**Hearing Date:** 04/08/2021
**Department:** 31
PLAINTIFF'S MOTION FOR LIMITED DISCOVERY IS DENIED.

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).

On February 4, 2021, Defendant Van Laar (hereinafter "Defendant") filed her ant-SLAPP motion originally set for hearing on March 10, 2021.

On March 9, 2021, Plaintiff filed the instant motion to lift stay of discovery to conduct limited discovery pursuant to Code of Civil Procedure section 426.16(g).

Plaintiff moves for an order lifting the stay of discovery imposed by Section 425.16(g) and allowing limited discovery to be conducted, namely in allowing Plaintiff to depose and obtain documents from Defendant.

Legal Standard

If a plaintiff believes that discovery is necessary to oppose an anti-SLAPP motion, Code of Civil Procedure section 425.16(g) expressly requires the filing of a noticed motion. (*Robertson v. Rodriguez* (1995) 36 Cal.App.4th 347.) The plaintiff may not simply oppose the anti-SLAPP motion by insisting that discovery is needed.

A plaintiff must show "good cause" before taking any discovery after the filing of an anti-SLAPP motion. (CCP § 425.16(g).) "Good cause" means only discovery relevant to the plaintiff's burden of establishing a "reasonable probability of prevailing on the claim" (CCP § 425.16(b)(3).) Discovery that is not relevant to a legal defense being asserted by the defendant in the anti-SLAPP motion is not permitted. (*Blanchard v. DIRECTV, Inc.* (2004) 123 Cal.App.4th 903, 922.) Plaintiff must demonstrate the facts they expect to uncover in their discovery. (*Id.*)

A trial court's decision to disallow discovery will not be disturbed unless it is "arbitrary, capricious, or a patently absurd determination." (*Tutor-Saliba Corp. v. Herrera* (2006) 136 Cal. App. 4th 604, 617.)

Discussion

Plaintiff moves for an order lifting the stay of discovery imposed by Section 425.16(g) and allowing limited discovery to be conducted, namely in allowing Plaintiff to depose and obtain documents from Defendant.

***Timeliness***

"If the plaintiff makes a timely and proper showing in response to the motion to strike, that a defendant or witness possesses evidence needed by plaintiff to establish a prima facie case, the plaintiff must be given the reasonable opportunity to obtain that evidence through discovery before the motion to strike is adjudicated." (*Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 37

Cal.App.4th 855, 868.) “The trial court, therefore, must liberally exercise its discretion by authorizing reasonable and specified discovery timely petitioned for by a plaintiff in a case such as this, when evidence to establish a prima facie case is reasonably shown to be held, or known, by defendant or its agents and employees. (*Id.*)

Defendant first opposes the instant motion arguing that Plaintiff’s motion for discovery, filed after the Court issued its tentative ruling granting Defendant’s anti-SLAPP motion, is not timely. Defendant asserts that Plaintiff’s counsel knew, even before Defendant filed her anti-SLAPP motion, the type of evidence Defendant intended to introduce in support of her arguments as a result of a telephone call between the parties on January 29, 2019. (Baughman Decl. ¶ 4.) Defendant contends that Plaintiff’s counsel also was or should have been well aware – both by virtue of the January 29, 2019 phone call and Defendant’s Memorandum of Points and Authorities in support of her motion to strike, not to mention the clear mandates of Section 425.16 and anti-SLAPP case law, that Plaintiff was required to submit admissible evidence in her opposition in order to meet her prong two burden. Defendant argues that Plaintiff’s counsel had 27 days between when she was informed of Defendant’s grounds for her anti-SLAPP motion and when her opposition was due to seek discovery; she did not. Defendant asserts that instead, Plaintiff chose to file a legally defective opposition without any admissible evidence in support of her claims.

Defendant contends that her reply brief in support of her anti-SLAPP motion contained no new evidence or arguments; every piece of evidence and every argument on which Plaintiff’s counsel now seeks discovery was presented in Defendant’s initial motion. Defendant argues that Plaintiff’s failure to seek discovery “in response to” Defendant’s anti-SLAPP motion as required waives the arguments set forth in her discovery motion.

