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Superior Court of California
County of Los Angeles

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Sherri R. Carter, Executive Officer/Clerk
By R. Castle, Deputy

Kimberly Koerber v. Cengage Learning, Inc., et al.
BC649878
Hearing: December 14, 2017

ORDER ON SPECIAL MOTION TO STRIKE PLAINTIFF'S FIRST AMENDED COMPLAINT (SLAPP SUIT) PURSUANT TO CODE OF CIVIL PROCEDURE § 425.16 BY DEFENDANT PROJECT VERITAS

The above-entitled matter came on for hearing on December 14, 2017. Suzanne E. Rand-Lewis, Esq. appeared on behalf of plaintiff Kimberly Koerber ("Koerber"). G. David Rubin, Esq. of Litchfield Cavo LLP appeared on behalf of Defendant Project Veritas. After oral argument, the court took the matters under submission. The court now issues the following ruling:

I. PERTINENT FACTUAL AND PROCEDURAL BACKGROUND

Project Veritas' Investigative Reports on Common Core Curriculum and Interview with Koerber

Plaintiff Kimberly Koerber was a sales consultant who was employed by co-defendants Cengage Learning Inc., and Cengage Learning Holdings II Inc. (collectively "Cengage"), and was paid through by commission and bonuses. (Plaintiff's First Amended Complaint ["FAC"] ¶ 1; Declaration of Plaintiff in opposition to motion ¶¶ 2-3.) Cengage in turn is a for-profit educational content, technology, and services company, whose business is based upon the sale of educational materials to states and other public entities. (FAC ¶ 3.) Cengage's profits rely upon states and other public and private entities "adopting" its educational materials. (FAC ¶ 12.)

Defendant Project Veritas is a media organization involved in undercover investigative journalism, and also a nonprofit organization incorporated in Virginia. (Declaration of Russell Verney ¶¶ 2-3.) Project Veritas presented evidence, through a declaration of its Executive Director Russell Verney, that its reports average over 100,000 views online, and the stories are often reported by other news outlets. The topics of the stories are issues of public interest, including Common Core school curriculum. (Verney Decl. ¶¶ 3-4.)

In 2015, in the midst of nationwide discussions of Common Core curriculum and national educational standards, Project Veritas launched an investigation into the Common Core Curriculum. (Verney Decl. ¶¶ 4-5.) The investigation sought to discover the relationship between textbook companies and Common Core standards, how textbook companies promoted Common Core to public officials and legislators, and the lobbying tactics of textbook companies. Project Veritas also sought to discover the reaction of those within the textbook industry to the backlash against Common Core. (Verney Decl. ¶ 5.)

Project Veritas' Common Core investigation led to four reports, published between January 12, 2016 and January 27, 2016. The reports disclosed candid opinions of teachers and employees of textbook companies about Common Core and the people who oppose it. (Verney Decl. ¶ 7.) Project Veritas selected Koerber to be interviewed based in part on Koerber's perceived role as a sales and marketing representative for a publisher of Common Core textbooks. (Verney Decl. ¶ 8.)

As part of its investigation, Project Veritas met with Plaintiff Koerber on the front patio of a Starbucks Coffee in Woodland Hills, California, on November 11, 2015. The interview occurred during the daytime, during Starbucks' regular business hours. (Verney Decl. ¶ 10.) On November 10, 2015, Koerber received a telephone call inviting her to assist with research for then-California Attorney General (now Senator) Kamala Harris. The information provided by Koerber was to be submitted anonymously to Kamala Harris to assist her in formulating policy. (Declaration of Plaintiff Kimberly Koerber in opposition ¶¶ 19-21.)

On November 11, 2015, the date of the interview, Koerber chose to sit at the Starbucks' outside patio for the interview. (Koerber Decl. ¶ 26.) Koerber was met by two individuals. (Koerber Decl. ¶ 31.) Koerber spoke the two individuals, believing that her comments would be used to assist Kamala Harris "in formulating policy." (Koerber Decl. ¶ 46.)

Koerber's Declaration, at paragraphs 48 and 49, sets forth many of the statements made by Koerber during the meeting at Starbucks. These include Koerber's opinions of people who are against Common Core (i.e. "People are not educated,") and Koerber's personal experience in pitching Common Core:

> "I did a big presentation yesterday for AP US History and the AP US History agenda was set, until Texas got upset about it and they wanted to have their founders – they wanted founders in it. And it's like – come on. The dead white guys did not create this country. It was a whole bunch of different kinds of people. And yes there were women, and yes there were people of color, and yes...you need to talk about them too. But they want to talk about those dead white guys." (Koerber Decl. ¶ 48 p. 5 l. 23-28.)

Koerber also discussed the "pushback" she was getting by the "bunch of Republican people, conservatives that don't like being told what to do by people they don't agree with," (Koerber Decl. ¶ 48 p. 6 l. 1-3) and discussed another example of the State of Texas' disagreement with the United States history textbooks. Koerber also indicated that the people in Texas did not like the way because the Constitution was covered in the textbooks "'cause they're idiots and they don't know what's in" the textbooks. (Koerber Decl. ¶ 48 p. 14-17.) Koerber directly referred to Common Core, including the state of Texas' position on Christianity in Common Core, and that Christianity is totally out of Common Core, and that "It's not a core concept at all." (Koerber Decl. ¶ 48 p. 6 l. 24-26; p. 7 l. 5-11.) Koerber discussed Christianity, Islam, and Judaism in the Common Core curriculum textbooks.

Koerber also expressed that "I think the progressive bias is the more educated you are, the better you are, and the conservative bias is the less they know the better they are going to be." (Koerber Decl. ¶ 48 p. 7 l. 24-26.)

Koerber also stated, "I can't stand it. If they talk to me one more time about...climate change not being real, I'm just gonna scream." (Koerber Decl. ¶ 48 p. 7 l. 3-4.)

