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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ORANGE

SARA KHALIL FARSAKH, an individual; SOONDUS AHMED, an individual; RAWAN HAMDAN, an individual; SARA C., an individual; YUMNA H., an individual; SAFA R., an individual; MARWA R., an individual, Plaintiffs, vs. URTH CAFFE CORPORATION; URTH CAFFE LAGUNA BEACH DEVELOPMENT, LLC; URTH PAYROLL SERVICES, INC.; AND URTH CAFFE ASSOCIATES VI, LLC, Defendants.	Case No.: 30-2016-00849787-CU-CR-CJC Hon. John C. Gastelum Dept. C-13 CROSS-COMPLAINANTS' OPPOSITION TO CROSS-DEFENDANTS' SPECIAL MOTION TO STRIKE PURSUANT TO C.C.P. § 425.16 Original Hearing Date: Nov. 8, 2016 Adjourned Hearing Date: Nov. 22, 2016 Time: 2:00 PM Department: C-13, Central Justice Center Reservation No.: 72432623
URTH LAGUNA BEACH DEVELOPMENT, LLC, a California limited liability company; and URTH CAFFE' ASSOCIATES VII, LLC, a California limited liability company, Cross-Complainants, vs. SARA KHALIL FARSAKH, an individual; SOONDUS AHMED, an individual; RAWAN HAMDAN, an individual; SARA C., an individual; YUMNA H., an individual; SAFA R., an individual; MARWA R., an individual, Cross-Defendants.	Discovery Cut-Off: N/A Motion Cut-Off: N/A Trial Date: N/A Action Filed: May 2, 2016 Documents Filed Herewith: [1] Notice of Lodging Ex. 1; [2] Declaration of Bruno Manetta; [3] Declaration of Jilla Berkman; and [4] Declaration of Antino Jimenez

Cross-Complainants Urth Laguna Beach Development, LLC, and Urth Caffe' Associates VII, LLC, oppose Cross-Defendants' Special Motion to Strike on the grounds that it fails to satisfy either of the two-prongs required by the anti-SLAPP statute C.C.P. § 425.16. Cross-Complainants respectfully submit that the memorandum of points and authorities that follows, and the supporting documents filed concurrently herewith, demonstrate not only the fatal infirmities of Cross-Defendants' motion, but also a failure to muster any serious arguments to survive the frivolousness standard set out in C.C.P. § 425.16(c)(1). As such, Cross-Complainants hereby respectfully request this Court to award Cross-Complainants their reasonable expenses, including attorney's fees, against Cross-Defendants and/or their counsel for defending against this motion pursuant to C.C.P. § 425.16(c)(1).

DATED: November 8, 2016

AMERICAN FREEDOM LAW CENTER, INC.

By: 

DAVID YERUSHALMI
Attorneys for Defendants/Cross-Complainants

MEMORANDUM OF POINTS AND AUTHORITIES

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I. STATEMENT OF RELEVANT FACTS.

This lawsuit involves an allegation by seven young women who visited the Urth Caffe in Laguna Beach on Friday night, April 22, 2016. Plaintiffs claim they were asked to leave because six of the women wore hijabs—that is, Plaintiffs allege that the Urth Caffe in Laguna Beach[1] is liable for religious discrimination in violation of the Unruh Civil Rights Act. (Compl. ¶¶ 45-51). Plaintiffs, however, present no actual evidence of discrimination. In fact, at the time, the women did not claim religious discrimination, but rather that they were being treated unfairly and singled-out. (Jimenez Decl. ¶ 27; Cross-Compl. ¶¶ 1-17; *see also* Compl. at ¶¶ 23-39).

To suggest an anti-Muslim bias by Urth Caffe is counterfactual and illogical. It is well known to Urth Caffe's customers, to the neighbors of the Laguna Beach café, and even to Plaintiffs, that the Urth Caffe in Laguna Beach is enormously popular among the local young Arab and Muslim population. (This is also true of most of the Urth Caffe locations.) Muslims make up a very large portion of the paying customer base of Urth Caffe. (Cross-Compl. ¶¶ 3-6; Berkman Decl. ¶¶ 9-10, 24, 27; *see also* Compl. ¶¶ 21-22).

