

**IN THE COURT OF APPEAL, STATE OF CALIFORNIA**  
**SECOND APPELLATE DISTRICT, DIVISION 7**

<b>PETER F. PAUL,</b>	)	
	)	Appeal No. B191066
<i>Plaintiff and Appellant,</i>	)	
	)	(Superior Court
vs.	)	No. BC 304174)
	)	
WILLIAM JEFFERSON CLINTON,	)	(Honorable Aurelio N. Munoz,
	)	Judge)
<i>Defendant,</i>	)	
	)	
<b>HILLARY RODHAM CLINTON, HILLARY</b>	)	
<b>RODHAM CLINTON FOR U.S. SENATE</b>	)	
<b>COMMITTEE, INC.,</b>	)	
	)	
<i>Defendants and Respondents.</i>	)	
	)	
	)	
_____	)	

APPELLANT’S OPENING BRIEF

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**Conformed to Notice of Errata Filed March 23, 2007**

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## TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ix
I. INTRODUCTION	1
A. Nature of the Action	1
B. Statement of Contentions	1
II. PROCEDURAL HISTORY	4
III. STATEMENT OF FACTS	5
A. Preliminary Factual Issues	5
1. HRC's Deceptions in the <i>Washington Post</i> Reveal True Feelings About Being Publicly Affiliated With Peter Paul.	6
a. The <i>Washington Post</i> calls HRC's campaign, inquiring about Paul's felony record.	6
b. Paul's criminal past was no secret to the Clintons.	7
c. HRC's campaign lies to cover up connection with Paul.	8
d. Paul's \$2,000 contribution is returned, but not his \$1.2 million-plus contributions.	10
e. Paul's role as HRC's largest campaign contributor would have been a major issue.	11
f. The Clintons cannot have been sincere about WJC's seeming willingness to accept Paul's post-White House employment offer.	12
2. What Caused the Demise of Stan Lee Media, Inc.?	13

## TABLE OF CONTENTS

	PAGE
a. Paul never “admitted” he caused SLM to fail.	14
b. The U.S. District Court in Los Angeles determined that Paul’s securities fraud was intended to help SLM and had nothing to do with its collapse.	14
B. Chronology of Events Giving Rise to This Case	15
1. Paul Co-Founds SLM and Conceives of a Plan to Hire Future Ex-President As a Rainmaker.	15
a. DNC Chairman Rendell befriends Paul with his promises to use his influence with WJC to help Paul present his proposal.	16
b. WJC acts as if Paul’s post-White House employment proposal is a real possibility.	16
c. HRC Promises to discuss Paul’s business proposal with WJC.	17
d. WJC conveys to Paul, via Tonken, his interest in Paul’s business proposal.	18
2. Paul Agrees to Underwrite the Tribute as a Good-Faith Advance on Post-White House Employment Agreement with WJC.	19
a. James Levin calls on behalf of WJC, inviting Paul to make a formal offer.	19
b. HRC’s campaign looks to Paul to produce and underwrite the event that was to become the Tribute.	20
c. Paul lays out conditions for committing himself to produce and underwrite the Tribute.	20

## TABLE OF CONTENTS

	PAGE
d. WJC claims to accept Paul's post-White House employment offer.	22
3. Negotiations for Concert Portion of Tribute	22
a. HRC insists on using Gary Smith over Dick Clark Productions.	22
b. HRC Claims to get Smith to drop his all-inclusive fee from \$850,000 to \$800,000.	23
4. WJC Sends in Levin to Spy on Paul's Business Operations.	23
a. Paul introduces Levin to his key investor, Tendo Oto.	24
b. WJC instructs Levin to befriend Oto.	24
5. Paul's Costs for the Tribute Skyrocket.	25
a. Smith reneges on the price HRC negotiated, but HRC does nothing about it.	25
b. Cynthia Gershman's promised \$525,000 for the Tribute never materializes.	25
6. HRC's Threat to Cancel Paul's Deal With WJC Strikes at Far More Than Paul's \$1.2 Million Outlay for the Tribute.	25
7. WJC's and HRC's Words and Actions Convince Paul that His Agreement with WJC is Real.	26
a. The White House bends the rules for Oto in a seeming show of support for WJC's deal with Paul.	27

## TABLE OF CONTENTS

	PAGE
b. The entire Clinton family acknowledges and endorses WJC's agreement with Paul.	28
c. The Clintons appear to further acknowledge and support WJC's business relationship with Paul and Oto at Streisand brunch.	29
8. WJC and HRC Use the Trappings of the Oval Office to Seduce Oto Away from Paul.	30
a. Oto is treated like royalty at the last White House State dinner.	30
b. Levin meets with Oto secretly in Tokyo.	31
c. Oto reneges on promises to form U.S. joint venture with SLM and to invest \$5 million in November 2000.	32
d. SLM's collapse can be traced to Oto's new partnership with WJC, through Levin, depriving SLM of the promised \$5 million.	32
9. HRC/Committee Alternate Between Threatening to Cancel Paul's Deal With WJC and Reassuring Paul the Deal Is On.	33
a. WJC and HRC send reassuring letters after Paul corroborates her campaign's lie to the <i>Washington Post</i> .	33
b. HRC arranges meeting with WJC at Air Force One to reassure Paul.	34
c. Smith withholds concert tape from the Tribute, but HRC puts pressure on Paul, not Smith.	35
10. The Clintons End Their Relationship with Paul.	36

## TABLE OF CONTENTS

	PAGE
IV. STANDARDS OF REVIEW	36
V. LEGAL DISCUSSION	37
A. HRC/Committee Failed to Meet Their Burden of Establishing That the Fifth Cause of Action Arises from Protected Activity.	37
1. The “law of the case” and collateral estoppel doctrines do not apply where there are new legal issues and evidence.	37
2. HRC’s actions as WJC’s agent were unrelated to her campaign.	39
3. The fundamental basis for Paul’s complaint is WJC’s false promise, which opened the door for the Clintons to destroy Paul’s company.	43
B. HRC Failed to Meet her Burden of Establishing That the Fourteenth Cause of Action Arises from Protected Activity.	45
1. Smith’s actions do not implicate the First Amendment because he was a mere vendor with no discretionary control.	45
2. HRC’s actions furthering Smith’s fraud were unrelated to her campaign.	47
C. Even if HRC/Committee’s Claimed, Protected Activities <i>Were</i> the Basis for Paul’s Claim, Their Activities Violated the Law, Making Section 425.16 Inapplicable.	50
1. The FEC determined that Paul’s in-kind contributions for the Tribute were illegally reported.	50
2. Since HRC/committee admit they “solicited” Paul’s contributions and “organized” the Tribute, his	

## TABLE OF CONTENTS

	PAGE
contributions were required to go to HRC’s campaign.	52
a. Paul’s \$1.2 million-plus contributions to HRC far exceed the \$2,000 statutory limit.	52
b. Solicitation of illegal contributions is not protected by the First Amendment.	54
c. The evidence is overwhelming that Paul’s in-kind contributions were required to go to HRC’s campaign, not to NYS 2000’s nonfederal fund.	55
3. HRC’s/Committee’s “solicitation” and “organizing” activities violated federal law, preventing section 425.16 protection.	58
D. Paul’s Evidence Established a Prima Facie Case with a Reasonable Prospect of Prevailing.	59
1. HRC/Committee failed to defeat Paul’s Evidence.	59
a. Paul’s burden of producing evidence is not great.	59
b. HRC/Committee’s evidence attacking Paul’s credibility is irrelevant.	60
c. HRC’s sworn declaration focuses on her lack of recall, failing to deny any of Paul’s factual contentions.	60
d. HRC/Committee erroneously characterized Paul’s eyewitness account as “unsupported allegations.”	61
e. HRC/Committee waived any hearsay objections.	63
2. Paul’s Evidence Established All Elements of Civil Conspiracy.	63

## TABLE OF CONTENTS

	PAGE
a. HRC's conspiracy with WJC	64
b. HRC's conspiracy with Smith	65
3. Paul's Evidence Established All Elements of Promissory Fraud.	65
a. HRC's furtherance of WJC's fraud	67
b. HRC's furtherance of Smith's fraud	71
E. The Trial Court Abused Its Discretion In Not Permitting Limited Discovery Before Granting the Anti-SLAPP Motion.	72
VI. CONCLUSION	73
CERTIFICATE OF COMPLIANCE	75

## TABLE OF AUTHORITIES

PAGE(S)

### FEDERAL CASES

<i>Buckley v. Valeo</i> (1976) 424 U.S. 1.	53, 54
<i>FEC v. Calif. Medical Assn.</i> (N.D.Cal. 1980) 502 F.Supp. 196.	58
<i>Goland v. U.S.</i> (9 <sup>th</sup> Cir. 1990) 903 F.2d 1247.	54
<i>McConnell v. FEC</i> (2003) 540 U.S. 93.	54
<i>Metabolife Internat., Inc. v. Wornick</i> (9 <sup>th</sup> Cir. 2001) 264 F.3d 832.	59
<i>U.S. v. Goland</i> (9 <sup>th</sup> Cir. 1992) 959 F.2d 1449.	54, 57
<i>U.S. v. Hsia</i> (9 <sup>th</sup> Cir. 1999) 176 F.3d 517.	54

### STATE CASES

<i>Briggs v. Lawrence</i> (1991) 230 Cal.App.3d 605.	38, 39
<i>Carver v. Bonds</i> (2005) 135 Cal.App.4th 328.	37
<i>Cotati v. Cashman</i> (2002) 29 Cal. 4th 69.	43
<i>Church of Scientology v. Wollersheim</i> (1996) 42 Cal.App.4th 628.	62
<i>Equilon Enterprises v. Consumer Cause, Inc.</i> (2002) 29 Cal.4th 53.	37, 43
<i>Foundation for Taxpayer and Consumer Rights v. Garamendi</i> (2005) 132 Cal.App.4th 1375.	44

## TABLE OF AUTHORITIES

	PAGE(S)
<i>Gallant v. City of Carson</i> (2005) 128 Cal.App.4th 705.	63
<i>Gallagher v. Connell</i> (2004) 123 Cal.App.4th 1260.	63
<i>Gallimore v. State Farm &amp; Casualty Ins. Co.</i> (2002) 102 Cal.App.4th 1388.	36
<i>The Governor Gray Davis Comm’n v. American Taxpayers Alliance</i> (2002) 102 Cal.App.4th 449.	51, 58
<i>Grant v. U.S. Electronics Corp.</i> (1954) 125 Cal.App.2d 193.	66
<i>Kidron v. Movie Acquisition Corp.</i> (1996) 40 Cal.App.4th 1571.	53
<i>Lafayette Morehouse, Inc. v. Chronicle Publishing Co.</i> (1995) 37 Cal.App.4th 855.	72
<i>Lazar v. Superior Court</i> (1996) 12 Cal.4th 631.	67
<i>Mendoza v. Club Car, Inc.</i> (2000) 81 Cal.App.4th 287.	73
<i>Novartis Vaccines and Diagnostics, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.</i> (2006) 143 Cal.App.4th 1284.	60, 64
<i>Paul for Council v. Hanyecz</i> (2001) 85 Cal.App.4th 1356.	50,51,58,59,62
<i>People v. Barragan</i> (2004) 32 Cal. 4th 236.	38, 47,51
<i>Peregrine Funding, Inc. v. Sheppard Mullin Richter &amp; Hampton LLP</i> (2005) 133 Cal.App.4th 658.	44
<i>Roberts v. Los Angeles County Bar Assn.</i> (2003) 105 Cal.App.4th 604.	62

## TABLE OF AUTHORITIES

	PAGE(S)
<i>Rowe v. Superior Court</i> (1993) 15 Cal.App.4th 1711.	60, 61
<i>Schroeder v. Irvine City Council</i> (2002) 97 Cal.App.4th 174.	72
<i>Scott v. Metabolife Internat., Inc.</i> (2003) 115 Cal.App.4th 404.	44, 46
<i>Sheeley v. City of Santa Clara</i> (1963) 215 Cal.App.2d 83.	62
<i>Warren v. Merrill</i> (2006) 143 Cal.App.4th 96.	66, 71
<i>Wilcox v. Superior Court</i> (1994) 27 Cal.App.4th 809.	60
<i>Wilson v. Parker, Covert &amp; Chidester</i> (2002) 28 Cal. 4th 811.	59
<i>Wimsatt v. Beverly Hills Weight etc. Internat., Inc.</i> (1995) 32 Cal.App.4th 1511.	38, 47

