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SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

JOSEPH R. FRANCIS and GGW BRANDS, INC.,

Plaintiffs,

vs.

RYAN D. SIMKIN, 4TH STREET MEDIA, L.L.C., 4 PARK PUBLISHING, and DOES 1 through 20,

Defendants.

Case No. BC 442226

DEFENDANTS 4TH STREET MEDIA, L.L.C. AND 4 PARK PUBLISHING'S NOTICE OF MOTION AND SPECIAL MOTION TO STRIKE PURSUANT TO C.C.P. § 425.16; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Hon. Joanne O'Donnell
Dept. 37

Date: November 30, 2010
Time: 9:00 a.m.

[Declarations of Lincoln D. Bandlow, Shelli Stutz, Brian Howie and Ryan Simkin, Notice of Lodging and Appendix of Non-California Authorities filed concurrently herewith]

Complaint Filed: July 23, 2010

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on November 30, 2010, at 9:00 a.m., or as soon thereafter as counsel may be heard, in Courtroom 37 of the above-entitled Court, the Honorable Joanne O'Donnell presiding, located at 111 N. Hill Street, Los Angeles, California 90012, defendants 4th Street Media L.L.C. and 4 Park Publishing (the "Publishing Defendants") will and hereby do move the Court for an order striking the second and third claims for relief in the Complaint filed by plaintiffs Joseph R. Francis and GGW Brands, Inc. ("Plaintiffs") under California's anti-SLAPP statute, Code of Civil Procedure § 425.16 ("Section 425.16").[1]

The Publishing Defendants are named in two claims: Claim Two for Intentional Interference with Contractual Relations and Claim Three for Injunctive Relief. These claims are based on the Publishing Defendants' speech in connection with issues of public interest. Accordingly, these claims fall within the scope of Section 425.16(e)(4) and, as such, the burden shifts to Plaintiffs to establish, with competent and admissible evidence, a probability that they will prevail on those claims. Section 425.16(b)(1). Plaintiffs cannot satisfy their burden for the following reasons:

(1) Claim Two, for tortious inference with contractual relations, fails for the following independent reasons:

   a. The activity that forms the basis of this claim is fully protected under the First and Fourteenth Amendments to the United States Constitution and under Article I, Section 2 of the California Constitution;

   b. A tortious interference claim requires the existence of a valid contract and no valid contract exists;

   c. Assuming a valid contract existed, the Publishing Defendants had no knowledge of any such contract prior to entering into an agreement with defendant Ryan Simkin to publish the book in question; and

   d. Assuming a valid contract existed, the Publishing Defendants did not engage in any intentional acts to enduce defendant Ryan Simkin to breach any contract.

[1] The acronym "SLAPP" stands for Strategic Lawsuit Against Public Participation.

(2) Claim Three, for injunctive relief, is derivative of and dependant upon Plaintiffs' tortious interference claim and, therefore, fails for all the reasons listed above.

The foregoing grounds are addressed in detail in the attached Memorandum of Points and Authorities, which is incorporated herein by reference. This Motion is based on this Notice, the attached Memorandum of Points and Authorities, the concurrently-filed Declarations of Lincoln D. Bandlow, Shelli Stutz, Brian Howie and Ryan Simkin, Notice of Lodging and Appendix of Non-California Authorities, all papers, pleadings, records and files in this case, and on such other evidence and/or argument as may be presented to the Court on the hearing on this Motion. The Publishing Defendants respectfully request that the Court strike Claim Two and Claim Three, as alleged against the Publishing Defendants, with prejudice and without leave to amend.

Dated: September 7, 2010

LATHROP & GAGE LLP

By: _____
Lincoln D. Bandlow

4TH STREET MEDIA, L.L.C., and
4 PARK PUBLISHING

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Complaint describes plaintiff Joe Francis as a "businessman and philanthropist." Here are some other terms used to describe him: convicted felon; child molester; jail-baiting pervert; pimp; sick bastard; sleaze-peddler; tax cheat; rapist; sleazehole; the epitome of a true misogynist, coked-out amoral direct marketer; violent thug; juvenile smut-peddler; sexual predator; one of the 50 most loathsome people in America; and the Douche of the Decade.[2] Francis is the notorious man behind the *Girls Gone Wild* franchise, which features young girls (often intoxicated teenagers) who take off their clothes for cameras in exchange for branded t-shirts and trucker hats. In building his empire, Francis has created a twisted cult of personality, powered by his own criminal/tortious acts and pure vanity, propelling his public persona and his *Girls Gone Wild* brand into worldwide recognition.

