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I. INTRODUCTION

Hillary Rodham Clinton (HRC) and her Committee¹ portray this case as “simple and straightforward.” (Oppos. Brief at 9) They argue that this appeal is indistinguishable from Peter Paul’s (Paul) prior appeal involving David Rosen (Rosen). (Oppos. Brief at 1-2, citing *Paul v. Clinton*, No. B178077, 2005WL2650937). Therefore, HRC and the Committee claim that the doctrines of collateral estoppel and “law of the case” require this Court to affirm the grant of their anti-SLAPP motion under Code of Civil Procedure Section 425.16. (Section 425.16) (Oppos. Brief at 14-19) Furthermore, they contend that the lower court correctly denied Paul’s motion for limited discovery because of his assertedly “total” lack of evidence. (Oppos. Brief at 39-40)

None of these arguments withstands scrutiny. This Reply Brief will explain why by highlighting four key points.

First, preclusion doctrines are inapplicable because this case, which concerns fraud and conspiracy by HRC and the Committee, is fundamentally different from Paul’s action against Rosen. HRC used

¹ Hillary Rodham Clinton for U.S. Senate Committee, Inc. (Committee) (jointly, HRC/Committee).

her position as the President's wife to add credibility to what *she* knew was William Jefferson Clinton's (WJC) sham commitment to Paul, and she aided WJC in luring away Paul's key corporate investor (which swiftly destroyed Paul's company). (Opening Brief at 17-18, 26-33) HRC and the Committee did not, however, reveal the full extent of their scheme to Rosen. Thus, Rosen's knowledge – a key element of fraud – is entirely different from that of HRC and the Committee, whose involvement in this fraud and conspiracy has never been considered by this Court. Moreover, unlike the case against Rosen, in this appeal Paul has presented evidence that WJC's promise to Paul was false when made – and that HRC knew this fact. (Opening Brief at 6-12)

Second, the anti-SLAPP statute does not apply because, even assuming *arguendo* that Paul's causes of action arose from HRC/Committee's political activity of soliciting campaign contributions and organizing a fundraising event, that conduct criminally violated federal election laws as a knowing solicitation and acceptance of federal contributions over \$2,000. (Opening Brief at 50-59) Criminal conduct is not protected under the anti-SLAPP statute. Moreover, Paul's undisputed evidence contradicts

HRC/Committee's brand-new position that they *never* said they solicited Paul's campaign contributions. (Oppos. Brief at 24) This Court should apply *Flatley v. Mauro* (2006) 39 Cal.4th 299 and rule that, in light of the undisputed facts, HRC/Committee's so-called "protected" conduct actually constituted a felony.

Third, contrary to HRC/Committee's assertions, Paul has presented relevant new evidence: Paul's Supplemental Declaration², which presents numerous exhibits, including FEC documents. Paul's complaint is legally sufficient and supported by competent evidence that establishes a prima facie case of fraud and conspiracy.

Fourth, because the very purpose of Section 425.16, subdivision (g) is to afford a plaintiff who *lacks* evidence necessary to establish a prima facie case the opportunity to obtain it, the lower court abused its discretion in denying Paul's discovery motion *due to* his supposed lack of evidence. Moreover, Paul's evidence did demonstrate that HRC had sufficient knowledge of the facts that the single, limited deposition he requested would not have been a "fishing expedition." It is Kafkaesque to grant an anti-SLAPP motion for lack of evidence

² Supplemental Declaration of Peter F. Paul, etc., dated March 27, 2006 (4CT781-5CT1038) (Paul's Supplemental Declaration)

while simultaneously denying Paul the opportunity to obtain such evidence.

II. **LEGAL DISCUSSION**

A. Collateral Estoppel and “Law of the Case” Doctrines Do Not Apply To Different Parties Engaged in Different Conduct, As Supported by New Evidence.

HRC/Committee’s Opposing Brief is filled with mischaracterizations, beginning with their claim that this appeal is “a virtual repeat” of our prior appeal, except for the “identity of the defendants.” (Oppos. Brief at 1) On the contrary, about the only thing the *same* is the Plaintiff and the pleadings. Paul’s Supplemental Declaration supplies many new facts about HRC’s specific conduct that falsely convinced Paul of WJC’s sincerity (Opening Brief at 39-50) and demonstrated that WJC never intended to work for Paul (and that HRC knew it). Key elements of Paul’s Supplemental Declaration are corroborated by the testimony and accounts of other witnesses as well as by FEC documents. (Opening Brief at 6-12, 17-18, 26-33)

HRC/Committee also mischaracterize Paul as arguing that his *claims* against HRC and the Committee are completely different than against Rosen. (Oppos. Brief at 2) Rather, Paul said that HRC’s

activities giving rise to his claims are entirely different from Rosen's.³ (Opening Brief at 38-39) Rosen's activities were limited to carrying out campaign functions. However, the specific conduct HRC engaged in that deceived Paul was different conduct from Rosen's, and it was unrelated to her campaign. (Opening Brief at 40-41)

Similarly, HRC/Committee erroneously state that Paul seeks *only* the return of his campaign contributions from HRC/Committee. (Oppos. Brief at 6) But the Complaint also seeks "compensatory damages" as to all losses caused by HRC/Committee's fraudulent conspiracy with WJC and James Levin (Levin), which includes losses from interference with SLM's funding. (1CT44:8) That involves much more than Paul's expenditures for the "Hollywood Gala Salute to President William Jefferson Clinton" on August 12, 2000 (Tribute). As HRC/Committee acknowledge, Paul's Supplemental Declaration focuses extensively on WJC's exploitation of his pretended business relationship with Paul to cozy up to Paul's key corporate investor, Tendo Oto (Oto). (Oppos. Brief at 16, fn. 14) Then, the Clintons together used the trappings of the White House to seduce Oto away

³ When Paul used the word "claims" on page 39 of the Opening Brief, it was meant in the sense of what Paul "asserts" HRC did in order to engage in fraud and conspiracy, not that his "cause of action" against her is different.

from Paul. (Opening Brief at 23-25, 27-31) Their interference caused Oto to renege on a promised \$5 million investment in SLM when that money was critically needed for operating capital, which brought about SLM's financial collapse. (Opening Brief at 32-33)⁴

HRC/Committee wrongly suggest that HRC's actions regarding Oto are not encompassed by the Fifth Cause of Action. (Oppos. Brief at 16, fn. 14) However, that claim specifically charges HRC and the Committee with conspiring with WJC *and Levin*. Moreover, the interference with Oto was enabled and facilitated by the Clintons' scheme of convincing Paul that WJC had accepted his proposal.

Turning to the Fourteenth Cause of Action, regarding Gary Smith's (Smith) fraud, HRC/Committee again mischaracterize Paul's arguments, claiming that he raised a "new legal theory" and requested a "judicial 'mulligan,'" supposedly without citing any support. (Oppos. Brief at 16) However, what was "new" was Paul's evidence. Since collateral estoppel only governs factual issues "actually

⁴ HRC/Committee contend that Paul's claim that Defendants' conduct injured SLM is "undermined" by the federal district court's determination that SLM was insolvent as of February 2000. (Oppos. Brief at 4, fn.5, citing Request for Judicial Notice, Exh. A, at 12:5-8) Paul would concede that SLM was not generating a profit at any time in 1999 or 2000 and that it was dependent on investment capital to meet its operating expenses. However, even as of October 2000, SLM's stock was trading at \$10.75 a share. (4CT801:26-28).

litigated” (*Wimsatt v. Beverly Hills Weight etc. Internat., Inc.* (1995) 32 Cal.App.4th 1511, 1516, this Court is not bound by determinations made based on *other* facts.

Most pertinently, Paul argued that the First Amendment is not implicated by Smith’s conduct, based on the new evidence – heretofore unconsidered – that Smith acted purely as a commercial vendor. (Opening Brief at 45-46) Contrary to HRC/Committee’s claim, Paul *has* presented new supporting evidence: the facts uncovered by the FEC’s investigation. (Oppos. Brief at 17) (5CT982-83, 985-87) Also contrary to HRC/Committee’s claim, Paul *did* cite legal authority for the proposition that a purely commercial transaction does not implicate the First Amendment, as required by Section 425.16. (Oppos. Brief at 17, fn. 16) Directly on point is *Scott v. Metabolife Internat., Inc.* (2003) 115 Cal.App.4th 404, cited in the Opening Brief at 46. Indeed, the anti-SLAPP statute itself explicitly makes this exception for commercial actors, in Code of Civil Procedure section 425.17, subdivision (c).⁵

⁵ Code Civ. Proc., § 425.17, subd. (c) provides:
“(c) Section 425.16 does not apply to any cause of action brought against a person primarily engaged in the business of selling or leasing goods or services ... arising from any statement or conduct by that person if both of the following conditions exist:

It is not necessary to rely on this provision, however, because the language of Section 425.16 has been consistently interpreted by California courts as excluding, by negative implication, causes of action arising from statements or actions that merely further a defendant's commercial interests, not the public interest. *Scott, supra*, 115 Cal.App.4th at 420-422 (manufacturer's advertising of its product does not concern issue of public interest), citing *Nagel v. Twin Laboratories* (2003) 109 Cal.App.4th 39, 42-43) and *Consumer Justice Center v. Trimedica International, Inc.* (2003) 107 Cal.App.4th 595.) That is why Paul has focused on section 425.16 and the cases interpreting it.