## FEDERAL STATUTES

2 U.S.C. § 434(b)	50
2 U.S.C. § 434a(2)(A)(iii)	9
2 U.S.C. § 437(g)(d)(1)(A)(i)	58
2 U.S.C. § 441a	53, 58
2 U.S.C. § 441a(a)(1)(A)	53, 57
2 U.S.C. § 441a(a)(7)(B)(i)	52, 57, 59

## TABLE OF AUTHORITIES

	PAGE(S)
2 U.S.C. § 441a(a)(8)	55
2 U.S.C. § 441a(f)	53, 58, 59
2 U.S.C. § 441e	27

### STATE STATUTES

Code Civ. Proc. § 425.16	passim
Code Civ. Proc. § 446 (a)	62
Civ. Code § 1572 (4)	66
Civ. Code § 1709	66
Civ. Code § 1710 (4)	66

### FEDERAL REGULATIONS

11 C.F.R. § 102.17(c)(8)(i)(A)	50
17 C.F.R. § 240.10(b)(5)	14

### OTHER SOURCES

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**I.**  
**INTRODUCTION**

**A. Nature of the Action**

This is an appeal from the trial court's order and judgment dated April 7, 2006 (5CT1178), which (1) denied plaintiff Peter Paul's (Paul) motion for leave to conduct limited discovery pursuant to Code of Civil Procedure<sup>1</sup> section 425.16 subdivision (g) and which (2) granted defendants Hillary Rodham Clinton's (HRC) and Hillary Rodham Clinton for U.S. Senate Committee, Inc.'s (Committee) (jointly, HRC/Committee) section 425.16 motion (anti-SLAPP), dismissing them from the case. Paul's right to appeal derives from section 425.16 subdivision (i).

Paul seeks reversal of the order granting the anti-SLAPP motion. In the event that order is not reversed, Paul seeks reversal of the order denying Paul's motion for leave to conduct limited discovery.

**B. Statement of Contentions**

The fundamental basis for Paul's complaint is William Jefferson Clinton's (WJC) false promise of a post-White House business

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<sup>1</sup> Unless otherwise noted, all statutory references are to the Code of Civil Procedure.

relationship, which paved the way for the Clintons to functionally gut the financial insides of Paul's company. HRC's liability in this fraudulent business scheme stems from her specific actions as WJC's agent. HRC's feigned interest in and acknowledgment of WJC's pretended business deal with Paul, her not-so-subtle threats to subvert their bogus contractual agreement unless she got what she wanted, her insincere gratitude for Paul's "friendship and support" and fake assurances that Paul had a deal with WJC were all made in cooperation with WJC and were wholly unrelated to her campaign.

HRC/Committee claim that the law of the case and collateral estoppel doctrines preclude this Court from ruling in Paul's favor. These doctrines do not apply here because the specific question of HRC's knowledge and complicity in the fraud has not been previously litigated. Furthermore, additional evidence, which was absent in prior proceedings involving Rosen, is only now before this Court. Therefore, this Court must decide for the first time the questions of law and fact presented in this appeal. In doing so, this Court must find that HRC/Committee have failed to establish that the Fifth Cause of Action arises from protected activity, as required by the anti-SLAPP statute.

HRC/Committee failed to establish that the Fourteenth Cause of Action arises from protected activity, as well. First, Smith's own actions do not trigger First Amendment protection. Smith was merely a vendor who had no input or control over the content of the event. Second, HRC's disingenuous "bargaining" with Smith and unwillingness to intervene on Paul's behalf to enforce the bargain directly benefited her personal relationship with Smith and in no way furthered her political campaign. Thus, HRC's collusion with Smith does not qualify under section 425.16.

Even if HRC/Committee's claimed protected activities *were* the basis for Paul's claim, they were illegal, thus making section 425.16 inapplicable. HRC/Committee knowingly solicited and accepted excessive contributions of over \$1.2 million, in clear violation of Federal law. Therefore, their so-called "protected acts" were nothing short of criminal conduct. Such behavior is certainly not protected within the meaning of the anti-SLAPP statute.

Paul has established a prima facie case by offering uncontroverted evidence that proves civil conspiracies between HRC and both WJC and Smith, promissory fraud by WJC and Smith, and acts on the part of HRC in furtherance of both fraud schemes. HRC's

sworn declaration fails to deny any of Paul's factual contentions. HRC/Committee's only means of attack is to focus on Paul's credibility, which is irrelevant at this point, and to claim that his allegations are unsupported, which is not true. Paul put forth numerous allegations in the complaint and in his Supplemental Declaration that were based on his personal knowledge, all of which amount to competent evidence that prove every element of both causes of action.

Lastly, Paul contends that the lower court arbitrarily denied his request for limited discovery because critical evidence that may be deemed necessary to establish a prima facie case can only be obtained directly from HRC.

## **II.** **PROCEDURAL HISTORY**

This action was filed on October 14, 2003. Paul's First Amended Complaint was filed on March 1, 2004. (1CT16) One of the defendants, HRC/Committee's campaign finance director David Rosen (Rosen), brought a successful anti-SLAPP motion (1CT60), dismissing him from the case on July 14, 2004. (3CT487) On July 22, 2004, HRC/Committee filed a "copycat" anti-SLAPP motion

(Supp.CT4), which was denied on procedural grounds on September 8, 2004. (3CT549)

Simultaneously appealing to this Court, Paul challenged the granting of Rosen's motion while HRC/Committee sought reversal of the denial of their motion. *Paul v. Clinton*, Oct. 18, 2005, B178077 [2005WL2650937 at \*1]. This Court affirmed the order granting Rosen's motion. *Id.* at \*11 The order denying HRC/Committee's motion was reversed and remanded. *Id.* The trial court was directed to rule on whether it would permit late filing of the motion and then proceed in accordance with this Court's expressed views. *Id.*

On remand, the trial court held a status conference on February 3, 2006, exercised its discretion to allow late filing of HRC/Committee's anti-SLAPP motion, and set the matter for hearing. (3CT689) Paul's motion for leave to conduct limited discovery was filed on February 9, 2006. (3CT690) On April 7, 2006, the trial court denied Paul's discovery motion while granting HRC/Committee's anti-SLAPP motion. (5CT1177) Paul filed a timely notice of appeal from the April 7, 2006, order on May 10, 2006. (5CT1193).

### **III. STATEMENT OF FACTS**

#### **A. Preliminary Factual Issues**

**1. HRC's Deceptions in the *Washington Post* Reveal True Feelings About Being Publicly Affiliated With Peter Paul.**

This Court has some familiarity with the facts of this case due to its decision affirming the granting of Rosen's anti-SLAPP motion. Many of the facts as presented by the parties to that appeal were incorrect and incomplete. However, before laying out a more accurate chronology of the events giving rise to this case, it is necessary to focus on one episode in mid-August 2000 that reveals what HRC's true feelings always were about being publicly affiliated with Paul.

**a) The *Washington Post* calls HRC's campaign, inquiring about Paul's felony record.**

Just two days after the August 12, 2000, Tribute<sup>2</sup>, Democratic National Committee (DNC) Chairman Ed Rendell (Rendell) left an "urgent" phone message for Paul to contact him regarding a *Washington Post* story being written by "The Reliable Source" columnist Lloyd Grove (Grove). (4CT798:17-19) Paul returned Rendell's call to learn that Grove had asked HRC's spokesman

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<sup>2</sup> The \$1.2 million "Hollywood Gala Salute to President William Jefferson Clinton" (Tribute) produced and underwritten by Peter Paul, discussed herein.

Howard Wolfson about Paul's role in HRC's campaign in view of Paul's felony convictions in the late 1970s. (4CT798:19-21)

**b) Paul's criminal past was no secret to the Clintons.**

Paul's twenty-year-old felony convictions and prison record were no secret to Rendell, nor to the Clintons. In 1994, Paul had, through a Clinton White House official and the Secret Service, arranged to personally conduct the first-ever book signing allowed in the White House for his then-client "Fabio" -- held in the White House Presidential Message Office. (4CT783:22-24) That evening, Paul arranged a private meeting for Fabio with the Clintons after the National Italian American Dinner in Washington. (4CT783:26-27; 821) On that occasion, Fabio followed Paul's instructions to create a Nancy Reagan/"Mr. T"-like photo with HRC. Fabio chased the First Lady around a conference table and then physically lifted her, from her sitting position on the floor, for a series of romance-pose photographs by the White House photographer. (4CT783:28-784:3) Paul's attendance at these activities in the White House and his arranging physical contact between the First Couple and his highly publicized business associate could only be permitted after Paul was carefully vetted.

Again, in February 2000, when Paul donated \$30,000 to sit at the host table with the President of the United States as the co-host of a DNC fundraising dinner, he was required to provide his Social Security number and birth date to the DNC organizers, led by Party Chairman Rendell, for the purpose of checking his background. (4CT784:4-9; 822) There were numerous, other occasions, long before Grove's phone call, that had required the DNC and the Secret Service to investigate Paul's background, such as when he hosted a fundraiser for Vice President Al Gore (4CT785:20-26; 864-865), hosted a VIP luncheon and tea for HRC (4CT787:15-20; 788:7-13; 869-872), and coordinated with Rendell, Stephanie Berger, and DNC consultant Terri New in preparation for a Presidential fundraiser and sleepover at Paul's Calabasas estate (1CT19:7-8; 21:3-7), which "morphed" into what would turn out to be the largest fundraising event of HRC's Senate campaign, the Tribute. (1CT 23:1-2; 5CT 980-81)

It was impossible for WJC, HRC, her campaign, or their agent, Rendell, *not* to have known about Paul's felony convictions.

**c) HRC's campaign lies to cover up connection with Paul.**

When Rendell spoke with Paul on that afternoon of August 14, 2000, he did not seem the least surprised that Paul had not discussed these convictions with him earlier. (4CT798:24-25) On the contrary, Rendell handled the situation regarding Paul's criminal past matter-of-factly, without emotion. (4CT798:25-26) What is revealing about their exchange is that Rendell, on HRC's behalf, asked Paul to *lie* about the fact Paul had personally paid for the Tribute and not to contradict HRC's spokesman's fabrication to Grove that Paul was merely one of several producers of the Tribute and had not made *any* contributions to her campaign. (4CT798:21-24; 799:5-7; 903)

Paul would later discover that the \$150,000 stock pledge he had made to HRC's campaign in June 2000, as well as the \$40,000 in in-kind contributions he made for HRC's luncheon and tea on June 9, 2000 – which the Federal Elections Commission (FEC) required to be disclosed in her campaign's June 30, 2000, quarterly report<sup>3</sup> – were never reported at all. (4CT787:24-27; 866-68) To date, no FEC report regarding the Tribute has disclosed Paul, personally, as the source of that in-kind contribution. (1CT37:11-22; 4CT808:13-23; 5CT1030-36) HRC's campaign apparently felt safe in assuring Grove that Paul

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<sup>3</sup> 2 U.S.C. § 434(a)(2)(A)(iii)

had never contributed to her campaign, so long as Paul corroborated that story.

When Grove's story appeared in the *Washington Post* the next day, it led off with: "Is Hillary Clinton soft on crime? We certainly hope not, even though convicted felon Peter Paul – who served three years in prison two decades ago after pleading guilty to cocaine possession and trying to swindle \$8.7 million out of the Cuban government – helped organize Saturday's star-glutted \$1 million fundraising gala for Clinton's Senate race at businessman Ken Robert's estate." (4CT799:8-14; 905) The story quoted Paul as saying he "only produced the gala" and had not "given or raised money for the first lady's campaign." (4CT905) "And we will not be accepting any contributions from him," Clinton campaign spokesman Howard Wolfson *vowed.*" (Id.)

