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SUPERIOR COURT, STATE OF CALIFORNIA

COUNTY OF ORANGE, CENTRAL JUSTICE CENTER

JANETTE MANDERSON, in her individual capacity, and in her capacity as: the attorney-in-fact for CATHERYN SMITH a.k.a. KAY SMITH; The Trustee of THE CHUCK SMITH 1990 FAMILY TRUST; and the personal representative of the ESTATE OF CHARLES W. SMITH; and THE WORD FOR TODAY, INC., a California non-profit religious corporation,

Petitioners,

v.

CALVARY CHAPEL COSTA MESA, a California non-profit religious corporation; and CALVARY CHAPEL COSTA MESA in and through its Officers and Directors individually; BRIAN BRODERSON, President and Chairman of the Board; MICHAEL MUGOVERO, Secretary and Director; Roger Wing, Assistant Secretary; DAVID EASON, Director; JOE DYER, Director; DOUG FINLAYSON, Director; PHIL TWENTE, Director; BOB WOLF, Director; CALVARY CHAPEL COSTA MESA d/b/a The Word for Today; and DOES 1 through 50, inclusive,

Respondents.

Case No.: 30-2014-00747427-CU-PT-CJC
Assigned to: Hon. Kirk Nakamura

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' SPECIAL MOTION TO STRIKE PLAINTIFFS' FIRST AMENDED COMPLAINT, PURSUANT TO CCP § 425.16

Date: June 25, 2015
Time: 2:00 p.m.
Dept.: C15

RESERVATION NO. 72162848

Complaint Filed: September 26, 2014
Trial Date: none set

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Defendants Calvary Chapel of Costa Mesa dba The Word for Today (erroneously sued as Calvary Chapel Costa Mesa) (the "Church" or "CCCM")[1], Brian Brodersen (erroneously sued as Brian Broderson) ("Brodersen"), Michael Mugavero (erroneously sued as Michael Mugovero ("Mugavero"), Roger Wing ("Wing"), David Eason ("Eason"), Joe Dyer ("Dyer"), Doug Finlayson ("Finlayson"), Phil Twente ("Twente"), Bob Wolf ("Wolf"), John Jackson (DOE 1), and Laura Jackson (DOE 2) (collectively, "Defendants") hereby submit the following points and authorities in support of Defendants' special motion to strike plaintiffs Janette Manderson ("Manderson"), in her individual capacity, as attorney-in-fact for Catheryn Smith a.k.a. Kay Smith, as Trustee of the Chuck Smith 1990 Family Trust (the "Trust"), and as the personal representative of the Estate of Charles W. Smith (the "Estate"); and The Word for Today, Inc.'s ("TWFT") (collectively, "Plaintiffs") First Amended Complaint ("FAC"), pursuant to Code of Civil Procedure, section 425.16:

I. INTRODUCTION

The FAC alleges seven causes of action arising out of Defendants' allegedly wrongful publication and radio broadcast of recorded sermons and other pastoral materials created by long-time Senior Pastor of the Church, Chuck Smith, within the course and scope of his employment at the Church. The sermons are broadcast over the Church's radio network as a part of its outreach and evangelism efforts. The broadcasts therefore amount to constitutionally protected religious speech on the part of the Defendants. Plaintiff TWFT alleges that it is the rightful owner of the intellectual property at issue, and that Defendants' broadcasts of the materials infringe TWFT's copyrights; Defendants deny TWFT's ownership claim. However, the federal Copyright Act, which preempts all state law claims to the ownership of copyrighted materials, provides that exclusive jurisdiction over copyright claims lies in the federal courts. Therefore, TWFT cannot prevail on any of its seven causes of action, as the state court lacks jurisdiction to grant it relief.

In addition, the FAC alleges two causes of action based on Defendants' alleged misappropriation of funds that rightfully belong to Chuck Smith's widow, Catheryn Smith.

[1] The Church was erroneously sued as *both* Calvary Chapel Costa Mesa *and* Calvary Chapel Costa Mesa d/b/a The Word for Today. However, The Word for Today is a registered fictitious business name of Calvary Chapel of Costa Mesa, not a separate legal entity.