Thus, any allegation of anti-Muslim discrimination must overcome the brute fact that it would be financial suicide for Urth Caffe to discriminate against Muslims. Urth Caffe depends in large measure on its Muslim customers and their continued satisfaction and patronage. Beyond this reality is the fact that after Plaintiffs were asked to leave, on that very same night, other Muslim women enjoyed their time at Urth Caffe at Laguna Beach, including at least one wearing a hijab and sitting in the same location as Plaintiffs in plain view of those passing by the café. Moreover, on any Thursday or Friday night, one may walk by the very busy Urth Caffe in Laguna

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[1] Plaintiffs named several Urth Caffe related entities as Defendants in their complaint ("Complaint"). Most of these entities have no connection to the operation or ownership of the Urth Caffe in Laguna Beach. The two Cross-Claimants are, respectively, the owner of the premises upon which the Urth Caffe in Laguna Beach operates and the entity that owns and operates the café. (Cross-Compl. ¶¶ 21-22; Berkman Decl. ¶ 8). We will refer to Cross-Complainants collectively as "Urth Caffe" in the singular.

Beach and see young Muslims, including many women wearing hijabs, enjoying the coffee and the engaging milieu. (Jimenez Decl. ¶¶ 10-12; Berkman Decl. ¶ 27).

To get around these insurmountable, if not fatal, facts and in an attempt to craft a discrimination-narrative out of whole cloth, Plaintiffs allege that there were acts of anti-Muslim vandalism in the neighborhood, presumably because the neighbors of Urth Caffe in Laguna Beach are bigots. This narrative then draws the most preposterous of conclusions and packages it in an allegation that the owners and managers of Urth Caffe took the decision to insult their paying customers by removing any "visible" Muslims from the popular patio seating area in an attempt to appease the anti-Muslim masses. To say that this concoction is dribble is to understate what is at work here.

The facts underpinning the narrative itself are false. There is no evidence of anti-Muslim vandalism. There have been a few acts of vandalism, such as tire slashings, but those were not directed at Muslims, but typically at employee vehicles. To the extent that these few acts of vandalism were in fact carried out by neighbors—another unsubstantiated assertion—it was understood by Urth Caffe that this represented at most a kind of juvenile protest against the traffic and parking congestion in and around the very popular café. Whatever the cause, and whoever the culprits, the vandalism was limited to only a few instances that were not a problem by this time in late April 2016. (Berkman Decl. ¶¶ 22-23).

But, even assuming *arguendo* that the acts of vandalism were caused by some anti-Muslim sentiment, the very idea that Urth Caffe decided to institute a policy to literally hide the fact that its main customer base was Muslim by asking these Plaintiffs to leave the patio seating area after they had been at the café in plain view for over an hour is an insult to anyone's intelligence. Was the policy purposed at fooling the allegedly bigoted neighbors into thinking Muslims had disappeared even though any of these neighbors could hear Arabic being spoken by a good many of the young people congregating at the café and could see women wearing

hijabs on just about every Thursday and Friday night? (Berkman Decl. ¶¶ 24-27).

The reality is that no one at Urth Caffe instituted or carried out any policy of religious discrimination or engaged in any act of religious discrimination. (Cross-Compl. ¶¶ 7-20; Berkman Decl. ¶¶ 9, 20, 24-27; Jimenez Decl. ¶¶ 4-7). On the night of April 22, one of the senior managers of Urth Caffe, Antino Jimenez, began implementing Urth Caffe's regular "45-minute" policy. In anticipation of the very busy hours on Friday night, at the first sign of lines queuing for the high-demand patio seats, Antino informed several groups of customers, each of whom had been seated for more than an hour, that they should be prepared to share their tables or move to some other location. (Plaintiffs had occupied three tables for more than an hour.) This would allow other customers to rotate into the high-demand popular tables. (Cross-Compl. ¶ 9; Jimenez Decl. ¶¶ 16-18).

Plaintiffs refused to follow the policy and their disruptive, rude, and aggressive conduct resulted in an Urth Caffe security guard asking them to leave the café. They refused. Jilla Berkman authorized staff to contact the local police who arrived on the scene. Only after 45 minutes, did Cross-Defendants leave the premises, and this was only after the police were called and arrived on the scene. (Cross-Compl. ¶¶ 10-17; Berkman Decl. ¶¶ 11-19; Jimenez Decl. ¶¶ 19-26).

