DEPARTMENT 61 LAW AND MOTION RULINGS

Case Number: BC660633 **Hearing Date:** August 30, 2017 **Dept:** 61

Defendants American Media, Inc., Radar Online, LLC, David Pecker, and Dylan Howard's Special Motion to Strike the Complaint is GRANTED.

Defendants may file a motion for attorneys' fees.

Facts

In this defamation case. Plaintiff Richard Simmons ("Simmons") alleges that in June 2016, defendants American Media, Inc., Radar Online, LLC, David Pecker, and Dylan Howard (collectively, "AMI") published an article stating that Simmons' withdrawal from public life was "due to him transitioning from a male to a female . . . ." (First Amended Complaint ("FAC") ¶ 25.) The articles, which appeared in the National Enquirer, were accompanied by photographs of Simmons from 2013 in costume as a female. (*Ibid*.)

The article was published on June 8, 2016 with the headline "Richard Simmons: He's Now a Woman!" (FAC ¶ 27.) The article also stated that Simmons has "undergone shocking sex surgery to change from a man to a woman," "was now living as a gal named Fiona," and has "slowly transformed into a female with breast implants, hormone treatments, and medical consultations on castration." (Complaint ¶ 27.)

The Complaint alleges that AMI knew that the information regarding Simmons' purported gender transformation were false. (FAC ¶ 29.)

Procedural History

Simmons filed his Complaint on May 8, 2017 and a First Amended Complaint (FAC) on June 7, 2017, alleging five causes of action:

1. Libel (Count I)
2. Libel (Count II)
3. Libel (Count III)
4. Libel (Count IV)
5. Invasion of Privacy – False Light

AMI filed its Special Motion to Strike on July 26, 2017. Simmons filed his Opposition on August 17, 2017. AMI filed its Reply on August 23, 2017.

I. REQUEST FOR JUDICIAL NOTICE

The court may take judicial notice of "official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States," "[r]ecords of (1) any court of this state or (2) any court of record of the United States or of any state of the United States," and "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (Evid. Code §452, subds. (c), (d), and (h).)

AMI requests that this court take judicial notice of the news articles at issue (Exhibits A through I) and photographs or websites (Exhibits J through U.) The court GRANTS the Motion as to Exihibts A through I and DENIES the request for judicial notice as to Exhibits J through U. Courts have taken judicial notice of the subject of the defamation lawsuit (See *Ferlauto v. Hamsher* (1999) 74 Cal.App.4th 1394, 1398, fn. 1.)
However, these documents and articles that are not the basis of the defamation lawsuit are not "facts and propositions that are not reasonably subject to dispute," nor are they "capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." The court will examine whether these documents are admissible as evidence.
Simmons requests that the court take judicial notice of an assortment of academic papers and news articles relating to transgender prejudice in the United States. The court DENIES this request for judicial notice for the same reasons as above, but will consider the documents as evidence in support of Simmons' Opposition.
The court GRANTS Simmons request for judicial notice of the following court documents attached as Exhibit E:

- Memorandum of law in Support of Plaintiffs Motion to Proceed in Anonymity, filed November 18, 2016 in *Jane Doe vs. Arrisi*, U.S. District Court for the District of New Jersey Case No. 3:16-8640.
- Declaration of Plaintiff Jane Doe in Support of Plaintiffs Motion to Proceed in Anonymity, filed November 18, 2016 in *Jane Doe vs. Arrisi*, U.S. District Court for the District of New Jersey Case No. 3:16-8640.
- Complaint, filed November 18, 2016 in *Jane Doe vs. Arrisi*, U.S. District Court for the District of New Jersey Case No. 3:16-8640.

II. OBJECTIONS

Simmons Objections

- Objections to Exhibits A through I are OVERRULED. These documents are attached to the FAC
- Objections to the Matthew Brown Declaration, the Eric Stahl Declaration, and Exhibits J though U are OVERRULED.

The court notes that Simmons objections fail to comply with the California Rules of Court because they do not set for the precise content of the objectionable statement and are not consecutively numbered. (Cal. Rules of Court Rule 3.1354, subd. (b).)
AMI Objections

- All Objections are OVERRULED

The court notes that both parties attempt to introduce evidence from the internet that is authenticated by law clerks who downloaded the information, and both parties object to each other's identically-authenticated evidence as lacking foundation. The court therefore overrules all objections.