Plaintiffs allege that Defendants withheld these funds with the intention of depriving Ms. Smith of the financial means to challenge Defendants' alleged copyright infringement. Therefore, by Plaintiffs' own allegation, the seventh and eighth causes of action arise out of conduct in furtherance of Defendants' continued broadcast of the recorded sermons. However, these causes of action are not brought by Catheryn Smith herself, but rather by her daughter, Plaintiff Manderson. Because Manderson lacks standing to pursue claims that belong to her mother, these causes of action cannot succeed on the merits. Moreover, even if Catheryn Smith were properly a party, the indisputable evidence shows that she has received all funds to which she is legally entitled.

For all of these reasons, and those that follow, Defendants respectfully request that the court enter an order striking the FAC in its entirety, pursuant to Code of Civil Procedure §425.16.

II. SUMMARY OF RELEVANT FACTS

A. The Parties

Plaintiff Janette Manderson is the eldest daughter of Catheryn and Chuck Smith, the attorney-in-fact for Catheryn Smith, the trustee of the Trust, and executrix of the estate of Chuck Smith, who passed away on October 3, 2013. (FAC, ¶1.) Plaintiff TWFT is a non-profit religious corporation that was incorporated by Chuck Smith and his brother, Paul, in 1978. (FAC, ¶4.) Manderson is also a member of the Board of Directors of TWFT.

Defendant CCCM is a non-profit religious corporation which operates under the fictitious name of The Word for Today. (FAC, ¶5.) Defendants Brodersen, Mugavero, Wing, Eason, Dyer, Finlayson, Twente, Wolf, John Jackson, and Laura Jackson are directors, officers, or employees of the Church. (FAC, ¶6.)

B. The Intellectual Property at Issue

Chuck Smith was hired by the Church as Senior Pastor in November 1965. (FAC, ¶13.) Over the forty-eight years that Chuck Smith was Senior Pastor, he delivered innumerable sermons and pastoral messages to the congregation at the Church and at pastoral conferences, and made several presentations at Christian conferences, events, and even during trips to the Holy Land. (FAC, ¶14.) Pastor Smith's teachings were captured or recorded in various forms of media, and often re-broadcast over television, radio, or internet. (*Ibid.*) He also wrote several books, outlines, pamphlets, and even his own study Bible. (*Ibid.*)

For over 20 years, the Church has been broadcasting Pastor Smith's pre-recorded sermons on a radio program called The Word for Today. (Wing Decl., ¶3.) The Word for Today is aired over the Church's radio station, KWVE. (*Ibid.*) The Church also broadcasts other Gospel programs and pastoral messages, all as part of its outreach and evangelism efforts, through which it reaches believers throughout the world. (*Ibid.*) The Church's broadcast division has never been for-profit; in fact, many of the recorded broadcasts are made available for download free of charge. (Wing Decl., ¶4.) The broadcasts serve a solely religious and community service-based purpose. (*Ibid.*)

Plaintiffs implicitly concede the sermons created by Pastor Smith in the course and scope of his employment belonged to the Church under the work for hire doctrine. On February 12, 1998, however, Plaintiffs contend the Church executed a resolution transferring all rights to and interests in Chuck Smith's writings and tapes to TWFT. (FAC ¶21, Exh. 1.) Defendants contest the validity of the 1998 transfer, as evidenced by the Church's June 23, 2009 resolution rescinding the transfer. (See FAC ¶30.) Nevertheless, TFWT alleges it is currently the sole owner of all copyrighted materials created by Chuck Smith. Defendants deny this allegation and maintain that the Church owns all materials created in the course and scope of Chuck Smith's employment at the Church.

C. <u>The Life Insurance and Annuity Plans</u>

In or about 1997, Chuck Smith purchased a life insurance policy on his own life. (Dyer Decl., Exh. B.) The plan included a $1 million guaranteed death benefit. (*Ibid.*) On or about September 27, 2006, Chuck Smith executed a "Request for Change of Beneficiary Form," which designated CCCM as the sole beneficiary of the life insurance plan. (*Ibid.*) Catheryn Smith also signed the change of beneficiary form the same day, as may have been required by community property law. (*Ibid.*) Thus, since 2006, CCCM has been the sole and rightful owner of any and all benefits under the life insurance plan.

