

Hearing Date: 04/07/2021

Department: 31

SPECIAL MOTION TO STRIKE FILED BY THE DAILY MAIL IS GRANTED.

Background

On December 22, 2020, Plaintiff Katherine Hill filed the instant action against Defendants Kenneth Heslep; Jennifer Van Laar; Joseph Messina; Mail Media, Inc. ("the Daily Mail"); Salem Media Group, Inc. ("Salem Media"); and Does 1 through 50. The Complaint asserts causes of action for:

- (1) Action Based on Civil Code Section 1708.85 (against Heslep, Van Laar, the Daily Mail; and Salem Media);
- (2) Civil Conspiracy to Violate Civil Code Section 1708.85;
- (3) Intentional Infliction of Emotional Distress (against Heslep); and
- (4) Action Based on Bus. Prof. Code Section 17200 (against the Daily Mail and Salem Media).

Defendant the Daily Mail (hereinafter "Defendant") now moves to strike Plaintiff's Complaint as an unlawful Strategic Lawsuit Against Public Participation ("SLAPP").

Legal Standard

Code of Civil Procedure section 425.16 sets forth the procedure governing anti-SLAPP motions. In pertinent part, the statute provides, "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 Constitution or the 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." (Code Civ. Proc., § 425.16, subd. (b)(1).) "[A]n anti-SLAPP motion, like a conventional motion to strike, may be used to attack parts of a count as pleaded." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 393.) The purpose of the statute is to identify and dispose of lawsuits brought to chill the valid exercise of a litigant's constitutional right of petition or free speech. (Code Civ. Proc., § 425.16, subd. (a); *Sylmar Air Conditioning v. Pueblo Contracting Services, Inc.* (2004) 122 Cal.App.4th 1049, 1055-1056.)

Courts employ a two-step process to evaluate anti-SLAPP motions. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 61.) To invoke the protections of the statute, the defendant must first show that the challenged lawsuit arises from protected activity, such as an act in furtherance of the right of petition or free speech. (*Ibid.*) From this fact, courts "presume the purpose of the action was to chill the defendant's exercise of First Amendment rights. It is then up to the plaintiff to rebut the presumption by showing a reasonable probability of success on the merits." (*Ibid.*) In determining whether the plaintiff has carried this burden, the trial court considers "the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (Code Civ. Proc., § 425.16, subd. (b)(2); see *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 291 (*Soukup*).)

Request for Judicial Notice

The court may take judicial notice of “official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States,” “[r]ecords of (1) any court of this state or (2) any court of record of the United States or of any state of the United States,” and “[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.” (Evid. Code § 452, subds. (c), (d), and (h).)

Taking judicial notice of a document is not the same as accepting the truth of its contents or accepting a particular interpretation of its meaning. (*Fremont Indem. Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 113-14 (citations and internal quotations omitted).) In addition, judges “consider matters shown in exhibits attached to the complaint and incorporated by reference.” (*Performance Plastering v. Richmond American Homes of California, Inc.* (2007) 153 Cal.App.4th 659, 665.) However, “[w]hen judicial notice is taken of a document . . . the truthfulness and proper interpretation of the document are disputable.” (*Aquila, Inc. v. Sup. Ct.* (2007) 148 Cal.App.4th 556, 569 (quoting *StorMedia Inc. v. Sup. Ct.* (1999) 20 Cal.4th 449, 457 n. 9).)

Defendant requests that the Court take judicial notice of the following documents:

- (A) Legislative history materials for California Assembly Bill 2643;
- (B) Publications relating to Plaintiff Katie Hill’s 2018 congressional campaign and service in the U.S. House of Representatives;
- (C) October 23, 2019 Press Release from House Ethics Committee;
- (D) Publications relating to House ethics investigation of Plaintiff;
- (E) October 24, 2019 MailOnline article;
- (F) October 27, 2019 letter from Plaintiff;
- (G) Publications relating to Plaintiff’s resignation from Congress;
- (H) Publications relating to Plaintiff from 2020;
- (I) August 8, 2020 article from Los Angeles Magazine containing excerpt from Plaintiff’s memoir.

The unopposed request is GRANTED.

Evidentiary Objections

Defendant submits evidentiary objections to the Declaration of Katherine Hill.

Objection No. 10 - OVERRULED.

The remaining objections are immaterial to the Court’s disposition of the motion. The Court therefore declines to rule upon them._

Discussion

Defendant moves to strike Plaintiff’s entire Complaint as an unlawful SLAPP.

First Prong: Protected Activity

An anti-SLAPP motion requires the moving party to bear the initial burden of establishing a prima facie showing that the plaintiff's cause of action arises from the defendant's free speech or petition activity. (*Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, 894.)