Plaintiffs claim that Urth Caffe enforced the policy in violation of its own written notice provided customers. (Compl. ¶¶ 26-27). They are wrong. The Urth Caffe policy, summarized by a notice placed on the café's tables, states: "During our busy rush times, if you have already been at a table for 45 minutes or longer, please share your table or give your table to someone who is waiting. If tables are available, you are certainly welcome to enjoy Urth for as long as you desire." (Tajsar Decl. at Ex. 5, filed in supp. of Cross-Defs.' Special Mot. Strike). The notice does not inform customers that if there are other available tables that the customer may remain at the high-demand tables. It simply makes the point that the 45-minute policy does not

require the customer to leave the restaurant. The policy requires customers to share or rotate to other available tables—typically, tables indoors or in the back or side of the patio area.

Even assuming Plaintiffs reasonably misunderstood the written notice, when Urth Caffe staff explained the policy in more detail, they were obligated to abide by the policy. As customers, Plaintiffs were granted permission to enjoy Urth Caffe while abiding by the policy. The fact that they did not like the policy does not change that fact. California law permits restaurants to establish reasonable policies to achieve reasonable business ends. Restaurants do not have to establish or implement policies the customer considers reasonable or even the most reasonable policy simply. The 45-minute policy was reasonable and not discriminatory. *See In re Cox*, 3 Cal. 3d 205, 217 (Cal. 1970) ("In holding that the Civil Rights Act forbids a business establishment generally open to the public from arbitrarily excluding a prospective customer, we do not imply that the establishment may never insist that a patron leave the premises. Clearly, an entrepreneur need not tolerate customers who damage property, injure others, or otherwise disrupt his business. A business establishment may, of course, promulgate reasonable deportment regulations that are rationally related to the services performed and the facilities provided.")

The facts in this case irrefutably demonstrate that Urth Caffe did not implement the policy in some discriminatory, anti-Muslim fashion. In fact, as video evidence shows, *before asking Plaintiffs to abide by the policy*, Antino informed a group of women (*sans* hijab) sitting at the table closest to the street at the front of the patio area *and next to Plaintiffs table* that they were similarly subject to the 45-minute policy. These women, unlike Plaintiffs, did not complain and in fact gave up their table in accordance with the 45-minute policy. (Jimenez Decl. ¶¶ 17-18).

II. BURDEN OF PROOF.

Plaintiffs, as Cross-Defendants, bring this Special Motion to Strike ("Motion") pursuant to the anti-SLAPP statute C.C.P. § 425.16. The initial burden is on the moving party to satisfy the two prongs of the statute. The first prong requires the movant to establish that the challenged

lawsuit is "arising from" "protected activity." C.C.P. § 425.16(b)(1); *City of Cotati v. Cashman*, 29 Cal. 4th 69, 73-74 (Cal. 2002); *Equilon Enters. v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 67 (Cal. 2002); *Navellier v. Sletten*, 29 Cal. 4th 82, 88 (Cal. 2002). Once the moving party successfully meets its burden to enable the court to determine that the challenged litigation arises from protected activity, the burden shifts to the non-moving party to show that, given the evidence presented, it has set out a *prima facie* showing of facts that could allow the finder of fact to find in its favor. C.C.P. § 425.16(b)(2) (requiring denial of the motion if "the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim"). "Probability" is a legal term-of-art dependent upon the proceedings at issue. The California Supreme Court has carefully articulated its meaning and significance in context of the anti-SLAPP statute: "As we previously have observed, in order to establish the requisite probability of prevailing, the plaintiff need only have stated and substantiated a legally sufficient claim. Put another way, the plaintiff must demonstrate that the complaint is both legally sufficient and supported by a sufficient *prima facie* showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." *Navellier*, 29 Cal. 4th at 88-89 (citations and internal quotation marks omitted).