In or about 1997, CCCM purchased an annuity plan for the benefit of Chuck and Catheryn Smith. (Dyer Decl., ¶3, Exh. A.) The plan paid a monthly premium to the Smiths for the remainder of Chuck Smith's life. (Dyer Decl., ¶4.) Unfortunately, Pastor Smith died in October 2013. (FAC, ¶3.) Shortly after Pastor Smith's death, in November 2013, the Church, which had purchased the annuity, received a transfer of benefits form from the issuer of the annuity, Canada Life. (Mugavero Decl., ¶3.) Defendant Mugavero forwarded the transfer of benefits forms to Catheryn Smith's financial advisor, Rick Fromm, so that the benefits could be fully transferred to Ms. Smith. (*Ibid.*)

In or about January 2014, CCCM received a follow up from Canada Life, stating that the transfer of benefits had not been completed. (Dyer Decl., ¶4.) Defendant Dyer contacted Plaintiff Manderson and assisted her in completing the transfer of benefits forms. (*Ibid.*) In April 2014, Dyer received a voicemail from Canada Life, stating that all forms had been received, but that a box had been marked on the forms indicating that CCCM would still be responsible for withholding income taxes from each of the benefits payments. (Dyer Decl., ¶5.) In order to remove the Church from the role of middle man, Defendants completed a form which transferred full ownership of the annuity to Catheryn Smith. (*Ibid.*) This form was mailed to Manderson for her mother's signature. (*Ibid.*) Thereafter, Dyer confirmed with Canada Life that all funds owed to Catheryn Smith, including all payments in arrears, in a total amount of $66,666.64, were wired to Ms. Smith's account on May 27, 2014. (Dyer Decl., ¶6.) Defendants no longer have any ownership or control over the annuity plan or its benefits, and to Defendants' knowledge, all funds owed have been paid to Catheryn Smith.

III. <u>THE ANTI-SLAPP REMEDY</u>

A defendant may file a special motion to strike at any time within sixty days of service of a plaintiff's complaint. (Code Civ. Proc. §425.16(f).) Moreover, amending the complaint "reopens" the time period for an anti-SLAPP motion. The sixty-day period for filing the motion runs from service of the most recent amended complaint, *not* from the original complaint. (*Country Side Villas Homeowners Ass'n v. Ivie* (2011) 193 Cal.App.4th 1110, 1116.)

The anti-SLAPP statute protects individuals who exercise their constitutionally protected rights of petition or free speech from the burdens of meritless and retaliatory litigation at an early stage in the proceedings by subjecting these lawsuits to a special motion to strike. (Code Civ. Proc. §425.16(b)); *Dixon v. Superior Court* (1994) 30 Cal.App.4th 733, 741.) To achieve its goal, the statute is to be "construed broadly." (Code Civ. Proc. §425.16(a).) In keeping with this mandate, the Supreme Court has held that the anti-SLAPP statute is not limited to any particular cause of action. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.) Rather, the determining factor in deciding whether the anti-SLAPP statute applies is whether or not the complaint arose out of the defendant's protected speech. (*Ibid.*)

The anti-SLAPP statute involves a two-step process for determining whether a claim is subject to being stricken. In the first step, the defendant bringing the anti-SLAPP motion must make a prima facie showing that the plaintiff's suit is subject to section 425.16 by showing the defendant's challenged acts were taken in furtherance of his or her constitutional rights of petition or free speech in connection with a public issue, as defined by the statute. (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 733.)