CCP § 425.16(e) states, "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, or (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."

There exists a "legislative mandate to construe section 425.16 broadly. Thus, section 425.16, subdivision (a), states: 'The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.'" (*Vergos v. McNeal* (2007) 146 Cal.App.4th 1387, 1395.)

"In determining "whether the challenged claims arise from acts in furtherance of the defendants' right of free speech or right of petition under one of the categories set forth in section 425.16, subdivision (e). [Citation.] '[w]e examine the principal thrust or gravamen of a plaintiff's cause of action to determine whether the anti-SLAPP statute applies.'" [Citation.] The "gravamen is defined by the *acts on which liability is based*, not some philosophical thrust or legal essence of the cause of action." [Citation.] In other words, "for anti-SLAPP purposes [the] gravamen [of plaintiff's cause of action] is defined by the *acts on which liability is based*." [Citation.]" (*Optional Capital, Inc. v. Akin Gump Strauss, Hauer & Feld LLP* (2017) 18 Cal.App.5th 95, 111.)

"[A] claim is not subject to a motion to strike simply because it contests an action or decision that was arrived at following speech or petitioning activity, or that was thereafter communicated by means of speech or petitioning activity. Rather, a claim may be struck only if the speech or petitioning activity *itself* is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted." (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1060.)

Defendant argues that the complained of activity is protected activity under both Section 425.16(e)(3) and (4).

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 & 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

"Subdivision (e) of [425.16] includes four separate categories of acts which qualify for treatment under the section. The first two categories pertain to statements made in

connection with proceedings “before” or “in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law.” The third category identifies matters of “public interest” addressed in circumstances traditionally protected by the right to freedom of speech; i.e., statements “made in a place open to the public or a public forum in connection with an issue of public interest.” Category Four provides a catch-all for “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.” (*Italics added.*)” (*Lieberman v. KCOP Television, Inc.* (2003) 110 Cal.App.4th 156, 164.)

“‘A cause of action arises from protected activity within the meaning of section 425.16, subdivision (e)(4) if the plaintiff’s claims are predicated on conduct that is (1) in furtherance of the right of free speech, and (2) in connection with a public issue or issue of public interest.’ [Citation.] “‘An act is in furtherance of the right of free speech if the act helps to advance that right or assists in the exercise of that right.’” [Citations.]” (*Collier v. Harris* (2015) 240 Cal.App.4th 41, 51.)

“The California Supreme Court held that Web sites accessible to the public are “public forums” for the purposes of the anti-SLAPP statute. [Citation.] “‘Cases construing the term “public forum” as used in section 425.16 have noted that the term “is traditionally defined as a place that is open to the public where information is freely exchanged.” [Citation.] “Under its plain meaning, a public forum is not limited to a physical setting, but also includes other forms of public communication.’” [Citation.]” (*Kronemyer v. Internet Movie Database Inc.* (2007) 150 Cal.App.4th 941, 950.)

“It is beyond dispute that reporting the news is an exercise of free speech. [Citations.] California courts have also held pre- and post-reporting conduct, such as investigating, newsgathering, writing, and interviewing is conduct in furtherance of free speech. [Citations.] As in *Lieberman*, courts have held defendants may satisfy the showing they were engaged in conduct in furtherance of free speech under section [425.16], even when their conduct was allegedly unlawful. [Citations.]” (*Simmons v. Bauer Media Group USA, LLC* (2020) 50 Cal.App.5th 1037, 1044-1045.)

“Reporting the news is speech subject to the protections of the First Amendment and subject to a motion brought under section 425.16, if the report concerns a public issue or an issue of public interest. [Citation.]” (*Lieberman, supra*, 110 Cal.App.4th at 164.) “[T]he constitutional guarantee [of free speech] has its fullest and most urgent application precisely to the conduct of campaigns for political office.” [Citation.] Indeed, “[t]he right to speak on political matters is the quintessential subject of our constitutional protections of the right of free speech. “Public discussion about the qualifications of those who hold or who wish to hold positions of public trust presents the strongest possible case for applications of the safeguards afforded by the First Amendment.”” [Citation.] “The character and qualifications of a candidate for public office constitutes a ‘public issue or public interest’” for purposes of section 425.16. [Citation.]” (*Collier, supra*, 240 Cal.App.4th at 52.)