III. SPECIAL MOTION TO STRIKE

In 1992 the Legislature enacted Code of Civil Procedure section 425.16 as a remedy for the "disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (Code Civ. Proc., §425.16, subd. (a); *Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 817.) The lawsuits are commonly referred to as "SLAPP" lawsuits, an acronym for "strategic lawsuit against public participation." (*Equilon Enterprises, LLC v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 57, fn. 1.) A defendant opposing a SLAPP claim may bring an "anti-SLAPP" special motion to strike any cause of action "arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue . . . ." (Code Civ. Proc., §425.16, subd. (b)(1).) An anti-SLAPP motion may be addressed to individual causes of action and need not be directed to the complaint as a whole. (*Shekhter v. Financial Indemnity Co.* (2001) 89 Cal.app.4th 141, 150.)

In ruling on an anti-SLAPP motion, a trial court uses a "summary-judgment-like procedure at any early stage of the litigation." (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 192.) This is a two-step process. First, the defendants must show that the acts of which the plaintiff complains were taken "in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue." (Code Civ. Proc., §425.16 subd. (b)(1).) Next, if the defendant carries that burden, the burden shifts to the plaintiff to demonstrate a probability of prevailing on the claim. (Code Civ. Proc., § 425.16 subd. (b)(3).)

In making both determinations the trial court considers "the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (Code Civ. Proc., §425.16, subd. (b)(2); *Equilon Enterprises*, *supra*, 29 Cal.4th at p. 67.)

A. PROTECTED ACTIVITY

The anti-SLAPP statute defines protected activities as:

> (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

(Code Civ. Proc., §425.16, subd. (e).)

Here, it is undisputed that because the underlying claims relate to a newspaper article regarding a public figure, Simmons, the basis for this action are "protected activities" under the anti-SLAPP statute. (See Opposition at pp. 4–5.)

B. PROBABILITY OF PREVAILING ON THE CLAIM

A plaintiff must "demonstrate that the complaint is both legally sufficient and supported by a prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." (*Matson v. Dvorak* (1995) 40 Cal.App.4th 539, 548.) A defendant can meet its

burden if it can establish that the plaintiff cannot overcome an affirmative defense. (*Birkner v. Lam* (2007) 156 Cal.App.4th 275 at 285.)

"[A] plaintiff cannot simply rely on his or her pleadings, even if verified. Rather, the plaintiff must adduce competent, admissible evidence." (*Grenier v. Taylor* (2015) 234 Cal.App.4th 471, 480.) A plaintiff bears the burden to "present competent, admissible facts in opposing the anti-SLAPP motion . . . ." (*Steed v. Department of Consumer Affairs* (2012) 204 Cal.App.4th 112, 124.) Where a party fails to present evidence, a court properly grants the anti-SLAPP motion and strikes the Complaint. (*Ibid*.)

"Legally sufficient" means that the cause of action would satisfy a demurrer. (*Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1421.) The evidentiary showing must be made by competent and admissible evidence. (*Morrow v. Los Angeles Unified School District* (2007) 149 Cal.App.4th 1424, 1444.) Proof, however, cannot be made by declaration based on information and belief. (*Evans v. Unkow* (1995) 38 Cal.App.4th 1490, 1497–1498.) The question is whether the plaintiff has presented evidence in opposition to the defendant's motion that, if believed by the trier of fact, is sufficient to support a judgment in the plaintiff's favor. (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 965.)

IV. First through Fourth Causes of Action – Defamation Claims

"Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." (Civ. Code, § 45.)

"A libel which is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact, is said to be a libel on its face. Defamatory language not libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a proximate result thereof. Special damage is defined in Section 48a of this code." (Civ. Code, § 45a.)

"Defamation is an invasion of the interest in reputation. The tort involves the intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or which causes special damage." (*Smith v. Maldonado* ("*Smith*") (1999) 72 Cal.App.4th 637, 645.)