In evaluating the evidence either for purposes of the first prong or the second, the anti-SLAPP statute instructs as follows: "In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." C.C.P. § 425.16(b)(2). For purposes of the second prong, however, all of the evidence of the non-moving party is credited as true. *Navellier, supra, at 88-89.* That is, the court is not to engage in a weighing of the evidence or the evidentiary claims, but rather consider the evidence favorable to the non-moving party as true. *Sycamore Ridge Apartments LLC v. Naumann*, 157 Cal. App. 4th 1385, 1397 (Cal. Ct. App. 2007) ("For purposes of an anti-SLAPP motion, the court considers the pleadings and evidence submitted by both sides, but does not

weigh credibility or compare the weight of the evidence. Rather, the court's responsibility is to accept as true the evidence favorable to the plaintiff. A plaintiff need only establish that his or her claim has minimal merit to avoid being stricken as a SLAPP.")

III. CROSS-DEFENDANTS' MOTION FAILS TO SATISFY EITHER PRONG OF THE ANTI-SLAPP STATUTE.

A. The Trespass Cross-Claim Is Not "Arising From" Protected Activity.

"Protected Activity" is a defined term and discussed by the case law. We will return to Cross-Defendants' assertions of "protected activity" momentarily, but first we address a fundamental mischaracterization of the "arising from" requirement as set out in their motion.

Cross-Defendants' entire discussion of the "arising from" requirement is found at the bottom of page 8 of their legal memorandum and ends at line 15 on the very next page. (Mem. in Supp. of Special Mot. to Strike ["Mot. Mem."] at 8-9). The discussion is vague in the extreme, seeking to leave the impression, and indeed concluding with the statement, that it is not the ***basis of liability*** of the challenged lawsuit that is the salient analysis for "arising from," but rather some extenuated "functional" relatedness—as in the "real reason" or subjective intent for bringing the lawsuit. (Mot. Mem. at 9 ["Despite Urth Caffe's sole cause of action being trespass, the complaint ***functionally arises*** from Plaintiffs' public statements about discrimination made at the Caffe (sic), online, and in their subsequent litigation-related activity."] [emphasis added]).

Of course, there is no such word, or even similar concept, used in the statute, and the apparent meaning of "functional" as proffered by Cross-Defendants contradicts the very cases and law they cite just a few sentences before. What Cross-Defendants are attempting to do with their "functional" relatedness test is to get around the fact that the ***liability*** for trespass does not arise from any protected activity. It arises from Cross-Defendants' refusal to leave the café after engaging in conduct that was rude, disruptive, and damaging to the experience of the other Urth Caffe clientele and, as such, Urth Caffe's business. And while expressive conduct and rude and disruptive speech may be protected activity in certain circumstances, Cross-Defendants' conduct

and speech at the café itself was most assuredly not (as discussed below in detail).

We begin where we should, and where the California Supreme Court instructs everyone to begin when analyzing the anti-SLAPP statute—with its plain language. *Navellier*, 29 Cal. 4th at 89-95 ("Plaintiffs' cited cases do not provide a basis for departing from the anti-SLAPP statute's plain language."). The statute provides in relevant part as follows:

> 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. (2) ***In making its determination***, the court ***shall consider*** the pleadings, and supporting and opposing affidavits stating ***the facts upon which the liability or defense is based***.

C.C.P. § 425.16(b) (emphasis added).

We note at the outset that subsection (b)(2) states explicitly that when a court makes its determination, the court is instructed to analyze "the facts ***upon which the liability*** or defense ***is based***." On its face, the statute limits a court's analysis to the objective facts giving rise to trespass liability. To confirm this plain reading of the statute and to apply it to the facts before this Court, we turn to the first of the three Supreme Court companion cases focusing on the proper interpretation and application of the anti-SLAPP statute.

In the *City of Cotati*, the Court focused in on the "arising from" requirement. In that case, the City passed a mobile home park ordinance, which negatively impacted mobile home park owners. The owners sued in federal court on federal constitutional grounds. The City then sued the owners in what it considered to be a more friendly state court seeking a declaration that the ordinance was constitutional and stating in its lawsuit that the "case or controversy" with the owners arose out of their federal lawsuit. *City of Cotati*, 29 Cal. 4th at 72. In other words, but for the federal lawsuit, there would be no controversy with these particular owners.

Moreover, the City conceded that it brought its lawsuit following the federal lawsuit in an effort to convince the federal court to dismiss the owners' lawsuit on abstention grounds. The

City also conceded that it brought the state action to obtain a favorable ruling quickly from a friendly forum and to use that judgment as *res judicata* against the federal suit. *Id*. at 73-74.