Koerber also expressed her opinion regarding what she believed to be opposition to the Common Core's curriculum on the United States Constitution, that opponents of Common Core, the "conservative voters," only want to teach some of the Constitution, i.e. "the part of the Constitution that they like," but not all of it. (Koerber Decl. ¶ 48 l. 5-11.) Koerber stated her

belief of the "conservative voters" who are making "push back" to Common Core, want to teach the Second Amendment. Koerber stated,

> "Damn the Second Amendment. I don't think personal handguns need to be on anyone except the government, the police. What is the purpose of having a gun?
>
> The separation of church and state they don't understand.
>
> They don't like that. They don't like equal rights between all groups. The voter suppression that is going on in the south is just unbelievably awful.
>
> People who are not educated are easy flim flam. And they react by fear instead of by knowledge." (Koerber Decl. ¶ 48 p. 8 l. 13-20.)

The video report is attached as Exhibit A to the Verney Declaration. It includes video clips of Koerber, as well as of then-Republican candidates for President, including Donald Trump and Ted Cruz, discussing the Common Core curriculum at a public forum. The video report also shows that the United Kingdom's *Daily Mail* news website re-published an article about Project Veritas' Common Core investigation. (Exhibit A, time counter 2:25.) A copy of the Breitbart online article is attached as Exhibit B to the Verney Declaration. It identifies Koerber as "a former marketing executive for Pearson Education publisher who now works as a sales consultant for National Geographic – another Gates Foundation-funded Common Core publisher." (Exhibit B.)

Project Veritas' journalist also asked Koerber for information regarding the profits for textbook publishers with the Common Core curriculum. Koerber did not plead ignorance of the subject, but instead provided a substantive response:

"Anytime anybody changes something in a textbook it's profitable for the textbook companies. So the textbooks have to change and the school district has to adopt the new ones. That's profitable." (Koerber Decl. ¶ 49.)

Based upon the content of this Starbucks interview with Koerber, Project Veritas published its third Common Core investigative report, on January 21, 2016. The report was embedded in a news story independently written and published by Breitbart News: Dr. Susan Berry, *"Exclusive: Former Pearson Exec Reveals Anti-American Agenda in Common Core."* The Project Veritas report is still available online. (Verney Decl. ¶ 8-9.)

The instant lawsuit and anti-SLAPP motion

On February 8, 2017 Koerber filed her Complaint; and on June 23, 2017, filed her First Amended Complaint. The First Amended Complaint contains twenty-three causes of action against multiple defendants. Koerber alleges that Defendants Project Veritas; Project Veritas LLC; Project Veritas Action Fund; Breakthrough Dev Group; James O'Keefe III; Allison Maass and Doe 1 Female Using the Pseudonym "Alyssa Harris" (both hereinafter "Maass"); Christian Hartsock; and Doe 3 Male Using the Pseudonym "Steve Packard" (both hereinafter "Hartsock"), illegally recorded Plaintiff without her knowledge, and posted the video online. Plaintiff alleges the video was used by Defendants Cengage Learning Inc. and Cengage Learning, Holdings II Inc., through Plaintiff's managers, Defendants Eric Bredenberg; Don Royal; and Kristen McDaniel, as a justification for her termination.

With respect to moving defendant Project Veritas, Plaintiff alleges eleven causes of action: (1) the thirteenth cause of action for intentional infliction of emotional distress; (2) the fourteenth cause of action for violation of Business & Professions Code, section 17200 (the Unfair Competition Law "UCL"); (3) the fifteenth cause of action for violation of the Invasion of Privacy Act (Penal Code, § 632); (4) the sixteenth cause of action for violation of the Invasion of Privacy Act (Penal Code, § 647j); (5) the seventeenth cause of action for invasion of privacy (Civil Code, § 1708.8); (6) the eighteenth cause of action for common law invasion of privacy; (7) the nineteenth cause of action for public exposure of private facts; (8) the twentieth cause of action for public exposure of private facts – false light; (9) the twenty-first cause of action for violation of privacy – use of name or likeness (Civil Code, § 3344); (10) the twenty-second cause of action for negligence (Civil Code, § 1708); and (11) the twenty-third cause of action for intentional interference with prospective economic relations. In each cause of action asserted against Project Veritas, the gravamen of the claim involves Defendant's alleged recording, editing, and publication of a video regarding statements Plaintiff made that were allegedly obtained under false pretenses.

On October 17, 2017, Project Veritas filed a special motion to strike pursuant to Code of Civil Procedure section 425.16 ("anti-SLAPP" motion). Defendant contends that all of Koerber's claims against it arose solely from defendant's acts in furtherance of the right of free speech in connection with an issue of public interest.

On November 20, 2017, subsequent to Koerber's ex parte on of that date, the court granted Koerber additional pages for her opposition brief, so the opposition was not to exceed 20 pages, and also granted Project Veritas additional pages for its reply brief. Koerber filed her 24-page opposition on November 22, 2017. Project Veritas filed its reply brief on December 1, 2017. On December 14, 2017, the court entertained oral argument, and took the matter under submission.

The court now rules as follows:

II. LEGAL STANDARD AND EVIDENCE SUBMITTED IN CONNECTION WITH PROJECT VERITAS' ANTI-SLAPP MOTION

A. Project Veritas' Request for Judicial Notice

Project Veritas timely filed a request for judicial notice in connection with its filings. Taking judicial notice of a document is not the same as accepting the truth of its contents or accepting a particular interpretation of its meaning, and it does not require acceptance of the truth of factual matters that might be deduced therefrom. (*Fremont Indem. Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 113-14; *Cruz v. County of Los Angeles* (1985) 173 Cal.App.3d 1131, 1134.) In addition, judges "consider matters shown in exhibits attached to the complaint and incorporated by reference." (*Performance Plastering v. Richmond American Homes of California, Inc.* (2007) 153 Cal.App.4th 659, 665.) While the court may take judicial notice of the fact that documents were filed with a court, the court may not take judicial notice of the truth of facts contained in those filings, even if they are factual findings from the judge. (*Steed v. Department of Consumer Affairs* (2012) 204 Cal.App.4th 112, 121.)