As an initial matter, AMI argues that with respect to the defamation and libel claims, Simmons cannot show a probability of prevailing under a special damages theory. (anti-SLAPP at pp. 24–25.) Simmons introduces no evidence of any "special damages" from the alleged defamation, and appears to concede in his Opposition that he did not suffer any special damages, arguing only that he need not prove special damages for his claims to survive this motion. (Opposition at p. 13.) Accordingly, the court will consider only whether Simmons can prevail on his defamation claims under the theory that the false statements, specifically, that he was undergoing a sex change operation and was a transgender person, have a "natural tendency to injure" his reputation, and are thus libel per se.

The court notes that "[t]he question [of] whether a statement is reasonably susceptible to a defamatory interpretation is a question of law for the trial court. Only once the court has determined that a statement is reasonably susceptible to such a defamatory interpretation does it become a question for the trier of fact whether or not it was so understood." (*Smith*, *supra*, 72

Cal.App.4th at p. 647.) Accordingly, this court finds that it is properly the role of the court to determine, as a matter of law, whether the alleged statements are "reasonably susceptible to a defamatory interpretation."

AMI argues that as a matter of law, misidentifying a party as transgender has no "natural tendency to injure" one's reputation, pointing to case law holding that misidentification of one's race or misidentification of one's medical conditions or sexuality have no such "natural tendency." (anti-SLAPP at pp. 19–24.)

The court agrees with AMI that false speech is subject to some First Amendment protections. The US Supreme Court has rejected a categorical rule that "false statements receive no First Amendment protection." (*U.S. v. Alvarez* (2012) 567 U.S. 709, 719.)

The court agrees with Simmons that a plaintiff in a defamation suit need not introduce any evidence of a compensable injury to one's reputation, and may proceed "without regard to measuring the effect the falsehood may have had upon a plaintiff's reputation," but instead only as to "'personal humiliation, and mental anguish and suffering' as examples of injuries which might be compensated consistently with the Constitution upon a showing of fault." (*Time, Inc. v. Firestone* ("*Firestone*") (1976) 424 U.S. 448, 460.)

However, the court also agrees with AMI that although a plaintiff proceeding in a defamation case under a "libel per se" theory need not show actual damages to reputation, the plaintiff may only recover damages for, inter alia, personal humiliation or mental anguish if the underlying statements themselves have a "natural tendency to injure" one's reputation. (See Reply at pp. 8–10.)

For example, in *Jackson v. Mayweather* ("*Mayweather*") (2017) 10 Cal.App.5th 1240, 1262, the court found that even if famed boxer Floyd Mayweather made a false statement regarding the reasons he broke up with a girlfriend (or who broke up with whom to begin with), a merely false statement is not enough, and "more is required." Specifically, the Court of Appeal held that "[o]n its face, the allegedly false part of the posts (the cause of the breakup) did not expose Jackson to contempt, ridicule or other reputational injury. [Citations.] Indeed, the evidence Jackson presented of negative public reaction and the emotional distress she suffered as a result of Mayweather's May 1, 2014 posts focused on the abortion of the twin fetuses, not Mayweather's role in, or reasons for, ending the couple's relationship. The May 1, 2014 posts do not support Jackson's claim for defamation." (*Ibid*.)

Accordingly, although it is true that Simmons would not need to introduce any evidence of reputational damage to proceed in a defamation cause of action seeking only the emotional damages caused by the allegedly defamatory statement, Simmons must be able to show, as a threshold matter, that the allegedly defamatory statement *on its face* was the type of statement that would "naturally tend" to injure one's reputation. The mere fact that Simmons may have suffered emotional distress because of the false statements is insufficient by itself.

Therefore, the court now arrives at the heart of this issue: does falsely reporting that a person is transgender have a natural tendency to injury one's reputation? The court notes that this appears to be an issue of first impression in California, and will therefore look to persuasive holdings both inside and outside of California to aid in its analysis of this novel legal issue.

This court finds that because courts have long held that a misidentification of certain immutable characteristics do not naturally tend to injure one's reputation, even if there is a sizeable portion of

the population who hold prejudices against those characteristics, misidentification of a person as transgender is not actionable defamation absent special damages.