Defendant argues that Section 425.15 applies to Plaintiff’s claims against it because all of Plaintiff’s claims arise from the content of an October 24, 2019 article (the “Article”), a news publication on the MailOnline website. (Complaint ¶ 79-80, 131-136, 163-165, 185-186.) Defendant contends that her claims thus fall within Section 425.16(e)(3) as arising from writing “made in . . . a public forum in connection with an issue of public interest,” and subsection (e)(4) as “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.” Defendant argues

that the Article reported on alleged sexual liaisons that Plaintiff purportedly had with a young campaign aide and with an office staffer; her conduct then was the subject of a House ethics investigation. (Complaint ¶ 79; Laidman Decl., Exh. C-D.) Defendant asserts that one of the photos at issue here showed Plaintiff with the campaign staffer (Laidman Decl., Exh. E); the other appeared to show Plaintiff using a then-illegal drug and displaying a tattoo that was controversial because it resembled a white supremacy symbol that had become an issue during her congressional campaign. (Laidman Decl., Exh. B, E.)

Defendant contends that the controversy over Plaintiff's alleged improper relationships with staffers already was playing out publicly prior to the Article's publication, including coverage of announcements from the House Ethics Committee and from Plaintiff herself. (Complaint ¶ 67-78; Laidman Decl., Exh. C-D.) Thus, Plaintiff acknowledges that the "story and images spread like wildfire across hyper-partisan publications" and then "made headlines everywhere - The Washington Post, CNN, Politico, NPR." (Complaint ¶ 83, 85; Laidman Decl., Exh. D, G-I.) Defendant asserts that this further demonstrates the requisite connection to issues of public interest, as "public interest can be 'evidenced by media coverage.'" (*Sipple v. Foundation For Nat. Progress* (1999) 71 Cal.App.4th 226, 238-239.)

In opposition, Plaintiff argues that the core injury-producing conduct underlying her claims is the nonconsensual distribution of her private sexual images. (Complaint ¶ 148.) Plaintiff asserts that the cause of action centers around intentional sharing without consent. Plaintiff contends that publication is not an element of the causes of action and is relevant only insofar as Defendant's extensive online reach increases Plaintiff's damages. Plaintiff argues that speech plays no role in the core injury-producing conduct. Plaintiff asserts that even when distribution is arguably speech, distribution is nevertheless distinct from speech.

The Court finds that the gravamen of Plaintiff's Complaint against Defendant constitutes protected activity under Sections 425.16(e)(3) and (4). As correctly noted by Plaintiff, the gravamen of her Complaint against Defendant is Defendant's distribution of Plaintiff's intimate images. However, the distribution of such images is alleged to have only occurred through their publication on the MailOnline website. Accordingly, Defendant's distribution of the intimate images through their publication constitutes a "statement" or "other conduct in furtherance of the right to free speech" for the purposes of the anti-SLAPP analysis.

As held by the authorities above, reporting the news is speech subject to the protections of the First Amendment and subject to an anti-SLAPP motion if the report concerns a public issue or an issue of public interest. (*Lieberman, supra*, 110 Cal.App.4th at 164.) Further, "[t]he character and qualifications of a candidate for public office constitutes a 'public issue or public interest'" for purposes of section 425.16. [Citation.] (*Collier, supra*, 240 Cal.App.4th at 52.) Here, the intimate images published by Defendant spoke to Plaintiff's character and qualifications for her position, as they allegedly depicted Plaintiff with a campaign staffer whom she was alleged to have had a sexual affair with and appeared to show Plaintiff using a then-illegal drug and displaying a tattoo that was controversial because it resembled a white supremacy symbol that had become an issue during her congressional campaign. (Complaint, Exh. B, E.) Accordingly, the images were a matter of 'public issue or public interest.'

Notably, Plaintiff does not dispute that MailOnline is a public forum for the purposes of the anti-SLAPP statute.

Based on the foregoing, the Court concludes that Defendant has prevailed as to the first prong.

Second Prong: Probability of Success on the Merits

On the second prong of the analysis, courts employ a “summary-judgment-like” procedure, “accepting as true the evidence favorable to the plaintiff and evaluating the defendant’s evidence only to determine whether the defendant has defeated the plaintiff’s evidence as a matter of law.” (*Gerbosi v. Gaims, Weil, West & Epstein, LLP* (2011) 193 Cal.App.4th 435, 444.) In other words, the Court does not assess credibility, and the plaintiff is not required to meet the preponderance of the evidence standard. The Court accepts as true the evidence favorable to the plaintiff, who need only establish that his or her claim has “minimal merit” to avoid being stricken as a SLAPP. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 291.) The plaintiff is required to present facts which would, if proved at trial, support a judgment in the plaintiff’s favor. (Code of Civ. Proc., § 425.16(b); *Shekhter v. Financial Indemnity Co.* (2001) 89 Cal.App.4th 141, 150-151.)