“(1) The statement or conduct consists of representations of fact about that person's ... business operations, goods, or services, that is made for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services, or the statement or conduct was made in the course of delivering the person's goods or services.

“(2) The intended audience is an actual or potential buyer or customer, or a person likely to repeat the statement to, or otherwise influence, an actual or potential buyer or customer....”

All of the necessary conditions of subdivisions (c)(1) and (2) exist: The conduct at issue – fraudulent statements from Smith to Paul that he would produce the concert for a fixed amount and that he had lowered that amount to \$800,000 – “consists of representations of fact about [Smith's] business...made for the purpose of obtaining approval for ...commercial transactions in [Smith's]...services” and “the intended audience is an actual ...buyer or customer,” namely, Paul.

Paul also argued that HRC's conduct in furthering Smith's fraud did nothing to advance or benefit her campaign, since the value to her campaign of the concert and concert video was the same whether or not Smith received the extra \$81,100 Paul was compelled to pay him. Therefore, Paul's claim against HRC in the Fourteenth Cause of Action did not arise from her First Amendment activities. (Opening Brief at 47-50) HRC/Committee completely ignored this argument.

In sum, HRC/Committee have failed to explain how the new factual issues presented by this appeal could have been litigated in the Rosen appeal, given that the evidence is different, the conduct is different, and the parties who engaged in the conduct are different. Collateral estoppel does not govern such a case. *Wimsatt, supra*. Similarly, HRC/Committee have failed to explain how the separate legal issue of whether HRC/Committee's *distinct* conduct implicated the First Amendment could have been decided in the prior appeal, especially since the Court did not have before it the same evidence of their conduct. *People v. Barragan* (2004) 32 Cal.4th 236, 246. There is consequently no "law of the case" applicable to this appeal.

B. HRC/Committee's Conduct Does Not Enjoy First Amendment Protection In Any Event Because It Was Criminal, As a Matter of Law.

Paul argued below that the campaign contributions solicited by HRC/Committee were illegal by virtue of the failure of New York Senate 2000⁶ (NYS 2000) to accurately report them. HRC/Committee responded that NYS 2000's false underreporting of Paul's \$1.2 million-plus in expenditures for the Tribute, while illegal, was not conduct by HRC or the Committee, nor is it the conduct giving rise to Paul's case.⁷ (Opposition Brief at 20-23) Even conceding that it is not the conduct giving rise to the Fifth and Fourteenth Causes of Action, however, Paul has now identified a far more direct basis for demonstrating that HRC/Committee's conduct was not protected by

⁶ As described in the FEC General Counsel's brief, "NYS 2000 was one of several joint fundraising committees consisting of partnerships between the Democratic Senatorial Campaign Committee ('DSCC') and U.S. Senate candidates, and sometimes with the respective state party committees. For the August 12, 2000 event, the participating committees included Hillary Rodham Clinton for U.S. Senate Committee, Inc. ('Clinton for Senate'), the DSCC and the New York State Democratic Committee ('NYSDC')." (5CT977:3-7)

⁷ HRC/Committee mention the "differing allegations" between the Complaint and the Opening Brief regarding the total amount of Paul's expenditures on their behalf – whether it was \$1.9 or \$1.2 million. (Oppos. Brief at 3, fn. 4) Since the FEC independently corroborated that Paul spent at *least* \$1.2 million on the Tribute alone (5CT976), Paul has used this figure for the purposes of making our arguments on appeal. This in no way limits the level of damages Paul may prove at trial.

the First Amendment. The very conduct which HRC/Committee view as giving rise to Paul's claims – soliciting campaign contributions and organizing a fundraising event – was, in this instance, illegal and therefore not protected. Their legal right to solicit campaign contributions from Paul ended once he had given HRC's campaign the maximum allowable contribution of \$2,000.

Under federal campaign finance law, all of Paul's expenditures at issue in this case *must* be deemed federal ("hard" money) contributions to HRC's Senate campaign and not nonfederal ("soft" money) contributions to NYS 2000. (2 U.S.C. § 441a(a)(7)(B)(i)) (Section 441a(a)(7)(B)(i)). That section provides:

[E]xpenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a *candidate*, his authorized political committees, or their agents, shall be considered to be a *contribution to such candidate*. [emphasis added]

The maximum Paul was permitted to contribute to HRC's Senate campaign was \$2,000, whether as cash or in-kind contributions. *Buckley v. Valeo* (1976) 424 U.S. 1, 23, 36-37. (2 U.S.C. § 441a(a)(1)(A)) That section presently provides:

No person shall make contributions...to any candidate and his authorized political committees with respect to

any election for Federal office which, in the aggregate, exceed \$2,000.⁸

It also was illegal for HRC/Committee to “knowingly *accept*” Paul’s contributions in excess of \$2,000. (2 U.S.C. § 441a(f))

In fact, because HRC/Committee’s solicitation and coordination of Paul’s contributions were done “knowingly and willfully” and the amount involved exceeded \$25,000 for the calendar year 2000, their so-called “protected activity” constituted a felony under Title 2 of the United States Code, section 437g(d)(1)(A)(i).

The First Amendment does not protect criminal activity, and neither does the anti-SLAPP statute. *Paul for Council v. Hanyecz* (2001) 85 Cal. App. 4th 1356, 1366-67; *Novartis Vaccines and Diagnostics, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2006) 143 Cal. App. 4th 1284, 1296. HRC/Committee ridicule this argument as an “eleventh-hour appellate brainstorm” (Oppos. Brief. at 20), but nothing bars this Court from considering a purely legal theory for the first time on appeal. *Major v. Silna* (2005) 134 Cal. App. 4th 1485, 1493, fn. 4.

⁸ Prior to 2002, the maximum amount was \$1,000 per election to a federal candidate, with the primary and the general counting as two elections, allowing \$2,000 total. (*McConnell v. FEC* (2003) 540 U.S. 93, 267-68 (dsn. opn. of Thomas, J.); *Buckley v. Valeo* (1976) 424 U.S. 1, 24)

Furthermore, contrary to HRC/Committee's claim, the new evidence represented by the 7/5/05 FEC General Counsel's Brief (5CT975-997), the 9/29/05 FEC General Counsel's Report #2 (5CT9989-1028) and NYS 2000's 12/29/05 Conciliation Agreement (4CT966-5CT974) is not irrelevant. (Oppos. Brief at 23) This evidence establishes a key fact: that the Tribute was indeed financed almost single-handedly by Peter Paul, who expended over \$1.2 million producing this event alone, a *huge* sum. (5CT981:1-8)

HRC/Committee also wrongly contend that, in asserting "that Defendants directly and personally solicited \$1.2 million from [Paul] in campaign contributions," Paul has raised a "different theory of *liability*." (Oppos. Brief at 20) Plaintiff's theory of liability – promissory fraud – remains unchanged. Nor does it matter that "[t]his allegation is wholly missing from the Complaint." (Oppos. Brief at 24) The fact that HRC/Committee's conduct was criminal neither adds to nor subtracts from their liability to Paul, but it does mean their conduct is not protected by the First Amendment.

Most telling is what the Defendants do *not* say when they are confronted with the charge that they directly and personally solicited over \$1.2 million from Paul in campaign contributions. They do not

say, “So what? We had a right to do that.” They do not make any attempt to argue that our *legal* analysis is incorrect. (Opening Brief at 52-59) They never take issue with the contention that *if* it can be shown that HRC/Committee solicited or coordinated Paul’s in-kind expenditures, they *must* be considered contributions to HRC’s campaign -- and therefore excessive – thus rendering HRC/Committee’s acceptance of them criminal conduct. Far from it. HRC/Committee’s sole defense is that (a) “there is no evidence to support this theory” and (b) it is supposedly contradicted by the FEC documents Paul submitted into evidence. (Oppos. Brief at 20)

HRC/Committee have thus conceded that if Paul’s evidence demonstrates that their conduct does amount to soliciting and coordinating his in-kind expenditures, such conduct is not protected, and the anti-SLAPP statute does not apply to this case.

Plaintiff will now examine each of these two contentions in turn – lack of evidence and the FEC’s seemingly contrary finding – and show that neither one holds water.