Specifically, Project Veritas requests the court take judicial notice of the video report featuring Plaintiff that was published on January 21, 2016 on YouTube. This video forms the basis of Plaintiff's claims against Project Veritas, and its existence is undisputed by the parties (See Compl. ¶¶ 18, 22-23, 26-31); accordingly, the existence of the video is judicially noticeable, though the truth of any assertions contained therein is not. (See *Ingram v. Flippo* (1999) 74 Cal.App.4th 1280, 1285, fn.3. [finding the existence of a letter and media release that form the basis of the allegations of the complaint judicially noticeable].) Plaintiff objects that the availability of a document on the internet does not make its assertions true. The court agrees and notes that it is only judicially noticing the existence of the video, not the truth of its contents.

Defendant additionally requests the court take judicial notice of: (1) the Missouri Court of Appeals, Western District's opinion in *Sauer v. Nixon* (Mo.App. 2015) 474 S.W.3d 624); (2) the United States District Court, District of Idaho's opinion in Regan v. Otter (D.Idaho 2016) 2016 WL 1430006; (3) the United States District Court, Middle District of Louisiana's opinion in *Jindal v. U.S. Dept. of Educ.* (M.D.La. 2015) 2015 WL 854132); (4) the United States District Court, Southern District of New York's opinion in *Great Minds v. John Wiley & Sons, Inc.* (S.D.N.Y. 2016) 204 F.Supp.3d 507; and (5) the 2014-2015 history of state legislative action taken in response to the Common Core initiative.

As to the first four items, the existence of these court opinions and the legislative action identified is judicially noticeable. (Evid. Code, § 452, subds. (c), (d).) Plaintiff objects that a court may not take judicial notice of hearsay allegations of disputable facts, even allegations set forth in other opinions. As stated herein, the court does not judicially notice the truth of any disputable issues of fact contained in these documents.

As to the fifth item requested, the history of the state legislative action is summarized in Shane Vander Hart's March 27, 2014 Internet publication. This summary is not judicially noticeable but the court notes that the request for judicial notice only asks the court to judicially notice the legislative action cited—not the summary; thus the court will not judicially notice this summary document.

B. Koerber's Request for Judicial Notice

Subsequent to oral argument, Koerber submitted, on January 5, 2018, a request for judicial notice of an opinion in *Democracy Partners v. Project Veritas*, United States District Court, District of Columbia, Civil Action 17-047 (ESH), dated January 4, 2018. While the court may take judicial notice of the existence of the decision, the decision is not relevant to this court's determination. The case involved application of the District of Columbia's "Anti-SLAPP Act," and, according to the allegations, the location where the videotaping occurred was allegedly in private offices in a secured building that is not accessible to the public, and access is through a key or electronic pass card. Therefore, the court declines to take judicial notice.

C. Project Veritas' Objections to Evidence

Declaration of Plaintiff Kimberly Koerber ("Koerber Declaration")

Overruled: 1-2, 4, 6, 10, 13-26, 29-32, 36, 42, 44, 50-51, 70-71, 74, 92-98, 100
Sustained: 3, 5, 7-9, 11-12, 27-28, 33-35, 37-41, 43, 45-49, 52-69, 72-73, 75-91, 99

D. Koerber's Objections to Evidence

Declaration of Russell Verney ("Verney Declaration")

Overruled: 1-7, 10-17, 19-30, 32-35, 37-45
Sustained: 8, 18, 31, 36

Declaration of G. David Rubin ("Rubin Declaration")

All objections are overruled.

E. Project Veritas' Special Motion to Strike (anti-SLAPP)

Pursuant to Code of Civil Procedure § 425.16, a party may move to strike a cause of action that arises from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue. The moving party has the initial burden to demonstrate that a cause of action is subject to a special motion to strike. (*Martinez v. Metabolife Inter. Ins.* (2003) 113 Cal.App.4th 181, 186; *Fox Searchlight Pictures Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 304.)

To prevail on an anti-SLAPP motion, the moving party must make a prima facie showing that the attacked claims arise from a protected activity, including defendants' right of petition or free speech. (See, e.g., *Healy v. Tuscany Hills Landscape & Recreation Corp.*, (2006) 137 Cal.App.4th 1, 5 (*Healy*); *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 278; Code Civ. Proc., § 425.16(e).) If this burden is met, the plaintiff must establish a reasonable probability that he or she will prevail on the merits. (See, e.g., *Healy, supra,* 137 Cal.App.4th at p. 5.)

Under section 425.16, subdivision (e), an act in furtherance of a person's right of petition or free speech under the United States or California constitution in connection with a public issue includes "any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest or . . . any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." That is, a moving party can satisfy its burden by showing (1) statements made before legislative, executive or judicial proceedings, or made in connection with matters being considered in such proceedings, or (2) statements made in a public forum, or other conduct in furtherance of the exercise of the constitutional rights of petition or free speech, in connection with issues of public interest. (Code Civ. Proc. § 425.16(e); *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 66.) If the court finds such a showing has been made, the burden then shifts to the plaintiff, who must demonstrate a probability of prevailing on the merits claim. (*Equilon Enterprises, supra,* 29 Cal.4th at p. 67.)

"[A] moving defendant's burden to show a cause of action arising from is not met simply by showing that the *label* of the lawsuit appears to involve the rights of free speech or petition; he or she must demonstrate that the *substance* of the plaintiff's cause of action was an act in furtherance of the right of petition or free speech." (*Jespersen v. Zubiate-Beauchamp* (2003) 114 Cal.App.4th 624, 630.) "The critical consideration is whether the cause of action is based on the

defendant's protected free speech or petitioning activity." (*Feldman v. 1100 Park Lane Associates* (2008) 160 Cal.App.4th 1467, 1478.) "The anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's activity that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning." (*Ibid.*) "The Supreme Court has explained the phrase 'arising from' in section 425.16 should not be construed as meaning 'in response to.' The statutory phrase 'cause of action ... arising from' means simply that the defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech." (*Moore v. Shaw* (2004) 116 Cal.App.4th 182, 195.)