Defendant rejects Plaintiff’s assertion that “cases on point suggest that timeliness for a discovery motion under California Civil Code section 425.16(g) depends only on whether the motion was made prior to the hearing on the anti-SLAPP motion.” This view is unsupported by the three cases Plaintiff cites, two of which are unpublished and cannot be cited by Plaintiff or considered by the Court pursuant to California Rules of Court Rule 8.1115. Defendant contends that even if these unpublished cases were properly considered, neither even remotely stand for the position Plaintiff asserts. Defendant argues that Plaintiff’s sole published case, *Evans v. Unkow* ((1995) 38 Cal.App.4th 1490, 1499) is inapposite, as it involved the denial of a discovery request made by a plaintiff in the context of a motion for reconsideration where the court said a discovery request accompanying a motion for reconsideration was untimely. The court did not discuss or remotely suggest that a request for discovery made after opposition briefing and after the court’s tentative ruling was issued, and a mere 13 hours before the hearing on the motion, would be timely. Defendant contends that Plaintiff has no legal authority to support her extraordinary request.

Defendant further argues that Plaintiff had ample notice and opportunity to seek the discovery that she now belatedly requests. Defendant contends that granting Plaintiff’s untimely motion for discovery would defeat the legislative purpose of the anti-SLAPP statute—to allow early dismissal of meritless SLAPP suits so as not to deplete the defendant’s energy and resources and to ensure an expedited procedure for resolution of frivolous lawsuits. (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 192.) Defendant argues that indeed, if this Court were to grant Plaintiff’s discovery motion, the Court would presumably also need to allow a second round of briefing to address whatever new evidence Plaintiff believes supports her claims, and a subsequent response by Defendant, frustrating legislative intent and creating a procedural quagmire.

In reply, Plaintiff argues that her motion is timely. Plaintiff asserts that her motion was properly noticed and Defendant knew the motion would be filed. (Baughman Decl. ¶ 6.) Plaintiff asserts that on March 8, 2021 at 12:46 pm, Plaintiff’s counsel requested a meet and confer about the motion. Plaintiff contends that a number of emails were exchanged and on March 9, 2021, the telephonic meet and confer transpired between counsel. (Supp. Goldberg Decl. ¶ 1.) Plaintiff argues that she had every right to bring a motion before the Court held a hearing on the anti-SLAPP motion.

Plaintiff asserts that she deserves the most expansive interpretation of timeliness when it comes to filing a motion of discovery given the fact that she is presently defending herself against four sets of anti-SLAPP motions. Plaintiff contends that prevents the Court from continuing a hearing to a later date so that the discovery it authorized can be completed. Plaintiff argues that timeliness must be construed in light of the imperative for a court to "liberally" exercise its discretion to grant a plaintiff limited discovery against a media defendant holding otherwise unavailable information. (*Lafayette Morehouse, Inc.*, *supra*, 37 Cal.App.4th at 868.)

The Court finds that the instant motion is untimely. As noted by Defendant, Plaintiff filed the instant motion hours *after* the Court issued its tentative ruling on March 9, 2021. Whether or not Plaintiff saw or reviewed the tentative ruling prior to her drafting of the instant motion is of no import; the undisputed facts establish that Plaintiff failed to move for limited discovery prior to filing her opposition on the merits or at *any time* before this Court issued its tentative ruling.

While the statute itself does not state that a motion for limited discovery must be brought at a certain time, the Court finds that the summary judgment statute, another kind of dispositive motion, is instructive here. Pursuant to Code of Civil Procedure 437c(h), "[i]f it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication, or both, that facts essential to justify opposition may exist but cannot, for reasons stated, be presented, the court shall deny the motion, order a continuance to permit affidavits to be obtained or discovery to be had, or make any other order as may be just. The application to continue the motion to obtain necessary discovery may also be made by ex parte motion at any time on or before the date the opposition response to the motion is due."

In *Roth v. Rhodes* ((1994) 25 Cal.App.4th 530), the party moving for a continuance to conduct discovery necessary to oppose the motion for summary judgment made the request at the time of the hearing on the motion. The court held that that "in and of itself, is an adequate basis for denial of the continuance [for the purposes of discovery]. Being mindful of the preparation time required of the trial judge for a motion of this type, we recognize where such a request is made after the court reviewed the matter in preparation for the hearing, substantial inefficiencies result if continuance is granted." (*Roth*, *supra*, 25 Cal.App.4th at 547–548.) The court in *Roth* also noted that no reason was given for the lateness of the request, which it held, "too, was a sufficient basis for the denial of the continuance." (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 548.)