He is also highly combative. The public record is replete with reports of his acts of physical abuse against others. In addition to actual violence, Francis uses attorneys to intimidate and coerce his perceived enemies. Despite his occasional crowing about the First Amendment – when it protects the exploitation of drunken girls who flash their breasts to strangers armed with cameras – Francis is not so keen on free speech protections for those who speak out about Francis. Thus, he routinely directs his attorneys to silence individuals and the media with threats of defamation, slander and (as here) claims for tortious interference with a contract. Francis has threatened legal action against bloggers, movie studios, newspapers and book publishers for publishing material to which he takes exception. Indeed, he recently commanded his lawyers to send a nasty letter to the producers of the film *Piranha 3D* because the film includes a clearly parodic character who videotapes groups of drunken, breast-flashing girls and then this character has a certain body part become a piranha treat.

Thus, Francis is the quintessential public figure. Indeed, Francis actively seeks out, if not lives and breathes for, public attention. Francis and his companies are the proper subjects of commentary, discussion and debate. Not all of it will be to his liking. No matter how wealthy and "lawyered-up" he may be, Francis has no right to silence reporting about him or his companies.

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[2] *See* Declaration of Lincoln D. Bandlow ("LDB Decl."), Exs. 1-56, and Section II(A), *infra*.

Here, Francis wants to do exactly that: he has brought suit to stop the publication of the book *FLASH! Bars, Boobs and Busted: 5 Years on the Road with Girls Gone Wild* (the "Book"), written by defendant Ryan Simkin ("Simkin") and published by moving defendants, 4th Street Media L.L.C. and 4 Park Publishing ("Publishing Defendants"). The Book chronicles Simkin's experiences working for *Girl's Gone Wild* over the last decade. Plaintiffs seek damages and injunctive relief, through the guise of an intentional interference with contract claim, to punish the Publishing Defendants for their fully-protected speech. As set forth below, the California anti-SLAPP statute, Code of Civil Procedure § 425.16 ("Section 425.16") thwarts just such an effort. Accordingly, Plaintiffs' claims against the Publishing Defendants must be stricken and dismissed with prejudice.

II. STATEMENT OF FACTS

A. Joe Francis, GGW Brands and Mantra Films

Both GGW Brands, Inc. ("GGW Brands") and non-party Mantra Films, Inc. ("Mantra") are part of the *Girls Gone Wild* franchise built by Francis. Described as a "global media company specializing in lifestyle entertainment" (Complaint ¶ 5), in reality, Mantra offers a massive catalog of videos that feature intoxicated young women exposing themselves and/or engaging in sex acts with other women. Declaration of Brian Howie ("Howie Decl."), ¶ 14, Ex. "B"; *Lane v. MRA Holdings, LLC*, 242 F. Supp. 2d 1205, 1209 (M.D. Fla. 2002) (*Girls Gone Wild* videos consist of "footage depicting young women exposing themselves on beaches, along streets, in bars, and in other public places"); *Jones-Harris v. State*, 943 A. 2d 1272, 1289 (Md. App. 2008) (*Girls Gone Wild* is a "soft porn video series" which "shows young inebriated women engaging in heterosexual and bisexual acts and exposing almost every conceivable anatomical part"). The videos are usually taped in drinking establishments, and rented RV's located nearby, which are sponsored by Plaintiffs and which bear the *Girls Gone Wild* mark. Howie Decl., ¶ 14, Ex. "B." The videos are available *via* pay-per-view, the internet and the U.S. Postal Service. *Id*. GGW Brands publishes a magazine entitled *Girls Gone Wild*, which features printed matter akin to the videos produced by Mantra. Complaint ¶ 6.

Plaintiffs concede that Francis and his companies are matters of intense public interest, alleging that Francis turned the *Girls Gone Wild* franchise into a "multi-million dollar global media enterprise" (Complaint ¶ 1) that is "one of the most recognizable brands in the lifestyle entertainment

business." *Id*. In a 2006 *Los Angeles Times* exposé, Francis related that a big part of his job is "simply to be seen." LDB Decl., Ex. 1, at 2. Francis further noted: "Everything that gets covered in my name drives the business . . . The two are synonymous. You have to play the image up." *Id*. at 3. On his website, Francis touts that the *Girls Gone Wild* brand has "expanded into more than two dozen countries around the world" and that the phrases "Girls Gone Wild" and "Gone Wild" have "entered the vernacular of countries across the globe just as they have in the United States." *Id*., Ex. 46. His pending wedding to an entertainment reporter has been covered by news outlets such as Fox, Dallas Morning News, New York Post, Huffingtonpost, NBC, Business Insider, KTLA and E! Online. LDB Decl., Exs. 23-30. Nevertheless, Francis complains that the press is too critical or, as he so eloquently puts it, that he has been "anally raped over and over by the media." *Id*., Ex. 1.