“[A]n action may not be dismissed under this statute if the plaintiff has presented admissible evidence that, if believed by the trier of fact, would support a cause of action against the defendant.” (*Taus v. Loftus* (2007) 40 Cal.4th 683, 729.) “In making this assessment, the court must consider both the legal sufficiency of and evidentiary support for the pleaded claims, and must also examine whether there are any constitutional or nonconstitutional defenses to the pleaded claims and, if so, whether there is evidence to negate any such defenses. [Citation.]” (*McGarry v. University of San Diego* (2007) 154 Cal.App.4th 97, 108.)

“[P]roperly submitted admissible evidence should be considered, and a court evaluating a probability of success should draw any non-speculative inferences favorable to the plaintiff. [Citations.]” (*Monster Energy Co. v. Schechter* (2019) 7 Cal.5th 781, 795.)

First Cause of Action for Violation of Civil Code Section 1708.85

Civil Code section 1708.85, entitled “Distribution of sexually explicit materials; private cause of action; use of pseudonym,” provides, in relevant part:

(a) A private cause of action lies against a person who intentionally distributes by any means a photograph, film, videotape, recording, or any other reproduction of another, without the other’s consent, if (1) the person knew that the other person had a reasonable expectation that the material would remain private, (2) the distributed material exposes an intimate body part of the other person, or shows the other person engaging in an act of intercourse, oral copulation, sodomy, or other act of sexual penetration, and (3) the other person suffers general or special damages as described in Section 48a.

(b) As used in this section, “intimate body part” means any portion of the genitals, and, in the case of a female, also includes any portion of the breast below the top of the areola, that is uncovered or visible through less than fully opaque clothing.

(c) There shall be no liability on the part of the person distributing material under subdivision (a) under any of the following circumstances:

(1) The distributed material was created under an agreement by the person appearing in the material for its public use and distribution or otherwise intended by that person for public use and distribution.

(2) The person possessing or viewing the distributed material has permission from the person appearing in the material to publish by any means or post the material on an Internet Web site.

(3) The person appearing in the material waived any reasonable expectation of privacy in the distributed material by making it accessible to the general public.

(4) The distributed material constitutes a matter of public concern.

(5) The distributed material was photographed, filmed, videotaped, recorded, or otherwise reproduced in a public place and under circumstances in which the person depicted had no reasonable expectation of privacy.

(6) The distributed material was previously distributed by another person.

(Civ. Code, § 1708.85(a)-(c).)

Public Concern Exception

While there are no published decisions addressing the public concern exception to Civil Code section 1708.85, both parties in this instance cite to cases involving a similar public concern exception, often referred to as the “newsworthiness” defense, involved with the tort of invasion of privacy: public disclosure of private facts. Because it appears that the parties are in agreement that the public concern exception of Civil Code section 1708.85 is analogous to the “newsworthiness” defense in an invasion of privacy action, the Court analyzes the public concern exception based on the principles articulated in those lines of cases.

“[T]he analysis of newsworthiness inevitably involves accommodating conflicting interests in personal privacy and in press freedom as guaranteed by the First Amendment to the United States Constitution[.]” (*Shulman v. Group W Productions, Inc.* (1998) 18 Cal.4th 200, 215.)

“In determining whether a particular incident is “newsworthy” and thus whether the privilege shields its truthful publication from liability, the courts consider a variety of factors, including the social value of the facts published, the depth of the article’s intrusion into ostensibly private affairs, and the extent to which the party voluntarily acceded to a position of public notoriety. [Citation.] If the information reported has previously become part of the “public domain” or the intrusion into an individual’s private life is only slight, publication will be privileged even though the social utility of the publication may be minimal. ([Citation] (publication of photograph of plaintiffs in public place not sufficiently intrusive); [citation].) On the other hand, when the legitimate public interest in the published information is substantial, a much greater intrusion into an individual’s private life will be sanctioned, especially if the individual willingly entered into the public sphere.” (*Kapellas v. Kofman* (1969) 1 Cal.3d 20, 36.)

“Because of their public responsibilities, government officials and candidates for such office have almost always been considered the paradigm case of “public figures” who should be subjected to the most thorough scrutiny. In choosing those who are to govern them, the public must, of course, be afforded the opportunity of learning about any facet of a candidate’s life that may relate to his fitness for office. [Citations.] Consequently, the press must be given ample “breathing space” to disseminate all information that may cast light on a candidate’s qualifications. As the United States Supreme Court emphasized in *Garrison v. Louisiana*, [citation], “[S]peech concerning public affairs is more than self-expression; it is the essence of self-government. The First and Fourteenth Amendments embody our “profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials.” [Citation.]” (*Kapellas, supra*, 1 Cal.3d at 36-37.)