Numerous courts have concluded public websites are "public forums" within the meaning of the anti-SLAPP statute. (*Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 41, fn. 4; *Cross v. Facebook, Inc.* (2017) 14 Cal.App.5th 190, 199; *Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240, 1252.) " 'In general, "[a] public issue is implicated if the subject of the statement or activity underlying the claim . . . was a person or entity in the public eye . . . .' [Citations.]" (*Jackson v. Mayweather, supra,* 10 Cal.App.5th at p. 1254; *Seelig v. Infinity Broadcasting Corp.* (2002) 97 Cal.App.4th 798, 807–808 (*Seelig*).) The requirement under section 425.16, subdivision (e)(3) that the challenged comments be made in connection with an issue of public interest, "like all of section 425.16, is to be 'construed broadly' so as to encourage participation by all segments of our society in vigorous public debate related to issues of public interest." (*Seelig,* at p. 808.)

III. ANALYSIS OF CLAIMS AGAINST PROJECT VERITAS' ARGUMENTS IN ANTI-SLAPP MOTION

A. Code of Civil Procedure, § 425.17 Exception from Anti-SLAPP

As an initial matter, Plaintiff contends that the motion is barred under the section 425.17, subdivision (c) exception to section 425.16. Code of Civil Procedure, section 425.17, subdivision (c) provides:

> Section 425.16 does not apply to any cause of action brought against a person primarily engaged in the business of selling or leasing goods or services ... arising from any statement or conduct by that person if both of the following conditions exist:
>
> (1) The statement or conduct consists of representations of fact about that person's or a business competitor's business operations, goods, or services, that is made for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services, or the statement or conduct was made in the course of delivering the person's goods or services.
>
> (2) The intended audience is an actual or potential buyer or customer, or a person likely to repeat the statement to, or otherwise influence, an actual or potential buyer or customer ... notwithstanding that the conduct or statement concerns an important public issue.

(Code Civ. Proc., § 425.17, subd. (b).)

Plaintiff argues that Defendant is a commercial corporation operating as a media organization and business, and that Defendant also sells goods to the public in the form of books and T-shirts. (Opp. 8.) According to Plaintiff, Defendant's representations are about the services she rendered as a "sales and marketing representative for a publisher of textbooks," and as her role related to providing services in relation to publishing and media. From this, Plaintiff contends that Defendant is either a business competitor or that its conduct related to its business operations, goods, or services, such that section 425.17 applies.

Plaintiff state that her former employer is a publisher of textbooks and that her role was as a sales and marketing representative. Plaintiff does not present any evidence that Defendant is involved in textbook publication or produced, marketed, or sold textbooks. Nor does the alleged conduct at issue in Plaintiff's claims consist of representations of fact about Project Veritas' business operations, goods, or services—they involve Defendant's alleged recording and publication of Plaintiff's opinions concerning topics including the Common Core curriculum. Thus, the alleged conduct of surreptitious recording, editing, and publication of Plaintiff's comments does not constitute "representations of fact about that person's or a business competitor's business operations, goods, or services," and the section 425.17 exception does not apply.

Therefore, this court finds that there is no factual or legal basis to justify applying the commercial speech exception, of Code of Civil Procedure § 425.17.

B. Step One: Acts in Furtherance of the Constitutional Right of Petition or Free Speech, i.e. Newsgathering Conduct

Section 425.16, subdivision (e) includes four separate categories of acts which qualify for treatment under the section. "The first two categories pertain to statements made in connection with proceedings 'before' or 'in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law.' The third category identifies matters of 'public interest' addressed in circumstances traditionally protected by the right to freedom of speech; i.e., statements 'made in a place open to the public or a public forum in connection with an issue of public interest.' Category four provides a catch-all for 'any other *conduct* in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.' " (*Lieberman v. KCOP Television, Inc.* (2003) 110 Cal.App.4th 156, 166 (*Lieberman*), italics added.) The facts here trigger the last two categories.

Defendant Project Veritas contends that the conduct at issue was taken in furtherance of its exercise of free speech activity. (Mot. 4, citing *Lieberman*, 110 Cal.App.4th at p. 166.) In *Lieberman*, the Court of Appeal recognized that reporting the news is speech subject to the protections of the First Amendment and subject to a motion brought under section 425.16, if the report concerns a public issue or an issue of public interest. (*Id.* at p. 164.) As section 425, subdivision (a) mandates that the statute be construed broadly and the statute's reach is not restricted to speech but expressly applies to all *conduct in furtherance* of the exercise of the right of free speech in connection with a public issue, the *Lieberman* Court held that surreptitious recordings that are made in aid of and that were incorporated into a broadcast in connection of a public issue fall within the scope of section 425.16. (*Id.* at p. 166.) As the accused conduct involved news gathering conduct in furtherance of the exercise of the right of free speech, the

applicability of section 425.16 turns on whether the underlying speech arose in connection with a public issue.

Project Veritas contends that the recording was made in aid of and in furtherance of a broadcast related to the Common Core curriculum and public education, which is a public issue and an issue of public interest. (Mot. 5-6, Rubin Decl. Exs. 1-4.) Plaintiff disagrees and contends that the statement at issue in her claims relate to the recording and publication of statements she made in a private conversation, and that the recording and publication of Plaintiff's allegedly highly personal comments did not constitute any conduct in connection with a public issue or on an issue of public interest. (Opp. 14, citing *Weinberg v. Feisel* (2003) 110 Cal.App.4th 1122 (*Weinberg*).)

As recognized in *Weinberg*, the Legislature established this limitation, that the conduct must be in connection with an issue of public interest, to limit the types of conduct that come within the third and fourth categories of subdivision (e). (*Id.* at p. 1132.) Courts have broadly construed the term "public interest" to include not only governmental matters, but also private conduct that impacts a broad segment of society and/or that affects a community in a manner similar to that of a government entity. (*Cross v. Cooper* (2011) 197 Cal.App.4th 357, 372 (*Cross*).)