The owners responded by filing an anti-SLAPP motion in the City's state court action, alleging that the City's lawsuit was quite obviously "arising from" the federal action (and, by definition, a lawsuit arising from a judicial filing is "protected activity"). The owners made three basic arguments in support of their motion. First, there would have been no "controversy" with these owners but for the federal action. Second, the City concedes its lawsuit was in direct response to the federal lawsuit and in fact a strategic ploy to defeat the federal suit. Third, the very timing of the lawsuit, following on the heels of the initiation of the federal lawsuit, demonstrates that the state action was "in response to" the federal action. *Id*. at 72-73.

The trial court granted the owners' anti-SLAPP motion. The Court of Appeal reversed. *Id*. The Court of Appeal's reversal was predicated on the finding that while the City's action might have been in response to the federal lawsuit—indeed the City's action might have actually intended to chill the owners' protected activity (*i.e*., the federal lawsuit)—there was in the end no actual chilling effect, and the statute impliedly required such an effect. *City of Cotati v. Cashman*, 90 Cal. App. 4th 796, 805-06 (Cal. Ct. App. 2001).

On petition for review, the owners asked the Supreme Court to resolve two issues that had roiled the trial and lower appellate court decisions for some time: "whether a defendant in order to prevail on an anti-SLAPP motion must demonstrate that the targeted action was intended to chill the defendant's free speech or petition rights; and whether a moving defendant must show that the action had the effect of chilling such rights." *City of Cotati*, 29 Cal. 4th at 74. In response, the Supreme Court issued separate opinions in each of *City of Cotati*, *Equilon*, and *Navellier*.

In *City of Cotati*, the Supreme Court decided definitely that the anti-SLAPP statute required neither an intent-to-chill nor a chilling effect. The Court, however, still ruled in favor of the City and against the owners' motion. It did so by holding unequivocally that "arising from"

did not mean "resulting from" or anything remotely similar to Cross-Defendants' "functionally" related analysis. Specifically, it did not matter that the City's motives in filing the state lawsuit, and its intended effect, was to defeat the federal lawsuit. It did not matter that the state lawsuit grounded its "actual controversy" claim on the fact of the lawsuit. In short, while there is no question that the City's suit was "functionally" related to the owners' earlier federal lawsuit, it did not matter—the City's claims in its lawsuit did not arise from the federal litigation because the declaratory judgment the City sought in its complaint was not based upon the filing of the federal litigation, but rather a claim the ordinance was constitutional.

Per the Court, "arising from" has nothing to do with retaliation or even an intent to use litigation tactics to impact your adversary's protected activity—whether that activity is filing a federal lawsuit as in the *City of Cotati* or airing out bogus claims of discrimination on social media and filing meritless Unruh Civil Rights Act lawsuits as in this case. The Court's own words are instructive and demonstrably on point:

> The anti-SLAPP statute cannot be read to mean that "any claim asserted in an action which arguably was filed in retaliation for the exercise of speech or petition rights falls under section 425.16, whether or not the claim is based on conduct in exercise of those rights." *
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> * *
>
> . . . To construe "arising from" in section 425.16, subdivision (b)(1) as meaning "in response to," as Owners have urged, would in effect render all cross-actions potential SLAPP's. We presume the Legislature did not intend such an absurd result. . . .
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> * * *
>
> Owners also have complained that City filed its lawsuit tactically, so that they would be "forced . . . to bear the expense and burden of simultaneously litigating two different legal actions in two different jurisdictions." But City's subjective intent, as discussed, is not relevant under the anti-SLAPP statute. As a corollary, a claim filed in response to, or in retaliation for, threatened or actual litigation is not subject to the anti-SLAPP statute simply because it may be viewed as an oppressive litigation tactic. That a cause of action arguably may have been triggered by protected activity does not entail that it is one arising from such. To focus on City's litigation tactics, rather than on the substance of City's lawsuit, risks allowing Owners to circumvent the showing expressly required by section 425.16, subdivision (b)(1) that an alleged SLAPP arise from protected speech or petitioning.
>
> In short, the statutory phrase "cause of action . . . arising from" means simply that the defendant's act underlying the plaintiff's cause of action must itself have been an act in furtherance of the right of petition or free speech. In the anti-SLAPP context, the critical

> point is whether the plaintiff's cause of action itself was based on an act in furtherance of the defendant's right of petition or free speech.