Plaintiff was on notice of the issues raised by Defendant's anti-SLAPP motion no later than February 4, 2021, the date Defendant filed her motion or even earlier in January during a phone conversation with Defendant's counsel. Based on the initial hearing date of March 10, 2021, Plaintiff's opposition was due on February 25, 2021, and Plaintiff timely filed her opposition on the merits. Presumably, Plaintiff would have become aware of the discovery needed to oppose the anti-SLAPP on its merits during the drafting of the opposition. Still, Plaintiff did not file the instant motion *along* with her opposition on the merits nor did she move ex parte to continue the hearing on the anti-SLAPP to a date after so that a motion for limited discovery could be heard. Instead, Plaintiff waited 12 days to file the instant motion, after Defendant had filed her reply and this Court had issued its tentative ruling, and one day before the hearing on this motion. Plaintiff gave no indication to the Court or to Defendant of her intention to move for limited discovery prior to Defendant filing her reply. Plaintiff also gives no explanation for her delay.

In failing to give notice to Defendant of her intent to move for limited discovery prior to the date Defendant's reply was due, Plaintiff's untimely request flies in the face of the anti-SLAPP statute's purpose of "prevent[ing] SLAPPs by ending them early and without great cost to the SLAPP target." (*Varian Medical Systems, Inc.*, *supra*, 35 Cal.4th at 192.) Additionally, given that the Court had already issued its tentative ruling, substantial inefficiencies would result if the instant motion is granted.

Moreover, none of the cases cited by Plaintiff stand for the proposition that a motion is timely so long as it is made before the anti-SLAPP is ruled upon. While the Court must liberally exercise its discretion by authorizing reasonable and specified discovery, such a request for discovery must be timely made. Here, Plaintiff's motion was filed after her opposition on the merits, after Defendant's reply, and after the Court posted its tentative ruling. The motion is therefore untimely.

Based on the foregoing, Plaintiff's motion to lift stay of discovery to conduct limited discovery under Section 425.16(g) is DENIED.

Conclusion

Plaintiff's motion to lift stay of discovery to conduct limited discovery under Section 425.16(g) is DENIED.

DEFENDANT VAN LAAR'S SPECIAL MOTION TO STRIKE 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 Van Laar (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*).)

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 that section 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 Plaintiff's lawsuit concerns Defendant's First Amendment conduct in informing the public of an elected official's alleged sexual relationship with a paid staffer and illegal drug use. Defendant asserts that her news articles, including the photographs which are the subject of the causes of action, constitute protected activity, as they informed the public of potential gross abuses of power and privilege by a sitting Congresswoman. Defendant contends that the at-issue conduct – the publication of the photographs – occurred on Redstate.com and DailyMail.com, news mediums readily and publicly accessible. Defendant argues that they are thus "public forums" for anti-SLAPP purposes.

Defendant asserts that additionally, as a journalist, her reporting of the news and the photographs showing questionable behavior by Plaintiff is protected conduct. Defendant contends that even if

Defendant had been acting as a private citizen and not a journalist reporting the news, Defendant's conduct would be First Amendment protected because the articles and photographs addressing a sitting Congresswoman's alleged sexual relationship with a paid staffer and illegal drug use are indisputably matters of public interest.

Defendant argues that specifically, the photograph with the Congresswoman naked and brushing the hair of a paid staffer is of public concern because it offered readers visual evidence of the intimate nature of the alleged relationship with the staffer. (Van Laar Decl. ¶ 7.) Defendant asserts that the photograph of Plaintiff holding a bong appearing to contain marijuana is of public concern because readers could then conclude for themselves whether they believed it showed the Congresswoman engaged in illegal drug use. Defendant contends that Plaintiff's resignation independently confirms that the subjects of Defendant's news reporting were matters of interest to Plaintiff's constituents protected by the First Amendment.