1. Not Only Did HRC/Committee *Admit* to Soliciting Paul’s Contributions, But Paul’s Evidence Also Proves It.

In arguing that “Plaintiff has not offered any new evidence to support this new argument,” HRC/Committee first attempt to explain

away Paul's observation that they *admitted* they solicited Paul's political contributions. (Oppos. Brief at 24, re Opening Brief at 52) In their own words:

Plaintiff claims that Defendants failed to report political contributions accurately. ... However, reporting was not the protected activity. *The protected activity was "the solicitation of political contributions and the organization of a fundraising event."*(5CT1043:24-25)

Since HRC/Committee's basis for bringing their anti-SLAPP motion is that Paul's claims against them arise from protected activity, and the activity at issue is "solicitation of political contributions and the organization of a fundraising event," this is an admission that they solicited Paul's contributions and assisted in organizing the Tribute. Otherwise, what protected conduct have they engaged in that entitles them to bring an anti-SLAPP motion?

Denouncing this commonsense conclusion as "little more than a slick word game," HRC/Committee quickly backpedal to take the new position that HRC/Committee "never stated that *they* directly solicited campaign contributions from Plaintiff or that *they* organized the Tribute." (Oppos. Brief at 24; emphasis supplied) On the contrary – they say – "Defendants consistently have argued that their circumstances (and anti-SLAPP motion) are identical to those of Mr.

Rosen,” and “Mr. Rosen never has suggested that he directly solicited improper campaign contributions.” (Oppos. Brief at 25)

Mr. Rosen may not have admitted to soliciting “improper” campaign contributions, but he certainly claimed to have solicited campaign contributions from Paul, most notably in his anti-SLAPP motion. Moreover, by speaking not just of his own conduct but that of “Defendants” -- which he defined as including WJC, HRC, the Committee, NYS 2000, and himself (1CT63:26-28) -- Rosen acknowledged that *their* conduct also constituted solicitation of campaign contributions:

This motion is made on the following grounds: (1) Plaintiff’s First Amended Complaint asserts causes of action arising from Defendants’ solicitation of contributions for political parties and candidates. (1CT61:6-9)

Here, the complaint shows on its face that the causes of action asserted against Mr. Rosen all arise out of Defendants’ solicitation of political contributions – an activity at the core of Defendants’ constitutional rights of speech.... (1CT63:10-13)

All of Plaintiff’s claims against Mr. Rosen and the other Defendants arise out of the solicitation of political contributions.... (1CT65:1-2)

Here, Plaintiff’s claims all arise either directly from Defendants’ solicitation of political contributions from Plaintiff or from alleged acts in furtherance of such solicitation. *See, e.g.*, Complaint, ¶¶ 21-22, 29, 32-33,

34-40, 44-51, 54-55, 59-68, 84-85, 86-88, 100, 106, 145-154, 156-163, 165-166, 197-199. (1CT66:20-21)

Noticeably, Rosen's anti-SLAPP motion did not put any qualifications on this characterization of the Defendants' collective conduct, such as: "IF Defendants engaged in any of the acts alleged in the complaint, THEN they would have been acts of solicitation of political contributions from Plaintiff." His assertions take it for granted that the Defendants *did* solicit Paul's campaign contributions.

HRC/Committee's contention that they "never stated *they* directly solicited campaign contributions from Paul or that *they* organized the Tribute," is simply not true. (Oppos. Brief at 24) HRC/Committee expressly adopted and incorporated all the arguments set forth in Rosen's anti-SLAPP motion which, of course, includes all of the statements just listed above. (Supp.CT7:7-9 &fn.2)

HRC/Committee now even take the position that Paul's First Amended Complaint (Complaint) alleges that they did nothing more than make "statements *relating to* a political campaign," citing paragraphs 51, 66, 78, and 85. However, an examination of the specific conduct alleged in those paragraphs refutes this claim.

Paragraph 51 describes conduct constituting HRC's direct involvement in negotiating Smith's fee for producing the concert

portion of the Tribute (1CT026:6-9), designed to generate over a thousand hard-money contributions to HRC's campaign by ticket sales at \$1,000 each.⁹ By not only involving herself in the choice of who was to produce the concert, but becoming involved in negotiating his fee (or claiming to do so) to *ensure* Paul would use Smith, HRC was effectively "directing" Paul's expenditures for the benefit of her campaign.

Paragraph 66 sets forth HRC's telephone calls to Paul during the weeks leading up to the Tribute, to thank him for his generous support and to encourage him to continue. (1CT026:3-7) If HRC was "encouraging" Paul to *continue* his "financial support," how is that not a solicitation for contributions?

Paragraph 78 describes HRC's call the day after the Tribute, thanking Paul for underwriting it and expressing how important it was to her campaign. (1CT031:17-19) This shows HRC's "knowing and willful" "acceptance" of Paul's excessive, hard-money contributions. (2 U.S.C. §§ 437g(d)(1)(A)(i) and 441a(f))

⁹ Under 11 C.F.R. § 100.53, "The entire amount paid to attend a fundraiser or other political event and the entire amount paid as the purchase price for a fundraising item sold by a political committee is a contribution."

Finally, paragraph 85 describes HRC's sending Paul a note thanking him for his friendship and for the event, (1CT033:1-5) written on official letterhead for her U.S. Senate campaign. (4CT909) This shows HRC's understanding that Paul's contributions were intended to benefit her campaign, as well as her "knowing and willful" "acceptance" of those contributions. (2 U.S.C. §§ 437g(d)(1)(A)(i) and 441a(f))¹⁰

Clearly, the allegations of the Complaint go well beyond the making of innocuous statements relating to a political campaign. They fully implicate HRC/Committee's conduct as "solicitation of campaign contributions and organization of a fundraising event" for her campaign, which necessarily invokes the application of Section 441a(a)(7)(B)(i). Such allegations also constitute competent *evidence* of HRC's conduct, as they have been verified as being based on Paul's personal knowledge and not "information and belief." (4CT782:4-26) *Sheeley v. City of Santa Clara* (1963) 215 Cal.App.2d

¹⁰ The allegations of paragraph 80, describing HRC's campaign spokesman Howard Wolfson's disclosure to the *Washington Post* that the Tribute's cost exceeded \$1 million (1CT127:3-4), make it clear that, as of the week she made the phone call and wrote the note described in paragraphs 78 and 85, HRC knew the size of Paul's contributions.

83, 85 (“A verification is an affidavit of the truth of the matter stated.”).

HRC/Committee also try to sanitize their conduct by painting the many documented examples of solicitation and coordination of Paul’s contributions (by HRC and by WJC, Rendell, Levin, and Rosen, acting as her agents) listed at pages 55-57 of the Opening Brief as mere “statements of Plaintiff’s mistaken belief that he allegedly was contributing to ‘HRC’s campaign,’ rather than to NYS 2000.” (Oppos. Brief at 26) After tossing out this bald assertion, HRC/Committee do absolutely nothing to explain why, despite such conduct (which they never dispute happened), Paul’s expenditures were *not* contributions to HRC’s campaign.

Substantial evidence exists to establish the fact that Paul’s numerous, high-dollar contributions cannot be regarded as contributions to NYS 2000 because they were solicited and coordinated by HRC’s agents for the benefit of HRC’s campaign. Included in the evidence is Paul’s testimony that Levin called him and directly solicited Paul to pay for the proposed Tribute after Levin, Kelly Craighead (HRC’s senior staff official (4CT790:9)), and Rosen had just got done meeting with Aaron Tonken (who was Paul’s agent

and employee (4CT785:23-24, 27-28) (Tonken)) on June 23, 2000, in Chicago. (4CT790:4-16)

Tonken's autobiographical account corroborates the fact that it was during that June 23 meeting that the idea for the Tribute was first conceived. While Tonken claimed it had been his idea to put together a star-studded extravaganza for the President and First Lady, he noted that Levin had insisted it be a fundraiser for HRC's campaign. In addition, Tonken said he "almost died" when they told him that any such event would have to be put together in less than two months, because it would *have* to coincide with the Democratic National Convention. (4CT843-44) Tonken's account thus establishes that HRC's campaign controlled the concept of the event that Paul was subsequently asked to underwrite.