“Those who seek elected public position realize that in so doing they subject themselves, and those closely related to them, to a searching beam of public interest and attention. ([Citation] (“A politician, running for public office, in effect, offers his public and private life for perusal so far as it affects his bid for office.”); [citations].) Generally, courts will be most reluctant to impede the free flow of any truthful information that may be relevant to a candidate’s qualifications for office. . . . [N]ormally the public should be permitted to determine the importance or relevance of the reported facts for itself. If the publication does not proceed widely beyond the bounds of propriety and reason in disclosing facts about those closely related to an aspirant for public office, the compelling public interest in the unfettered dissemination of information will outweigh society’s interest in preserving such individuals’ rights to privacy.” (*Kapellas*, *supra*, 1 Cal.3d at 37-38.)

“[I]mages may involve issues of public interest. [Citation.] However, . . . the *Catsouras* court explained, ‘morbid and sensational eavesdropping or gossip “serves no legitimate public interest and is not deserving of protection.”’ [Citations.]” (*Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240, 1258-1259.)

Defendant first argues that the public concern exception bars Plaintiff’s claim under Section 1708.85 because the Article bears on Plaintiff’s character and fitness for office. Defendant asserts that the Article reported on allegations that a member of Congress had sexual relationships with staffers, which was the subject of an Ethics Committee probe. (Laidman Decl., Exh. E.) Defendant contends that the Article discussed Plaintiff’s personal life with her ex-husband and their bringing of a young campaign aide into their relationship, entwining Plaintiff’s private and public lives and raising questions about potential abuse of power, as Plaintiff acknowledged in her memoir. (Laidman Decl., Exh. E, I.) Defendant argues that the Article also explained why the drug use and tattoo depicted in the Water Pipe Picture raised questions about Plaintiff’s political hypocrisy given her role in Congress and criticisms of others she made during the campaign. (Laidman Decl., Exh. B, E.)

Defendant asserts that with respect to the two specific photos at issue here, the Hair Brushing Picture provided visual confirmation of Plaintiff’s relationship with her campaign aide. (Complaint ¶ 80; Laidman Decl., Exh. E.) Defendant contends that the Water Pipe Picture appears to show Plaintiff smoking marijuana, which is illegal under federal law, and the Article explained that the photo apparently was taken “before marijuana was legalized for recreational consumption in California.” (Laidman Decl., Exh. E.) Defendant argues that the Water Pipe Picture also showed Plaintiff’s iron cross tattoo; the Article explained that it was “similar to the symbols formerly used by white supremacists referencing a World War II Nazi medal,” which “could open the congresswoman to accusations of hypocrisy” because during her campaign, she had criticized a rival for an ad featuring a veteran who displayed a similar symbol on social media. (Laidman Decl., Exh. E.) Defendant asserts that the images clearly have the requisite logical relationship or nexus to the Article’s newsworthy subject matter. (*Shulman*, *supra*, 18 Cal.4th at 224.)

Defendant contends that Plaintiff cannot avoid these protections by arguing that the photos were not necessary or that a written description would have been sufficient. (Complaint ¶ 142.) Defendant argues that courts have rejected this kind of judicial second-guessing of news reporting. (*Shulman*, *supra*, 18 Cal.4th at 221, 229.)

Defendant finally asserts that public figures like Plaintiff invite more scrutiny and the newsworthiness inquiry considers the extent to which the plaintiff played an important role in public events. Defendant contends any intrusiveness was not disproportionate to the photos’ relevance. Defendant argues that it is undisputed that MailOnline redacted the two photos so

that no genitalia or other sensitive body parts were visible; the Complaint alleges only that a small portion of “the breast below the top of the areola” were shown. (Complaint ¶ 135-136; Laidman Decl., Exh. E.) Defendant asserts that the Complaint also alleges that Heslep had disseminated “more than seven hundred images,” but MailOnline only published two images that directly illustrated the alleged misconduct that resulting in Plaintiff’s resignation from here Congressional seat. (Complaint ¶ 69; Laidman Decl., Exh. E.) Defendant contends that Plaintiff’s claims against it are thus barred in their entirety.