**d) Paul's \$2,000 contribution is returned, but not his \$1.2 million-plus contributions.**

When Grove's research turned up the fact that Paul had made a \$2,000 cash contribution to HRC's Senate race, Mr. Wolfson made a big show of returning Paul's \$2,000 contribution that same day. (4CT799:27-800:2; 907) However, HRC's campaign never returned any portion of the over \$1.2 million already taken from Paul, nor keep

its “vow” to stop asking Paul for more money. (1CT37:14-15; 4CT800:23–801:28) Instead, it engaged in a six-year campaign to falsely report the source and amount of Paul’s true contributions. (1CT37:17-19; 4CT787:24-27; 866-68; 811:3-14; 5CT998-1006; 1029-1036)

After years of investigating, the FEC found probable cause to believe that the joint fundraising committee utilized by HRC’s campaign, New York Senate 2000 (NYS 2000), intentionally hid more than \$721,000 contributed by Paul as a result of having illegally underreported the *cost* of the Tribute. (4CT807:22-808:12; 968-5CT1028) As the entity delegated responsibility for reporting the total dollars spent on the Tribute as an in-kind contribution, NYS 2000 was ordered to file a report in January 2006 setting forth the true amount as \$1,240,972. (4CT807:22-807:3; 966; 968-5CT974) However, even the corrected report persists in obscuring Paul as the actual *source* of that contribution by falsely attributing \$225,000 to Stan Lee (5CT1034) and \$838,902 to Paul’s two wholly owned holding companies, Paraversal Inc. and Excelsior Productions, Inc. (5CT1035), rather than to Paul, personally.

**e) Paul’s role as HRC’s largest campaign contributor would have been a major issue.**

Why would Senator Clinton and her campaign go to such lengths to hide from the American public Paul's role as the single largest contributor to her campaign? Because the fact that her largest donor was a three-time convicted felon would have become a significant issue in her campaign – perhaps (at least in her estimation) costing her the election. Senator Clinton showed by her actions, and the actions of her campaign, that she regarded such an association as carrying an unacceptable risk to her public image and political aspirations.

**f) The Clintons cannot have been sincere about WJC's seeming willingness to accept Paul's post-White House employment offer.**

It is impossible for either of the Clintons to have been sincere in their outward and ongoing display of enthusiasm to Paul (described below) for the idea of WJC's working as a "rainmaker" for Paul when he left the White House. Such display of enthusiasm was completely inconsistent with HRC's *true* feelings about her campaign and her husband being associated with Paul.

This insight is key to understanding the Clintons' fraud in leading Paul to reasonably believe that a post-White House business relationship with WJC was even possible and, later, their fraud in

convincing Paul and his Japanese partner that WJC had indeed accepted his offer. Nothing could have been more abhorrent to HRC and the aspirations she and her husband shared for her political career than a high-profile, world-renowned, affiliation between her husband and Peter Paul.

## **2. What Caused the Demise of Stan Lee Media, Inc.?**

In February 2000, when Paul first conceived of the idea of hiring an ex-president to serve as a “rainmaker” for his two Internet-based companies, Stan Lee Media, Inc. (SLM), and Mondo English, Inc. (4CT782:27-783:2), his family's stock in SLM was worth \$60 million, and SLM had a market capitalization of approximately \$350 million (1CT18:13-17). Only a year later, his stock was worthless, and SLM had been forced to cease operations. (4CT805:15-22) What happened?

To read Rosen’s brief in opposition the last time this case was before this Court, Paul himself was the cause of his own undoing. Rosen’s brief boldly declared: “In fact, Stan Lee Media collapsed at the conclusion of the events here in question, as a result of massive securities fraud by Plaintiff, to which he has subsequently pled guilty.” (Rosen’s Brief in Opposition, 6/24/05, p.6) HRC/Committee

made a similar assertion in their Reply Memorandum In Support of Motion to Strike (Reply Memorandum) in connection with the order now on appeal. (5CT1102:5-21) That assertion is false. That is not what Paul pled guilty to, nor is it what caused SLM to fail, four months after the Tribute.

**a) Paul never “admitted” he caused SLM to fail.**

Paul’s allocution entering a guilty plea on March 7, 2005, to one count of violating a securities fraud regulation, in the U.S. District Court for the Eastern District of New York (5CT1155-1160), refers strictly to specific actions Paul took that violated 17 C.F.R. § 240.10b-5 and makes no reference of any kind to adverse impacts those actions may have had on SLM. There was absolutely no reference to the collapse of SLM in the allocution by which Paul pled guilty.

**b) The U.S. District Court in Los Angeles determined that Paul’s securities fraud was intended to help SLM and had nothing to do with its collapse.**

More significant is the fact that *the issue of whether Paul’s securities fraud is what caused the demise of SLM* has already been litigated. In its opinion dated July 23, 2003, the U.S. District Court for the Central District of California, in *Stan Lee Media, Inc., etc. v. Merrill Lynch, Pierce, Fenner & Smith, etc., et al.*, Case No. CV03-

1036(GAF)(MCx), held that SLM's crash in the final months of 2000 resulted from its severe financial condition, not from anyone's securities fraud violations. This supports Paul's contention that SLM failed because of a lack of operating capital – a situation directly linked to the Clintons' fraud, explained below. (4CT805:6-22)

Due to the relevance of the District Court's opinion to the question of whether Paul's company collapsed after his dealings with the Clintons because of something *he* did or something *they* did, Paul has filed, concurrently with this brief, a Request for Judicial Notice as to the *SLM v. Merrill Lynch* opinion.

**B. Chronology of Events Giving Rise to This Case**

**1. Paul Co-Founds SLM and Conceives of a Plan to Hire Future Ex-President As a Rainmaker.**

Paul co-founded Stan Lee Media Entertainment, Inc., in 1998 with Stan Lee, the creator of Spider Man, the Incredible Hulk, and the X-Men animation characters, as a digital, Internet-based, company. (1CT17:26-28) In 1999 the company went public as Stan Lee Media, Inc., attaining a market capitalization of approximately \$350 million. (1CT8:3-5).

In December 1999, Paul met with Los Angeles fundraiser and event producer Aaron Tonken (Tonken), who had been working with

DNC fundraising events in southern California. (1CT18:11-15) Tonken convinced Paul he could gain access to WJC by contributing to the Democratic Party. He suggested making a \$30,000 contribution to co-host an upcoming event at Café Des Artistes in Hollywood to be keynoted by WJC. (1CT18:17-20) After his meeting with Tonken, Paul conceived of a plan to hire WJC when he left office in January 2001 as a “rainmaker” for SLM and Mondo English, Inc. (1CT18:21-24)

**a) DNC Chairman Rendell befriends Paul with his promises to use his influence with WJC to help Paul present his proposal.**

Paul co-hosted the February 17, 2000,<sup>4</sup> event and sat with WJC. (1CT18:24-27; 4CT784:4-9, 822) Paul met Rendell, who described himself as the chief fundraiser for the DNC and a personal friend of WJC, noting that WJC had appointed his wife, Mrs. Rendell, to a federal judgeship. (4CT784:27-785:1) Rendell offered to use his relationship with WJC in furthering Paul’s quest to offer WJC a post-White House employment agreement. (4CT785:1-5)

**b) WJC acts as if Paul’s post-White House employment proposal is a real possibility.**

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<sup>4</sup> Unless otherwise noted, all dates occurred in 2000.

Some weeks later, Rendell told Paul he had discussed with WJC Paul's desire to work with him after he left office. (4CT786:23-25) Rendell explained the limitations on WJC's ability to spend time privately with people he did not previously know. (4CT786:1-3) WJC's advice to Paul, through Rendell, was that the best way he could justify spending private time with Paul – and thereby consider a post-White House business relationship with Paul – would be if Paul became a major supporter of his wife's Senate campaign. (4CT786:25-28)

Accordingly, Paul agreed to host two events for HRC's campaign, to spend time with her to determine the viability of his business proposal to WJC. (4CT787:8-10) The events were a June 9 luncheon at Spago for twelve VIP guests, followed by a tea at Cynthia Gershman's home for about a hundred supporters. (4CT787:11-12; 788:7,12)

**c) HRC promises to discuss Paul's business proposal with WJC.**

Between the luncheon and the tea on June 9, Paul spent nearly four hours at HRC's side. (4CT788:7-11, 869-872) They discussed Paul's support for her campaign as the means to get to know the First Family, with a view towards working together when WJC left office.

(4CT788:14-20) When Paul made reference to his “colorful” career in law and his anti-Castro activities, HRC’s facial expressions acknowledged her awareness of his past, while she steered the conversation in another direction. (4CT788:25-28) Paul also discussed with her his activities with Republican leaders in California, including President Reagan, who had ignored Paul’s felony convictions and prison terms in their public dealings with him. (4CT789:1-3; 783:7-21; 812-820)

HRC seemed enthusiastic about the prospect of working with Paul after WJC left office. (1CT21:1-3) Before they parted that day, HRC assured Paul she would specifically discuss with her husband Paul’s proposal, which included Paul’s offer of substantial support for her campaign as a good-faith advance on the business arrangement he would be agreeing to. (4CT789:8-12)

**d) WJC conveys to Paul, via Tonken, his interest in Paul’s business proposal.**

A week later, Rendell arranged with the Secret Service for Tonken to ride in WJC’s limousine back to the White House following a Committee/DNC fundraising event in Georgetown that Tonken had attended. (1CT 21:13-21; 4CT789:21-22; 856-859) Bringing up Paul in the conversation, WJC told Tonken that, based on

what he had heard from Rendell and HRC, he was interested to know more about Paul and his business. (4CT789:19-790:3) Tonken called immediately and related this conversation to Paul. (*Id.*)

**2. Paul Agrees to Underwrite the Tribute as a Good-Faith Advance on a Post-White House Employment Agreement with WJC**

**a) James Levin calls on behalf of WJC, inviting Paul to make a formal offer.**

A few days following Tonken's ride with WJC, Paul received the first of a series of calls from James Levin (Levin), who introduced himself as a personal and business associate of WJC and a major fundraiser and friend of HRC. (4CT790:4-9) Calling from Chicago, Levin said he had just met with Tonken, Kelly Craighead (HRC's senior staff official), and Rosen, and they had discussed proposing to Paul his hosting and underwriting a major fundraiser for HRC's campaign, to coincide with the Democratic National Convention the week of August 14. (4CT790:9-12,17-20) Levin told Paul he would be meeting with WJC about the proposed fundraiser if Paul would agree to produce and underwrite it. (4CT790:12-16) Levin met with Paul in Los Angeles on July 5, and Paul outlined for Levin his plans for working with WJC after he left office. (1CT 22:13)

**b) HRC's campaign looks to Paul to produce and underwrite the event that was to become the Tribute.**

On July 11, during a conference call organized by Rosen and Levin from Paul's office with Committee members in New York, including Howard Wolfson, the details were worked out as to the exact nature, size and anticipated cost of the event. (1CT22:12-23:19; 5CT981:13-982:7) Dubbed the "Hollywood Gala Salute to President William Jefferson Clinton" (Tribute), the event was to include a large concert and fundraising dinner and was scheduled for August 12. (4CT791:5-6)

Rosen and Tonken represented to Paul that Cynthia Gershman had agreed to contribute \$525,000 to fund the event as a co-sponsor. (1CT24-25) Paul discussed contributing a maximum of \$525,000 to underwrite the Tribute, as well as serving as executive producer of the event (at no cost to the campaign) and as co-host with Stan Lee. (1CT23:3-7) Plaintiff also discussed securing world-class artists to perform at the event, at his sole expense, to enable HRC's campaign to raise additional funds. (*Id.*)

**c) Paul lays out conditions for committing himself to produce and underwrite the Tribute.**

Paul's willingness to produce and underwrite the Tribute was absolutely contingent on WJC's acceptance of his employment offer. (1CT23:41; 4CT791:1-6, 795:18-24) Levin told Paul to prepare a written memorandum for WJC, which Paul delivered to Levin on the night of July 11. (1CT23:20-24) Under the terms of the offer, WJC would work with Paul and his companies, for one year, commencing when WJC left office, in consideration for: \$10 million in SLM stock; \$5 million in cash; a \$1 million contribution to the Clinton Presidential Library; and Plaintiff's underwriting of up to \$525,000 in expenses for the Tribute. (1CT23:24-24:2; 4CT795:18-24)