Francis has himself to blame for his bad press. In 2008, he was convicted on felony child abuse and prostitution charges relating to an incident involving the filming of underage girls in Florida. LDB Decl., Exs. 2, 18. Ever humble, in a Fox News interview, Francis compared his persecution to that of Jesus Christ and his treatment in jail to Abu Gharib. *Id*., Ex. 21. In 2007, he was found in contempt of court for calling the judge "out of his mind" and "a judge gone wild." *Id*., Exs. 4, 5. In 2009, he was convicted of filing a false tax return. *Id*., Exs. 18, 38. Francis has been named in at least one restraining order and numerous civil lawsuits. *Id*., Exs. 1, 18. By way of example only, in 2003, Francis was sued by a woman who helped him plan a Halloween party who Francis allegedly threatened and cursed out, causing the pregnant woman to have a miscarriage. *Id*. He has been ordered to pay Casino mogul Steve Wynn millions of dollars in unpaid gambling debts, only to respond to such an award by accusing Wynn of threatening to murder him. *Id.*, Ex. 18, 44.

Francis' conduct has resulted in numerous detractors. Readers of a popular internet blog, Gawker.com, voted Francis the "Douche of the Decade." LDB Decl., Ex. 6. Another blog listed Francis as one of the top 5 "Infamous Jailbaiting Perverts." *Id*., Ex. 10. USA Today recognized the *Girls Gone Wild* brand as one of the "25 Trends that Changed America" (along with Paris Hilton, Hooters and erectile dysfunction advertisements). *Id*., Ex. 11. A newspaper put Francis in the "Top 10 Celebrity Tax Evaders." *Id*., Ex. 12. Francis has been called a "Wal-Mart of Slime" (*id*., Ex. 13); the "second worst person in the world" (next to Mel Gibson) (*id*., Ex. 40); and a "multimillionaire

who made his fortune by cynically exploiting underage young women" whose videos documented the "decline of American civilization" and who "proved daily that alcohol is the original date rape drug" (*id.*, Ex. 42). One commentator summed up Francis by saying "[w]hat Martin Luther King was to black Americans, Joe Francis is to worthless lowest-common-denominator national embarrassments." *Id.*, Ex. 32. A Florida District Court Judge was more succinct, calling Francis "the devil." *Id*., Ex. 5.

B. Plaintiffs' Efforts to Restrict Free Speech

This lawsuit is the latest effort by Francis to restrain speech. In late 2009, Francis threatened Gawker with a libel lawsuit, saying he was going to "wipe [them] off the grid." LDB Decl., Exs. 7-9. In February 2010, Francis' libel claims against a *Playboy* model were dismissed on an anti-SLAPP motion. *Id*., Ex. 48. In May 2010, Francis threatened another website with claims for libel and *tortious interference with contract* for publishing reports that Francis physically attacked a pregnant employee. *Id*., Ex. 49. In an August 12, 2010 letter, Francis' attorneys threatened action against the producers of the recently released film *Pirahna 3D* because it has a character which parodies Francis and his *Girls Gone Wild* enterprise. *Id*., Ex., 50. Thus, although he says in the Complaint that he is "one of the most vocal advocates of an individual's right of free speech" (Complaint ¶ 4), that is not how Francis has behaved. Rather, his philosophy is simple: Free speech for me, but not for thee.

C. The Publishing Defendants and the Book

The Publishing Defendants are the brainchildren of Brian Howie, a successful director and producer. Howie Decl., ¶¶ 2, 3. Howie recently founded both 4th Street Media, which is dedicated to releasing books written by and geared toward women, and 4 Park Publishing, a subsidiary that operates under the motto "A Fresh Dose of Reality." *Id*. Another of the Publishing Defendants' principals, Shelli Stutz, graduated from Cornell Law School and is licensed to practice law in California. Declaration of Shelli Stutz ("Stutz Decl.)", ¶ 1. While Stutz sometimes provides the Publishing Defendants with legal assistance, most of her work concerns general business affairs. *Id*.

Howie first met both Francis and Simkin in or around 2003 at a *Girls Gone Wild* party in New Orleans. Howie Decl., ¶ 4; Declaration of Ryan Simkin ("Simkin Decl."), ¶ 6. At that time, Simkin was an event coordinator responsible for managing the event venue, equipment, cameramen and security for *Girls Gone Wild* events. Simkin Dec., ¶¶ 3-7. Howie was producing an off-Broadway

show featuring women who told personal stories. Howie Decl., ¶ 3. Howie's play, and events surrounding the play, frequently brought Howie, Francis and Simkin together. Howie Decl., ¶ 5; Simkin Decl., ¶ 6. Francis and Simkin repeatedly held Simkin out to be a high-ranking member of Francis' organization, often referring to Simkin as Francis' "right-hand man." Howie Decl., ¶ 5. *Id*.