In opposition, Plaintiff argues that Defendant does not adequately show that the distributed material is a matter of public concern. Plaintiff asserts that the public’s right to literally view an image can legitimately be weighed against the harm imposed upon the depicted individual. Plaintiff contends that while Defendant’s published statements about Plaintiff may well be protected speech, Defendant is being sued for the nonconsensual distribution of the intimate images, not the speech. Citing to *Jackson v. Mayweather* ((2017) 10 Cal.App.5th 1240, 1247), Plaintiff argues that the nude images were not newsworthy because Defendant could - and did - convey the same thing with words by describing the images which depicted Plaintiff nude. Plaintiff asserts that her nude images did not contribute to the public debate generally, or the specific issues identified by Defendant; they were included for “morbid and sensational prying” and now are being held up under the guise of newsworthy material. Plaintiff contends that no California Court has ever addressed the issue at hand here, in which the sensationalistic dissemination of a nude image of a politician occurs to generate web traffic, and the Court is therefore not obligated to hold said dissemination as protected activity.

The Court finds that Plaintiff has failed to carry her burden establishing that there is a probability of success on the merits on her claim under Civil Code section 1708.85. Section 1708.85(c)(5) provides for an exception from liability for images which are a matter of public concern. Here, Defendant has established that the images are a matter of public concern, as they speak to Plaintiff’s character and qualifications for her position as a Congresswoman, allegedly depicting an extramarital sexual relationship with a paid campaign staff member, the use of illegal drugs by a sitting Congresswoman, and a tattoo similar to the symbols formerly used by white supremacists.

Plaintiff’s argument that the images are not a matter of public concern because Defendant could have simply described the images rather than publishing them is unpersuasive, as the fact that information to be gleaned from an image may be disseminated in an alternative manner does not equate to a finding that the image itself is not a matter of public concern. (*Shulman, supra*, 18 Cal.4th at 228-229.) The images cannot be said to be mere “morbid and sensational eavesdropping or gossip [which] ‘serves no legitimate public interest and is not deserving of protection.’” (*Jackson*, 10 Cal.App.5th at 1258-1259.) Moreover, as held by the authorities above, “normally the public should be permitted to determine the importance or relevance of the reported facts for itself.” (*Kapellas, supra*, 1 Cal.3d at 37-38.)

Plaintiff’s citation to *Jackson* is of no help to her because the Court in *Jackson* specifically analogized the posting of a sonogram of the twins the plaintiff had been carrying prior to her abortion to the unauthorized distribution of photographs of a decapitated accident victim. (*Jackson, supra*, 10 Cal.App.5th at 1258.) Hence the phrase “morbid” used in *Jackson*. The court in *Jackson* quoted *Michaels v. Internet Entertainment Group, Inc.* ((1998) 5 F.Supp.2d 823, 839), a case on which Plaintiff also relies, for the proposition that even celebrities have privacy rights when it involves their sexual conduct. The *Michaels* case involved a lawsuit brought by two celebrities against an internet pornography company that sought to distribute a sex video depicting plaintiffs having sex. That case is readily distinguishable as the

distribution would have been of the entire video all of which depicted private sexual conduct. In a subsequent decision in the same case the court rejected plaintiffs' privacy claims against media defendants who published excerpts from the sex video tape in news reports, citing to *Shulman*. See *Michaels v. Internet Entertainment Group*, 1998 WL 882848 (C.D. Cal. Sept. 11, 1998.).

The two photos at issue here are nowhere as explicit as the sex video tape in the *Michaels* case, and are not morbid as the photos in *Jackson* were described. The photos show a sitting Congresswoman engaging in conduct some might consider highly inappropriate and perhaps unlawful, with one exhibiting Plaintiff's tattoo which looks similar to the symbols formerly used by white supremacists. The facts of which these photos speak are about Plaintiff's character, judgment and qualifications for her congressional position. Of course, these are matters of public concern. "[T]he publication does not proceed widely beyond the bounds of propriety and reason in disclosing facts about those closely related to an aspirant for public office, [and thus,] the compelling public interest in the unfettered dissemination of information will outweigh society's interest in preserving such individuals' rights to privacy." (*Kapellas, supra*, 1 Cal.3d at 37-38.)

Based on the foregoing, the Court finds that Defendant has prevailed on the second prong as to the first cause of action. Defendant's special motion to strike is GRANTED as to the first cause of action.

Second Cause of Action for Civil Conspiracy to Violate Civil Code Section 1708.85

"Civil conspiracy is not an independent tort. Instead, it is "a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration. [Citation.] By participation in a civil conspiracy, a coconspirator effectively adopts as his or her own the torts of other coconspirators within the ambit of the conspiracy. [Citation.] In this way, a coconspirator incurs tort liability co-equal with the immediate tortfeasors." [Citation.]