Paul conditioned any involvement with the Tribute on certain additional requirements of the White House, which would also serve to assure Paul that WJC had, indeed, accepted his proposal: having absolute, executive control over the event, including who would be admitted, seating, and access to WJC, being allowed to invite noncontributing guests of his choice, and having broad discretion to use the event for business purposes. (1CT23:10-12; 4CT795:24-796:4) Finally, WJC had to agree to participate as the event's honoree and that it would be his last official event in Hollywood, thereby assuring that an audience of 1,000 contributing guests could be

delivered in the four weeks between July 11 and August 12.  
(1CT23:12-14)

**d) WJC claims to accept Paul's post-White House employment offer.**

Within a few days, Levin informed Paul that he had personally delivered Paul's proposal to WJC and that WJC had accepted it, thus triggering Paul's check-writing for financing the event. (1CT24:3-5; 4CT791:2-6, 793:6-9)

**3. Negotiations for Concert Portion of Tribute**

**a) HRC insists on using Gary Smith over Dick Clark Productions.**

Plaintiff originally asked Dick Clark Productions to produce the concert portion of the Tribute. (4CT791:13-16) However, Rosen, Tonken, and Levin all told Paul that HRC had a personal relationship with the Grammy Award's producer Gary Smith (Smith) and that she insisted Paul use Smith over Dick Clark Productions. (1CT25:19-25; 4CT791:17-25; 878; 879-880) When Paul met with Smith, Rosen, and Tonken to discuss the final fees and costs for his production of the concert, Smith demanded \$850,000 as a "turn-key" fee, which included his services and all costs, including a high-quality, mastered edit of the event, ten days later. (1CT25:26-26:2; 4CT791:26-792:3)

**b) HRC claims to get Smith to drop his all-inclusive fee from \$850,000 to \$800,000.**

After they left Smith, Paul protested vehemently to Rosen about the \$850,000 fee. (4CT792:6-7) Rosen assured Paul that because of HRC's personal desire that he use Smith's services and because of her friendship with Smith, she would intercede on Paul's behalf to have Smith lower his fee. (1CT26:2-5; 4CT792:7-9) The next day, Rosen told Paul that HRC had spoken with Smith the night before, and that Smith had agreed to lower his fee by \$50,000. (1CT26:16-19; 4CT792:9-28; 847; 881-883; 884-891) HRC's unbending insistence on using Smith, plus Rosen's representation that she had succeeded in getting Smith to drop the fee by \$50,000 caused Paul to use Smith. (4CT793:1-5)

**4. WJC Sends in Levin to Spy on Paul's Business Operations**

Levin informed Paul that WJC requested he immediately begin spending time in Paul's offices to get to know the business of SLM and its principals, to better advise WJC about SLM's activities, objectives and international alliances. (1CT27:7-9; 4CT791:7-9) Tendo Oto (Oto), a Japanese investor interested in making significant investments in SLM, as well as forming joint ventures with SLM in

Asia and the U.S., was visiting Paul in Los Angeles during the week of July 16. (1CT26:9-10,15-21; 4CT795:10) Oto was the founder and CEO of Venture Soft of Japan, an Internet-based animation company similar to SLM. (1CT26:17-18; 4CT 795:9-10)

**a) Paul introduces Levin to his key investor, Tendo Oto.**

Based on WJC's assurances, through Levin, that he had accepted Paul's offer, and Levin's signing a confidentiality and non-competition agreement, Paul introduced Levin to Oto. (1CT27:9-10; 4CT795:6-10) Right away, Oto asked to participate in Paul's post-White House employment arrangement with WJC, provided WJC would assist the Asian joint venture between SLM and Venture Soft as part of the deal. (4CT795:13-17; 894-896) Because Oto regarded SLM a more attractive investment with a popular American president attached, Paul agreed. (1CT26:21-24) Paul's business relationship with Oto thus became intertwined with his promised deal with WJC.

**b) WJC instructs Levin to befriend Oto.**

Throughout Oto's visit that week, Levin spent considerable time with him and his entourage, at WJC's request. (4CT795:10-12) Paul interpreted this as confirmation that he had a solid deal with

WJC, as it appeared WJC was acting in furtherance of their future relationship by having Levin take such an interest in Oto.

**5. Paul's Costs for the Tribute Skyrocket.**

**a) Smith reneges on the price HRC negotiated, but HRC does nothing about it.**

About a week before the event, Smith reneged on HRC's confirmation that he lowered his fee by \$50,000. Smith demanded an extra \$75,000 as a "personal production fee," threatening to quit if he didn't get it. (1CT27:17-19; 4CT793:18-22; 848; 888-889) Paul asked Rosen to ask HRC to enforce the agreement she had negotiated with Smith. (1CT27:20-23; 4CT793:22-25) Rosen informed Paul that he had spoken to HRC, but she would not get involved. (1CT27:23-25; 4CT793: 25-27; 848) On Rosen's advice, Paul paid the additional \$75,000. (1CT27:25-28; 848)

**b) Cynthia Gershman's promised \$525,000 for the Tribute never materializes.**

Even worse, as the Tribute approached, Cynthia Gershman did not put up any of the promised \$525,000, which left Paul paying for the event entirely by himself. (1CT 28:2-3; 4CT806:16-807:21)

**6. HRC's Threat to Cancel Paul's Deal With WJC Strikes at Far More Than Paul's \$1.2 million Outlay for the Tribute.**

Shortly before the event, in a meeting with Rosen, Levin, and Tonken, Paul said that he could not contribute any more money towards the Tribute. (1CT28:11-15) In response, all three threatened Paul that his deal with WJC was off if he did not continue. (1CT28:16-19) During this same meeting, Paul asked Rosen to have HRC's campaign at least pick up the \$200,000 cost of printing and postage. (1CT28:20-22) Rosen refused and threatened to cancel the event if Paul did not continue underwriting it. (1CT28:22-24; 5CT992:1-993:2&fn.43)

To Paul, these threats went far beyond losing the \$1.2 million-plus he had already expended. By entangling his relationship with Oto with his deal with WJC, Paul had "bet the store." The loss of his future relationship with WJC now posed the serious risk that Oto would not invest in SLM, which threatened SLM's existence. Paul was over a barrel, and Levin had spent enough time at SLM to know this.

#### **7. WJC's and HRC's Words and Actions Convince Paul that His Agreement with WJC Is Real.**

In the weeks leading up to the Tribute, WJC and HRC had made at least three phone calls to Paul, thanking him for his generous financial support and encouraging him to continue. (1CT29:5-7)

These calls reinforced Paul's belief that he had a deal with WJC, so long as he kept writing checks.

**a) The White House bends the rules for Oto in a seeming show of support for WJC's deal with Paul.**

Paul's belief he had a contract with WJC was further strengthened when he observed the lengths to which the Clintons went to accommodate his use of the Tribute to promote Paul's business interests, particularly his relationship with Oto. (4CT796:4-9) Notwithstanding the White House Press Office rule banning international press and hard media (as opposed to entertainment media) from the event, on the day of the Tribute, a Japanese news crew from Tokyo was allowed to film Oto's attendance of the concert, the broadcast of which would make reference to Oto's and Paul's new relationship with WJC. (4CT796:9-17; 897)

It was improper for Oto to attend the event at all, since mere attendance at a campaign fundraising event gives the appearance of making a contribution, and campaign contributions from foreign nationals are strictly illegal.<sup>5</sup> (4CT796:18-28; 825-827; 898-901) Amazingly, Oto was seated immediately behind the First Family

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<sup>5</sup> 2 U.S.C. § 441e. Going beyond the mere appearance of impropriety, Oto in fact donated \$27,000 to attend the Tribute. (1CT30:16-22)

without a Secret Service background check. (*Id.*) The seating arrangement during the concert could only be explained in terms of WJC's declared business relationship with Paul: to the left of the First Family sat Stan Lee, to their right the Pauls, in the row ahead sat the CEO of SLM, Ken Williams, and directly behind them were Oto and his interpreter. (4CT899-901)

**b) The entire Clinton family acknowledges and endorses WJC's agreement with Paul.**

The extent to which the Clinton family focused their attention on Paul throughout the evening was also indicative of the special relationship Paul thought he had with WJC. At the VIP dinner, Paul was seated next to WJC, without interruption, for three hours. (4CT797:14-15,20-22) Hillary Clinton, Bill Clinton, and Chelsea Clinton all spoke with Paul at length – during the private welcome when they arrived, during the concert, at the small reception for the Clintons afterwards, and at the VIP dinner that followed. (4CT797:11-19; 901) Throughout the evening, the enthusiasm with which all three Clintons discussed WJC's future with Paul seemed to show their collective interest in and support for the project. (1CT29:27-30:10; 4CT797:15-18)

**c) The Clintons appear to further acknowledge and support WJC's business relationship with Paul and Oto at the Streisand brunch.**

The special treatment of Paul – and of his Japanese partner – seemed equally strong the following day during a brunch at Barbra Streisand's Malibu estate, an exclusive event open only to persons who had already donated at least \$500,000 to the Clinton Presidential Library. (4CT797:23-27) Although they didn't meet this criterion, the Pauls, Oto, and Oto's translator were admitted, thanks to arrangements made through WJC and Terrence McAuliffe. (4CT797:28-798:2)

Chelsea Clinton sought out Paul and, in front of Oto, spent about 25 minutes recapping the events of the night before. (4CT798:3-6) She described how, after she and her parents left the Tribute at 2:30 a.m., they had stayed up playing Scrabble, discussing the Tribute and the prospect of her father working with the creator of Spider Man when he left the White House. (1CT31:7-11; 4CT798:6-9)

Oto was allowed to have official photos taken by the White House photographer with WJC and HRC, and both WJC and HRC spoke at length with the Pauls and Oto. (1CT31:12-16; 4CT798:9-13; 902)

That evening, HRC left a detailed message on Paul's answering machine, thanking the Pauls for their friendship and what they were doing for her campaign. (4CT798:14-16)

Oto was impressed. He not only invested \$5 million in SLM within days of the Tribute, but he formed an Asian joint venture with SLM a week later. (4CT802:3-12; 894; 912-913; 915) Moreover, he promised to invest a minimum of \$5 million more in SLM in November. (4CT802:12-17)

**8. WJC and HRC Use the Trappings of the Oval Office to Seduce Oto Away from Paul**

**a) Oto is treated like royalty at the last White House State dinner.**

In what seemed like further affirmation of WJC's business agreement with Paul (and now Oto), Oto was invited to the last State dinner of the Clinton White House on September 17 in honor of the prime minister of India – contrary to protocol that foreign nationals only attend State dinners when their own country is being honored. (1CT34:12-19) Originally, Paul was to attend as well, but Levin told him to stay away because of the negative stories about Paul in the *Washington Post*. (*Id.*)

Levin later told Paul that most of the 2,500 guests were relegated to a tent erected outside, while he and Oto sat at a table adjacent to WJC. (4CT18-23) Later in the evening, White House social secretary and former Hillary Clinton staffer Capricia Marshall<sup>6</sup> escorted Oto on a personal tour of the Oval Office, where he was allowed to sit in WJC's chair behind WJC's desk for a photo session with the White House photographer. (4CT802:23-25; 855)

**b) Levin meets with Oto secretly in Tokyo.**

Were it not for Paul's mother touring Japan at the same time, Paul might never have discovered Levin's secret meeting with Oto in Tokyo during the first week of October. (4CT803:7-804:5; 916-919) Paul learned that Levin received \$100,000 from Oto for personally delivering the official photographs taken with the Clintons and at the White House. (1CT34:20-22; 4CT802:26-803:3; 804:10-12) Levin explained it afterwards by telling Paul WJC wanted him to investigate Oto's business personally since he was now a part of their business arrangement, although Levin said nothing about receiving the \$100,000. (4CT804:6-12)

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<sup>6</sup> See CWRU [Case Western Reserve University] Magazine, Spring 1999, article on *alumna* Capricia Marshall at: <http://www.case.edu/pubs/cwrumag/spring1999/features/marshall/textonly/>