In 2005, Simkin mentioned to Howie that he was working on a book about his years with *Girls Gone Wild*. Howie Decl., ¶ 6; Simkin Decl., ¶ 9. Howie liked the idea and offered to help find a publisher (at the time, Howie had not yet founded either of the Publishing Defendants). *Id*. Simkin did not state that he had signed any non-disclosure agreements or that he was in anyway prohibited from making the book. *Id*. While Howie and Simkin did not at that time take any steps to get the book published, they worked together in 2006 on a theatrical show and in December 2007 on a play written by Simkin titled *Boys Dumb/Girls Crazy*. Howie Decl., ¶ 7; Simkin Decl., ¶ 10.

In January of 2010, after founding the Publishing Defendants, Howie reached out to potential authors, including Simkin. Howie Decl., ¶ 8. Howie and Simkin discussed making *Boys Dumb/Girls Crazy* into a book. Howie Decl., ¶ 8; Simkin Decl., ¶ 14. Simkin also told Howie that "they" had been shopping a book about Simkin's *Girls Gone Wild* experiences. *Id*. Based on the circumstances and Simkin's representations, Howie understood "they" to be Simkin and Francis, *i.e.*, that Francis was helping Simkin sell his book. Howie Decl., ¶ 8. This understanding was later amply confirmed. Francis not only approved of Simkin publishing a *Girls Gone Wild* book, Francis actually helped Simkin meet publishers and agents who might be able to buy such a book. Simkin Decl., ¶¶ 11-12.

On February 16, 2010, Simkin and the Publishing Defendants signed an agreement to publish a book ("Book Agreement"), which was predicated on Simkin having the legal right to discuss *Girls Gone Wild* events and the Book containing "anecdotes, experiences, opinions, facts, celebrity encounters, and circumstances" based on Simkin's time with *Girls Gone Wild*. Howie Decl., ¶¶ 9-11, Ex. A at 1; Simkin Decl., ¶ 16. In exchange, Simkin received a $10,000 advance and the right to receive a percentage of the profits. *Id*. Moreover, Simkin warranted that he "has the right to enter into this [Book] Agreement and owns and can convey the rights granted" to the Publishing Defendants. Howie Decl., Ex. A, at ¶ 15(A).

In addition, the Publishing Defendants repeatedly asked Simkin whether he ever entered any confidentiality agreements with Francis, Mantra or related entities. Stutz Decl., ¶¶ 3-5. In response, Simkin represented that he might have entered into an employment agreement, but that if he had, it did not include a confidentiality or non-disparagement clause. Simkin Decl., ¶¶ 5, 15. Simkin said he was responsible for obtaining confidentiality agreements with other Mantra employees (including cameramen, whom Simkin managed) – but that he did not sign any such agreement himself. *Id*. Simkin also represented that he was in contact with the former in-house counsel for Mantra, who had advised Simkin that Simkin had the legal right to publish such a book. Stutz Decl., ¶ 4.

Based on the warranties in the Book Agreement, and Simkin's verbal representations, the Publishing Defendants executed the Book Agreement and paid Simkin a $10,000 advance. Stutz Decl., ¶¶ 4-6; Howie Decl., ¶¶ 8-9. In the weeks following the February 2010 execution of the Book Agreement, Simkin, Howie and Stutz worked tirelessly to write and edit the Book. Howie Decl., ¶ 11; Simkin Decl., ¶ 17. While the contents of the Book are drawn from Simkin's accounts of his experiences coordinating *Girls Gone Wild* events, the Publishing Defendants invested significant time and money to turn Simkin's experiences into the final written product. *Id*. The Book was complete, other than some editing, by late April 2010. Howie Decl., ¶ 11.

After the Book was completed and ready for printing, the Publishing Defendants for the first time received notice that Simkin purportedly executed a confidentiality or non-disparagement agreement. In May 2010, Stutz reached out to Francis as a courtesy to see if Francis wanted to play a part in the Book's publication. Stutz Decl., ¶¶ 8-11, Exs. "C"-"F." Francis responded with pure vitriol, firing off a nasty email saying that Stutz "fucked with the wrong guy" and that he was going to "take EVERYTHING YOU HAVE AND [Simkin] HAS." *Id*., ¶ 11, Ex. "F."

A few days later, Mantra's lawyer followed up with a cease-and-desist letter, which attached two agreements that Mantra contended precluded Simkin from making certain disclosures regarding his work for Mantra and Francis. Howie Decl., ¶ 12. Until receiving this letter, the Publishing Defendants had not seen any such agreements or any other evidence that such agreements existed (aside from the aforementioned email from Francis). *Id*. The Publishing Defendants were surprised

to learn that Simkin supposedly signed an agreement with a non-disparagement provision on February 17, 2010 – the day after he executed the Book Agreement. *Id*.