The elements of a civil conspiracy are (1) the formation of a group of two or more persons who agreed to a common plan or design to commit a tortious act; (2) a wrongful act committed pursuant to the agreement; and (3) resulting damages. [Citation.]" (*City of Industry v. City of Fillmore* (2011) 198 Cal.App.4th 191, 211-212.)

"[F]or conspiracy liability, the conspiring defendants must have actual knowledge that a tort is planned and concur in the scheme with knowledge of its unlawful purpose. [Citation.] Knowledge of the planned tort must be combined with intent to aid in its commission. [Citation.] "An agreement may be tacit as well as express. [Citation.] A conspirator's concurrence in the scheme 'may be inferred from the nature of the acts done, the relation of the parties, the interests of the alleged conspirators, and other circumstances.'" [Citation.]" (*Navarrete v. Meyer* (2015) 237 Cal.App.4th 1276, 1292.)

"A conspirator's concurrence in the scheme 'may be inferred from the nature of the acts done, the relation of the parties, the interests of the alleged conspirators, and other circumstances.'" [Citation.]" (*AREI II Cases* (2013) 216 Cal.App.4th 1004, 1024.)

"The gist of an action charging civil conspiracy is not the conspiracy but the damages suffered.' [Citation.] Conspiracy is not in itself a tort; it is simply a legal theory which will render all the participating members responsible for the wrong committed. (*Ibid.*) In order to state a cause of action based upon a conspiracy theory the plaintiff must allege the formation and operation of the conspiracy, the wrongful act or acts done pursuant to it, and the damage

resulting from such acts. [Citation.] In making such allegations bare legal conclusions, inferences, generalities, presumptions, and conclusions are insufficient. [Citation.] This rule has particular applicability here where the alleged object of the conspiracy, the publication of newsworthy information, is a matter the media defendants were constitutionally privileged to do and the only acts the defendants are alleged to have done pursuant to the conspiracy were privileged. Under such circumstances plaintiff cannot be permitted to avoid the effect of the constitutional privilege by the mere artifice of alleging that defendants acted pursuant to a conspiracy. [Citations.] In essence, plaintiff alleged a mutual agreement between the members of the press and others to gather newsworthy information about a public figure in a constitutionally protected fashion and then to print it. That allegation simply cannot, consistent with the Freedom of the Press Clause of the First Amendment, give rise to a cause of action in tort.” (*Nicholson v. McClatchy Newspapers* (1986) 177 Cal.App.3d 509, 521-522.)

Defendant argues that Plaintiff’s conspiracy claim must be stricken because it fails for all the same reasons as Plaintiff’s Section 1708.85 claim. Defendant asserts that where the underlying cause of action fails, so too does a derivative “conspiracy” claim.

Defendant contends that, moreover, Plaintiff also fails to plead the elements of a conspiracy, including facts showing that Defendant “agreed to a common plan or design,” and had “actual knowledge that a tort is planned and concur[ed] in the tortious scheme with knowledge of its unlawful purpose.” Defendant argues that the Complaint alleges that Defendant’s involvement began with publication of the Article, well after Heslep allegedly distributed the images on his own, and after they “spread quickly” in political circles. (Complaint ¶ 67-79.) Defendant asserts that the Complaint does not allege any “agreement” or knowing concurrence in a tortious scheme between Defendant and any alleged “co-conspirators.”

In opposition, Plaintiff argues that the standard under California law requires only “tacit consent.” Plaintiff asserts that when Defendant Van Laar, a known political opponent of Plaintiff, approached Defendant with nude photos depicting Plaintiff, a conspiracy to distribute those images was offered. (Van Laar Dec. ¶ 7.) Plaintiff contends that Defendant knew or reasonably should have known that the images provided by Defendant Van Laar were illegal material because Hill had made public statements stating exactly that fact, which it quoted. (Laidman Decl., Exh. E, at 146.) Plaintiff argues that by jumping aboard *The Daily Mail* and claiming the byline for the first article published, Van Laar cemented the conspiracy. Plaintiff asserts that Defendant made no attempt to acquire Hill’s permission to disclose the images and instead chose to complete the conspiracy that was offered to them when Defendant Van Laar provided them with unredacted nude images depicting Plaintiff.

Plaintiff contends that the nature of Defendant’s acts were not journalistic. According to Plaintiff, the illegal material was acquired by Hill’s political opponent and handed directly to Defendant who wrongfully published them.