Levin's sworn testimony regarding the same June 23 meeting shows the extent to which agents for HRC/Campaign knowingly solicited Paul's underwriting of the Tribute. Levin's account also demonstrates how, by instructing him to directly oversee all preparations for the event, WJC (as HRC's agent) used Levin to further coordinate Paul's expenditures for the Tribute.¹¹

¹¹ (1) Craighead asked Levin to join her at an HRC fundraising event on June 23 in Chicago to meet Tonken, so as "to gauge whether he

The DVD submitted with Paul’s concurrently filed Motion to Admit Documentary Evidence demonstrates that, not only HRC/Committee’s agents – but HRC herself – personally cooperated, consulted, and worked in concert with Paul to coordinate his expenditures for the concert portion of the Tribute. (Section 441a(a)(7)(B)(i)) The DVD also shows that HRC assisted Paul in securing the unpaid professional services of key entertainers like Cher as additional in-kind contributions. (*Id.*)

In sum, contrary to HRC/Committee’s assertion, there is certainly no shortage of evidence showing that HRC/Committee directly solicited and coordinated Paul’s in-kind contributions –

was for real and could be helpful with future events for us.” (see Exhibit A to concurrently filed Request for Judicial Notice (Levin Testimony) at 137:5-18) **(2)** The idea for the Tribute was created during that meeting. (4CT874:16-21; 875:13-14, 876:7-14) **(3)** Levin, Rosen, and Craighead, after meeting with Tonken, agreed on the proposed, large fundraiser for HRC. (Levin Testimony at 142:21-143:1) **(4)** WJC, after personally hearing Levin’s report, directed Levin to meet with Paul, “who was the gentleman that was going to be ultimately responsible for it, and [WJC] asked me to see if this was all, you know, for real, if this was a reality, because it was a very short time period.” (Levin Testimony at 143:2-12) **(6)** Levin met with Paul in Los Angeles, to discuss his willingness to underwrite this event, and reported back to WJC that he thought Paul “could pull this off.” (Levin Testimony at 144:5-19) and **(7)** WJC instructed Levin to oversee this event, which he did, spending increasing time in Los Angeles, which became full time during the last few weeks. (Levin Testimony at 144:20-25).

including *admitting* to that fact in their moving papers, Paul's testifying to that fact in the allegations of the Complaint and Supplemental Declaration, plus the other sworn testimony and first-hand account cited above, which show that these contributions *must* be considered "hard" money contributions to HRC's campaign.

2. The FEC Never Considered Whether Paul's In-Kind Contributions Were Solicited and Coordinated by HRC and Her Committee.

HRC/Committee contend that Paul "raised the same allegations with the FEC almost six years ago, and the FEC rejected them." (Oppos. Brief at 26) This claim is doubly false. First, Paul's complaint to the FEC¹² raised a different issue, namely, false *reporting* under Title 2 of the United States Code section 434(b). Second, the FEC found that this section had, indeed, been violated, and it imposed a fine. (4CT966; 970-72) Paul's claims were vindicated, not rejected.

Paul's FEC Complaint was entitled "False Reporting of Federal Election Campaign Contributions." The Complaint named HRC, the

¹² Paul's 7/16/01 complaint to the FEC (without the exhibits), later designated as MUR ("matter under review") 5225, is attached as Exhibit B to the concurrently filed Request for Judicial Notice (Paul's FEC Complaint). This document is also available online at <http://eqs.nictusa.com/eqs/searcheqs> under MUR number 5225.

Committee, NYS 2000, Rosen, Edward Rendell, Stephanie Berger, Levin, and WJC as Respondents and alleged violations of:

- A. 2 U.S.C. § 431, *et seq.* (definitions)
- B. 2 U.S.C. § 434(b) (reporting requirements);
- C. 11 C.F.R. § 104.3 (contents of reports);
- D. 11 C.F.R. § 110.9(a) (violation of limitations); and
- E. 11 C.F.R. § 110.9(b) (fraudulent misrepresentation)

(Paul's FEC Complaint at 1)

Paul's FEC Complaint never actually raised the issue of whether Paul's in-kind contributions should have been deemed contributions to HRC's Committee or NYS 2000. In fact, Paul's FEC Complaint never makes any reference at all to Section 441a(a)(7)(B)(i), the key campaign finance code section now at issue.

Nor did the FEC take it upon itself to explore this issue, which was outside the stated scope of Paul's FEC Complaint. Rather, the FEC focused its inquiry narrowly on the false reporting of the source and amount of Paul's in-kind contributions for the Tribute. Consequently, the only parties found to be at fault were NYS 2000 and Andrew Grossman (in his official capacity as its treasurer), the only parties legally obligated to properly report the contributions. (5CT1010:1-4) Since none of the other Respondents to Paul's FEC Complaint was legally obligated to file such reports, none of them was

found to have violated the Federal Election Campaign Act.
(5CT1010:12-29)

HRC/Committee were not candid in their September 28, 2001, Response to Paul's FEC Complaint when they stated: "The August 12, 2000 event was a joint fundraiser held by New York Senate 2000, it was not a Hillary Rodham Clinton for U.S. Senate Committee event."¹³ This statement is flatly contradicted by HRC's sworn testimony in this case, that: "In the summer of 2000, I knew Mr. Gary Smith and believed his work to be professional and of very high quality. I remember that he was asked to produce *a fundraising event for my Senate campaign*, which was held on August 12, 2000."
(5CT1175:15-17) (emphasis added)¹⁴

HRC/Committee make much of the FEC's findings that (1) the Committee "did not accept any 'advancements' of prohibited or

¹³ Response on behalf of HRC, her Committee, WJC, and William J. Cunningham, III, as treasurer, dated 9/28/01, p. 6. Attached as Exhibit C to the concurrently filed Request for Judicial Notice (Response to FEC). This document is also available online at <http://eqs.nictusa.com/eqs/searcheqs> under MUR number 5225.

¹⁴ Although Paul's FEC Complaint and his personal testimony might arguably have suggested to FEC investigators that there was evidence of solicitation and coordination of Paul's in-kind contributions by HRC's campaign agents, the FEC relied "on Paul's account only to the extent that it [was] corroborated by other sources." (5CT975 at fn. 2)

excessive funds from the other participants, or from any other sources in connection with the August 12, 2001 event;” and (2) Senator Clinton “similarly did not accept any illegal contributions.” (Oppos. Brief at 26, citing 5CT1008:6-7, 20) Both findings, however, resulted from the FEC’s “*limited* audit” of allocating fundraising costs. The FEC never considered whether Paul’s in-kind contributions had to be deemed contributions to HRC’s campaign.¹⁵

¹⁵ The General Counsel’s Report #2 states:

Based on the results of the limited audit, we determined that Clinton for Senate paid more than its minimum allocated share of expenses for the joint fundraising event, which it was permitted to do. *See* 11 C.F.R. § 106.6(a). *Accordingly*, Clinton for Senate did not accept any “advancements” of prohibited or excessive funds, etc. (5CT1008:3-6)(emphasis added)

By “limited audit,” the Report is referring back to a discussion on page 6 (5CT1003), which mentioned a

limited audit authorized by the Commission...to clarify uncertainties regarding the total amount of contributions [“i.e., checks written directly to NYS 2000 in response to event solicitations, all of which were reported” (5CT975:20-21)] and how those contributions were allocated and distributed, in order to determine whether any of the participating committees made or accepted excessive contributions. [fn. omitted] We determined that they did not. The audit did not focus on the unreported costs that are the subject of this report. (5CT1003:10-14)

The Commission’s audit was limited to determining whether the participating committees to NYS 2000 for the August 12 event had followed the requirements of 11 C.F.R. § 106.6 (in particular, subd. (d) regarding “Method for allocating direct costs of fundraising”) and determined that they had.

In short, the FEC did not have the same evidence that this Court now has and was never asked to evaluate the question that this Court is being asked to consider. Consequently, the FEC's seeming exoneration of both HRC and her Committee, recommending that the Commission find no reason to believe that either of them "violated

This regulation arises from the prohibition against using nonfederal, or "soft" money, to finance a federal election campaign. Based on the total amount of Paul's in-kind contributions to pay for the Tribute (which had been regarded as nonfederal, or "soft" money contributions to NYS 2000), HRC's campaign was required to transfer a certain percentage of its federal, or "hard" money, funds to a nonfederal account, so as to "pay" for its share of the event. The FEC explained these requirements and the necessary procedures for adhering to it in its Advisory Opinion No. 1992-33, dated 10/14/92, available at: <http://ao.nictusa.com/ao/no/920033.html>.

At page 11 of the General Counsel's Report #2 (5CT1008), the FEC was simply saying that HRC's Committee had transferred *more* than its required percentage of federal, or "hard" money into the nonfederal account (pursuant to 11 C.F.R. § 106.5). It was not expressing any opinion as to the issue under discussion here – whether Paul's in-kind contributions had to be deemed contributions to HRC's campaign. The FEC never evaluated or investigated that question.

The FEC's statement as to HRC is similarly limited to whether her campaign adhered to the allocation requirements (pursuant to 11 C.F.R. section 106.5):

Any potential liability of Senator Clinton would be based on whether she knowingly accepted prohibited or excessive in-kind corporate contributions. Because the investigation has shown that Clinton for Senate did not accept any "advancements" of prohibited or excessive funds from the other participants, it would appear that Senator Clinton similarly did not accept any illegal contributions. (5CT1008:16-20)

any provision of the Act or regulations in connection with this matter” (5CT1008:10-13, 20-22) is simply not conclusive as to issues not considered. This Court is thus the first tribunal to be asked to decide whether HRC/Committee violated Title 2 of the United States Code section 441a(f).