**c) Oto reneges on promises to form U.S. joint venture with SLM and to invest \$5 million in November 2000.**

In late October, Oto assured Paul he was still planning on making another \$5 million investment in SLM in November. (4CT804:13-16) Unbeknownst to Paul, on November 13 Oto incorporated Venture Soft USA in Illinois, with Levin as sole managing director. (4CT804:22-27; 920; 931-934) All Paul knew at the time was that, without explanation to him, Oto reneged on his promise to form a U.S. joint venture with SLM and that the \$5 million promised in mid-November never came. (4CT804:19-21)

**d) SLM's collapse can be traced to Oto's new partnership with WJC, through Levin, depriving SLM of the promised \$5 million.**

Without Oto's \$5 million investment in November, SLM was strapped for operating cash. (4CT805:6-8, 15-17) Paul was forced to margin family shares of SLM to obtain \$500,000 to loan SLM for operating expenses. (4CT805:7-8) When Paul was unable to repay the loan within two hours of a margin call on November 27, the shares securing the loan were sold into the open market. (4CT805:8-12) That caused the stock price to plummet, which, along with the voluntary sale of shares by corporate officers, caused the stock's collapse. (4CT805:12-19) Once the stock collapsed, a November 30 financing

deal fell through. (4CT805:19-21) As a result of this string of events, the company ceased operations on December 19, 2000. (4CT805:21-22)

Oto's promised investment would have provided operating cash during the interim period, from November 2000 until after WJC began working for SLM in January 2001, when other investors would have come on board. (4CT805:15-17) When Oto, without notice, failed to invest his promised \$5 million in November, the lack of operating cash created a liquidity crisis which, in turn, caused the stock to collapse, sinking the entire company. (4CT805:17-22)

**9. HRC and Her Campaign Alternate Between Threatening to Cancel Paul's Deal With WJC and Reassuring Paul the Deal Is On.**

While these activities were going on with Oto, HRC and her agents continued to assure Paul that his future relationship with WJC was intact. Never mind her campaign's disavowal of any connection with Paul in the *Washington Post*. So long as Paul acceded to HRC's demands, he needn't worry, he was told. (1CT32:5-27; 4CT 798:26-28; 799:15-19)

- a) **WJC and HRC send reassuring letters after Paul corroborates her campaign's lie to the *Washington Post*.**

Immediately after Paul acquiesced to HRC's demand he not contradict her spokesman Wolfson's lies to the media concerning Paul's financial support, HRC and WJC both sent letters to Paul. (1CT 33:1-5; 4CT800:13-16; 908-909) The friendly nature of the letters and their timing led Paul to believe their deal would still work if Paul went along with all their demands. (1CT 33:5-7; 4CT 800:16-22)

**b) HRC arranges meeting with WJC at Air Force One to reassure Paul.**

Rosen called and faxed repeatedly between August 4 and 24, insisting that Paul honor his \$150,000 stock pledge made in June and threatening Paul that his plans to work with WJC "won't work out" unless the stock was transferred. (1CT33:13-19; 4CT800:23-28) Paul informed HRC, through Rosen, that unless WJC personally assured him they still had a business deal, he would not contribute further to her campaign. (1CT33:15-17; 4CT800:28-801:5)

In response, HRC arranged for Paul to meet with WJC at Air Force One in Los Angeles on September 22. (4CT801:17-18) WJC took Paul aside and told him their deal was still on and allowed Paul to videotape him giving another thank-you message for Paul's gift of the Tribute. (1CT35:1-5; 4CT801:19-25; 911)

Convinced he still had a deal, on September 23 Paul instructed his controller to wire 5,000 shares of SLM stock, then trading at \$10.75, to Working Family Party (which was supporting HRC as its “fusion” candidate) as Rosen had demanded. (4CT800:26-27; 801:26-27) The stock was received and negotiated for approximately \$55,000. (4CT801:28)

**c) Smith withholds concert tape from the Tribute, but HRC puts pressure on Paul, not Smith.**

In late October, Levin called Paul repeatedly to obtain the videotape of the concert portion of the Tribute. (1CT35:6-12; 4CT794:1-5) Paul explained that Smith was withholding the *unedited* masters of the tapes unless Paul paid him another \$12,000, contrary to their \$800,000 “turn-key” fee deal, which included a final edit. (1CT35:12-14; 4CT794:5-9; 860)

Again, HRC refused to intercede. (4CT794:14-16) Levin pressured Paul to pay it because WJC and HRC were anxious to have the tape to give out as Christmas gifts. (1CT35:18-20; 4CT792:3-5; 794:4-5,11-14)

Through a lawyer, Paul negotiated Smith’s demand down to \$6,100 for delivery of the unedited tapes. (1CT35:23-24; 4CT794:17-23; 892) Paul was then obliged to pay \$5,000 to another contractor in

order to deliver a finished, edited tape to HRC because, once again, it didn't make sense to let money stand in the way of holding onto his future relationship with WJC. (1CT35:24-25)

**10. The Clintons End Their Relationship with Paul.**

The false hope presented by HRC's alternating threats and reassurances ended once she was elected to the Senate. Soon afterwards, with SLM out of business before WJC's obligations would have begun under their supposed contract, Paul's usefulness to the Clintons had also come to an end. Other than a generic Christmas card with a facsimile signature, Paul never heard from them again. (1CT36:7-9,26-27)

**IV.  
STANDARDS OF REVIEW**

This is an appeal of two motions: the court's granting of a Special Motion to Strike pursuant to Code of Civil Procedure section 425.16 (5CT1179) and its denial of a motion for limited discovery. (5CT1177) The questions of whether section 425.16 applies and whether the plaintiff has shown a probability of prevailing are both legal questions, which are reviewed de novo. *Gallimore v. State Farm & Casualty Ins. Co.* (2002) 102 Cal.App.4th 1388, 1396. A ruling on a request for discovery in opposition to an anti-SLAPP motion is

reviewed for an abuse of discretion. *Carver v. Bonds* (2005) 135 Cal.App.4th 328, 359.

**V.**  
**LEGAL DISCUSSION**

**A. HRC/Committee Failed to Meet Their Burden of Establishing That the Fifth Cause of Action Arises from Protected Activity.**

Consideration of a section 425.16 motion is a two-step process. First, the moving party/defendant must establish that the challenged claim arises from protected speech or petition rights. *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67. Second, if such a showing is made, the burden shifts to the plaintiff to demonstrate a probability of prevailing on the merits. *Id.*

HRC/Committee asserted that their burden, in this instance, was even less. They mistakenly argued that because their motion was identical to Rosen's, every legal and factual issue was also alike. Therefore, under the doctrines of the "law of the case" and collateral estoppel, they win. (3CT598-599)

**1. The "law of the case" and collateral estoppel doctrines do not apply where there are new legal issues and evidence.**

The law of the case doctrine requires that a point of law determined on appeal must be adhered to in subsequent proceedings.

*People v. Barragan* (2004) 32 Cal.4th 236, 246. However, the doctrine only controls subsequent proceedings to the extent the evidence remains unchanged. *Id.*

Similarly, collateral estoppel only governs factual issues “actually litigated.” *Wimsatt v. Beverly Hills Weight etc. Internat., Inc.* (1995) 32 Cal.App.4th 1511, 1516. This means the factual issue in the subsequent action must have been properly raised, submitted, and determined in the prior proceeding. *Briggs v. Lawrence* (1991) 230 Cal.App.3d 605, 611. Additionally, the issue to be precluded must be identical to the one previously decided. *Id.*

The evidence now in the record is completely different, as it now contains the March 27, 2006, Supplemental Declaration Of Peter F. Paul, etc. (Paul’s Supplemental Declaration), which authenticates 43 exhibits, including statements, sworn testimony, and photographs, as well as FEC documents from its investigation into the Tribute. (4CT781-5CT1036)

Since HRC’s personal activities underlying Paul’s claims were never evaluated, the legal issues as to her are new and unbound by any law of the case. Collateral estoppel is similarly inapplicable to HRC’s previously undisclosed deeds, since such facts were neither raised,

submitted, nor determined in Rosen's appeal to this Court. *Briggs, supra*, 230 Cal.App.3d at 611.

In deciding the "arising from" issue, this Court must consider not only the First Amended Complaint (complaint) (1CT16-57), but also Paul's Supplemental Declaration. (4CT781-5CT1036) (Civ. Code, § 425.16, subdivision (b)(2).) The events described in and documented by Paul's Supplemental Declaration demonstrate that Paul's claims as to HRC differ considerably from those as to Rosen and arise from different activities.

Unlike Rosen's appeal, the record now contains evidence of WJC's fraudulent intent and of HRC's knowing complicity. Even when HRC's liability derives from Rosen's acts as her agent, the fact that she was aware of WJC's duplicity makes it immaterial that Rosen may have been their unwitting pawn.

**2. HRC's actions as WJC's agent were unrelated to her campaign.**

Another distinction from Rosen's motion is that he acted as HRC's agent in connection with his duties as campaign finance director, whereas HRC acted *as WJC's agent* doing things mostly unrelated to her campaign.

For example, at the luncheon and tea on June 9, after Paul spoke to HRC about the possibility of hiring WJC when he left office, she encouragingly told Paul she would communicate his offer to her husband. (4CT789:8-10) Additionally, during the weeks preceding the Tribute, HRC's calls thanking Paul for all he was doing for her reinforced Paul's belief that WJC had accepted his offer. (1CT29:5-7) Since Paul only commenced producing and underwriting the Tribute because WJC convincingly feigned a commitment to work for him (4CT791:2-6), her acknowledgment of one was an allusion to the other.

On the day of the Tribute, HRC's agent, Rosen, obtained White House authority to override the Secret Service in permitting Oto to be admitted to the event. (1CT30:16-22; 4CT 796:18-28; 825-827; 898) This further strengthened Paul's faith in WJC's promise and convinced Oto as well. (4CT802:9-17; 914-915) That night, as HRC took her seat in front of Oto and greeted him through his translator (4CT796:21-23; 899), her actions – bearing no connection to her campaign – heightened Paul's and Oto's impression she supported their prospective business relationship with WJC (1CT30:17-21). In fact, HRC's colloquy throughout the evening seemed to acknowledge

and acclaim Paul's future association with her husband (4CT797:11-19).

The next day, HRC's continued friendliness and socializing with Paul and Oto at the Streisand brunch (again, unconnected to her campaign) further proved to Paul that she was acting in furtherance of their future business deal with WJC, including allowing official White House photographs of herself and WJC with Oto (1CT31:12-16; 4CT798:8-12).

At the India State dinner on September 17, HRC apparently played a role in arranging the extraordinary treatment Oto received in preference to almost all of the 2,500 other attendees. (4CT802:18-25) The White House's seating of Oto next to WJC's table had no political value and risked antagonizing friends and supporters relegated to the tent outside. HRC's former staffer and close family friend, Capricia Marshall,<sup>7</sup> later escorted Oto to the Oval Office for a session with the White House photographer. (4CT855) The rarity of being photographed in WJC's chair was not lost on Oto. When Paul's mother visited Oto in Japan two weeks later, she learned that Oto

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<sup>7</sup> See note 6, *supra*.

considered it “equal to the Emperor’s sacred chair in which no one is allowed to sit but the Emperor.” (4CT803:22-23; 916-917)

Finally, both before and after the Tribute, HRC, through her agents, consistently resorted to the particular threat that the deal with her husband was off unless Paul complied with her various demands - - i.e., to pay more than double what he had agreed to for the Tribute (1CT28:11-19), to corroborate her lie to the *Washington Post* (4CT798:26-28; 799:15-19), to transfer \$55,000 in stock in September (4CT801:6-16), and to deliver a finalized videotape of the concert by October (4CT794:10-16).