Once the defendant has established the plaintiff's claims arise out of protected activities, the burden shifts to the plaintiff to establish the "probability" that he will prevail on his claims against the defendants. (Code Civ. Proc. §425.16(c); Code Civ. Proc., §425.16(b)(1); *Navellier v. Sletten, supra*, 29 Cal.4th at pp. 88-89.) To establish a probability of prevailing, the plaintiff must show that "the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment." (*Id.*; see also *Premier Med. Mgmt. Systems, Inc. v. California Ins. Guar. Ass'n* (2006) 136 Cal.App.4th 464, 476.) Averments on information and belief are insufficient. (*Evans v. Unkow* (1995) 38 Cal.App.4th 1490, 1497–1498.) In this phase, the plaintiff must show both that the claim is legally sufficient and that there is admissible evidence that, if credited, would be sufficient to sustain a favorable judgment. (*McGarry v. Univ. of San Diego* (2007) 154 Cal.App.4th 97, 108.) The burden on the plaintiff is governed by the same standard applicable to summary judgment, nonsuit, and directed verdict motions. (*Seelig v. Infinity Broadcasting Corporation* (2002) 97 Cal.App.4th 798, 809.) Thus, the plaintiff must present evidence to overcome *all* privileges and defenses to the claims.

IV. PLAINTIFFS' ENTIRE LAWSUIT ARISES FROM PROTECTED ACTIVITY

A defendant bears the initial burden of demonstrating that the suit against it arises from conduct which is protected under the anti-SLAPP statute. To invoke the protection of the statute, a defendant need only make a prima facie showing that the plaintiff's complaint "arises from" the defendant's constitutionally protected free speech or petition activity. (Code Civ. Proc., §425.16(e); *Equilon Enterprises, LLC v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 61.)

The anti-SLAPP statute protects "any act in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution." (Code Civ. Proc. §425.16(b).) Protected activities include (1) statements and writings made before a legislative, executive, or judicial proceeding, "or any other official proceeding authorized by law;" (2) communications "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) statements and writings "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(e).)

The California Supreme Court has clarified that when assessing whether claims arise from protected activity, courts must distinguish between the acts underlying a plaintiff's causes of action and the "claimed illegitimacy of [those] acts[, which] is an issue… the plaintiff must raise and support in the context of the discharge of the plaintiff's [secondary] burden to provide a prima facie showing of the merits of the plaintiff's case." (*Navellier v. Sletten*, *supra*, 29 Cal.4th at p. 94 (quotes and cites omitted).) In other words, regardless of the legal grounds on which the plaintiff seeks redress, the only relevant issue in assessing the first prong of the anti-SLAPP analysis is the nature of the defendant's act that gave rise to the alleged cause of action.

In this case, Defendants' alleged conduct underlying the causes of action in the FAC can be divided into two categories: (1) broadcasting Chuck Smith's sermons over the radio; and (2) withholding personal property from Catheryn Smith. Each of the alleged acts is protected under the anti-SLAPP statute.

A. <u>Broadcasting the Sermons Is Protected Religious Speech</u>

One category of speech protected under the anti-SLAPP statute is statements and writings "made in a place open to the public or a public forum." (Code Civ. Proc. §425.16(e).) Radio broadcasts are considered public fora in the context of §425.16(e)(3). (See *Seelig v. Infinity*

Broadcasting Corp. (2002) 97 Cal.App.4th 798, 807.) Moreover, broadcasting the sermons over the radio is a form of constitutionally protected religious speech.

For over 20 years, the Church has been broadcasting the Word for Today program, as well as other Gospel programs, as a part of its outreach and evangelism efforts. (Wing Decl., ¶ 3.) The broadcasts allow the Church to spread its religious beliefs and teachings to listeners around the world. (*Ibid.*) This precise form of religious speech is protected under the free speech clause of the First Amendment. (*Capitol Square v. Pinette* (1995) 515 U.S. 753, 760 ("private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression").) The Church's broadcast division is not a business venture; the broadcasts serve a solely religious and community service-based purpose. (Wing Decl., ¶4.) Therefore, because the broadcasts are constitutionally-protected religious speech expressed in a public forum, they are protected under §425.16(e)(3).