In *Rivero v. Am. Fed. of State, Cnty. and Mun. Emp., AFL-CIO* (2003) 105 Cal.App.4th 913, the court described three nonexclusive and sometimes overlapping categories of statements that have been given anti-SLAPP protection. (*Id.* at pp. 919-924, cited in *Cross*, *supra*, 197 Cal.App.4th at p. 373.) "The first category comprises cases where the statement or activity precipitating the underlying cause of action was 'a person or entity in the public eye.' [Citation.] The second category comprises cases where the statement or activity precipitating the underlying cause of action involved 'conduct that could directly affect a large number of people beyond the direct participants.' [Citation.] And the third category comprises cases where the statement or activity precipitating the claim involved 'a topic of widespread, public interest.' [Citation.]" (*Cross*, 197 Cal.App.4th at p. 373.)

In *Weinberg*, the Court of Appeal recognized that section 425.16 "requires that there be some attributes of the issue which make it one of public, rather than merely private, interest." (*Id.*, *supra*, 110 Cal.App.4th at p. 1132.) And the *Weinberg* Court set forth additional guiding principles with regard to the attributes that make an issue of public, rather than merely private, interest. "First, 'public interest' does not equate with mere curiosity. [Citations.] Second, a matter of public interest should be something of concern to a substantial number of people. [Citation.] Thus, a matter of concern to the speaker and a relatively small, specific audience is not a matter of public interest. [Citation.] Third, there should be some degree of closeness between the challenged statements and the asserted public interest [citation]; the assertion of a broad and amorphous public interest is not sufficient [citation]. Fourth, the focus of the speaker's conduct should be the public interest rather than a mere effort 'to gather ammunition for another round of [private] controversy ....' [Citation.] Finally, 'those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure.' [Citation.] A person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people. [Citation.]" (*Weinberg*, *supra* 110 Cal.App.4th at pp. 1132-1133.)

With this background in mind, the court turns to the disclosures at issue in the case at hand. Defendant Project Veritas contends that Plaintiff's statements were politically oriented and

matters of public concern. (Reply 4.) Project Veritas contends that the Common Core curriculum and public education generally are public issues of national significance, and that the published video was the third of its kind and part of a series of publications offering political commentary on the Common Core education initiative. (Mot. at 5-6.)

While Plaintiff attests that she was only a sales consultant selling National Geographic materials with Cengage, that she had no position of any influence with Cengage, and that she was not in management or in a position that related to "common core" content in textbooks (Koerber Decl. ¶ 11), as set forth above in detail Plaintiff relayed her experience in giving presentations on the Common Core curriculum (of which National Geographic was a provider), including to Texas. Plaintiff states explicitly:

> "I did a big presentation yesterday for AP US History and the AP US History agenda was set, until Texas got upset about it and they wanted to have their founders – they wanted founders in it. And it's like – come on. The dead white guys did not create this country. It was a whole bunch of different kinds of people. And yes there were women, and yes there were people of color, and yes...you need to talk about them too. But they want to talk about those dead white guys." (Koerber Decl. ¶ 48 p. 5 l. 23-28.)

As one who presents Common Core curriculum to government agencies, in the hopes that the government agencies will adopt the Common Core curriculum (thereby purchasing the materials from Plaintiff, whose income was derived from commission and bonuses), Plaintiff's opinions as to the reaction of the government agencies to Common Core are of public interest. They also implicate conduct that could directly affect a large number of people beyond the litigants in this action. Through its journalistic endeavors, Defendant seeks to provide information to the public that may have an influential effect on whether school boards, cities, or states adopt the Common Core curriculum. Indeed, Defendant argues that "Plaintiff worked at Cengage, which 'through employees like Plaintiff, is engaged in the business of sales of educational materials to public entities and others" and that "[Cengage]'s profits rely upon States and other public and private entities 'adopting' its materials." (Mot. 6.)

Further, the speech at issue, uttered by one who makes presentations to public and private entities in the hopes that the Common Core curriculum will be adopted and purchased, involves statements or activity involving "a topic of widespread, public interest." (*Ibid.*) There is clear public interest in Common Core curriculum, and of the opinions of a Common Core public advocate as to the reasonableness or unreasonableness of the position of those who disagree with Common Core, specifically Texas. (*Nygard, Inc. v. Uusi-Kerttula* (2008) 159 Cal.App.4th 1027, 1042–1043; *Weinberg v. Feisel* (2003) 110 Cal.App.4th 1122, 1132–1133 [public interest not the same as mere curiosity but should be a matter of concern to a substantial number of people; there should be some degree of closeness between the challenged statements and the asserted public interest].) Defendant provided evidence that the adoption of Common Core curriculum generated a national debate, something unrefuted by Plaintiff. Plaintiff's statements themselves were included in one of three[1] investigative reports Defendant prepared on the issue of Common

[1] Arguably, if there was insufficient public interest in the first two Project Veritas Common Core reports, then there would not be a need for a third.

Core curriculum. The video report that included Koerber's statements also included interviews with public figures, including then-Republican Presidential candidates Donald Trump and Ted Cruz.

Indeed, Plaintiff discussed her experiences with marketing Common Core, and her opinions on the curriculum itself, in the interview in the belief that her statements would be provided to California's Attorney General. It is unrealistic to expect that the California Attorney General would be conducting research on something that is not actually something of widespread, public interest. That is, Plaintiff gave her opinions in the belief that she had useful information to offer for the California Attorney General.

To meet its threshold showing under the first prong of the anti-SLAPP analysis, defendant need not prove that the challenged activity is constitutionally protected. (*Haight Ashbury, supra,* 184 Cal.App.4th at p. 1548; *Scott v. Metabolife Internat., Inc.* (2004) 115 Cal.App.4th 404, 419-420 ["'The Legislature did not intend that . . . to invoke the special motion to strike the defendant must first establish her actions are constitutionally protected under the First Amendment as a matter of law'"].) Defendant need only show that the challenged activity comes within the scope of section 425.6, subdivision (e).