III. LEGAL STANDARDS CONCERNING CALIFORNIA'S ANTI-SLAPP STATUTE

A. Two-Step Process to Determine Whether a Claim Must be Stricken

California's anti-SLAPP statute creates a two-step process for determining whether an action should be stricken. *Varian Med. Sys., Inc. v. Delfino*, 35 Cal. 4th 180, 192 (2005). The court first decides whether defendant has shown that the acts complained of were taken in furtherance of the defendant's right of free speech "in connection with a public issue." *Equilon Enters. v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 67 (2002); C.C.P. § 425.16(e)(4). Once the first prong is shown, the burden shifts to the plaintiff to demonstrate a probability of success on its claims. If this burden cannot be met, the claims must be stricken. *Equilon Enters.*, 29 Cal. 4th at 67; C.C.P. § 425.16(b)(1).

B. The Anti-SLAPP Statute Broadly Protects Media and Entertainment Defendants

The anti-SLAPP statute encourages participation in matters of public significance by targeting "lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech." *Equilon Enterprises*, 29 Cal. 4th at 59-60 (*quoting* C.C.P. § 425.16(a)). In 1997, Section 425.16(a) of the anti-SLAPP statute was amended to ensure that it "shall be construed broadly." *See Briggs v. Eden Council*, 19 Cal. 4th 1106, 11231-22, 1125 (1999). Section 425.16 is routinely applied to protect media and entertainment defendants who distribute such works as newspapers and magazines (*Lafayette Morehouse v. Chronicle Publ'g Co.*, 37 Cal. App. 4th 855, 863-64 (1995) and *Stewart v. Rolling Stone LLC*, 181 Cal. App. 4th 664, 677-78 (2010)); community newsletters (*Damon v. Ocean Hills Journalism Club*, 85 Cal. App. 4th 468, 479 (2000)); greeting cards (*Hilton v. Hallmark Cards*, 599 F.3d 894, 904 (9th Cir. 2010)); and television/radio programming (*Lieberman v. KCOP Television, Inc.*, 110 Cal. App. 4th 156, 165 (2003)), *Seelig v. Infinity Broad. Corp.*, 97 Cal. App. 4th 798, 807-08 (2002)) and *Ingels v. Westwood One Broad. Servs. Inc.*, 129 Cal. App. 4th 1050, 1055-56 (2005)). Courts draw no distinction between reports concerning "news," like politics and world affairs, and reports concerning "entertainment," like celebrities and pop culture. *Gates v. Discovery Communications, Inc*., 34 Cal. 4th 679, 695 (2004) (freedom of speech protections "apply with equal force to the publication whether it be a news report or an entertainment feature"); *Hilton*,

599 F.3d at 905 ("the activity of the defendant need not involve questions of civic concern; social or even low-brow topics may suffice").

C. The Anti-SLAPP Statute Applies to "Any Kind of Claim" Interfering with Free Speech Rights – Including Claims for Tortious Interference

The anti-SLAPP statute is specifically geared to curb claims for tortious interference. *Briggs v. Eden Council for Hope & Opportunity*, 19 Cal. 4th 1106, 1125 (1999); *Nygard, Inc. v. Uusi–Kerttula*, 159 Cal. App. 4th 1027, 1039 (2008) (striking claim for tortious interference with an employment agreement calling for employee's confidentiality). Its application is not, however, limited to any particular claim. *Church of Scientology v. Wollershem*, 42 Cal. App. 4th 628, 642 (1996). The Legislature acknowledged that "all kinds of claims could achieve the objective of a SLAPP suit – to interfere with and burden the defendant's exercise of his or her rights." *Id*. at 652; *see also Hilton*, 599 F.3d at 905 ("the particular cause of action [plaintiff] has brought is irrelevant" to the first prong issue); *Stewart*, 181 Cal. App. 4th at 679 ("we do not evaluate the first prong of the anti-SLAPP test solely through the lens of a plaintiff's cause of action").