Id. at 76-78 (citations omitted); *Equilon Enters.*, 29 Cal. 4th at 65 ("By requiring that a moving defendant demonstrate that the targeted cause of action is one arising from protected speech or petitioning (§ 425.16, subd. (b)), our anti-SLAPP statute utilizes a reasonable, objective test that lends itself to adjudication on pretrial motion.").

As is clear from these controlling cases, Cross-Defendants' focus on the social media firestorm and the battling attorney press conferences and press releases, all of which took place ***after the trespass***, are entirely irrelevant to the question of "arising from." Indeed, while the Cross-Complaint makes mention of Cross-Defendants' post-trespass social media and media campaign in two allegations (Cross-Compl. ¶¶ 18, 43), it does so quite patently to illustrate the fact that Cross-Defendants intended to, and did in fact use, the post-trespass media firestorm to cause even greater harm to Urth Caffe. As a matter of law, however, the trespass claim begins the night of April 22 when Cross-Defendants refused to leave and ends when the police finally escort them off the premises. *Martin Marietta Corp. v. Ins. Co. of N. Am.*, 40 Cal. App. 4th 1113, 1132 (Cal. Ct. App. 1995) ("Trespass may be by personal intrusion of the wrongdoer or by his failure to leave; . . .") (internal quotation marks omitted).

Given the Supreme Court's explanation of "arising from" and the facts upon which the trespass claim is based, we can eliminate altogether any assertion that Cross-Defendants' ***post-trespass*** social media and mainstream media campaigns are relevant "protected activity" for purposes of the anti-SLAPP motion. We can also ignore Cross-Defendants' assertion that the ***post-trespass*** filing of their Complaint was the relevant protected activity. This leaves open only the issue whether Cross-Defendants' conduct at the café—the conduct upon which the trespass claim is based—is protected activity. It is not, and we examine that issue now.

As noted earlier, the statute provides a lengthy description of "right of petition or free speech" as follows:

> (e) As used in this section, "act ***in furtherance of a person's right of petition or free speech***

> under the United States or California Constitution in connection with a public issue" includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum ***in connection with an issue of public interest***, 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.

Id. at § 425.16(e). Cross-Defendants argue only subsections (1) and (3) as the "protected activity" from which the trespass claim purportedly arises (Mot. Mem. at 11-14; n.1 and accompanying text). Subsection (1) relates to Cross-Defendants' assertion that the Complaint they filed as Plaintiffs in this matter is protected activity. As noted above, the filing of the Complaint is protected activity; however, per the analysis in *City of Cotati*, the trespass claim is not based upon the post-trespass filing of the Complaint. Cross-Defendants' position that subsection (1) applies is untenable. That leaves subsection (3).[2] Only activity that took place at Urth Caffe on the evening of April 22, 2016, and specifically only Cross-Defendants' conduct upon which the actual trespass claim is based, qualifies to even claim the status of "protected activity."

Under subsection (3), Cross-Defendants must show that their conduct, upon which the

[2] Assuming for the sake of this discussion that Urth Caffe in Laguna Beach qualifies as a "place open to the public," Cross-Defendants ignore the "open to the public" requirement and only claim that a restaurant is a "public forum" and thus satisfies subsection (3). (Mot. Mem. at 10). While it is true that many courts have treated the two terms as functionally equivalent, *see, e.g.*, *Damon v. Ocean Hills Journalism Club*, 85 Cal. App. 4th 468, 474-75 (Cal. Ct. App. 2000) (holding that a homeowners' association meeting open to all interested parties was both "open to the public" and a "public forum"), at least one court has not, *see Nygard, Inc. v. Uusi-Kerttula*, 159 Cal. App. 4th 1027, 1038 (Cal. App. Ct. 2008) (concluding that "open to the public" is not synonymous with "public forum"), and no court has yet to define what it means to be "open to the public" as opposed to being a "public forum." To the extent that Cross-Defendants rely exclusively on the "public forum" requirement to capture conduct or speech at the café itself, they are wrong. Their citation to *Albertson's Inc. v. Young*, 107 Cal. App. 4th 106, 120 (Cal. Ct. App. 2003), as part of the *Pruneyard* progeny, does nothing to establish that a stand-alone, single-purpose café has the indices of a public forum set out in the case law. Indeed, no court has ever concluded that a stand-alone restaurant is a public forum under *Pruneyard*. Consequently, there is no "right of petition or free speech" implicated here. But the nature of the "forum" is not the only reason why the Motion fails, as we discuss further above.