Courts have held that "[t]he nature of the public reaction to political labels as affected by variations in time, place and circumstance is a matter of more than historical interest in its relation to the law of defamation." (*Washburn v. Wright* (1968) 261 Cal.App.2d 789, 796.)

For similar reasons, courts have held that changes in the public's attitude towards certain medical conditions, such as cancer, makes a false statement about such a medical condition no longer defamatory per se.

> In this modern era, with its greater medical knowledge and societal concern with health and medical care, diseases and medical treatment are discussed candidly and freely in the home, in social circles, and in the media. For example, a malignancy suffered by the wife of the President of the United States, by a prominent United States senator, or by a movie star is front page public news. No one today treats such a communication as damaging to the esteem or reputation of the unfortunate victim in the community. The public's reaction today to a victim of cancer is usually one of sympathy rather than scorn, support and not rejection. Persons afflicted with cancer or other serious diseases, whether debilitating only or ultimately fatal, frequently carry on their personal or professional activities in today's enlightened world in normal fashion and without any deprecatory reflection whatsoever. Defamatory statements are those which discredit or debase a person's good name and standing or hold him up to public ridicule, hatred or contempt. [Citation.] The incurrence of a crippling or fatal illness is indeed unfortunate but, unless the disease is loathsome, it does not tarnish the victim's reputation or cause others to spurn him.

(*Chuy v. Philadelphia Eagles Football Club* (3d Cir. 1979) 595 F.2d 1265, 1281–1282.)

Although not binding on this court, the court notes as significant that as early as 1977, courts in Kansas had recognized that changing social views towards natural children had rendered a false statement that one is illegitimate no longer defamatory per se. (See *Bradshaw v. Swagerty* (Kan. Ct. App. 1977) 1 Kan.App.2d 213, 215 ["an imputation of bastardy or illegitimacy is generally held not slanderous per se, although it might be actionable where it affected property rights acquired through inheritance."].)

In 1917, courts once held that misidentification of one's race was defamatory per se, holding that "the authorities establish that the publication of a writing containing such a statement in respect to a white man is libelous per se, at least in a community in which marked social differences between the races are established by law or custom." (*Stultz v. Cousins* (6th Cir. 1917) 242 F. 794, 797.) In 1957, the Supreme Court of South Carolina held that "to publish in a newspaper of a white woman that she is a Negro imputes no mental, moral or physical fault for which she may justly be held accountable to public opinion, yet in view of the social habits and customs deep-rooted in this State, such publication is calculated to affect her standing in society and to injure her in the estimation of her friends and acquaintances. That such a publication is libelous per se is supported by the very great weight of authority." (*Bowen v. Independent Pub. Co.* (1957) 230 S.C. 509, 513.)

However, modern courts have rejected such statements based on a misidentification of race as

libelous per se. A Georgia appellate court held in 1989 that a statement that a funeral home run by a white family had "primarily black clientele" was not libelous per se, noting that "'[i]t would ignore reality to suggest that racial and ethnic prejudices do not exist or that all manifestations of those prejudices have been eliminated.... The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.' [Citation.]" (*Thomason v. Times-Journal, Inc.* (Ga. Ct. App. 1989) 190 Ga.App. 601, 603.)

Courts have also held that false imputations of homosexuality are no longer libelous or defamatory per se. California federal courts have held that "[w]hile statements regarding plaintiff's possible falsification of a workers' compensation claim and his purported professional incompetence implicate the aforementioned slander per se prong and thus damages are presumed, the statement as to plaintiff's homosexuality would require a showing of actual damages. Because plaintiff has made no such showing, the court will focus on the first two alleged statements." (*Greenly v. Sara Lee Corp.* ("*Greenly*") (E.D. Cal., Apr. 30, 2008, No. CIV S-06-1775 WBSEFB) 2008 WL 1925230, at *8.)