In all these actions, HRC presented herself as an agent of WJC in acting to (a) convince Paul that his criminal record would be no obstacle to WJC’s willingness to be associated with him (4CT788:25-789:10), (b) convince both Paul and Oto that WJC had definitely accepted Paul’s offer (4CT796:7-18; 798:3-16; 802:18-25), (c) threaten Paul with cancellation of the deal unless he acceded to her escalating demands (1CT28:11-19; 4CT798:26-28; 799:15-19; 801:6-16; 794:10-16), and (d) seduce and divert Oto from investing \$5 million in SLM at a critical juncture (4CT802:18-804:12). As WJC’s wife, HRC’s personal actions and representations to Paul and Oto had

a unique force and credibility in causing them both to believe and then rely on WJC's false promise. (4CT789:8-10; 797:11-19; 798:10-16)

Unlike Rosen, HRC's liability to Paul arises overwhelmingly from her actions as WJC's agent in hoodwinking Paul and beguiling Oto -- not from her activities in furtherance of her campaign. That her *reason* for defrauding Paul was to enrich her campaign's coffers is beside the point. The fraud scheme itself, and, more importantly, her actions that advanced the ruse, were not campaign activities. Such actions were not *themselves* acts in furtherance of petition or free speech, despite being tangentially related to her campaign. Section 425.16 does not apply in such a case. *Equilon, supra*, 29 Cal.4th at 66.

**3. The fundamental basis for Paul's complaint is WJC's false promise, which opened the door for the Clintons to destroy Paul's company.**

Similarly to the plaintiffs in *Cotati v. Cashman* (2002) 29 Cal.4th 69, the fundamental basis for Paul's complaint against HRC/Committee is not to challenge their solicitation of campaign contributions and organization of a campaign fundraising event. Rather, it is a dispute arising from WJC's false promise, which opened the door for the Clintons to subvert Paul's company. Since the claimed protected activity is separate from that dispute, the anti-

SLAPP statute does not apply. *Id.* at 80; *Foundation for Taxpayer and Consumer Rights v. Garamendi* (2005) 132 Cal.App.4th 1375, 1393.

Even if the actions giving rise to Paul's claims are deemed to involve a mixture of protected and unprotected conduct, the claims are not subject to a section 425.16 motion if the protected activity is merely incidental to the unprotected conduct. *Scott v. Metabolife Internat., Inc.* (2003) 115 Cal.App.4th 404, 414 ("the mere mention of the protected activity does not subject the cause of action to an anti-SLAPP motion.") . *See, also, Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 672-73.

It should be further noted that none of HRC's speech at issue, whether directly or through her agents Rendell, Rosen and Levin, was speech in connection with an official proceeding, speech on a public issue, or speech to the public. (Civ. Code, § 425.16 subds. (e)(1)-(e)(3).) All of it was private conversation concerning a private matter. All of it – including the threats -- served to reinforce Paul's (and Oto's) conviction they had a commitment they could bank on, so long as Paul complied with HRC's demands.

Finally, it is noteworthy that WJC, in not joining the anti-SLAPP motion, has never asserted that his actions underlying Paul's

claims were protected. It follows that, as his agent, HRC's actions fall outside section 425.16 protection as well.

Since the doctrines of law of the case and collateral estoppel are inapplicable to HRC's actions, and since her activities giving rise to Paul's claims at most only tangentially relate to her campaign activities, the lower court erred in ruling that defendants had met their burden under section 425.16 as to the Fifth Cause of Action.

**B. HRC Failed to Meet Her Burden of Establishing That the Fourteenth Cause of Action Arises from Protected Activity.**

Regarding the Fourteenth Cause of Action, the law of the case and collateral estoppel doctrines are also inapplicable to the issue of whether Smith's fraud arose from protected activity. This is because this Court has never considered whether Smith's activities were limited to those of a commercial vendor for hire. If they were, the First Amendment is no more implicated as to Smith's participation in the Tribute than as to Patricia Waters, the \$125,000 printing contractor (5CT987:13-988:1,6&fn.31), or Wolfgang Puck, the \$70,000 caterer (5CT983:11-12).

**1. Smith's actions do not implicate the First Amendment because he was a mere vendor with no discretionary control**

Unlike Paul, who, as executive producer, made every key decision regarding every aspect of the event, including the concert, Smith had no discretionary control over the program, the presentations, or the artists. (1CT23:5,10-11; 24:7-8; 25:13-17; 4CT795:28-796:1)

Smith's involvement was limited to having his company, Black Ink Productions, handle such nondiscretionary tasks as the mechanics of designing and building a stage and hiring an orchestra, gospel choir back-up group, make-up and hair artists, audio, camera, video and prop technicians, key grips, electricians and security personnel. (5CT982:14-17) Black Ink also shipped in hundreds of trees and bushes and rented lighting, sound and video equipment, along with large generators to power the system. (5CT982:17-20)

Since Smith made no decisions regarding the program's content, it is of no consequence to Paul's claim whether the event for which Smith was hired was political, commercial, or charitable in nature. That it was political is purely incidental – both to Smith's acts, giving rise to Smith's fraud against Paul, and to HRC's acts, in furtherance of Smith's fraud. Thus, the Fourteenth Cause of Action is not subject to section 425.16. *Scott, supra*, 115 Cal.App.4th at 414.

**2. HRC's actions furthering Smith's fraud were unrelated to her campaign.**

There is also no binding law of the case or collateral estoppel as to whether HRC's acts to advance Smith's fraud are protected activities. That is because this Court has never examined the evidence, most of it new to the record, demonstrating her knowledge of and participation in that fraud. *Wimsatt, supra*, 32 Cal App.4th at 1516; *People v. Barragan, supra*, 32 Cal.4th at 246.

Smith's fraud is documented by the May 2005 testimony under oath of Levin (4CT792:19-22; 881-883) and Raymond Reggie (4CT792:23-28; 884-891), by Tonken's autobiographical account (4CT792:22-23; 847-848), and by Smith's candid admissions to Mike Wallace, which were relayed to Paul (4CT792:11-18). This evidence corroborates Paul's testimony that Smith initially quoted a fee of \$850,000 to produce the concert portion of the Tribute (4CT791:26-792:1), that HRC personally negotiated him down to \$800,000 (4CT792:6-11), that Paul would never have used Smith, but for HRC's insistence and the representation that Smith lowered his fee by \$50,000 (4CT793:1-5), and that Smith demanded \$75,000 extra at the eleventh hour, which Paul had to pay (1CT27:17-27; 4CT793:18-27).

The fact that Smith never intended to stand by his \$800,000 “commitment,” and that HRC knew it, is documented by HRC’s response when Paul requested she intervene to get Smith to honor the agreement she negotiated: She did nothing. (1CT27:23; 4CT793:22-27; 848)

Her refusal to act *is* evidence. She did not even go through the motions of trying to get Smith to stand by his “promise.” This demonstrates that she regarded their agreement as meaningless. Otherwise, she would have treated Smith’s conduct as a direct insult to herself. HRC certainly knew how to pressure people to honor commitments, as shown by the way she later used Rosen to hound Paul about honoring his stock pledge, notwithstanding the fact Paul had spent more than double his half-million-dollar commitment. (1CT33:13-19; 4CT800:27-801:16)

Why did she squeeze Paul, instead of at least picking up the phone and appealing to Smith, however unsuccessfully? It is also telling that she seemed not the least bit irritated or bothered that Smith took this action. (4CT793:25-26) Had HRC regarded Smith’s promise as real, she would have taken *some* remedial action when he

repudiated their agreement. That she did not clearly smacks of collusion, showing they both anticipated Smith's doing this all along.

When Smith later withheld the unedited videotape of the concert as a ploy to again extort money from Paul, HRC again refused to pressure Smith to honor their "agreement." (1CT35:6-22; 4CT794:3-16) Instead, she had Levin pressure Paul to pay whatever was necessary to deliver an edited tape to her. (4CT794:12-16) As between Smith and Paul, the direction in which HRC pushed shows with whom she expected to do business in the future. She put the pressure on Paul, the guy with whom she knew she had no future.

Neither HRC's phony negotiation with Smith, nor her refusal to protect Paul's rights in the agreement he was lured into accepting because he relied on her word, were acts in furtherance of HRC's campaign. Obviously, the value of the concert and video to her campaign was the same whether or not Paul spent \$75,000 extra for the concert or \$11,100 extra for the edited videotape. HRC's acts promoting Smith's fraud furthered only her friendship with Smith -- not her campaign.

Since the doctrines of law of the case and collateral estoppel are inapplicable to Smith's activities, and since HRC's activities in

furtherance of their joint fraud in no way furthered her campaign, the lower court erred in ruling that HRC had met her burden as to the Fourteenth Cause of Action.

**C. Even If HRC/Committee’s Claimed, Protected Activities Were the Basis for Paul’s Claim, Their Activities Violated the Law, Making Section 425.16 Inapplicable.**

**1. The FEC determined that Paul’s in-kind contributions for the Tribute were illegally reported.**

In his Supplemental Brief opposing the anti-SLAPP motion, Paul noted that this case does not involve a *valid* exercise of free speech or petition rights. (4CT773-774) This is because NYS 2000 conceded, in its 12/29/05 Conciliation Agreement with the FEC, that it violated Title 2 of the United States Code section 434(b) and Title 11 of the Code of Federal Regulation section 102.17(c)(8)(i)(A) when it hid over \$721,000 in Paul’s in-kind contributions for the Tribute. (4CT807:22-808:3; 966-5CT974) Consequently, the in-kind contributions HRC/Committee solicited were *illegal* contributions. Therefore, the acts of solicitation at issue here are not “protected acts” under section 425.16. *Paul for Council v. Hanyecz* (2001) 85 Cal.App.4th 1356, 1367.

In footnote 4 of their Reply Memorandum, HRC/Committee argued that the determination that the conduct at issue *is*

constitutionally protected is “binding law of the case.” (5CT1043:21-22) As noted before, however, this doctrine only controls subsequent proceedings to the extent the evidence remains unchanged. *People v. Barragan, supra*, 32 Cal.4th at 246.

That is not the case here. The new evidence of the 7/5/05 FEC General Counsel’s Brief (5CT975-997), the 9/29/05 FEC General Counsel’s Report #2 (5CT998-1028), and NYS 2000’s 12/29/05 Conciliation Agreement (4CT966-5CT974) raise the previously unconsidered question of whether section 425.16 is unavailing when the campaign contributions at issue were illegal because of being illegally reported.

Second, HRC/Committee argued that, since they did not concede illegality, the anti-SLAPP statute applied. (5CT:26-28) While it is true that the defendants in *Paul for Council* conceded the illegality of their act of laundering campaign contributions, concession of illegality is not a prerequisite. This criterion can also be met by conclusively establishing the illegality of the defendant’s acts. *Paul for Council, supra*, 85 Cal.App.4th at 1367; *The Governor Gray Davis Comm’n v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449, 459.

In this case, the fact that Paul's in-kind contributions were illegally reported is conclusively established by NYS 2000's Conciliation Agreement and the FEC documents referenced above. (4CT966-5CT974; 5CT9775-997; 5CT998-1028)

The third argument advanced in footnote 4, at first glance, seems more compelling. They contended that, "reporting was not the protected activity. The protected activity was 'the solicitation of political contributions and the organization of a fundraising event.'" (5CT1043:24-26)

**2. Since HRC/Committee admit they "solicited" Paul's contributions and "organized" the Tribute, his contributions were required to go to HRC's campaign.**

In asserting that they *solicited* Paul's political contributions and *helped organize* a fundraising event Paul financed, HRC/Committee have brought their claimed, "protected" conduct squarely within the confines of Title 2 of the United States Code section 441a(a)(7)(B)(i): "[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)

**a) Paul's \$1.2 million-plus contributions to HRC far exceeded the \$2,000 statutory limit.**

By HRC/Committee's own admissions, then, *all* of the contributions at issue were also illegal because they exceeded – by over \$1.2 million -- the \$2,000 statutory limit on contributions to candidates for Federal office. (2 U.S.C. § 441a(a)(1)(A)). This plainly violated Title 2 of the United States Code section 441a(f), which prohibits candidates and their campaign committees from knowingly accepting contributions in violation of Title 2 United States Code section 441a.