trespass claim is based, is "in connection with an issue of public interest." The cases and factual argument proffered by Cross-Defendants to satisfy this requirement demonstrate precisely why their conduct on the evening of April 22 was not even remotely "in connection with an issue of public interest." Specifically, Cross-Defendants conflate their refusal to abide by a reasonable 45-minute seating policy with their quite contrived, if not concocted, post-trespass claims of religious discrimination. In fact, *at no time did Cross-Defendants claim religious discrimination during the incidents giving rise to liability for trespass*. At best, they complained about being singled-out and treated unfairly, but not because they were Muslims or wearing hijabs. At no time that evening at the café did Cross-Defendants link their objections to a religious bias or any other basis that would have been of interest to the public. Quite simply, a customer's complaints about poor or unfair service directed to the establishment's staff and surrounding patrons is hardly a matter of public interest, and there is no case to suggest otherwise.

The court in *Wilbanks v. Wolk*, 121 Cal. App. 4th 883, 898 (Cal. Ct. App. 2004), sets out three factual contexts that have given rise to a finding of a public-interest issue, and this construct remains valid today (*see, e.g., Greco v. Greco*, 2 Cal. App. 5th 810, 824 [Cal. Ct. App. 2016] [quoting *Wilbanks*' 3-part construct in full]):

> The most commonly articulated definitions of "statements made in connection with a public issue" focus on whether (1) the subject of the statement or activity precipitating the claim was a person or entity in the public eye; (2) the statement or activity precipitating the claim involved conduct that could affect large numbers of people beyond the direct participants; and (3) whether the statement or activity precipitating the claim involved a topic of widespread public interest. As to the latter, it is not enough that the statement refer to a subject of widespread public interest; the statement must in some manner itself contribute to the public debate.

Wilbanks v. Wolk, 121 Cal. App. 4th at 898. Nothing Cross-Defendants said or did while at Urth Caffe in Laguna Beach on April 22 comes close to any of these factual contexts. Cross-Defendants, however, artificially attempt to fit their conduct and speech at the café into categories (2) and (3). We treat each of these arguments in turn.

Cross-Defendants first attempt to claim that Urth Caffe in Laguna Beach is "a large,

powerful organization [that] may impact the lives of many individuals." (Mot. Mem. at 12, § B.1.b.i). The first case Cross-Defendants cite is *Macias v. Hartwell*, 55 Cal. App. 4th 669, 674 (Cal. Ct. App. 1997). *Macias* is inapposite and in fact demonstrates why this case is not a public-interest issue. As the *Macias* court explained:

> Appellant's contention that the publication did not involve a public issue is without merit. The public issue was a union election affecting 10,000 members and her qualifications to serve as president. Although matters of public interest include legislative and governmental activities, they may also include activities that involve private persons and entities, especially when a large, powerful organization may impact the lives of many individuals.

*Macias v. Hartw*ell, 55 Cal. App. 4th at 673-74. Commenting on a union election affecting the lives of 10,000 people is hardly analogous to Cross-Defendants' disruptive behavior and complaints about unfair treatment at a *café*.

Oddly enough, Cross-Defendants also cite *Wilbanks* on the following point, which we most assuredly agree is instructive. In *Wilbanks*, the defendant operated a website that served as a *de facto* watchdog of the viatical industry, providing both general consumer information and specific remarks about various players in the industry. In one post, the defendant made allegedly defamatory remarks about one of these players, and the player sued. The defendant moved to strike pursuant to the anti-SLAPP statute. After setting out the three-part construct above, the court noted that criticism of the plaintiff's business practices simply did not give rise to a public-interest issue. What did qualify, however, was the fact that the context of defendants' defamatory statement was a much broader message of consumerism for those who might need to take advantage of the viatical industry, her expertise, and the broad exposure of her message. The court noted specifically that this consumerism was of public interest and affected many people. *Wilbanks*, 121 Cal. App. 4th at 899-901. While it is arguable that Cross-Defendants' ***post-trespass*** social media and mainstream media campaigns alleging religious discrimination might satisfy *Wilbanks*, it is certainly not the case that their *conduct at the café* amounted to anything remotely similar. If it did, every time we complained to our waiter in a loud voice at our favorite