B. <u>Plaintiffs Allege Defendants Withheld Funds in Furtherance of Their Continued Broadcast of the Sermons</u>

Another protected category under the anti-SLAPP statute is any "conduct in furtherance of the exercise of" protected speech. (Code Civ. Proc. §425.16(e.)) "An act is in furtherance of the right of free speech if the act helps to advance that right or assists in the exercise of that right." (*Hunter v. CBS Broadcasting, Inc.* (2013) 221 Cal.App.4th 1510.) The plaintiff in *Hunter* alleged gender and age discrimination against the defendants when they hired young women as meteorologists for their news broadcasts ahead of plaintiff, a middle-aged man. (*Id.* at pp. 1514-1515.) The court held that news broadcasts qualify as exercises of protected speech, and that the selection of weather anchors "helped advance or assist" the protected expression and therefore "qualifies as a form of protected activity." (*Id.* at p. 1521.)

By Plaintiffs' own allegation, Defendants' alleged acts of withholding personal property from Catheryn Smith were taken in furtherance of Defendants' efforts to continue broadcasting the sermons over the radio. Plaintiffs allege throughout the FAC that one of the primary objectives of Defendants' conspiracy was to prevent Catheryn Smith (and, by extension, Plaintiffs) from being able to resist Defendants' use of the pastoral materials by withholding personal property. (See e.g.

FAC ¶29(d)-(e).) Therefore, Plaintiffs themselves allege Defendants' purported acts of withholding property from Catheryn Smith were "conduct in furtherance of" the continued broadcast of sermons over the radio, which is constitutionally protected religious speech.

C. The Broadcasts Constitute Matters of Public Interest

Finally, in order to be protected under the anti-SLAPP statute, the acts must be in connection with a matter of public interest. "Section 425.16 does not define 'public interest,' but its preamble states that its provisions 'shall be construed broadly' to safeguard 'the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.' (§425.16(a).)" (*Nygard, Inc. v. Uusi-Kerttula* (2008) 159 Cal.App.4th 1027, 1039.) In *Nygard*, the court held that "an issue of public interest… is any issue in which the public is interested. In other words, the issue need not be significant to be protected by the anti-SLAPP statute – it is enough that it is one in which the public takes an interest." (*Id.* at p. 1276.)

The courts have further clarified that an issue is a matter of public interest if it is "something of concern to a substantial number of people." (*Weinberg v. Feisel* (2003) 110 Cal.App.4th 1122, 1132-1133.) In *Tamkin v. CBS Broadcasting, Inc.* (2011) 193 Cal.App.4th 133, the plaintiffs alleged that they were defamed when their names were used for villain characters in early drafts of the script for an episode of the crime drama "C.S.I." In reversing the trial court's denial of CBS's anti-SLAPP motion, the Court of Appeal held that "C.S.I." was of interest to a sufficient number of people to render its script a matter of public interest. (*Id.* at p. 144.) In the context of this case, there is, without doubt, continuing, widespread public interest in religion generally, and in the teachings of Calvary Chapel and of Chuck Smith in particular. Tellingly, Plaintiffs concede public interest in their own pleading. (See, e.g., FAC, ¶¶12, 14, 15, 17, 23, 26.) Defendants' broadcasting of the pastoral messages is inexorably intertwined with the tenets, practices, and beliefs of Calvary Chapel, which has thousands of members around the world. Therefore, it is clear that the sermons Defendants broadcast are of interest to a substantial number of people, and the sermons and all acts in furtherance of their broadcast are therefore protected under the anti-SLAPP statute.

Thus, Defendants have met their minimal burden of establishing that the conduct complained of was protected under the anti-SLAPP statute. The burden now shifts to Plaintiffs to present evidence to establish a likelihood that the causes of action in the FAC will succeed on the merits.

V. MANDERSON LACKS STANDING TO ASSERT CATHERYN SMITH'S CLAIMS

"Every action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute." (Code Civ. Proc. §367.) A real party in interest is defined as the person possessing the right sued upon by reason of the substantive law. (*Personnel Com. v. Barstow Unified School Dist.* (1996) 43 Cal.App.4th 871, 877.) If a plaintiff's lack of standing appears on the face of the complaint, the complaint must be dismissed. (*County of Fresno v. Shelton* (1998) 66 Cal.App.4th 966, 1009.) This is the situation presented by the seventh and eighth causes of action in the FAC.