3. Federal Preemption Doctrines Are Inapplicable Because This Court Is Merely Being Asked to Determine Whether Section 425.16 Protects the Conduct at Issue.

Finally, HRC/Committee suggest that this Court lacks jurisdiction to consider Paul’s argument that the anti-SLAPP statute does not apply because HRC/Committee’s “protected” conduct was a violation of federal law. They state: “The FEC has ‘the sole discretionary power to determine in the first instance whether or not a civil violation of the [Federal Election Campaign Act] has occurred. *FEC v. Democratic Senatorial Campaign Comm.* (1981) 454 U.S. 27, 37 (internal quotation omitted).” (Oppos. Brief at 27, fn.26)

There are three problems with this argument. First, Paul has set forth a *criminal* violation of the Federal Election Campaign Act (FECA), not civil.¹⁶

¹⁶ The Justice Department can investigate criminal violations of the Act (*United States v. Tonry* (1977) 433 F.Supp. 620, 622-23), such as intentional and factually aggravated violations of the FECA (typically, violations involving a substantial sum of money and which resulted in

Secondly, HRC/Committee effectively claim an unfettered right to solicit illegal campaign contributions merely because the FEC has exclusive jurisdiction over civil enforcement. This would mean that all manner of criminal conduct subject to enforcement by a federal agency would enjoy the protection of the anti-SLAPP statute, thwarting the very purpose of the statute, which exists only to protect the *valid* exercise of First Amendment rights. (Section 425.16, subd. (a))

Third, and most importantly, this Court is not being asked to make this determination to administer or enforce any provision of the FECA, but only to evaluate whether Section 425.16 protects HRC/Committee's conduct. This is ultimately a matter of state law. A California court necessarily has jurisdiction to determine whether a California procedural statute applies to conduct defined as criminal. It is immaterial whether the conduct at issue constitutes a crime under the laws of this state, another state, or the federal government.

the reporting of false campaign information to the FEC). *See*, generally, Dosanto, *Federal Prosecution of Election Offenses, The Department of Justice, Sixth Edition, January 1995*, Part II, "Campaign Financing Fraud," 1508 PLI/Corp 789, 882 (Practising Law Institute Corporate Law and Practice Course Handbook Series PLI Order No. 6819; September, 2005).

Significantly, the only effect of this Court's finding that the evidence conclusively establishes that HRC/Committee's conduct criminally violated federal campaign laws will be a reversal of the granting of HRC/Committee's anti-SLAPP motion. Nothing more. This finding would not be admissible in any future criminal prosecution.

4. Defendants *Cannot* Meet Their Burden Under Section 425.16 If Their "Protected Conduct" Was Illegal As a Matter of Law.

The anti-SLAPP statute addressed 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." (Section 425.16, subd. (a)) The statute's special motion to strike is available only as to a claim that "arises from" and is "based upon" constitutionally protected speech or petitioning. *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76, 78; *Navellier v. Sletten* (2002) 29 Cal.4th 82, 89; *Gallimore v. State Farm Fire & Cas. Ins. Co.* (2002) 102 Cal.App.4th 1388, 1398-1399 (Sup.Ct. hearing den.).

This Reply Brief has assumed, for the sake of argument, that Paul's action *is* "based upon" and "arises from" HRC/Committee's solicitation of his campaign contributions and their organization of a

fundraising event, activities normally accorded First Amendment protection. (See, e.g., *McConnell v. FEC* (2003) 540 U.S. 93, 139-142 (applying First Amendment scrutiny to restrictions on campaign solicitations). The question remains, however, whether in *this* instance such conduct is constitutionally protected.

Ordinarily, in determining whether the anti-SLAPP statute applies, the Court engages in a two-phase analysis. It first determines whether the plaintiff's claim "arises from protected speech." *Navellier, supra*, 29 Cal.4th at 89. If so, the Court proceeds to the second phase: determining whether the plaintiff has made a prima facie showing on the merits.

In most cases where the plaintiff contends that the defendant's speech is not constitutionally protected, that contention is based on a factually disputed claim that the speech was wrongful, e.g., fraudulent or defamatory. The courts resolve such factual disputes by moving to the second, merits phase.¹⁷

¹⁷ In *Chavez v. Mendoza* (2001) 94 Cal.App.4th 1083, for example, the plaintiff in a malicious prosecution case argued that the defendants' prior lawsuit was not constitutionally protected because their allegations were "unsupported by the facts." Since the defendants did not agree that their prior allegations were factually baseless, the plaintiff could not show, *as a matter of law*, that the defendants' conduct was constitutionally unprotected, and the appellate court held that the resolution of that dispute belonged in the second phase of the

But that approach is not applicable in those unusual cases where, as here, no conflict of fact exists and it is clear, *as a matter of law*, that the speech or conduct at issue was *not* constitutionally protected. The anti-SLAPP statute is to be “construed broadly” (Section 425.16, subd. (a)), but not to benefit individuals who engage in activities that are indisputably illegal.

The solicitation, coordination and acceptance of campaign contributions by a federal candidate or campaign in excess of the legal limit is a criminal act under the FECA, and thus *cannot* fall within the ambit of a constitutionally protected exercise of free speech or petition.

By its plain language, the anti-SLAPP statute protects the exercise of constitutional rights of petition and free speech, not the commission of criminal acts. Under such circumstances, any interest in protecting a defendant’s illegal conduct is so clearly absent that the special motion to strike procedure is not available to the defendant.

In such cases, the anti-SLAPP motion will be rejected in the first phase of the analysis, with no need to proceed to the merits. *Paul for Council, supra*, 85 Cal.App.4th at 1365-67 (anti-SLAPP statute

anti-SLAPP analysis, dealing with the merits.

inapplicable where defendant's conduct indisputably criminal); *Lam v. Ngo* (2001) 91 Cal.App.4th 832, 851 (criminal acts not protected by anti-SLAPP statute, despite political motives and context of political demonstration). In such cases, the moving party *cannot* meet its burden of putting on a prima facie case of constitutional protection, and the motion must on that basis be denied.

5. The Three-Part Test of *Flatley v. Mauro* Is Directly Applicable to Determining the Illegality of HRC/Committee's Conduct.

In *Paul for Council* the defendants "effectively conceded the illegal nature of their election campaign finance activities for which they [claimed] constitutional protection," but that is not the case here. *Paul for Council, supra*, 85 Cal.App.4th at 1367. Here, "Defendants do not concede any improper, much less illegal, activity." (Oppos. Brief at 22, fn.22)

The recent case of *Flatley v. Mauro* (2006) 39 Cal. 4th 299, provides a framework for determining the applicability of the anti-SLAPP statute to conduct giving rise to a plaintiff's claim that, while asserted to be illegal, is not *conceded* to be illegal.

Flatley involved an entertainer who was falsely accused of raping a woman who had spent the night in his hotel room. A lawyer

sent the entertainer a demand letter, threatening to ruin the entertainer's reputation and career unless he immediately acceded to the letter's settlement demands. *Id.* at 307-310.

When the entertainer sued the lawyer for civil extortion, the lawyer brought an anti-SLAPP motion, asserting that the letter was a pre-litigation settlement offer in furtherance of his constitutional right of petition, and therefore protected by Section 425.16, subdivisions (e)(1) and (4). *Id.* at 311. The anti-SLAPP motion was denied, and the Court of Appeal affirmed, holding that, based on *Paul for Council*, the anti-SLAPP law did not apply because the defendant's conduct constituted criminal extortion as a matter of law, and extortionate speech is not constitutionally protected. *Id.*

Appealing to the California Supreme Court, the defendant argued that the conduct at issue was not criminal extortion, but rather "the kind of permissible settlement negotiations that are attendant upon any legal dispute" and therefore protected by the First Amendment. *Id.* at 328. The Supreme Court resolved the question of whether the conduct was criminal by a three-step process. First, the Court laid out the elements of criminal extortion. *Id.* at 326-28. Second, the Court examined whether there was any dispute as to the

facts and found there was not. *Id.* at 328-29. Third, the Court applied the law to the undisputed facts, found that the conduct at issue satisfied all of the necessary elements of the crime, and on that basis affirmed the denial of the anti-SLAPP motion. *Id.* at 328-333.