restaurant about the overcooked food, we would give rise to a public-interest issue. Such a result would turn the public-interest issue into an all-encompassing term with no real meaning, thereby giving rise to absurd results, such as those sought here by Cross-Defendants.

Cross-Defendants' second argument for public-interest issue is easily and quickly dismissed. Here, Cross-Defendants argue that their claim of religious discrimination and anti-Muslim bias amounted to a public-interest issue because these matters are of widespread public concern. Urth Caffe agrees that actual discrimination and claims of discrimination are a matter of widespread public concern. This, however, does not change the result. Cross-Defendants' claims of religious discrimination did not occur until after they left the café. The only thing heard from Cross-Defendants' at the café that evening was a complaint about being treated unfairly and singled-out. But this is the kind of adolescent griping (*i.e.*, "it's not fair; you let Johnny do it!") all of us who have raised children have had to suffer. This does not qualify as a public-interest issue, but rather a rite of passage for young people who need to mature and learn to respond to life's challenges in more productive ways.

In sum, Urth Caffe respectfully requests this Court to deny the Motion on the grounds that it fails to satisfy the first prong of the anti-SLAPP statute—that is, the factual basis for the trespass Cross-Complaint does not arise from protected activity.

B. The Evidence Establishes Urth Caffe's *Prima Facie* Showing of Trespass.

As set out in the Statement of Facts above, Urth Caffe has established a *prima facie* case for trespass. A *prima facie* case of trespass is (1) an unlawful entry upon or refusal to leave (2) plaintiff's property. *Martin Marietta Corp.,*40 Cal. App. 4th at 1132 ("Trespass may be by personal intrusion of the wrongdoer or by his failure to leave; . . .") (internal quotation marks omitted*); see also Civic Western Corp. v. Zila Indus., Inc.*, 66 Cal. App. 3d 1, 16-17 (Cal. Ct. App. 1977) (explaining that trespass is both the unauthorized entry upon land of another or exceeding the consent given). Notwithstanding Cross-Defendants' assertion to the contrary, when seeking

nominal damages, as the Cross-Complaint does, actual damages are not a required element of the cause of the action. *Id*. at 18 ("This tort [trespass] has always given rise to nominal damages even where there was no proof of actual damage.").

Urth Caffe had a reasonable 45-minute policy and attempted to implement it. Cross-Defendants refused to abide by the policy and were told to leave. They refused. They left only after the police were called. By the time Cross-Defendants' left, they had trespassed for approximately 45 minutes. Civil trespass does not include a grace-period after being told to leave until the police are called, they actually arrive, and then spend 20 minutes trying to convince the trespasser to leave.

IV. CROSS-DEFENDANTS' ANTI-SLAPP MOTION IS FRIVOLOUS AND THE COURT SHOULD AWARD URTH CAFFE ITS REASONABLE EXPENSES, INCLUDING ATTORNEY'S FEES.

Upon a finding that an anti-SLAPP motion is frivolous, "the court **shall** award costs and reasonable attorney's fees" to the prevailing plaintiff. C.C.P. § 425.16(c)(1). As set out in this opposition, Cross-Defendants' motion ignores the unambiguous law of "arising from" set out by the Supreme Court in three separate companion cases, asserts a preposterous public-interest issue to create "protected activity" when none existed, asserts without any legal authority a grace-period for the trespasser, and misstates the requirement of trespass as requiring actual damages. In short, the Motion is frivolous.

CONCLUSION

For the foregoing reasons, Urth Caffe respectfully asks this Court to (1) deny Cross-Defendants' anti-SLAPP motion, (2) rule that the Motion is frivolous, and (3) award Urth Caffe its costs and reasonable attorney's fees in opposing the motion.

DATED: November 8, 2016 AMERICAN FREEDOM LAW CENTER, INC.

By: _____
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