The court in *Greenly* cited to *Albright v. Morton* ("*Albright*") (D. Mass. 2004) 321 F.Supp.2d 130, 134 in support of its conclusion that an allegation of defamation for a false statement regarding homosexuality requires allegations or proof of special damages. In *Albright*, the court held that "[l]ooking at any 'considerable and respectable class of the community' in this day and age, I cannot conclude that identifying someone as a homosexual discredits him, that the statement fits within the category of defamation per se." (*Albright*, *supra*, 321 F.Supp.2d at p. 136.) The court reasoned that "the large majority of the courts that have found an accusation of homosexuality to be defamatory per se emphasized the fact that such a statement imputed criminal conduct," and because of the Supreme Court's ruling in *Lawrence v. Texas* (2003) 539 U.S. 558, holding that statutes criminalizing homosexual conduct violate the Due Process Clause of the US Constitution, such a rationale is no longer applicable. (*Ibid*.) The Court held that because the *Lawrence* decision found that criminalizing homosexual conduct "'demeans the lives of homosexual persons,' . . . Continuing to characterize the identification of someone as a homosexual defamation *per se* has the same effect." (*Id*. at p. 137.)

The court in *Albright* also rejected arguments that because a portion of the community feels that homosexuals are less reputable than heterosexuals, a misidentification is libelous per se. (*Albright*, *supra*, 321 F.Supp.2d at pp. 137–138.) The court reasoned that although Massachusetts's Supreme Court ruled in its landmark decision that homosexual marriage was legal that "a segment of the community views homosexuals as immoral, it also concludes that courts should not, directly or indirectly, give effect to these prejudices. If this Court were to agree that calling someone a homosexual is defamatory per se—it would, in effect, validate that sentiment and legitimize relegating homosexuals to second-class status." (*Ibid*.)

Here, the court notes that neither a medical condition, nor race, nor sexuality are a perfect analogy to the issue we address today, but acknowledges that being transgender shares several important characteristics with all three. Being transgender is an issue that often (although not always) requires a medical diagnosis and medical intervention. Like race, being transgender is an immutable characteristic. Although there is no connection between homosexuality and being transgender, both characteristics relate to sex and gender.

AMI also points out that in California, discrimination against a person on the basis of their "gender

identity and gender expression" is expressly illegal. (see Gov't Code §§ 1955, 12940, 12926, subd. (r)(2)(C)(2).) California has also banned the "trans panic" defense in homicide cases. (Penal code § 192, subd. (f) ["For purposes of determining sudden quarrel or heat of passion pursuant to subdivision (a), the provocation was not objectively reasonable if it resulted from the discovery of, knowledge about, or potential disclosure of the victim's actual or perceived gender, gender identity, gender expression, or sexual orientation, including under circumstances in which the victim made an unwanted nonforcible romantic or sexual advance towards the defendant, or if the defendant and victim dated or had a romantic or sexual relationship."].)

The similarities between being transgender and the above discussed characteristics compel this court to conclude that being misidentified as transgender is not libelous per se because such an identification does not expose "any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." While, as a practical matter, the characteristic may be held in contempt by a portion of the population, the court will not validate those prejudices by legally recognizing them.

Simmons argues that fundamental principles underpinning defamation provide that "an unprivileged falsehood need not entail universal hatred to constitute a cause of action. No falsehood is thought about or even known by all the world. No conduct is hated by all." (*Peck v. Tribune Co.* ("*Peck*") (1909) 214 U.S. 185, 190.) In *Peck*, plaintiff's picture was used in an advertisement that stated "'[a]fter years of constant use of your Pure Malt Whisky, both by myself and as given to patients in my capacity as nurse, I have no hesitation in recommending it as the very best tonic and stimulant for all local and run-down conditions.'" (*Id*. at p. 188.) Plaintiff alleges that she was not a nurse, and in fact was "a total abstainer from whisky and all spirituous liquors." Justice Holmes held that even though there was no general consensus that to be a whisky drinker was wrong, "[i]f the advertisement obviously would hurt the plaintiff in the estimation of an important and respectable part of the community, liability is not a question of a majority vote." (*Ibid*.) Justice Holmes therefore held that "[i]t seems to us impossible to say that the obvious tendency of what is imputed to the plaintiff by this advertisement is not seriously to hurt her standing with a considerable and respectable class in the community. Therefore it was the plaintiff's right to prove her case and go to the jury, and the defendant would have got all that it could ask if it had been permitted to persuade them, if it could, to take a contrary view." (*Id*. at p. 190.)