In opposition, Plaintiff argues that Defendant fails to show that the challenged claims arise from protected activity. Plaintiff first asserts that the gravamen of Plaintiff's claims against Defendant are image-based privacy violations and are not protected activity. Citing to *Jackson v. Mayweather* ((2017) 10 Cal.App.5th 1240, 1249), Plaintiff contends that California courts distinguish between statements and images when determining whether the plaintiff's cause of action was based on defendant's free speech. Plaintiff argues that while Defendant's statements about Plaintiff may well be protected speech, Defendant is being sued for the distribution of the images, not the speech. Plaintiff asserts that the nude images were not newsworthy because Defendant could, and did, convey the same thing with words and descriptions of the images. Plaintiff contends that, additionally, Defendant continued to distribute the images even after she'd already published her article about Plaintiff. Plaintiff argues that several of the nude images Defendant distributed were never published at all, undermining her claim that the non-distributed ones were ever newsworthy.

Plaintiff further asserts that Defendant's conduct was not in furtherance of her rights to free speech. Plaintiff contends that Defendant misconstrues the alleged conduct at issue, as it is not Defendant's reporting about Plaintiff, but her distribution of Plaintiff's intimate photos which constitute the core injury-producing conduct alleged by Plaintiff. Plaintiff argues that Defendant's conduct in publishing Plaintiff's photos do not serve the required "public interest." Plaintiff asserts that her intimate photographs, alongside reporting about their contents, served only the public's curiosity in viewing her naked body, not any interest in Plaintiff's character and qualifications as an elected official.

Plaintiff finally contends that Defendant is not being sued for news gathering or news reporting, but for distributing Plaintiff's naked images. Plaintiff argues that Defendant admits in her declaration to sharing ten nude images of Plaintiff with the Daily Mail but does not explain how each of those ten images relate to sexual relationships with a paid staffer or illegal marijuana use. Plaintiff asserts that Defendant fails to explain how republishing the nude images furthers her right to petition or advances a matter of public concern.

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. (Complaint ¶ 73-75, 79-80 146-147, 157.) However, the distribution of such images is alleged to have only occurred through their publication on Redstate.com and DailyMail.com. (Complaint ¶ 73-75, 79-80, 146-147.) The publication of the images accompanied articles that were also published on the subject news websites. 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.

While Plaintiff argues that Defendant's distribution of the images to the Daily Mail is the activity complained of, nowhere in the Complaint is that alleged. Instead, the Complaint only alleges that Defendant distributed the images through their publication in the articles allegedly written by

Defendant. "'As is true with summary judgment motions, the issues in an anti-SLAPP motion are framed by the pleadings.' ([citation]; *Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 655, 49 Cal.Rptr.2d 620 [the pleadings "frame the issues to be decided"].) Thus, the act or acts underlying a claim for purposes of an anti-SLAPP statute *is determined from the plaintiffs' allegations.* [Citation.] Because the issues to be determined in an anti-SLAPP motion are framed by the pleadings, we will not "insert into a pleading claims for relief based on *allegations of activities that plaintiffs simply have not identified* .... It is not our role to engage in what would amount to a redrafting of [a] complaint in order to read that document as alleging conduct that supports a claim *that has not in fact been specifically alleged*, and then assess whether the pleading that we have essentially drafted could survive the anti-SLAPP motion directed at it." [Citation.]" (*Medical Marijuana, Inc. v. ProjectCBD.com* (2020) 46 Cal.App.5th 869, 883.) Accordingly, the Court may not look to Defendant's alleged distribution of the images to the Daily Mail as the activity complained of as this is not alleged in the Complaint.

Plaintiff's citation to *Jackson* to argue that the publication of images does not constitute protected speech is unavailing, as the court's statements regarding "newsworthiness" were not made in connection with its determination of whether the publication of the images was a statement for the purposes of the anti-SLAPP analysis. (*Jackson*, *supra*, 10 Cal.App.5th 1240, 1256–1259.) Instead, those statements were geared towards whether Plaintiff had shown a probability of success on the merits as to her cause of action for invasion of privacy: public disclosure of private facts. (*Jackson*, *supra*, 10 Cal.App.5th 1240, 1256–1259.) Accordingly, *Jackson* is inapposite, as the court in *Jackson* implicitly found that the posting of images were statements for the purposes of the anti-SLAPP analysis.

Finally, 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 images published by Defendant spoke to Plaintiff's character, judgment and qualifications for her position, as they allegedly depicted an extramarital sexual relationship with a paid campaign staff member and the use of illegal drugs. Accordingly, the images were a matter of 'public issue or public interest.'

Notably, Plaintiff does not dispute that Redstate.com and DailyMail.com are public forums for the purposes of the anti-SLAPP statute.