6. Applying *Flatley*, HRC/Committee’s Conduct Was Indisputably Illegal and Therefore Unprotected by Section 425.16.

Like the defendant in *Flatley*, HRC/Committee claim their conduct giving rise to Paul’s claims – soliciting campaign contributions and organizing a political fundraising event – was legal, in *this* case because Paul’s in-kind expenditures were properly deemed to be nonfederal (or “soft” money) contributions to NYS 2000. (Oppos. Brief at 26) In contrast, Paul contends that such conduct by the candidate, her Committee, and their agents transformed his contributions into excessive federal (or “hard” money) contributions to HRC’s campaign in violation of Title 2 of the United States Code, sections 441a(f) and 437g(d)(1)(A)(i). To resolve this dispute over the legality of HRC/Committee’s accepting Paul’s contributions, it is necessary to examine and apply federal campaign law.

a) Elements of the Crime of Accepting Illegal Campaign Contributions

The United States Supreme Court upheld the constitutionality of a \$1,000 per-election limit on individuals' contributions to federal candidates, based on the primary purpose for the enactment of the FECA: "to limit the actuality and appearance of corruption resulting from large individual financial contributions...." *Buckley v. Valeo* (1976) 424 U.S. 1, 26. The Court also upheld the Act's treatment of "all expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate as *contributions* subject to the limitations set forth in [§] 608(b)." *Id.* at 47 (emphasis added), referring to former Title 18 United States Code section 608(c)(2)(B).

In 1976 Congress incorporated these provisions into newly enacted Title 2 of the United States Code, section 441a.¹⁸ Thus, Section 441a(a)(7)(B)(i), as presently worded, has been in effect since 1976.¹⁹

¹⁸ Pub.L. No. 94-283, entitled the "Federal Elections Campaign Act Amendments of 1976." Section 112 added 2 U.S.C. 441a.

¹⁹ The current definitions of "contribution" and "expenditure" are essentially unchanged from those in the 1974 amendments reviewed in *Buckley*. (2 U.S.C. § 431(8)-(9); *Buckley, supra*, 424 U.S. at 145-48).

Of the limited number of cases interpreting that section, most involved large expenditures for expressive communications where the issue before the court was whether an individual (or an organization) had made a “coordinated” or an “independent” expenditure in funding the communication. (See, e.g., *FEC v. Colorado Republican Federal Campaign Committee* (2001) 533 U.S. 431; *U.S. v. Goland* (9th Cir. 1992) 959 F.2d 1449) An “independent” expenditure can be limitless, because it is deemed to be speech by the person or entity making the expenditure, whereas an expenditure “coordinated” with the candidate is deemed to be the *candidate’s* speech, subject to federal limitation. *Buckley, supra*, 424 U.S. at 19-21.

Cases evaluating what constitutes a “coordinated” expenditure are instructive for the issue at hand. In *FEC v. Christian Coalition* (D.D.C. 1999) 52 F.Supp.2d 45, the U.S. District Court, over the FEC’s objection, adopted a somewhat lenient standard for making this determination, a “minimalist” view of what *must* be deemed to be a contribution to a federal candidate:

A contribution provides the candidate with something of value that she wants or needs. . . . The government’s compelling interest arises from the recognition that as the magnitude of a contribution grows, so grows the likelihood that the candidate will feel beholden to the source of those contributors. . . . The fact that the

candidate has *requested or suggested* that a spender engage in certain speech indicates that the speech is valuable to the candidate, giving such expenditures sufficient contribution-like qualities to fall within the Act's prohibition on contributions.

In the absence of a request or suggestion from a campaign, an expressive expenditure becomes "coordinated": where the candidate or her agents can exercise control over, or where there has been substantial discussion or negotiation between the campaign and the spender over, a communication's (1) contents; (2) timing; (3) location, mode, or intended audience (e.g., choice between newspaper or radio advertisement); or (4) "volume" (e.g., number of copies of printed materials or frequency of media spots). Substantial discussion or negotiation is such that the candidate and spender emerge as partners or joint venturers, but the candidate and spender need not be equal partners. This standard limits § 441b's contribution prohibition on expressive coordinated expenditures to those in which the candidate has taken a sufficient interest to demonstrate that the expenditure is perceived as valuable for meeting the campaign's needs or wants. (*Id.* at 91-92 [emphasis added])

b) As Required by *Flatley*, Paul's Evidence Is Uncontroverted.

Step two of the *Flatley* analysis is to determine whether the relevant evidence is contested or uncontested. In *Flatley*, the Court observed:

[The attorney] did not deny that he sent the letter nor did he contest the version of the telephone calls set forth in Brandon's and Field's declarations in opposition to the motion to strike. We may therefore view this evidence as uncontroverted. (*Id.* at 328-29)

Similarly, here, although HRC/Committee hardly miss an opportunity to cast aspersions on Paul’s credibility, they never deny that the events happened exactly as Paul described them. Nor do they present any conflicting evidence.²⁰ This Court must therefore regard Paul’s evidence as uncontroverted.

c) HRC/Committee’s Conduct Satisfied the Elements of the Crime of Accepting Illegal Contributions, Making Their “Protected” Conduct of Soliciting Contributions and Organizing a Fundraiser Illegal As Well.

Step three of *Flatley* is to apply the law to the uncontroverted facts. Even under the relaxed standard of *Christian Coalition* described above and even though – in contrast to the expenditures there – Paul’s expenditures were for goods and services rather than

²⁰ HRC/Committee mistakenly rely on the prosecutor’s statement in David Rosen’s criminal trial, supposedly to the effect that there was no evidence of wrongdoing by Hillary Clinton. (Oppos. Brief at 21, fn. 20; p. 34, fn. 34) First, the prosecutor’s exact words to the jury were, “You will *hear* no evidence that Hillary Clinton was involved in this in any way, shape or form,” not that such evidence was nonexistent. Second, arguments made by attorneys in opening argument are not evidence. Third, in contrast to this, the prosecutor also told the jury that the *raison d’être* for the Tribute was to *raise money for Hillary Clinton’s campaign*. (See Exhibit D to Request for Judicial Notice, at 5:6-8 and 8:3-5) He also repeatedly characterized the Tribute as being *for HRC’s campaign*. (*Id.* at 2:22, 3:15-17, 13:14-15)

speech, this case easily meets the criteria for requiring Paul's expenditures to be deemed contributions to the candidate, HRC.

First, there was no "absence" of a request or suggestion from HRC's campaign for Paul's numerous and voluminous expenditures. By that standard alone, they must be deemed contributions to HRC's campaign, subject to the \$2,000 ceiling, rather than contributions to NYS 2000. In the following examples, Paul was solicited for a contribution in excess of the federal limit:

- As a result of WJC's suggestion and at DNC Chairman Ed Rendell's and Rosen's request (with WJC, Rendell, and Rosen all acting as agents on HRC/Committee's behalf), Paul underwrote the \$40,000 in expenses for HRC/Committee's back-to-back fundraisers on June 9, 2000, (1CT019:25-020:1; 4CT786:23-28, 787:8-12, 21-23) and he was required to pledge \$150,000 in SLM stock to HRC's campaign for the privilege of hosting these events. (4CT787:15-21)
- On or about June 24, 2000, Levin, on behalf of HRC/Committee and WJC (as HRC's agent) called Paul and requested that he underwrite a large fundraising event for HRC's campaign, which he and two other of HRC's agents (Rosen and Kelly Craighead)

had conceptualized. (4CT790:4-20; 4CT874-76; Levin Testimony at 137-143)

- In July 2000 HRC, through Rosen, *insisted* that Paul use Smith to produce the concert portion of the Tribute, over any other producer. (4CT793:1-5; 886:1-887:12)

Numerous other examples were listed in the Opening Brief at 55-57. There were also “substantial discussions and negotiations between the campaign and the spender” over Paul’s expenditures for the Tribute, including the program (i.e. “contents”), its “timing” (during the DNC Convention), and “location” (Los Angeles area) (*Christian Coalition, supra*, 52 F.Supp.2d at 92).²¹

Based on this overwhelming evidence of extensive coordination by HRC/Committee and their agents of Paul’s in-kind expenditures, they cannot be deemed to be anything other than contributions to HRC’s federal campaign. As such, they were wildly in excess of the

²¹ The evidence includes: (1) the July 11, 2000, conference call (1CT022:16-023:9; 5CT981:13-982:5); (2) HRC’s and her agent Kelly Craighead’s direct involvement with preparations for the Tribute; (3) HRC’s involvement in the negotiations with Smith so that Paul would contract with him to produce the concert portion of the Tribute (4CT791:13-792:28; 879-80); Levin’s and Rosen’s ongoing supervision of preparations for the Tribute (Levin Testimony at 144:20-25; 5CT982:8-13); and (4) HRC’s sworn declaration, in which she herself characterized the Tribute as a fundraising event for her Senate campaign (5CT1175:16-17).

statutory limit of \$2,000, making HRC/Committee's conduct of "soliciting campaign contributions" and "organizing" the Tribute *criminal* conduct not protected by the First Amendment. As a matter of law, therefore, HRC/Committee have failed to establish that their conduct is covered by the anti-SLAPP statute. On that basis, the judgment must be reversed.