Other similarly well-respected jurists have held that simply because a mischaracterization *shouldn't* be considered wrong, the existence of a large percentage of the population who does, in fact, consider the characterization to be wrong is sufficient to make a statement libelous per se. Justice Learned Hand held that falsely calling somebody a "communist" in 1947 was libelous per se, holding:

> The interest at stake in all defamation is concededly the reputation of the person assailed; and any moral obliquity of the opinions of those in whose minds the words might lessen that reputation, would normally be relevant only in mitigation of damages. A man may value his reputation even among those who do not embrace the prevailing moral standards; and it would seem that the jury should be allowed to appraise how far he should be indemnified for the disesteem of such persons.
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> . . .

> [I]n New York if the exception covers more than such a case, it does not go far enough to excuse the utterance at bar. [Citation.], following the old case of Moffatt v. Cauldwell, 3 Hun 26, 5 T.& C. 256, held that the imputation of extreme poverty might be actionable; although certainly 'right-thinking' people ought not shun, or despise, or otherwise condemn one because he is poor.
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> . . .
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> We do not believe, therefore, that we need say whether 'right-thinking' people would harbor similar feelings toward a lawyer, because he had been an agent for the Communist Party, or was a sympathizer with its aims and means. It is enough if there be some, as there certainly are, who would feel so, even though they would be 'wrong-thinking' people if they did.

(*Grant v. Reader's Digest Ass'n, Inc.* (2d Cir. 1945) 151 F.2d 733, 735.)

In *Gallo v. Alitalia-Linee Aeree Italiane-Societa per Azioni* (S.D.N.Y. 2008) 585 F.Supp.2d 520, 549–550, the court held:

> I therefore agree with these New York courts who have added "imputations of homosexuality" to the list of these types of statements that are per se slanderous. I note that no New York court (certainly not the New York Court of Appeals) has held that imputations of homosexuality do not qualify as per se slanderous. This Court's decision to include homosexuality in the slander per se category should not be interpreted as endorsing prejudicial views against gays and lesbians. [Citation.] Rather, this decision is based on the fact that the prejudice gays and lesbians experience is real and sufficiently widespread so that it would be premature to declare victory. If the degree of this widespread prejudice disappears, this Court welcomes the red flag that will attach to this decision.

Accordingly, Simmons' central argument is that because there is widespread prejudice against transgender individuals in the United States, a false statement that one is transgender is libelous per se even if more "enlightened" citizens would not consider being transgender to be immoral or wrong.

Simmons attempts to distinguish *Greenly* because it was a slander, not a libel, case, and that the basis of the decision was that because homosexuality is no longer criminalized, it doesn't "fit" into any of the enumerated "slander per se" definitions.

In California, a statement is "slanderous per se" if it:

1. Charges any person with crime, or with having been indicted, convicted, or punished for crime;

2. Imputes in him the present existence of an infectious, contagious, or loathsome disease;

3. Tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other

occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits;

4. Imputes to him impotence or a want of chastity; or

5. Which, by natural consequence, causes actual damage.

(Civ. Code, § 46.)

The court recognizes that a claim for libel and a claim for slander are different and distinct, but doos not agree with Simmons that a holding that a statement is not "slanderous per se" is "a far less dramatic proposition" than whether a statement is libelous per se. (See Opposition at p. 10.) While "slander per se" includes five enumerated statements, the third formation of "slander per se" is nearly identical in function to the definition of libel per se, that is, a statement which "exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation."

Simmons cites to *Kaeo-Tomaselli v. Butts* ("*Kaeo-Tomaselli*") (D. Hawaii, Nov. 30, 2012, No. CIV. 11-00670 LEK) 2012 WL 5996436 for the proposition that it is the only published case addressing whether misidentifying a person as transgender is libelous per se. (Opposition at p. 11.) However, the court in *Kaeo-Tomaselli* merely recited a prior ruling holding that a statement that plaintiff was "a sex change" stated a slander cause of action. (*Ibid*. at p. 3.) The issue of whether such a statement was slander per se was not addressed in the published ruling, and noted that "[d]efendants' Motion does not address the Court's previous ruling that Plaintiff properly stated both §1983 and slander claims." (*Id*. at p. 4.)