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

***Prong 2: 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.) "The plaintiff need only establish that his or her claim has 'minimal merit' [citation] to avoid being stricken as a SLAPP." (*Soukup*, *supra*, 39 Cal.4th at 291.) "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.)

As previously noted above, because Plaintiff has failed to allege in her Complaint that Defendant distributed intimate images of Plaintiff to the Daily Mail, the Court disregards Plaintiff's arguments under the second prong to the extent they rely on such evidence.

***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).)

Defendant argues that Plaintiff cannot carry her burden of showing a probability of success on the merits because the subject photographs related to matters of public concern, were previously distributed by another and did not expose an intimate body part.

Defendant asserts that for the reasons discussed above, allegations that a member of Congress engaged in an extramarital sexual relationship with a paid campaign staff member and used illegal

drugs are matters of public interest and concern, thereby falling under the exception provided for in Section 1708.85(c)(4). Plaintiff argues in her Complaint that because the photographs caused her "humiliation and emotional distress," this removes them from being matters of public concern, however, Defendant argues that how information is perceived by an individual has no bearing on whether or not that information is a matter of public concern.

Defendant additionally argues that the Complaint repeatedly alleges that Defendant Heslep was the original distributor of the photographs at issue and he sent them to numerous individuals, including Defendant. (Complaint ¶ 64-65, 69-70, 75, 143.) Accordingly, the Complaint contains no allegation, nor could there be, that Defendant was the first one to distribute the photographs. Defendants argues that because Plaintiff readily admits that the distributed material was previously distributed by another person, Defendant has no liability on this claim.

Defendant finally asserts that no exceptions are required in the first place because the photographs do not 'expose an intimate body part" of Plaintiff, as required by Section 1708.85(a). Defendant contends that the photographs at issue were redacted, by use of blurring or a black box, so that no "intimate body parts" are visible. Defendant argues that even if the photographs were not matters of public concern and even if Defendant did not first publish the photographs, since no "intimate body part" was exposed, Plaintiff cannot establish a prima facie case of violation of Section 1708.85.

In opposition, Plaintiff asserts that as alleged in the Complaint, Plaintiff had a reasonable expectation that the intimate images captured by her husband would remain private and she never consented to the distribution of said intimate images. (Complaint ¶ 132, 140). Plaintiff contends that this reasonable expectation of privacy would have been known to Defendant based on the questionable way that she received the material – from an anonymous email account with a link to a trove of 100 images of Plaintiff, including ten images containing nudity. Plaintiff argues that based on the context and quantity of the material, all of which was revealing, Defendant would clearly have expected that the images' distribution wase deliberately intended to violate Plaintiff's privacy. Plaintiff contends that the fact that Defendant, a political rival of the person depicted in the intimate images, was specifically sent the material would further inform Defendant that it was shared in violation of Plaintiff's expectation of privacy. Plaintiff argues that as a self-proclaimed journalist we could expect Defendant to be uniquely positioned to draw these conclusions.

Plaintiff argues that the Complaint further alleges that many of the images distributed by Defendant depict an "intimate body part." (Complaint ¶ 135, 136). Plaintiff notes that Defendant admits to distributing ten nude images where Plaintiff's nipples are exposed. (Van Laar Decl. ¶ 3, 7.) Plaintiff contends that she suffered both general damages and special damages as a result of the nonconsensual distribution of her intimate images. (Complaint ¶ 149-150.)

Plaintiff additionally argues that Defendant's affirmative defenses fail.

As to Defendant's arguments relating to the public concern exception, Plaintiff contends that while Defendant claims that the publication of Plaintiff's intimate images was to show an extramarital sexual relationship with a paid campaign staffer and the use of illegal drugs, the publication of the Hairbrush Image was gratuitous and unnecessary because Defendant possessed and published other non-nude affectionate images of Plaintiff with the brunette, along with intimate texts exchanged between Plaintiff and the brunette, which sufficiently made Defendant's point. Plaintiff argues that Defendant had additional options available to express the point she was trying to make about the relationship – including cropping the image more modestly, describing the image with words only, or by reaching out to Plaintiff to interview her about the allegations.

Plaintiff asserts that the Water Bong Image does not further the public interest regarding Plaintiff's unlawful drug use because Plaintiff had already publicly admitted to the use of marijuana and ran a political campaign open about her prior drug use. Plaintiff contends that the image too could have been described instead of published and/or more modestly cropped. Plaintiff asserts that the nude

image of her sunbathing fails to relate to either of Defendant's goals of exposing a sexual liaison or drug use.