C. Even If HRC/Committee's Conduct Enjoyed Statutory Protection, the Judgment Must Be Reversed Because Paul Has Established a Prima Facie Case.

HRC/Committee never squarely address the systematic case (all supported by citations to evidence in the Clerk's Transcript) Paul made against them in his Opening Brief. (Opening Brief at 59-71) Instead, they focus their attack on the Complaint (for supposedly providing too *little* detail) and on Paul's Supplemental Declaration (for supposedly providing too *much*). (Oppos. Brief at 31-32) HRC/Committee also seem convinced that if they repeat the false mantra that "Plaintiff has not presented any evidence" enough times, this Court will believe them. However, it is Paul's abundance of evidence against HRC/Committee that distinguishes this appeal from the last one.

HRC/Committee also try to make it appear that Paul “conceded” he had no evidence by taking out of context the statement that, while he had *indirect* evidence establishing every element of his case, he lacked *direct* evidence as a result of not being able to depose HRC. (Oppos. Brief at 11, citing Opening Brief at 72) California courts have long recognized the inherent difficulty in proving fraudulent intent by direct evidence:

Fraud assumes as many and complex forms as the ingenuity of man is able to devise. Rarely can it be proved by direct evidence; usually, as here, the plaintiff must establish his cause of action by circumstantial evidence, if at all.... Volume 24, American Jurisprudence, section 281, p. 126: “A court in looking for proof of fraud is not confined to 'wide open spaces' or to detailed proof of fixed and definite overt acts or conduct. Facts of trifling importance when considered separately, or slight circumstances trivial and inconclusive in themselves, may afford clear evidence of fraud when considered in connection with each other. It has been said that in most cases fraud can be made out only by a concatenation of circumstances, many of which in themselves amount to very little but in connection with others make a strong case.” (*Peskin v. Squires* (1957) 156 Cal.App.2d 240, 249-50)

Thus, Paul’s concession that he lacks *direct* evidence of the defendants’ fraudulent intent does not suggest that this case lacks merit.²²

²² BAJI No. 2.00 “Direct and Circumstantial Evidence—Inferences” (Spring 2007 edition) provides, in pertinent part:

HRC/Committee also fail to support their contention that Paul is required to do anything more than demonstrate that his case has “minimal merit.” (Oppos. Brief at 27-28, citing Opening Brief at 59-60) The plaintiff’s burden in an anti-SLAPP motion approximates that used in determining a motion for nonsuit. *Metabolife Intern., Inc. v. Wornick* (9th Cir. 2001) 264 F.3d 832, 840. (Opening Brief at 59)

A motion for nonsuit may properly be granted when, and only when *disregarding conflicting evidence*, and giving to plaintiff’s evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff. (*Peskin, supra*, 156 Cal.App.2d at 242 [internal quotes and ellipses omitted; emphasis supplied])

1. Paul’s Evidence Established All Elements of the Fifth Cause of Action.

HRC/Committee offer almost no comment regarding Paul’s evidence offered in support of the Fifth Cause of Action, nor do they make any attempt to explain how this evidence fails to satisfy the requisite elements of promissory fraud as to WJC (*Warren v. Merrill*

“It is not necessary that facts be proved by direct evidence. They may be proved also by circumstantial evidence or by a combination of direct and circumstantial evidence. Both direct and circumstantial evidence are acceptable as a means of proof. Neither is entitled to any greater weight than the other.”
(emphasis added)

(2006) 143 Cal.App.4th 96, 110) and of HRC/Committee's concurrence in and advancement of that fraud (*Kidron v. Movie Acquisition Corp.* (1996) 40 Cal.App.4th 1571, 1581:

- That HRC *knew* WJC had promised Paul he would accept Paul's offer of a post-White House employment arrangement, is shown, for example: (1) by HRC's overt enthusiasm for Paul's business proposal when they were together on June 9, 2000 (1CT21:1-3; 4CT789:8-12) coupled with her thanking Paul for his generous financial support subsequent to Levin's informing Paul that his proposal to WJC was accepted (1CT23:24-24:5, 29:5-7); (2) by HRC's discussing WJC's future with Paul during the Tribute (4CT797:15-18); (3) by her agents' multiple threats to cancel the deal if Paul did not (a) continue underwriting the Tribute, (b) go along with her campaign's lie to the *Washington Post*, and (c) honor his pledge of stock to HRC's campaign (1CT28:16-19; 4CT798:26-28, 799:15-19; 801:13-16), and (4) by HRC's arranging for Paul to meet with WJC at Air Force One in response to Paul's demand that WJC personally assure him they still had a deal (4CT801:17-17).

- That HRC *knew* WJC never intended to work for Paul is shown: (1) by her campaign's asking Paul to lie to *Washington Post* reporter Lloyd Grove about having bankrolled the Tribute (4CT798:21-24; 799:5-7; 903) and (2) by her campaign's showy return of Paul's \$2,000 cash contribution. (4CT799:27-800:2; 907) These acts demonstrate that HRC considered Paul's criminal history a source of embarrassment. Therefore, WJC could not have been sincere in agreeing to publicly affiliate himself with Paul, nor could HRC have been sincere in her displayed enthusiasm for the idea. HRC/Committee have also never challenged Paul's assertion that, as President and First Lady, the Clintons *must* have known of his felony record prior to WJC's pretended acceptance of Paul's offer. (Opening Brief at 7-8)
- WJC's fraudulent intent is also evidenced by WJC's acts, through Levin, to frustrate the purpose of WJC's supposed agreement with Paul, i.e., leading Oto to abandon Paul, which caused SLM's collapse (Opening Brief at 67-68).²³

HRC/Committee set up a straw man by selectively quoting from the Opening Brief to make it seem as if Paul contended that

²³ Paul refers the Court to pages 67-71 of his Opening Brief for further examples of evidence in support of the Fifth Cause of Action.

HRC's knowledge of and concurrence in WJC's fraud could be inferred from the fact of their marriage alone and then decrying that inference as "wildly illogical." (Oppos. Brief at 34) On the contrary, Paul pointed out that HRC's knowledge of and concurrence in WJC's fraud could be inferred from the three elements listed in *Novartis Vaccines and Diagnostics, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2006) 143 Cal.App.4th 1284, 1300. Besides "relationship," there is also "the nature of the acts done," i.e., HRC's exploitation of her status as WJC's wife to manipulate Paul into increased spending on her behalf (both by convincing him he *had* a commitment and by convincing him he might *lose* that commitment). As a third element, an inference can also be derived from the Clintons' "common interest" in the success of her Senate race. *Id.* (Opening Brief at 64) HRC/Committee have nothing to say about this evidence.

2. Paul's Evidence Established All Elements of the Fourteenth Cause of Action Against HRC.

Similarly, HRC/Committee misrepresent Paul as contending that HRC's knowledge of and concurrence in Smith's fraud could be inferred *solely* from the fact of her longstanding friendship and ongoing business relationship with him. In fact, again relying on *Novartis, supra*, Paul pointed to HRC's and Smith's shared advantage

in the fraud, which directly benefited Smith while also ensuring that HRC got what she wanted, namely, the best possible Hollywood producer for showcasing her image. (1CT35:9-11; 4CT794:12-14) Additionally, as evidence to be inferred from “the nature of the acts done,” Paul cited HRC’s failure to take action when Smith repudiated the agreement (4CT793:25-26), pointing out that HRC would have taken some remedial action *if* she had regarded Smith’s promise as real, because it would have amounted to an affront to her, personally. (Opening Brief at 48 and 65) HRC/Committee ignore this evidence completely.

Likewise, HRC/Committee make no comment regarding any of the other evidence offered in support the Fourteenth Cause of Action, once again neglecting to explain how Paul’s evidence fails to satisfy the necessary elements of promissory fraud against Smith (*Warren, supra*, 143 Cal.App.4th at 110) and of HRC’s concurrence in and advancement of that fraud (*Kidron, supra*, 40 Cal.App.4th at 1581):

- That HRC *knew* Smith never intended to honor his promise to produce the concert portion of the Tribute and deliver an edited master of the concert for a flat fee of \$800,000 is shown: (1) (as just mentioned above) by HRC’s treatment of this promise as

meaningless when Smith repudiated it by extorting from Paul an extra \$75,000 at the last minute (4CT793:25-27; 848) and (2) HRC's similar refusal to enforce the agreement when Smith demanded more money before releasing the *unedited* master. (4CT794:10-20).