Defendant Project Veritas has made this showing, that the challenged activity comes within the scope of the anti-SLAPP statute. Therefore, the burden shifts to Plaintiff.

C. Step Two: Probability of Prevailing on the Merits

Where, as here, the moving party has successfully shifted the burden, the opposing party must demonstrate a probability of prevailing on the merits of the complaint. *(Equilon Enterprises, supra,* at p. 67; §425.16(b)(1).) "[A]n action may not be dismissed under this statute if the plaintiff has presented admissible evidence that, if believed by the trier of fact, would support a cause of action against the defendant." (*Taus v. Loftus* (2007) 40 Cal.4th 683, 729.) Although the plaintiff does not have to prove its case at this juncture, the "plaintiff must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88-89; *Zamos v. Stroud* (2004) 32 Cal.4th 958, 965.)

Plaintiff bears the burden of showing a probability of prevailing through admissible evidence. The plaintiff "cannot rely on the allegations of the complaint, but must produce evidence that would be admissible at trial. [Citation.]" (*Integrated Healthcare Holdings, Inc. v. Fitzgibbons* (2006) 140 Cal.App.4th 515, 527.) If the plaintiff does not demonstrate a probability of success on the merits, by competent, admissible evidence, or if the defendant shows that the plaintiff cannot prevail as a matter of law, the complaint must be stricken. (*Evans v. Unkow* (1995) 38 Cal.App.4th 1490, 1498.)

1. The Action is Barred by the Statute of Limitations

According to the record, the subject meeting occurred on November 11, 2015, and Plaintiff first learned of the recording and publication on January 21, 2016. (FAC ¶¶ 14-21; Verney Decl. Exhibit A.) Plaintiff filed her action on February 8, 2017, more than a year after the recording, and of the publication.

Penal Code § 632 is subject to a one-year statute of limitation. (Code of Civil Procedure § 340(a).) Therefore, Plaintiff's 15th and 17th causes of action, for invasion of privacy, are barred. While Plaintiff contends that Code of Civil Procedure § 334.1 provides for a two year statute of limitations, that statute pertains to "[a]n action for assault, battery, or injury to, or for the death of an individual caused by the wrongful act or neglect of another." The statute does not apply.

Plaintiff's remaining causes of action are also barred by Civil Code § 3225.3, the Uniform Single Publication Act. This statute prohibits a plaintiff from asserting more than one tort cause of action of any kind based upon an alleged defamation or invasion of privacy or any other tort, resulting from a publication. (*See Strick v. Superior Court* (1983) 143 Cal.App.3d 916, 924.)

It is Plaintiff's burden to provide admissible evidence as to facts that would warrant application of the "delayed discovery" rule. Plaintiff has not only done so, but Plaintiff alleges that she learned of the November 11, 2015 recording on January 21, 2016, i.e. the date of publication. (FAC ¶¶ 17-21; Verney Decl. ¶¶ 8-9.) Further, the delayed discovery rule pertains only to when the Plaintiff learned of a suspected wrong, not when Plaintiff learned who actually made the video recording. (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1110-11.) Finally, Plaintiff provides no factual support as to why she could not make the discovery sooner. Plaintiff has no admissible evidence that she could not, through exercise of reasonable diligence, discover that Defendant was behind the video. (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 807.)

The court finds that the entirety of the action is barred by the statute of limitations. In addition, the court finds that Plaintiff has failed to show, through admissible evidence, reasonable likelihood of prevailing on the merits of the causes of action as well.

2. Plaintiff Cannot Show Reasonable Likelihood of Prevailing on the Merits of the Fifteenth Cause of Action

The burden is on Plaintiff to show that her communication between her and Defendant was "confidential." (*Flanagan v. Flanagan* (2002) 27 Cal.4th 766, 774-776.)

In the seminal case of *Lieberman v. KCOP Television, Inc., supra,* 110 Cal. App. 4th 156, two reporters met a doctor at his clinic and secretly recorded their private consultations on audio and videotape. (*Id.* at 161–62.) Portions of the tapes were later broadcast in a segment called "Caught in the Act," which claimed the doctor prescribed Vicodin without conducting proper medical examinations. (*Id.* at 162.) The doctor brought suit under section 632 and argued, as Plaintiff does here, the illegal act of recording does not constitute protected conduct under the anti-SLAPP statute. (*Id.* at 165.) Concluding to the contrary, the court noted the statute covers "conduct in furtherance of the exercise" of free speech, and found the surreptitious recording—which it categorized as "newsgathering"—was conduct in furtherance of that right.

At this point in the proceedings, however, it is far from clear that Defendant's creation of the recording actually violated section 632, and unless the conduct conclusively is shown or admitted to be illegal, a defendant can still invoke the anti-SLAPP statute. (*Flatley v. Mauro* (2006), 39 Cal. 4th 299, 317.) In particular, the California Supreme Court held the statute may be invoked unless the conduct is "illegal as a matter of law," meaning the defendant "concedes" or "uncontroverted and conclusive evidence" establishes the speech or petitioning activity is illegal. (*Id.* at 320.) To find otherwise would eviscerate the anti-SLAPP statute's protections

because the plaintiff could preclude the statute's application simply by alleging criminal conduct by the defendant. As more fully explained below, section 632 outlaws only the surreptitious recording of "confidential communications," but a communication is not confidential if "made in a public gathering" or the parties reasonably may expect that it "may be overheard." (Penal Code §§ 632(a), (c)).

Further, the facts in *Wilkins v. National Broadcasting Company, Inc.* (1999) 71 Cal. App. 4th 1066 are remarkably similar to those in the instant matter. In that case, two reporters surreptitiously recorded a lunch meeting with two salesmen on "an outside patio table at a restaurant in Malibu." (Id. at 1072.) As in this matter, the lunch meeting was videotaped with hidden cameras, and NBC later broadcast brief excerpts of the videotape footage on its program *Dateline NBC* entitled "Hardcore Hustle." The "Hardcore Hustle" report had the first in a three-part Dateline NBC series about the "pay-per-call" industry.