As to Defendant's arguments relating to the previous distribution exception, Plaintiff contends that Defendant does not adequately claim the distributed material was previously distributed by another person. Plaintiff asserts that the previous distribution exception is intended for situations in which a person casually retweets or forwards a nude image without knowing the context. Plaintiff contends that the exception also intends to shield youth offenders from criminal liability – especially when they don't possess adult judgment to not to share nude images they receive. Plaintiff argues that this exception is not intended for situations, as here, where somebody takes an active role in carefully combing through 100 images, redacting some of them, writes a many hundred-word article with the images as the focal point, downloads them onto thumb drive, shares the thumb drive, has interviews about the material, and proceeds to publish differently redacted images on different web sites.

Plaintiff asserts that if not for Defendant and her efforts to publish the materials in the first and second publications they appeared, it is likely Plaintiff never would have experienced the harm she did. Plaintiff contends that if received money for publishing the intimate images depicting Plaintiff, without a release from Plaintiff, Defendant may have violated federal pornography recordkeeping laws. Plaintiff contends that the fee arrangements are among the many issues that compel discovery in this case.

Plaintiff argues that while she believes Heslep is the original distributor of the images, Defendant's transfer of the material onto a hardware, curation of the images, and distributing the material transforms what she received into something fundamentally different. Plaintiff asserts that the extent of Defendant's sharing before and after publication remains unknown. Plaintiff contends that Defendant should not get the benefit of this exception, which is intended for more passive receipt and sharing.

In reply, Defendant argues that Plaintiff's opposition fails to cite to any supporting evidence, resorting to citing her Complaint allegations instead. Defendant asserts that rather than a recitation of facts and evidence personally known to Plaintiff, Plaintiff's declaration contains recitations of her opinion, what she speculates Defendant knew, and ultimate legal conclusions. Defendant contends that Plaintiff's declaration contains none of the competent, admissible, evidence the law requires to support her claims and Defendant's anti-SLAPP should be granted on those grounds alone.

Defendant argues that even if Plaintiff had proffered some admissible evidence, her prong two analysis ignores the plain wording of the statute and makes no effort to prove the necessary elements of her claims. Defendant asserts that Plaintiff cites to no case law and no admissible evidence in the entirety of her discussion regarding Civil Code section 1708.85. Defendant contends that Plaintiff cannot, and does not, deny that the photographs at issue were previously distributed by another person. Defendant argues that Plaintiff's only argument on the prior distribution exception is that the Legislature should have written the law differently so that this type of publication was not protected.

Without any legal basis, Plaintiff asks this Court to decide that, in light of some reporting on a subject, publication of additional speech on that subject is "gratuitous and unnecessary" as a matter of law. Defendant contends that nowhere does the statute create a standard that, when a matter is of public concern, it is the role of the courts to decide when there has been "enough" publication of that material, so as to make further evidence proving the truth of the matter "gratuitous and unnecessary." Defendant argues that nowhere does the statute suggest that, when dealing with a matter of public concern, if it can be argued that a point might be made using other evidence, that precludes the publication of materials otherwise protected from liability under the law. Defendant asserts that, rather, the statute simply asks: does the speech concern a matter of public concern. If so, there is no liability. Defendant contends that there is no need for a balancing test weighing competing interests, or to question whether a journalist should have made a different choice.

Defendant contends that the Court is no more permitted to decide the proper publication criteria of journalists than it is to buck the will of the Legislature because a plaintiff thinks the law should have been written another way.

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 under Civil Code section 1708.85. First, there is no liability under the statute if the "distributed material was previously distributed by another person. Section 1708.85(c)(6). Heslep is that other person and Plaintiff admits that he previously distributed the images.

Second, Section 1708.85(c)(4) 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 as a sitting Congresswoman, allegedly depicting an extramarital sexual relationship with a paid campaign staff member and the use of illegal drugs. 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. Neither is the Court persuaded by Plaintiff's plea that the courts should determine when there has been enough publication, then curtail further publication of that matter. These are not workable standards especially in the face of a clear and unambiguous statement from the Legislature that provides an exception for speech that relates to a matter of public concern.