The constitutionality of dollar limits on expenditures made at the direction of a federal candidate or his or her staff was expressly upheld in the landmark case of *Buckley v. Valeo* (1976) 424 U.S. 1, 46. As for coordinated, in-kind contributions, the Court observed, “The expenditure of resources at the candidate’s direction for a fundraising event at a volunteer’s residence[,] or the provision of in-kind assistance in the form of food or beverages . . . provides material financial assistance to a candidate. The ultimate effect is the same as if the person had contributed the dollar amount to the candidate and the candidate had then used the contribution to pay for the fundraising event or the food.” *Id.* at 36-37.

The Supreme Court has reaffirmed its holdings in *Buckley* numerous times, as in *McConnell v. FEC* (2003) 540 U.S. 93: “Ever since our decision in *Buckley*, it has been settled that expenditures by a noncandidate that are ‘controlled by or coordinated with the candidate and his campaign’ may be treated as indirect contributions subject to FECA’s source and amount limitations.” *Id.* at 219.

**b) Solicitation of illegal contributions is not protected by the First Amendment.**

There is no constitutional right to solicit illegal campaign contributions. In *U.S. v. Hsia* (9th Cir. 1999) 176 F.3d 517, a woman was charged with defrauding the FEC by acting to funnel money from a Buddhist temple in Hacienda Heights, through straw contributors, into various federal campaigns, including the Clinton/Gore ’96 Primary Committee. The court rejected Ms. Hsia’s claim that she was simply soliciting political contributions, making her actions protected speech. “The only solicitations alleged are those of *conduit* contributions and of nominal ‘contributions’ from the conduits themselves. Neither is protected.” *Id.* at 525. *See, also, Goland v. U.S.* (9th Cir. 1990) 903 F.2d 1247, 1258 (rejecting as frivolous a claimed right to make anonymous campaign contributions aggregating

\$120,000, on the theory there would be no opportunity for exacting a *quid pro quo* deal.)

- c) **The evidence is overwhelming that Paul's in-kind contributions were required to go to HRC's campaign, not to NYS 2000's nonfederal fund.**

While HRC/Committee may attempt to claim that Paul's in-kind campaign contributions were actually given to NYS 2000 and, from there, to a nonfederal fund, the following facts disprove this.<sup>8</sup>

Paul's initial interest in contributing to HRC's campaign came about because WJC, through Rendell, informed Paul that if he became a major supporter of *HRC's campaign*, it would create opportunities to spend time together so as to develop a personal relationship and consider Paul's proposal. (4CT786:23-787:4) Acting on WJC's suggestion, Paul's pledged \$150,000 in stock (at Rendell's insistence) for the privilege of hosting *HRC's campaign's* June 9 luncheon and tea and spent \$40,000 for expenses and entertainment for the back-to-back events (4CT787:15-23).<sup>9</sup>

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<sup>8</sup> Moreover, contribution limits are not modified simply because the contribution is made through a conduit. (2 U.S.C. § 441a(a)(8)).

<sup>9</sup> None of which have ever even been reported as contributions. (4CT787:24-27; 866-868; 836-837)

It was Levin, acting on behalf of *HRC* and WJC, who approached Paul with the idea of his underwriting a major fundraiser for *HRC's campaign*. (4CT790:4-16). In paying for the Tribute, Paul wrote no checks to NYS 2000. (1CT29:9-11; 96-109; 4CT800:5; 907) His in-kind gifts were for the benefit of *HRC's campaign* (1CT38:5-9), including providing the talents of several world-class entertainers in order that *HRC* could raise more money at the fundraising event (1CT23:4-6).

The Tribute was organized in close consultation with members of *HRC's campaign* and White House staff. (1CT22:16-23:2; 25:12-25; 26:25-27:4, 20-27; 4CT790:4-26; 791:26-28; 841-845; 850-851; 874-877; 5CT980-997) *HRC* was *personally* involved at the planning stage when she insisted that Paul hire Smith (4CT791:16-25; 879-880). When Paul complained that he could not afford to continue footing the bill, Rosen, on behalf of *HRC*, flat-out coerced Paul into paying over twice his \$525,000 commitment. (1CT28:11-7)

*HRC personally* attended the Tribute and participated in the program. (4CT797:11-19; 902) She left a detailed message on the Pauls' home answering machine, thanking them for their friendship and what they were doing *for her campaign*. (4CT798:14-16) Both

Clintons wrote letters thanking Paul for his generosity, with WJC specifically saying, “And of course I’m very grateful for the boost it gave *Hillary’s campaign*.” (4CT800:13-14; 908-909)

Paul’s stock transfer of \$55,000 to Working Family Party was done at *HRC’s* insistence and specifically to benefit *HRC’s campaign* (4CT800:23-801:16, 26-28; 910). Finally, Paul paid \$11,100 extra to obtain *HRC’s* edited videotape because she left him no other option. (4CT794:10-20)

Thus, in every possible way, every one of Paul’s in-kind contributions at issue here fits within the defining elements of Title 2 of the United States Code section 441a(a)(7)(B)(i). He made the expenditures in “cooperation, consultation, [and] in concert, with, [and] at the request [and] suggestion of, a candidate, [her] authorized political committees, [and] their agents.” This is vastly more coordination of effort between donor and candidate than what has been deemed sufficient to uphold a criminal conviction for making an excessive campaign contribution in violation of Title 2 United States Code section 441a(a)(1)(A). *U.S. v. Goland* (9th Cir. 1992) 959 F.2d 1449, 1452.

The threshold showing for *civil* liability for a “knowing acceptance” of an excessive contribution in violation of Title 2 United States Code section 441a(f) is even lower. *FEC v. Calif. Medical Assn.* (N.D.Cal. 1980) 502 F.Supp. 203-204; *FEC v. John A. Dramesi for Congress Committee* (Dist.N.J. 1986) 640 F.Supp. 985, 987.

**3. HRC/Committee’s “solicitation” and “organizing” activities violated federal law, preventing section 425.16 protection.**

The conduct at issue violates Title 2 United States Code section 437g(d)(1)(A)(i), which provides: “Any person who knowingly and willfully commits a violation of any provision of this act which involves the making, receiving, or reporting of any contribution, donation, or expenditure aggregating \$25,000 or more during a calendar year shall be fined under Title 18, or imprisoned for not more than 5 years, or both.”

Paul has “conclusively established” that HRC/Committee’s solicitation of the contributions at issue was in violation of Title 2 United States Code section 441a. *Paul for Council, supra*, 85 Cal.App.4th at 1367; *The Governor Gray Davis Comm’n, supra*, 102 Cal.App.4th at 459. As a matter of law, such conduct is not protected by the anti-SLAPP statute. *Id.* Furthermore, their conduct in

organizing the Tribute jointly with Paul is enough, by itself, to make Paul's in-kind contributions illegal. (2 U.S.C. §§ 441a(a)(7)(B)(i) and 441a(f)) Such conduct is also unprotected, as a matter of law.

**D. Paul's Evidence Established a Prima Facie Case with a Reasonable Prospect of Prevailing.**

**1. HRC/Committee failed to defeat Paul's evidence.**

**a) Paul's burden of producing evidence is not great.**

Only if the defendants clear their hurdle under section 425.16, subdivision (b)(1) does the court consider the second step, that of requiring the plaintiff to present evidence establishing a prima facie case. *Paul for Council, supra*, 85 Cal.App.4th at 1365. The plaintiff's burden approximates that used in determining a motion for nonsuit or directed verdict, in which dismissal is mandated *only* when "no reasonable jury could find for the plaintiff." *Metabolife Intern., Inc. v. Wornick* (9th Cir. 2001) 264 F.3d 832, 840.

To survive an anti-SLAPP motion, the plaintiff must demonstrate the complaint's legal sufficiency and support it with enough evidence to support a favorable judgment. *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821. The legal sufficiency of the Fifth and Fourteenth causes of action was judicially determined when the trial court overruled the demurrer of HRC/Committee

(among other defendants) as to the 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup>, 16<sup>th</sup> and 17<sup>th</sup> causes of action. (2CT469)

As for how much evidence will suffice, the complaint need only be shown to have “minimal” merit. *Novartis Vaccines and Diagnostics, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2006) 143 Cal.App.4th 1284, 1299.

**b) HRC/Committee’s evidence attacking Paul’s credibility is irrelevant.**

In weighing the sufficiency of the evidence, credibility is irrelevant. *Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 823, overruled on another point in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68, fn.5. As between competing evidence, the court may only determine whether the defendant’s opposing affidavits (if any), *as a matter of law*, defeat the plaintiff’s evidence, as by establishing an affirmative defense. *Rowe v. Superior Court* (1993) 15 Cal.App.4th 1711, 1723.

Moving parties’ evidence here focused almost entirely on Paul’s credibility (5CT1053), which is simply not a basis for granting an anti-SLAPP motion. *Wilcox, supra*, 27 Cal.App.4th at 823.

**c) HRC’s sworn declaration focuses on her lack of recall, failing to deny *any* of Paul’s factual contentions.**

The only other supporting evidence submitted was HRC's sworn declaration filed on the morning of the April 7, 2006, hearing. (5CT1174-1176) Oddly, she never denies the truth of any of Paul's claims. Instead, her declaration consists entirely of a series of rather bizarre statements to the effect that she "would have remembered" making the statements attributed to her in Paul's Supplemental Declaration, but she "doesn't believe" she made them because she has "no recollection whatsoever" of doing so. If Paul is lying about the content of their conversations, why doesn't she just say so? A declaration of this nature is a testament to nothing -- other than HRC's poor memory.

Without opposing evidence, this court must accept Paul's evidence as being undefeated, as a matter of law. *Rowe, supra*, 15 Cal.App.4th at 1723.

**d) HRC/Committee erroneously characterized Paul's eyewitness account as "unsupported allegations."**

HRC/Committee offered one other reason why Paul's Supplemental Declaration should be rejected. Characterizing Paul's eyewitness testimony as "unsupported allegations," (5CT1047:5-17), and pulling out of context this Court's statement that "[a]llegations do not constitute admissible evidence'" (referencing Appellate

Decision at \*8), they urged that “Plaintiff’s new and unsupported allegations should be disregarded.” (5CT1047:17-21)

On the last appeal, Paul’s evidence in support of his claims of fraud consisted solely of his allegations based on “information and belief” in paragraphs 120, 121, 143, 181, 182, and 199 of the complaint. Quoting *Roberts v. Los Angeles County Bar Assn.* (2003) 105 Cal.App.4th 604, 614, that, “Allegations do not constitute admissible evidence and are insufficient to establish a prima facie showing.” *Paul, supra*, 2005WL2650937 at \*8, this Court affirmed in Rosen’s favor.

*Roberts* relied on *Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 656, overruled on another point in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68, fn.5. *Wollersheim* in no way held that everything contained in a verified complaint is inadmissible as evidence. Only allegations “not within the personal knowledge of the verifier” are not evidence. *Id.* In contrast, matters within the personal knowledge of the verifier are competent evidence and thus admissible. *Sheeley v. City of Santa Clara* (1963) 215 Cal.App.2d 83, 85; Code of Civil Procedure section 446 subdivision (a).

Hence, all of the allegations of the complaint *not* based “on information and belief” are competent evidence, by virtue of the verification contained in Paul’s Supplemental Declaration (4CT782:4-26). Paul’s Supplemental Declaration, based on matters within Paul’s personal knowledge, is also competent evidence. Both provide evidentiary support for Paul’s prima facie case. (§ 425.16 subd. (b)(2))

**e) HRC/Committee waived any hearsay objections.**

Importantly, HRC/Committee failed to raise any hearsay objections to Paul’s evidence. They are therefore *waived* for the purposes of this appeal. As this Division held in *Gallagher v. Connell* (2004) 123 Cal.App.4th 1260, inadmissible hearsay can be used to support a plaintiff’s prima facie case on appeal of an anti-SLAPP motion if the defendant failed to object below. *Accord, Gallant v. City of Carson* (2005) 128 Cal.App.4th 705, 710.

**2. Paul’s Evidence Established All Elements of Civil Conspiracy.**

The Fifth Cause of Action alleges that HRC/Committee conspired with WJC and Levin to commit the fraud and deceit alleged in the First Cause of Action. The Fourteenth Cause of Action alleges

that HRC conspired with Smith to commit the fraud and deceit alleged in the Eleventh Cause of Action.