IV. PLAINTIFFS' CLAIMS TAKE AIM AT THE PUBLISHING DEFENDANTS' EXERCISE OF THEIR FREE SPEECH RIGHTS IN PUBLISHING A BOOK THAT CONCERNS NUMEROUS MATTERS OF PUBLIC INTEREST

Section 425.16(e)(4) encompasses any claim that arises from, or is based on, acts taken in furtherance of the exercise of speech rights "in connection with a public issue or an issue of public interest." C.C.P. § 425.16(e)(4). First, the development and publication of the Book is obviously an exercise in speech. *See Lieberman*, 110 Cal. App. 4th at 166 (gathering of information for publication constituted an act "in furtherance" of free speech and satisfied first prong of the anti-SLAPP statute). Second, the Book satisfies the "public interest" requirement – particularly given the broad interpretation given to that term. The definition of "public interest" has been "broadly construed to include not only governmental matter, but also private conduct that impacts a broad segment of society." *Damon*, 85 Cal. App. 4th at 479. Any matter in which the public takes interest is a "public interest" – regardless of its overall societal importance. *See, e.g.*, *Nygard,* 159 Cal. App. 4th at 1039 (statements about colorful Finnish businessperson in the public interest); *Sipple v. Found.*

for Nat. Progress, 71 Cal. App. 4th 226, 239 (1999) (article about political consultant in the public interest); *Blanche Hall v. Time Warner, Inc.*, 153 Cal. App. 4th 1337 (2007) (article about Marlon Brando in public interest); *Stewart*, 181 Cal. App. 4th at 677-78 (magazine foldout about a "popular genre of music" in public interest).

Here, the Book relates to numerous issues of public interest: Francis; the celebrities that Francis has dated and who revolve around him; *Girls Gone Wild* videos and the public's reaction to them; drug and alcohol use; free speech; obscenity laws and many others. *See* Howie Decl., Ex. "B." Plaintiffs themselves have conceded as much. *See Gritzke v. M.R.A. Holdings, LLC*, 2002 WL 32107540 (N.D. Fla. 2002) (asserting that footage of college student who exposed herself for *Girls Gone Wild* video was "footage of a newsworthy public event"). Although to many he is a shallow profiteer who exploits his performers and customers alike, Francis has clearly captured the public's attention (or at least their morbid curiosity) and is part of our popular culture, already leading one court to hold that speech about Francis satisfies the anti-SLAPP statute. LDB Decl., Ex. 48. The Book also contains substantial information about the well-known celebrity, Paris Hilton (*see* Howie Decl., Ex. B), and thus the Book meets the first prong for that reason alone. *See Hilton*, 599 F.3d at 907 (first prong met because greeting card concerned Paris Hilton and there is a public interest in Paris Hilton's "life, image, and catchphrase"). Accordingly, the first prong of the Anti-SLAPP statute is clearly met.

V. PLAINTIFFS CANNOT DEMONSTRATE A PROBABILITY OF SUCCESS ON THEIR CLAIMS AGAINST THE PUBLISHING DEFENDANTS

Because the Publishing Defendants satisfied the first prong of the anti-SLAPP statute's test, the burden shifts to Plaintiffs to present "competent and admissible evidence' showing that they will "probably" prevail on their claims. *Equilon Enters.*, 29 Cal. 4th at 67; C.C.P. § 425.16. Plaintiffs cannot meet this burden and thus their claims against the Publishing Defendants must be stricken.

A. Plaintiffs' Tortious Interference With Contractual Relations Claim Fails

Plaintiffs asserting a tortious interference with contract claim must establish: (1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of that contract; (3) defendant engaged in intentional improper acts to induce the third party to breach the contract; (4) an actual

breach of the contract; and (5) damages suffered as a result of the breach. *Quelimane Co. v. Stewart Title Guar. Co.*, 19 Cal. 4th 26, 55 (1998). Plaintiffs' claim fails for a number of different reasons.

1. The First Amendment Bars Plaintiffs' Claim

This lawsuit attempts to restrain speech about numerous public issues and flies in the face of the Publishing Defendants' First Amendment rights. Indeed, it is ironic that pornographers such as Plaintiffs would be biting the hand from which they are fed. Courts have consistently extended free speech protection to the type of newsgathering and publishing activity upon which Plaintiffs' tortious interference claim is predicated. Thus, the First Amendment bars Plaintiffs' claim.

Identical claims were dismissed on demurrer in *Nicholson v. McLatchy Newspapers*, 117 Cal. App. 3d 509 (1986). In *Nicholson*, the plaintiff, an attorney, was under consideration for a judicial appointment and received a "not qualified" rating by the State Bar. California law states that such ratings are confidential and the newspaper defendants supposedly conspired with the State Bar to disclose and print that information. *Id*., at 514. The Court held that the solicitation and publication of information, even information known to be confidential, was protected by the First Amendment:

> [T]he First Amendment protects the **ordinary news gathering techniques of reporters and those techniques cannot be stripped of their constitutional shield by calling them tortious**. . . . In fact, "without some protection for seeking out the news, freedom of the press could be eviscerated." [citation] **The First Amendment, therefore bars interference with this traditional function of a free press in seeking out information by asking questions**. Thus it is that "a journalist is free to seek out sources of information not available to members of the general public, that he is entitled to some constitutional protection of the confidentiality of such sources and that government cannot restrain the publication of news emanating from such sources." [citation] Consequently, the news gathering component of the freedom of the press-the right to seek out information-is privileged at least to the extent it involves "routine ... reporting techniques." [citation] **Such techniques, of course, include asking persons questions, including those with confidential or restricted information**.