The plaintiffs in *Wilkins* asserted claims virtually identical to the claims at issue here, for intrusion, unlawful recording of confidential communications (i.e. violation of Penal Code section 632), fraud, public disclosure of private facts, intentional infliction of emotional distress or negligent infliction of emotional distress, against National Broadcasting Company, Inc., and its producers (collectively referred to as NBC). The trial court granted summary judgment in favor of NBC. The trial court also denied the Plaintiffs' motion for a new trial and assessed discovery sanctions against them and their counsel. On appeal by the Plaintiffs, the Second District Court of Appeal affirmed the granting of summary judgment.

In light of that standard, Defendant's creation of the recording may or may not be criminal given the conversation took place at restaurant---not a dark, secluded spot inside of the restaurant, but outside, on the front patio--open to the public when other customers were present. Indeed, for many, a Starbucks Coffee shop is the quintessential "public place" where, for example, people who have met each other only online go to meet each other in person for the first time.

Further, despite Plaintiff's contentions that she believed the conversation was private, Plaintiff does not refuse the video evidence, of the interview (Verney Decl. Exh. A) which depicts people walking past the parties, there is background noise, and Plaintiff does raise her voice.

Because Plaintiff has failed to satisfy her burden of establishing that she would have a reasonable likelihood of prevailing on the merits, the court therefore GRANTS Defendant's anti-SLAPP motion, and strikes the 15th cause of action.

3. Plaintiff Cannot Show Reasonable Likelihood of Prevailing on the Merits of the Sixteenth Cause of Action

Plaintiff has failed to show the existence of a private right of action for a violation of Penal Code § 647(j). Further, given that this statute relates to conduct when a person "looks through a hole or opening" into various interior rooms (such as a bedroom, bathroom, or fitting room), Plaintiff has failed to demonstrate that a hidden camera recording a conversation occurring in public, on the exterior patio of a Starbucks Coffee shop, during daytime when the business is open to the public, falls within the meaning of the statute.

Because Plaintiff has failed to satisfy her burden of establishing that she would have a reasonable likelihood of prevailing on the merits, the court therefore GRANTS Defendant's anti-SLAPP motion, and strikes the 16th cause of action.

4. Plaintiff Cannot Show Reasonable Likelihood of Prevailing on the Merits of the Seventeenth Cause of Action

Plaintiff has failed to provide evidence to show that the conduct at issue here, of a hidden camera recording a conversation occurring in public, on the exterior patio of a Starbucks Coffee shop, during daytime when the business is open to the public, falls within the meaning of Civil Code § 1708.8. There is no admissible evidence of a trespass into the life of someone engaging in a personal or familial activity. Indeed, the subject conversation was not a private conversation with family members. Rather, at the time Plaintiff gave the interview, Plaintiff believed that her statements would be transmitted to then-Attorney General Kamala Harris, for research purposes. (FAC ¶¶ 14-15.)

Because Plaintiff has failed to satisfy her burden of establishing that she would have a reasonable likelihood of prevailing on the merits, the court therefore GRANTS Defendant's anti-SLAPP motion, and strikes the 17th cause of action.

5. Plaintiff Cannot Show Reasonable Likelihood of Prevailing on the Merits of the Eighteenth, Nineteenth, and Twentieth Causes of Action

The eighteenth, nineteenth, and twentieth causes of action attempt to assert claims based upon common law invasion of privacy.

In *Wilkins*, *supra*, the court discussed the California Supreme Court's analysis in *Shulman v. Group W Productions, Inc.* (1998), 18 Cal.4th 200, 230-232, 74 Cal.Rptr.2d 843, 955 P.2d 469, of the tort of intrusion: "Of the four privacy torts identified by Prosser, the tort of intrusion into private places, conversations or matter is perhaps the one that best captures the common understanding of an 'invasion of privacy.' It encompasses unconsented-to physical intrusion into the home, hospital room or other place the privacy of which is legally recognized, as well as unwarranted sensory intrusions such as eavesdropping, wiretapping, and visual or photographic spying. [Citation.]" It is in the intrusion cases that invasion of privacy is most clearly seen as an affront to individual dignity.

"[T]he action for intrusion has two elements: (1) intrusion into a private place, conversation or matter, (2) in a manner highly offensive to a reasonable person. [¶] . To prove actionable intrusion, the plaintiff must show the defendant penetrated some zone of physical or sensory privacy surroundings, or obtained unwanted access to data about, the plaintiff. The tort is proven only if the plaintiff had an objectively reasonable expectation of seclusion or solitude in the place, conversation or data source. [Citations.]"

Here, Plaintiff agreed to meet with interviewers on an exterior patio of the Starbucks Coffee in Woodland Hills, during business hours, and share her views on the Common Core curriculum. As noted above, Plaintiff made her statements under the belief that her comments would be transmitted to then-Attorney General Kamala Harris (albeit anonymously). Given that Plaintiff's

intent was to provide research material for California's Attorney General, there is no admissible evidence that any "private facts" were revealed. Perhaps Plaintiff believed her statements would be relayed to the Attorney General's office anonymously, but the statements nonetheless were intended to be relayed to California's Attorney General. Further, the subject matter, Common Core curriculum, as noted above is of legitimate public concern. (*Shulman, supra*, at p. 214.) By agreeing to provide her opinions regarding Common Core to the California Attorney General, Plaintiff concededly admits that her statements were of legitimate public concern, concern enough that the California Attorney General would be conducting research on the subject.