The elements of civil conspiracy are: “(1) the formation and operation of the conspiracy, (2) wrongful conduct in furtherance of the conspiracy, and (3) damages arising from the wrongful conduct.” *Kidron v. Movie Acquisition Corp.* (1996) 40 Cal.App.4th 1571, 1581. Liability may be imposed on all those concurring in the fraud scheme having knowledge of its unlawful purpose. *Novartis Vaccines, supra*, 143 Cal.App.4th at 1300. The requisite concurrence and knowledge may be inferred from “the nature of the acts done, the parties’ relations to each other, and the common interest of the alleged conspirators.” *Id.*

**a) HRC’s conspiracy with WJC**

Thus, with regard to the conspiracy between WJC and HRC to defraud Paul, concurrence and knowledge may be inferred from the fact of their marriage relationship, from the way HRC used her status as WJC’s wife to manipulate Paul (using the deal with her husband as both carrot and stick, as discussed previously), and from the Clintons’ shared interest in enriching and advancing HRC’s Senate campaign and her political future.

### **b) HRC's conspiracy with Smith**

With regard to the conspiracy between Smith and HRC to defraud Paul, concurrence in and knowledge may be inferred from their longstanding friendship and ongoing business relationship (4CT791:16-25; 878; 879-880), from the fact that the fraud directly benefited Smith, while ensuring that HRC's public image would be put to best advantage in the capable hands of one of Hollywood's top producers (all videotaped and ready for distribution to her friends and supporters as Christmas gifts [1CT35:9-11; 4CT794:12-14]).

HRC's knowledge of and concurrence in the conspiracy is also shown by the fact that Smith's repudiation of *their* agreement did not result in her taking any action (4CT793:25-26), as it would have if she had regarded Smith's promise as real. Her refusal to take remedial action is thus evidence of HRC's own view that the agreement was a sham. Since HRC herself did not take the agreement seriously, her only possible reason for leading Paul to believe that her intercession had caused Smith to drop his fee by \$50,000 was to trick Paul into using Smith over Dick Clark Productions.

### **3. Paul's Evidence Established All Elements of Promissory Fraud**

Since civil conspiracy is not an independent tort, Paul must also present evidence establishing a prima facie claim for the underlying torts, which, both as to the Fifth and Fourteenth Causes of Action is promissory fraud. (1CT38:23; 43:23-26; 50:18; 54:1-3)

This Division recently had occasion to note the elements of promissory fraud: “Actual fraud occurs when, among other circumstances, a person makes a promise without the intention of performing it. To prove a cause of action for actual fraud requires evidence of (1) representation; (2) falsity; (3) knowledge of falsity; (4) intent to deceive; and (5) reliance and resulting damage (causation).” *Warren v. Merrill* (2006) 143 Cal.App.4th 96, 110 (internal quotes omitted); Civil Code, sections 1572, subdivision (4), 1709, and 1710, subdivision (4).

In the case of promissory fraud, the lack of any intention to perform must exist at the time of making the promise. *Grant v. U.S. Electronics Corp.* (1954) 125 Cal.App.2d 193, 200. However, subsequent conduct may be used to provide evidence that the fraudulent intent existed when the promise was made. *Id.*

When a plaintiff has been fraudulently induced to enter into a contract, liability is not dependent upon whether the defendant's

promise is ultimately enforceable as a contract. *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.

**a) HRC's furtherance of WJC's fraud.**

The Clintons' undisclosed plan was to make Paul *think* he had a contract with WJC so that Paul would begin performance of his side of the agreement (4CT791:1-6; 795:18-796:9) and permit WJC's agent, Levin, to have access to his confidential business contacts and operations (4CT791:7-12; 795:6-12).

WJC and HRC would then use inside information Levin learned about SLM and its key investor, Oto, to pursue two lines of attack. On the one hand, they would extort greater sums from Paul than he had agreed to expend, knowing that, for Paul, a threat to cancel the deal equated to a threat to sink his company. (1CT28:11-29:1,17-18; 31:12-14; 4CT795:13-17; 796:14-17; 802:1-17; 803:21-28) On the other hand, they would develop a secret relationship with Oto (4CT803:1-16; 804:2-4; 918) – under the guise of “furthering” WJC's deal with Paul (4CT804:6-9) – prompting Oto to abandon Paul (4CT804:19-20), form a joint venture with Levin (4CT804:21-7; 920; 931-934), and renege on his promise to put \$5 million into SLM in mid-November (4CT802:3-8,12-17; 804:13-16,20-21). This collapsed

SLM (4CT805:6-22) and neatly rendered performance by either side impossible.

Based on the way HRC, through her agents, immediately and falsely disavowed all association with Paul to *Washington Post* reporter Lloyd Grove (and instructed Paul to do the same) (1CT31:20-32:4; 4CT798:17-800:6; 905; 907), it is evident that WJC could never have had any genuine interest in a business arrangement requiring him to publicly affiliate himself with Paul. HRC's handling of Lloyd Grove's inquiries demonstrates that both she and her husband knew WJC would not jeopardize her political career by being publicly tied to Paul.

The falsity of WJC's promise is further shown by the Clintons' joint acts to frustrate the purpose of the supposed agreement by leading Oto to abandon Paul.

Paul, for his part, reasonably regarded as sincere the Clintons' expressed interest in his offer (4CT786:25-28; 789:8-10,23-26; 790:4-16,27-28; 791:1-2), because of having been a guest in the Clinton White House in 1994 (4CT783:22-784:3; 821), and the fact that other public figures had willingly collaborated with Paul in high-profile events and activities (4CT783:7-21; 800:8-10; 812-820).

After WJC communicated his pretended acceptance of Paul's offer, both Clintons worked to keep Paul persuaded that WJC had made a commitment to him. For example, WJC's sending in Levin to get to know SLM and its business contacts (4CT791:7-9; 795:6-12), including Oto, made sense if WJC really intended to be a goodwill ambassador for SLM. The lengths to which the Clintons went to accommodate Oto at the Tribute (4CT796:7-28) and the State dinner (4CT802:18-25) and the way they permitted Paul to use the Tribute for business purposes (4CT796:3-4) all seemed contraindicated in terms of HRC's political goals, but logical in terms of WJC's business goals with Paul and Oto. Additionally, HRC presumptively acknowledged the existence of the deal every time she threatened to cancel it if Paul did not comply with her demands. (1CT28:11-19; 4CT798:26-28; 799:15-19; 801:6-16; 794:10-16)

That both Clintons *intended* to deceive Paul is clear from the fact that Paul's only interest in supporting HRC's campaign was in order to procure WJC's future services. (4CT786:23-787:10; 789:8-12; 791:1-6; 793:6-9; 795:18-24) They therefore knew that Paul would not begin producing and underwriting the Tribute unless he believed WJC had accepted his offer. (4CT791:2-6) The threats to

cancel the event and/or cancel the deal also demonstrated the Clintons' conscious intent to manipulate Paul by making him think WJC's promise was real. (1CT28:11-19; 4CT798:26-28; 799:15-19; 4CT801:6-16; 4CT794:10-16)

Other deliberate acts by the Clintons that convinced Paul were: their enthusiastic discussion regarding working with Paul during the Tribute and the Streisand brunch (4CT797:11-798:13), the personal letters they wrote Paul after the *Washington Post* articles that disparaged him (4CT800:13-22; 908-909), and the meeting HRC arranged between Paul and WJC at Air Force One on September 22, when WJC assured Paul their deal was intact. (4CT801:17-25; 911)

Paul's reliance on WJC's promise to his detriment is shown by his bankrolling the Tribute practically by himself (4CT806:16-807:21; 947-948; 960-963; 964-965; 5CT981:1-8) and expending additional monies in fear of losing the deal (4 CT 801:6-28; 794:10-20), yet receiving nothing in return. (1CT36:26-27) He also allowed WJC, through Levin, to have access to his primary investor (4CT795:8-12), which provided the means through which the Clintons were able to uproot Paul's company (4CT802:18-805:22). Paul's damages include not only the \$1.2 million-plus out-of-pocket spent in reliance on the

bogus agreement (5CT981:8), but the potentially \$60 million in lost value of his SLM stock (1CT18:6-7) and the loss of his company (1CT36:22-23; 4CT805:15-22).

**b) HRC's furtherance of Smith's fraud.**

Paul's evidence established all of the requisite elements of promissory fraud as to Smith (*Warren, supra*, 143 Cal.App.4th at 110) and that HRC acted to advance the scheme. The false representation was that – thanks to HRC -- Smith had agreed to accept \$800,000 as an all-inclusive fee to produce the concert. (4CT792:9-18; 881-883; 884-891) That this representation was false when made is documented by HRC's treatment of this promise as meaningless when Smith repudiated it. (4CT793:25-26) The intent to deceive is shown by HRC's complicity when Smith demanded \$75,000 extra at the last minute and that she did nothing – showing she did not regard it as a mistake or a misunderstanding, nor did Smith. Paul's detrimental reliance is demonstrated by his statement that he would have used Dick Clark Productions if Smith had not lowered the fee (4CT793:1-5), and that his only alternative to paying Smith the extra \$75,000 was to cancel the event, costing him his relationships with both WJC and Oto.

Paul has thus established a prima facie case by sufficient evidence, if credited at trial, to sustain a verdict against HRC/Committee as to the Fifth Cause of Action and against HRC as to the Fourteenth Cause of Action. It was thus further error for the lower court to have granted the anti-SLAPP motion.

**E. The Trial Court Abused Its Discretion In Not Permitting Limited Discovery Before Granting the Anti-SLAPP Motion.**

As a matter of due process, particularly where the evidence critical to establishing the prima facie case is in the defendant's sole possession, trial courts must liberally exercise their discretion in allowing limited discovery under section 425.16 subdivision (g). *Schroeder v. Irvine City Council* (2002) 97 Cal.App.4th 174, 190.

As demonstrated above, Paul presented the trial court with *indirect* evidence of every element of his case against HRC/Committee. What he lacked was *direct* evidence of HRC's intentions. Since HRC is the only source of that evidence, the court abused its discretion in granting the anti-SLAPP motion for lack of evidence while denying Paul's limited request for discovery to obtain it. *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 37 Cal.App.4th 855, 868.

No reasonable judge could review Paul's Supplemental Declaration (4CT781-5CT1036), assess it as a "total lack of evidence" (5CT1178), and reject Paul's request to depose HRC as "a fishing expedition." *Mendoza v. Club Car, Inc.* (2000) 81 Cal.App.4th 287, 301 (abuse of discretion defined as "making an arbitrary, capricious, or patently absurd determination.")

If this Court determines that HRC/Committee met their threshold burden under section 425.16, and, additionally, that Paul failed to establish a prima facie case, Paul asks this Court to find that the trial court abused its discretion in denying his discovery motion and remand the case with instructions to permit Paul to depose HRC to obtain the evidence necessary to satisfy the requirements of section 425.16 subdivision (b)(1).

## **VI.** **CONCLUSION**

Based on the foregoing, Paul asks this Court to find or rule as follows:

- That defendants HRC/Committee did not satisfy their burden under section 425.16 subdivision (b)(1) of establishing that Paul's claims as to them arise from constitutionally protected activity.

Alternatively, to find:

- That HRC/Committee did not meet their burden under section 425.16 subdivision (b)(1) because their claimed, protected acts violated the law, making their conduct unprotected as a matter of law. Alternatively, to find:
- That, if Paul's evidence were credited, he has demonstrated a probability of prevailing on the merits of his claims as to HRC/Committee.
- And, therefore, the trial court's April 7, 2006, Order granting the anti-SLAPP motion is REVERSED. Alternatively, to find:
- That the trial court abused its discretion in denying Paul's motion for leave to conduct limited discovery prior to granting HRC/Committee's anti-SLAPP motion based on a lack of sufficient evidence to establish a prima facie case.

Respectfully submitted,

January 10, 2007

UNITED STATES JUSTICE FOUNDATION

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing APPELLANT’S OPENING BRIEF  
is in compliance with the requirements of California Rules of Court,  
Rule 8.204(c)(1). The brief contains 13,832 words.

January 10, 2007

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D. Colette Wilson