Id., at 513, 519-520; *see also Landmark Comms., Inc. v. Virgina*, 435 U.S. 829, 838, 841 (1978) (rejecting criminal sanctions against newspaper that printed obviously confidential information); *Bartnicki v. Vopper*, 532 U.S. 514 (2001) (media defendant could not be precluded from publishing illegally obtained taped conversation about matter of public concern).

Thus, the Publishing Defendants' acts are protected even if Plaintiffs' could otherwise state a claim for tortious interference (they cannot). The Complaint alleges that the Publishing Defendants solicited information from Simkin and later printed that information in the Book. Complaint ¶ 30. That conduct is protected by the First Amendment regardless of whether Simkin was under a legal obligation not to make such disclosures (he was not) and/or whether the Publishing Defendants knew of Simkin's legal obligations (they did not). In other words, the act of publishing information that comes from a person the publisher knows is legally bound not to disclose it is a "routine reporting technique" protected by the First Amendment and immune from tort liability.

2. No Valid Contract Precluded Defendant Simkin from Disclosing Any Information to the Publishing Defendants

To prevail on a claim of tortious interference with a contract, a plaintiff must establish the existence of a valid, enforceable contract. *Quelimane*, 19 Cal. 4th at 55. The Complaint alleges the existence of a hodgepodge of supposed agreements thrown against the wall in the hopes that one might apply and be enforceable. The supposed agreements unravel upon the slightest of scrutiny.

2002 or 2003 Non-Disclosure Agreement (not attached to Complaint). The Complaint alleges the existence of a non-disclosure agreement, dated either in 2002 or 2003, entered into by Mantra and Simkin. Complaint ¶ 16. Critically, however, Plaintiffs do not attach a copy of this agreement but allege that it was their "policy and practice" to have cameramen sign such agreements. Plaintiffs aver that Simkin was a cameraman and therefore must have signed a similar agreement. *Id*. This averment is based "on information and belief." *Id*. In the face of these averments, Simkin states under penalty of perjury in the concurrently-filed Declaration that he was never a cameraman and never signed a non-disclosure agreement in 2002 or in 2003. *See* Section II(C), *supra*.

October 2005 Non-Disclosure Agreement (Exhibit "A" to Complaint). The Complaint further alleges the existence of an October 18, 2005 confidentiality agreement. As set forth above, however, Simkin's October 2005 window of employment lasted only a few weeks. The information that Simkin disclosed to the Publishing Defendants consisted primarily of information obtained long before 2005. The Complaint does not identify a single fact that was simultaneously (a) confidential,

(b) acquired by Simkin during this short stint of employment, and (c) disclosed by Simkin to the Publishing Defendants.

February 2010 Acknowledgment of Receipt of Wages (Exhibit "C" to Complaint). The Complaint also alleges that Simkin's disclosures breached an agreement dated February 17, 2010. This agreement purports to prohibit Simkin from speaking to anyone about anything learned during any of this multiple stints of employment with Mantra. The non-disclosure clause of this agreement is unenforceable and reflects a violation California Labor laws. In 2008, Francis hired Simkin to write articles for Plaintiffs' magazine. Simkin Decl., ¶ 11. Simkin performed the work, conveyed the writings and submitted an invoice. Francis, however, refused to pay Simkin the due and owing wages. After significant begging by Simkin, Francis agreed to pay Simkin $2,700, but conditioned the payment upon Simkin signing a non-disparagement clause.

That "condition" more than voids the agreement – it violates California law. Employers cannot condition the payment of wages owed upon releases or a discount of the indebtedness. *See*, *e.g.*, Cal. Labor Code §§ 206, 206.5, 216; *In re Trombley*, 31 Cal. 2d 801, 809 (1948) (an employer who refuses to pay owed wages "acts against good morals and fair dealing, and necessarily intentionally does the act which prejudices the rights of his employee"); Cal. Civ. Code §§ 1575, 1668. To do so is a criminal act. Labor Code Section 206.5(a). Setting aside the propriety, morality and legality of withholding wages due, the release in the February 2010 agreement is not enforceable.

