their burden of establishing a "probability of success on the merits."

VII. CONCLUSION

The Defendants have met their burden to show the anti-SLAPP statute applies because Plaintiffs' claims against them arise from protected activity. The burden then shifts to Plaintiffs to show the probable validity of her claims. But Plaintiffs can never meet their burden. Respectfully, the motion should be granted.

DATED: February 6, 2017

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DATED: February 6, 2017

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(Per Local Rule 5-1(i)(3), Mr. Horowitz's concurrence in the filing of this document was obtained on February 3, 2017.)

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