- That HRC was personally involved in the negotiations with Smith and in the representation that Smith had lowered his \$850,000 fee by \$50,000 thanks to her intervention is evidenced: (1) by Rosen's assurance to Paul that HRC would personally intervene to get Smith to lower his fee and Rosen's call the next day that HRC had done just that (1CT25:26-26:9; 4CT792:6-11); (2) by Smith's admission to Mike Wallace and producer Bob Anderson that Mrs. Clinton had personally called Smith and asked him to lower his fee (1CT26:12-14; 4CT792:11-18); and (3) by Tonken's autobiographical account of the incident (4CT847).²⁴

²⁴ HRC/Committee belatedly point out that "Mr. Tonken's book is not a sworn declaration..." (Opposing Brief at 34, fn. 34) Since they failed to object to this evidence below and request a ruling striking it as hearsay, this Court *may* consider the excerpts from Tonken's book included in the record in evaluating whether Paul has presented a prima facie case. *Gallagher v. Connell* (2004) 123 Cal.App.4th 1260. (4CT823-863)

3. Paul's Evidence Is Uncontested and Undefeated.

It should be also noted that HRC/Committee do not oppose Paul's arguments that (1) HRC's sworn declaration fails to deny *any* of Paul's factual contentions and (2) Paul's Supplemental Declaration and his verified Complaint (as to all of the allegations *not* based "on information and belief") are competent evidence. (Opening Brief at 60-63) HRC/Committee have thereby conceded these points.

4. "Lack of Credibility" Is Not an Accepted Basis for Granting an Anti-SLAPP Motion.

HRC/Committee cite no authority for their imaginary "this-case-is-highly-unusual" exception to the ordinary rule governing anti-SLAPP motions: that the Court should not weigh the credibility or comparative probative strength of competing evidence in determining whether a plaintiff has established a prima facie case. (Oppos. Brief at 36) *Flatley, supra*, 39 Cal.4th at 326; *Nagel, supra*, 109 Cal.App.4th at 45.

Elaborating on what they mean by this being an "unusual case" – and ignoring completely the corroborating evidence provided by the forty-three supporting exhibits attached to Paul's Supplemental Declaration -- HRC/Committee assert: "This is a case in which Plaintiff's entire evidentiary showing consists of his own word."

(Oppos. Brief at 36) Even if that were true, Paul’s eyewitness account is *still* evidence. HRC/Committee cannot point to a single case or statute requiring, or even *permitting*, this Court to disregard Paul’s own account merely by virtue of his past criminal convictions. The only case HRC/Committee cite as support, *24 Hour Fitness, Inc. v. Super. Ct.* (1998) 66 Cal.App.4th 1199, 1211, is irrelevant because there is no material fact “admitted” in Paul’s pleadings, his declaration, or his Opening Brief that defeats his claim against HRC/Committee.

Moreover, if the list provided – of “inconsistencies” and examples of Paul’s so-called “willingness to say anything” – is the *best* HRC/Committee can come up with, they have failed in their attempt to discredit Paul. (Oppos. Brief at 37-38) In every example they list, the only “inconsistency” is the fact that Paul’s Supplemental Declaration provided more detail than what had been stated in the Complaint.

On the other hand, what is conspicuous by its absence in this case is a declaration by HRC or WJC setting forth a contrary account to Paul’s version of the facts. As Paul pointed out before, if he is lying, why doesn’t HRC simply say so? (Opening Brief at 61) Oddly,

the record is completely devoid of any conflicting testimony. Paul's evidence is clearly undefeated, as a matter of law. *Rowe v. Superior Court* (1993) 15 Cal.App.4th 1711, 1723.

D. The Trial Court Abused Its Discretion By Denying Paul the Opportunity to Obtain Prima Facie Evidence While Simultaneously Dismissing this Case for the Lack of It.

HRC/Committee contend that the lower court was “correct to reject” the argument that Paul’s “total lack of direct evidence constitutes ‘good cause’ for lifting the mandatory discovery stay.” (Oppos. Brief at 39-40) Both HRC/Committee and the lower court have it exactly wrong. The whole purpose of Section 425.16, subdivision (g)’s provision for permitting discovery is to afford a plaintiff who does *not* have the evidence necessary to establish a prima facie case an opportunity to obtain it! *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 37 Cal.App.4th 855. In *Lafayette Morehouse*, the court acknowledged that the discovery stay “might well adversely implicate a plaintiff’s due process rights ... [unless] given the reasonable opportunity to obtain that evidence through discovery before the motion to strike is adjudicated.” *Id.* at 868. The plaintiff, however, “never sought discovery or the benefit of the statutorily mandated exception.” *Id.* at 867. There was no

indication that the Court would have denied the plaintiff's discovery request *had it been made*.

HRC/Committee also chide Paul for “fail[ing] to cite a single case in which a California court has ordered discovery based upon a similar theory of ‘good cause.’” (Oppos. Brief at 40) A survey of all cases involving Section 425.16, subdivision (g) reveals that there are only four valid reasons for denying such a discovery motion: (1) because the motion was never properly made, as in *Lafayette Morehouse, supra*; (2) because the defendant can demonstrate a complete legal defense to the plaintiff's claim, making the discovery request moot, *see, e.g., Blanchard v. DIRECTV, Inc.* (2004) 123 Cal.App.4th 903, 922; (3) because the evidence sought is already available from another source, *see, e.g., Schroeder v. Irvine City Council* (2002) 97 Cal.App.4th 174, 191; and (4) because there was no showing that the evidence sought would be determinative of the issue. *See, e.g. Garment Workers Center v. Superior Court* (2004) 117 Cal.App.4th 1165, 1162. None of those reasons is applicable here.

Admittedly, there is no reported California case in which the lower court denied a properly made discovery motion under Section 425.16, subdivision (g), and the appellate court reversed it for an

abuse of discretion. The only pertinent case is *Barrett v. Rosenthal* (2004) 114 Cal.App.4th 1379, 9 Cal.Rptr.3d 142, reversed on other grounds in *Barrett v. Rosenthal* (2006) 40 Cal.4th 33. Although Paul may not rely on the depublished Court of Appeal's decision, he calls it to this Court's attention because the appellate court held it was an abuse of discretion to deny a request for discovery of evidence pertaining to actual malice while granting an anti-SLAPP motion for failure to show such malice. *Id.* at ___, 9 Cal.Rptr.3d at 150.

In the case at hand, the trial court granted the anti-SLAPP motion based exclusively on Paul's inability to establish HRC's personal knowledge of WJC's and Smith's fraudulent intent:

As was the case with Rosen the most he can show is that promises were made by other people and those promises were never performed. Even *assuming* the promises were with the intent not to perform, there is nothing to indicate *Hillary Clinton was aware* that the promises were not made in good faith. As to the fourteenth cause of action, there is nothing to indicate *Hillary Clinton was aware* of the false promises made by Smith or that she was helping Smith in his alleged nefarious activities. (5CT1179) (emphasis added)

Unlike the reasons this Division found for reversing a lower court's order *permitting* discovery, in *Garment Workers, supra*, 117 Cal.App.4th at 1162, here the lower court never made any finding that Paul's motion for limited discovery was improper because: (1) Paul

had failed to bring a proper motion, (2) a request for direct evidence of HRC's personal knowledge was moot, (3) such evidence was already available from another source, or (4) such evidence was unnecessary to establish a prima facie case.

Quite the contrary, Paul's discovery motion was denied because he *did not have* direct evidence of HRC's personal knowledge of WJC's and Smith's fraudulent intent. This abridged Paul's constitutional right of due process and was a clear abuse of discretion. *Lafayette Morehouse, supra*, 37 Cal.App.4th at 54.

Furthermore, Paul's discovery request was limited to "evidence relating to PAUL's prima facie case" as "'held or known' by HRC." (3CT693:23) Thus, it was inherently limited in scope, not "broad, sweeping, and ill-defined." (Oppos. Brief at 40)

Finally, even if seeking "to conduct a fishing expedition" *were* a reason to deny a discovery motion under Section 425.16, subdivision (g), Paul's motion was nothing of the sort. (Oppos. Brief at 40) Paul's Supplemental Declaration provided sufficient indirect evidence of HRC's knowledge of Paul's business proposal, WJC's purported acceptance of it, and HRC's undisclosed desire *not* to be

publicly identified with Paul to dispel any notion that Paul merely “hoped” he might find out something relevant from deposing HRC.

For all of the foregoing reasons, it was an abuse of discretion for the trial court to deny Paul’s discovery request.

III.
CONCLUSION

Based on the foregoing, Paul asks this Court to rule in accordance with his Conclusion at pages 73-74 of the Opening Brief.

June 20, 2007

Respectfully submitted,

UNITED STATES JUSTICE FOUNDATION

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing APPELLANT’S REPLY BRIEF is
in compliance with the requirements of California Rules of Court,
Rule 8.204(c)(1). The brief contains 9632 words.

June 20, 2007

D. Colette Wilson