Plaintiff also failed to establish misappropriation. The First Amendment bars liability for the unauthorized use of an individual's name or likeness in expressive works that contribute truthful information to the public debate. (*Dora v. Frontline Video, Inc.* (1993) 15 Cal.App. 4th 532, 542; *Montana v. San Jose Mercury News, Inc.* (1995) 34 Cal.App.4th 790-797.) Here, Plaintiff provides no evidence of a benefit by Defendant to the use of Plaintiff's likeness. This is not a situation, as in *Montana*, where Joe Montana posters were sold; Defendant did not sell Koerber posters for profit. Rather, the videotaped information from Plaintiff was used as part of an investigative report, regarding Common Core curriculum. The interview was part of the story, but not the entirety of the story.

Finally, Plaintiff has failed to present admissible evidence of a disclosure of a fact about Plaintiff that was false and placed Plaintiff in a "false light." The video footage is of Plaintiff's statements. Presumably, Plaintiff meant to be truthful when she made her statements, given that her intent was to provide research information for California's Attorney General.

Plaintiff has failed to meet her burden of demonstrating any intrusion, or public disclosure of private facts, or that she would have a reasonable likelihood of prevailing on the merits of her invasion of privacy claims, the court therefore GRANTS Defendant's anti-SLAPP motion, and strikes the 18th, 19th, and 20th causes of action.

6. Plaintiff Cannot Show Reasonable Likelihood of Prevailing on the Merits of the Twenty-First Cause of Action

Under Civil Code § 3344(d), there is no statutory claim for misappropriation for the "use of a name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign." A misappropriation claim will not lie for the "[p]ublication of matters in the public interest, which rests on the right of the public to know and the freedom of the press to tell it." (*Montana, supra*, 34 Cal.App.4th at p. 793.)

Plaintiff not only has failed to provide admissible evidence to establish a prima facie case for misappropriation, but she has failed to provide any admissible evidence to establish a direct connection between the alleged use and a commercial purpose.

Because Plaintiff has failed to satisfy her burden of establishing that she would have a reasonable likelihood of prevailing on the merits, the court therefore GRANTS Defendant's anti-SLAPP motion, and strikes the 21st cause of action.

7. Plaintiff Cannot Show Reasonable Likelihood of Prevailing on the Merits of the Thirteenth Cause of Action

" 'The elements of a prima facie case for the tort of intentional infliction of emotional distress [are] . as follows: "(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard [for] the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct." ' [Citation.]" (*Miller v. National Broadcasting Co., supra*, 187 Cal.App.3d at p. 1487.)

As noted above, the act of filming an interview in a public place constituted neither an intrusion on Plaintiff's privacy, a violation of Penal Code § 632, or public disclosure of private facts. Plaintiff knew she was being interviewed, and believed that her comments would be transmitted to the California Attorney General for research purposes. Given that, and that California courts have found the legality of "undercover videotaping" for newsgathering purposes, Plaintiff has provided no admissible evidence indicating that she can establish that the conduct is so extreme and outrageous "as to exceed all bounds of that usually tolerated in a civilized society." (*Trerice v. Blue Cross of California* (1989) 209 Cal.App.3d 878, 883.)

Because Plaintiff has failed to satisfy her burden of establishing that she would have a reasonable likelihood of prevailing on the merits, the court therefore GRANTS Defendant's anti-SLAPP motion, and strikes the 13th cause of action.

8. Plaintiff Cannot Show Reasonable Likelihood of Prevailing on the Merits of the Twenty-Second Cause of Action

An essential element of a negligence claim is the existence of a legal duty to exercise due care. (*Wise v. Superior Court* (1990) 22 Cal.App.3d 1008, 1013.) Plaintiff has failed to provide any admissible evidence that would give rise to a duty of care owed by investigative journalists to Plaintiff.

Because Plaintiff has failed to satisfy her burden of establishing that she would have a reasonable likelihood of prevailing on the merits, the court therefore GRANTS Defendant's anti-SLAPP motion, and strikes the 22nd cause of action.

9. Plaintiff Cannot Show Reasonable Likelihood of Prevailing on the Merits of the Fourteenth Cause of Action

Plaintiff alleges a violation of Business & Professions Code § 17200, which prohibits unlawful, unfair, or fraudulent business practices. As noted above, Plaintiff has failed to provide admissible evidence establishing that Defendant's actions were unlawful. Plaintiff has also cannot establish fraud within the meaning of this consumer statute. Plaintiff has no admissible evidence that the publication is likely to mislead or deceive the public. *(Klein v. Earth Elements, Inc.* (1997) 59 Cal.App.4th 965, 970.)

Indeed, there is no evidence as to anything actually misleading about the publication; the publication consisted of raw video footage of Plaintiff speaking. As noted above, because Plaintiff believed that her statements would be forwarded to the California Attorney General, presumably Plaintiff spoke the truth.

Because Plaintiff has failed to satisfy her burden of establishing that she would have a reasonable likelihood of prevailing on the merits, the court therefore GRANTS Defendant's anti-SLAPP motion, and strikes the 14th cause of action.

10. Plaintiff Cannot Show Reasonable Likelihood of Prevailing on the Merits of the Twenty-Third Cause of Action

One of the elements of a claim for interference with prospective economic advantage is that Plaintiff establish that Defendant intended to disrupt an economic relationship, or knew that disruption of the relationship with certain or substantially certain to occur. (CACI 2202.) Further, the interfering conduct must be wrongful by some legal measure other than the fact of the interference itself. (*Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 393.)

Here, Plaintiff has no admissible evidence that Defendant engaged in any independently wrongful act. As noted above, there is an established body of California law upholding concealed videotaping of interviews to be used for newsgathering purposes. Plaintiff has no evidence of any independently wrongful act beyond the alleged interference itself.

Because Plaintiff has failed to satisfy her burden of establishing that she would have a reasonable likelihood of prevailing on the merits, the court therefore GRANTS Defendant's anti-SLAPP motion, and strikes the 23rd cause of action.

IV. ORDER

IT IS THEREFORE ORDERED that Project Veritas' Special Motion to Strike is GRANTED in its entirety. The court orders Plaintiff Kimberly Koerber's First Amended Complaint dismissed against Project Veritas with prejudice.