Various Undated Oral Agreements. The Complaint also avers that Simkin orally agreed not to disclose "confidential information" and/or information disparaging to Plaintiffs. *See*, *e.g.*, Complaint ¶ 2, 13. Of course, an oral agreement "never" to disclose or disparage is violative of the statute of frauds in that it cannot be performed in one year. Cal. Civ. Code § 1624(a)(1); *Munoz v. Kaiser Steel Corp.*, 156 Cal. App. 3d 965, 971 (1984) (oral employment agreement held unenforceable under statute of frauds). Even if the Complaint otherwise adequately stated a claim for the tortious interference with an oral agreement,[3] that claim would be barred by the statute of frauds.

[3] Moreover, the Complaint fails to assert a claim for the breach of an oral agreement. Rather, Plaintiffs' contract claim is styled "Breach of Written Contract."

3. The Publishing Defendants Had No Knowledge of Any Confidentiality Agreements Prior to Entering the Book Agreement

Even if Plaintiffs somehow establish the existence of a valid contract, they will not be able to prove that the Publishing Defendants had any knowledge of any such agreement prior to the execution of the Book Agreement or Simkin's disclosure of the information contained in the Book. The defendant's knowledge is an essential element to a claim for tortious interference. *See Quelimane*, 19 Cal. 4th at 55; *Summit Mach. Tool Mfg. Corp. v. Victor CNC Sys., Inc.*, 7 F.3d 1434, 1442 (9th Cir. 1993) (applying California law and rejecting tortious interference claim where plaintiff failed to establish defendants' prior knowledge of agreement). As set forth in the accompanying declarations, the Publishing Defendants had no knowledge that Simkin was purportedly under any contractual obligation not to disclose information. *See* Section II(C), *supra*.

The Publishing Defendants relied on Simkin's oral and written representation to enter into the Book Agreement and work with Simkin on the Book. *Id*. The Publishing Defendants were not made aware of any supposed contracts that would prohibit Simkin from disclosing the information set forth in the Book until mid-May 2010. By that time, the parties had already entered into the Book Agreement, the Publishing Defendants had already forwarded Simkin his $10,000 advance, and the Book was substantively complete. *Id*. The Publishing Defendants had every right to publish the Book, regardless of Simkin's contractual obligations. *Dryden v. Tri-Valley Growers*, 65 Cal. App. 3d 990, 996 (1977) (there is no requirement that parties "rescind a contract lawfully entered into on the ground that it might offend the legal rights of others"). Because the Publishing Defendants did not know of a valid contract prior to executing the Book Agreement and/or receiving the information from Simkin, Plaintiffs' tortious interference claim fails.

4. The Publishing Defendants Did Not Engage In Any Intentional Improper Acts To Enduce Defendant Simkin To Breach Any Contract

In addition to having no knowledge of any contract between Simkin and Plaintiffs, the Publishing Defendants certainly did not engage in any intentional improper acts to enduce Simkin to breach any contract. Indeed, they did exactly the opposite: they required Simkin to specifically represent and warrant in the Book Agreement that he was *not* breaching any such contract. They

repeatedly asked him to confirm that he was not breaching any such contract. Finally, the only "acts" that the Publishing Defendants undertook as to Simkin was to pay him an advance for his writing services. Thus, Plaintiffs cannot show that the Publishing Defendants engaged in any intentional improper acts to somehow induce Simkin to breach a contract.

B. Plaintiffs Cannot Present Competent and Admissible Evidence Showing that they Will Probably Prevail on Their Claim for Injunctive Relief

Plaintiffs' only other claim against the Publishing Defendants, for injunctive relief, is predicated on, and derivative of, its tortious interference claim. To state a "claim" for injunctive relief, a plaintiff must first prove-up a tort or other wrong that necessitates such relief. 5 Witkin, Cal. Proc. 5th (2008) Plead, § 823, p. 239. Plaintiffs' injunctive relief claim merely incorporates by reference the previous allegations and asserts that their remedies at law are inadequate. Complaint ¶¶ 33-35. Therefore, just as Plaintiffs' tortious inference claim must fail, so to must their claim for injunctive relief.

VI. CONCLUSION

As numerous lawsuits set forth in the LDB Decl. attest, over the years a number of young women who have woken up, or sobered up, the day after a long night of partying and realized that they traded their dignity for a set of Mardi Gras beads, have sued Francis and his company to stop the distribution of these women's filmed folly. In response to such lawsuits, nobody has trumpeted the First Amendment more loudly than Joe Francis. Now, when the protective blare of that trumpet is necessary to protect a work about Francis and the iconic *Girls Gone Wild* empire, Plaintiffs seek to silence it. Fortunately, the California Legislature created the anti-SLAPP statute to make sure Plaintiffs' effort will not succeed. For all of the foregoing reasons, the motion should be granted.

Dated: September 7, 2010

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