Accordingly, it is unclear whether the court found that the statement was slander per se, or whether the complaint at issue properly pleaded special damages. The court notes that the statement that plaintiff was "a sex change" was made by the manager of what appears to be a halfway house, who would not accept plaintiff because she perceived her to be transgender. Accordingly, it seems likely that the court found that the statement was actionable slander because plaintiff suffered special damages from the slander. Regardless, it is unclear from the ruling why the court found the slander cause of action to be properly pleaded.

The court does not mean to imply in its holding that the difficulties and bigotry facing transgender people is minimal or nonexistent. To the contrary, the court has reviewed the evidence submitted by Simmons regarding the deplorable statistics relating to transgender people. (See, inter alia, Scott Decl. Ex. D.)

However, this court finds that even if there is a sizeable portion of the population who would view being transgender as negative, the court should not, in the words of our cousins in Massachusetts, "directly or indirectly, give effect to these prejudices." (*Albright*, *supra*, 321 F.Supp.2d at p. 137–138.) Similar to the that court's reasoning regarding the prejudices facing homosexuals, "[i]f this Court were to agree that calling someone" transgender "is defamatory per se—it would, in effect, validate that sentiment and legitimize relegating [transgender people] to second-class status." Such a finding is consistent with holdings that misidentifying one's race, medical condition, or sexual orientation is not libelous per se

simply because there exist a portion of the population that expresses prejudice towards those groups.

Accordingly, the court finds that the statements that are the basis for the four libel causes of action are not libelous per se. Because Simmons has failed to meet his evidentiary burden of showing any special damages from the statements, the Special Motion to Strike is GRANTED as to the First through Fourth Causes of Action.

V. Fifth Cause of Action – False Light

"When a false light claim is coupled with a defamation claim, the false light claim is essentially superfluous, and stands or falls on whether it meets the same requirements as the defamation cause of action." (*Eisenberg v. Alameda Newspapers, Inc.* (1999) 74 Cal.App.4th 1359, 1385, fn. 13.)

Simmons argues that it is possible for a defamation claim to fail and a false light claim to survive. (Opposition at pp. 13–14.)

Courts have previously held that "In order to be actionable, the false light in which the plaintiff is placed must be highly offensive to a reasonable person. [Citation.] Although it is not necessary that the plaintiff be defamed, publicity placing one in a highly offensive false light will in most cases be defamatory as well. The substantial overlap between the two torts raised from the outset the question of the extent to which the restrictions and limitations on defamation actions would be applicable to actions for false light invasion of privacy." (*Fellows v. National Enquirer, Inc.* ("*Fellows*") (1986) 42 Cal.3d 234, 238–239.) However, the court in *Fellows* also noted that "[t]he overwhelming majority of decisions in other jurisdictions enforce defamation restrictions in actions for false light invasion of privacy when such actions are based on a defamatory publication." (*Id*. at p. 245.) The court ultimately held that "when a false light action is based on a publication that is defamatory within the meaning of [Civil Code section 45a, requiring special damages for language that is defamatory only by reference to extrinsic facts], pleading and proof of special damages are required." (*Id*. at p. 236.)

Here, for the same reasons as above, the court finds that the statements misidentifying Simmons as transgender do not cause any reputational damages by themselves, and would therefore require the pleading — or in the instant case on a Special Motion to Strike, evidentiary support — of special damages. Because Simmons has failed to introduce any evidence of special damages, the court GRANTS the Special Motion to Strike as to the Fifth Cause of Action.

C. ATTORNEYS' FEES

Code Civ. Proc. section 425.16, subd. (c) states "[i]f the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5." "The party prevailing on a special motion to strike may seek an attorney fee award through three different avenues: simultaneously with litigating the special motion to strike; by a subsequent noticed motion, as was the case here; or as part of a cost memorandum." (*Carpenter v. Jack In The Box Corp.* (2007) 151 Cal.App.4th 454, 461.)

Here, AMI is the prevailing party. AMI may file a Motion for Attorneys' Fees.