The Court finds that Plaintiff has failed to carry her burden establishing that there is a probability of success on the merits as to her claim for civil conspiracy. As noted by the authorities above, when the alleged object of a conspiracy is a matter a defendant is constitutionally privileged to do, and the only acts the defendant is alleged to have done pursuant to the conspiracy are privileged, a plaintiff cannot be permitted to avoid the effect of the constitutional privilege by alleging that defendants acted pursuant to a conspiracy. (*Nicholson v. McClatchy Newspapers* (1986) 177 Cal.App.3d 509, 521-522.) Here, given the Court’s ruling finding that Defendant’s actions were privileged pursuant to the public concern exception to Section 1708.85, Plaintiff cannot be permitted to avoid the effect of the constitutional privilege by alleging that Defendant acted pursuant to a conspiracy. Because

Plaintiff has failed to establish a probability of success on the merits as to her Section 1708.85 cause of action, Plaintiff has also failed to establish a probability of success on the merits as to her cause of action for civil conspiracy.

Based on the foregoing, the Court finds that Defendant has prevailed on the second prong as to the second cause of action. Defendant's special motion to strike is GRANTED as to the second cause of action.

Fourth Cause of Action for Action Based on Bus. Prof. Code Section 17200

"The UCL does not proscribe specific acts, but broadly prohibits "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising...." [Citation.] "The scope of the UCL is quite broad. [Citations.] Because the statute is framed in the disjunctive, a business practice need only meet one of the three criteria to be considered unfair competition." [Citation.] " "Therefore, an act or practice is "unfair competition" under the UCL if it is forbidden by law or, even if not specifically prohibited by law, is deemed an unfair act or practice.'" [Citation.]" (*Durell v. Sharp Healthcare* (2010) 183 Cal.App.4th 1350, 1359.)

"Although the unfair competition law's scope is sweeping, it is not unlimited. Courts may not simply impose their own notions of the day as to what is fair or unfair. Specific legislation may limit the judiciary's power to declare conduct unfair. If the Legislature has permitted certain conduct or considered a situation and concluded no action should lie, courts may not override that determination. When specific legislation provides a "safe harbor," plaintiffs may not use the general unfair competition law to assault that harbor." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 182.)

"A plaintiff may thus not "plead around" an "absolute bar to relief" simply "by recasting the cause of action as one for unfair competition." [Citation.] The rule does not, however, prohibit an action under the unfair competition law merely because some other statute on the subject does not, itself, provide for the action or prohibit the challenged conduct. To forestall an action under the unfair competition law, another provision must actually "bar" the action or clearly permit the conduct. There is a difference between (1) not making an activity unlawful, and (2) making that activity lawful. . . . Acts that the Legislature has determined to be lawful may not form the basis for an action under the unfair competition law, but acts may, if otherwise unfair, be challenged under the unfair competition law even if the Legislature failed to proscribe them in some other provision." (*Cel-Tech Communications, Inc.*, *supra*, 20 Cal.4th at 182-183.)

Defendant finally argues that Plaintiff's duplicative UCL claim similarly fails. Defendant asserts that because it derives entirely from Plaintiff's Section 1708.85 claim, it thus fails for the same reasons set forth above.

In opposition, Plaintiff argues that Defendant's conduct was unfair insofar as they were knowingly committing a crime by publishing unlawfully distributed intimate images in violation of California's statutory prohibition against the dissemination of said images.

The Court finds that Plaintiff has failed to carry her burden establishing that there is a probability of success on the merits as to her cause of action for violation of Business and Professions Code section 17200. As held by the authorities above, a plaintiff may not plead around an absolute bar to relief simply by recasting the cause of action as one for unfair competition. (*Cel-Tech Communications, Inc.*, *supra*, 20 Cal.4th at 182-183.) Here, by creating the public concern exception to Section 1708.85, the Legislature explicitly extended

protection to any dissemination of images that related to a public concern, such as those published here. Accordingly, Plaintiff may not plead around this absolute bar to relief by recasting her cause of action as one for unfair competition. Because Plaintiff has failed to establish a probability of success on the merits as to her cause of action under Section 1708.85, Plaintiff has also failed to establish a probability of success on the merits as to her cause of action under Business and Professions Code section 17200.

Based on the foregoing, the Court finds that Defendant has prevailed on the second prong as to the fourth cause of action. Defendant's special motion to strike is GRANTED as to the fourth cause of action.

Conclusion

Defendant's special motion to strike is GRANTED in its entirety.

Moving party is to give notice.

The parties are strongly encouraged to attend all scheduled hearings virtually or by audio. Effective July 20, 2020, all matters will be scheduled virtually and/or with audio through the Court's LACourtConnect technology. The parties are strongly encouraged to use LACourtConnect for all their matters. All social distancing protocols will be observed at the Courthouse and in the courtrooms.