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 cannot carry her burden establishing a probability of success on the merits as to her second cause of action for civil conspiracy because the Complaint includes no allegations, nor could it, establishing the existence of a conspiracy or Defendant's participation in a conspiracy. Defendant presents evidence that she formed no agreement or conspiracy to distribute the images. (Van Laar Decl. ¶ 10.) Defendant asserts that, indeed, the Complaint never suggests an agreement prior to Heslep's dissemination of the "computer file containing more than seven hundred images." (Complaint ¶ 69.) Defendant contends that instead, the Complaint suggests "[t]he conspiracy was formed when Defendant Heslep distributed an electronic file containing blackmail material." (Complaint ¶ 156.) Defendant argues that there is no statutory liability when distributed material was previously distributed by another person. (Civil Code § 1708.85(c)(6).) Defendant asserts that this makes perfect sense because if conspiratorial liability could arise simply from receiving and disseminating information, then any journalist could be liable for conspiracy when any private citizen or anonymous source sends a journalist material later deemed to be tortious. Defendant contends that Plaintiff's allegation that Heslep distributed the electronic file containing the images is fatal to her second cause of action.

Defendant argues that even if Plaintiff's Complaint had not defeated her own claims, Defendant has provided competent admissible testimony that she did not receive the photographs from Defendant.

Defendant presents evidence that she had no contact or communication with any named Defendant regarding either the articles or the photographs. (Van Laar Decl. ¶ 3-10.) Defendant presents further evidence that she made no agreement to distribute the photographs. (Van Laar Decl. ¶ 10.) Instead, Defendant exercised her independent journalist judgment to determine that the photographs, which potentially depicted illegal activity by a member of Congress, were of public concern. (Van Laar Decl. ¶ 11.)

Defendant asserts that on these incontrovertible facts, no conspiracy is pled.

In opposition, Plaintiff argues that the record sufficiently supports Plaintiff's claim that Defendant engaged in a conspiracy to non-consensually distribute Plaintiff's intimate images. Plaintiff asserts that when an unnamed third party provided Defendant, a known political opponent of Plaintiff, with nude photos of Plaintiff, a tacit conspiracy to distribute those images was offered. Plaintiff asserts that Defendant did not need to be told expressly to go and publish the private images; Defendant understood what was to be done and in publishing the nude photos, completed the conspiracy against Plaintiff.

Plaintiff contends that additionally, the Defendant's acts were not journalistic, even if she wishes to hide behind such a well-guarded station. Plaintiff argues that Defendant's relationship to Plaintiff as a political opponent gives away her interests as a co-conspirator. Plaintiff argues that Defendant's October 27, 2019 Tweet, which she published on the day that Plaintiff resigned from Congress in support of Mike Garcia – Plaintiff's presumptive replacement – supports the conclusion that Defendant conspired to illegally disseminate Plaintiff's nude photos which she knew, or should have

known, were being published without Plaintiff's consent and for no valid purpose other than to inflict harm upon Plaintiff.

Plaintiff asserts that Defendant has not defeated the evidence suggesting that a conspiracy occurred.

In reply, Defendant reject's Plaintiff's position that any time someone takes action that might benefit another's goals, whether or not that action is related, and even if there is absolutely no other evidence of an agreement, this constitutes "tacit consent" under conspiracy law. Defendant points out that a conspiracy requires knowledge of the illegality, an agreement, intent, and assent to the ends of the conspiracy.

The Court finds that Plaintiff has failed to carry her burden establishing a probability of success on the merits as to her second cause of action for civil conspiracy. Contrary to Plaintiff's arguments case law clearly holds that "the conspiring defendants must have actual knowledge that a tort is planned and concur in the scheme with knowledge of its unlawful purpose." (*Navarrete*, *supra*, 237 Cal.App.4th at 1292.) Plaintiff has presented no evidence whatsoever to establish that Defendant had knowledge that there was a plan to violate Section 1708.85, much less that Defendant concurred in the scheme with knowledge of its unlawful purpose. Defendant's evidence that she had no contact or communication with any named Defendant regarding either the articles or the photographs, made no agreement to distribute the photographs, and acted independently in publishing the photographs, defeats Plaintiff's claim as a matter of law. (Van Laar Decl. ¶ 3-11.)

Moreover, 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 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.

Conclusion

Defendant's special motion to strike is GRANTED.

Moving party 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.*