Catheryn Smith is not a named plaintiff in this lawsuit, either by herself or through a guardian ad litem. Manderson has filed an application for appointment as guardian ad litem for Catheryn Smith, in order to add Ms. Smith as a plaintiff – Defendants have opposed Manderson's appointment as such – but no order has yet been entered by the court, and Ms. Smith therefore remains a nonparty. Instead, *Manderson* purports to prosecute the seventh and eighth causes of action on behalf of Catheryn Smith, in her alleged capacity as attorney-in-fact for Ms. Smith. (FAC, ¶¶108, 121.) This is improper, as Manderson lacks standing to sue on behalf of a nonparty.

An attorney-in-fact is "a person granted authority to act for the principal in a power of attorney." (Probate Code §4014.) The holder of a power-of-attorney is not a real party in interest and may not prosecute the action in her own name. (*Arnold Management Corporation v. Eischen* (1984) 158 Cal.App.3d 575, 581.) In *Arnold Management Corporation*, AMC filed an action to set aside a foreclosure and for damages, as attorney-in-fact holding special power of attorney as to the interests of other plaintiffs in the case. The court sustained the defendants' demurrer on the grounds that AMC lacked standing, and dismissed AMC from the action, holding: "An attorney in fact is not a trustee. One who is described in an instrument, whether parol or special, as the attorney in fact of another, does not hold the character of trustee, and is not a necessary party to represent the interest of the principal. Our statute requires every action to be prosecuted in the name of the real party in interest." (*Ibid.*)

Catheryn Smith is not named as a plaintiff in this lawsuit. Rather, Manderson is the plaintiff, acting as Ms. Smith's "attorney-in-fact." As explained, however, the law provides that Ms. Smith is the real party in interest and the only person who can bring claims on her behalf. Thus, the causes of action brought by Manderson, on behalf of Catheryn Smith, must be dismissed.

VI. EVEN IF CATHERYN SMITH WERE ADDED AS A PARTY, THE SEVENTH AND EIGHTH CAUSES OF ACTION CANNOT SUCCEED ON THE MERITS

As noted above, Manderson has applied to be appointed guardian ad litem for Catheryn Smith, who is not currently a party in this litigation. Even if Ms. Smith were added as a plaintiff, however, the seventh and eighth causes of action cannot succeed on the underlying merits.

A. Defendants Have Not Withheld Any Benefits Owed to Catheryn Smith

The seventh cause of action in the FAC alleges Defendants committed financial abuse of Catheryn Smith, an elder, by withholding life insurance and annuity proceeds to which Ms. Smith is lawfully entitled. However, the evidence is indisputable that Defendants have not withheld any benefits owed to Catheryn Smith or to Plaintiffs.

With regard to the life insurance policy, Chuck and Catheryn Smith voluntarily transferred all rights to the benefits of the life insurance plan to CCCM on or about September 27, 2006. (Dyer Decl., Exh. B.) As the court can see in Exhibit B to the Dyer declaration, not only did Chuck Smith sign the form requesting the change of beneficiary, and the designation of CCCM as the beneficiary to one hundred percent of the policy proceeds, <u>Catheryn Smith herself signed it</u> on September 27, 2006. Her signature is found under the following typewritten statement: "If the policy was issued or if the policy holder lives in a community property state (listed above), his or her spouse (if any) must sign this Request for Change for Beneficiary Form if the change would deprive the spouse of an interest in the proceeds of the policy." Thus, since 2006, CCCM has been the sole and rightful owner of any and all benefits under the life insurance plan, and neither Catheryn Smith nor any other person has any rightful claim to those funds.

With regard to the annuity, Defendants have never been in possession of any of the benefits therefrom and have never taken any steps to prevent Catheryn Smith from receiving such funds. In fact, Defendants have gone to great lengths to assist Ms. Smith in securing her benefits and ensuring that she has complete access to and control over those benefits. (See Dyer Decl., ¶¶4-6.)

Defendants are informed and believe that Ms. Smith has received *all* of the benefits from the annuity plan, including back payments for the amounts that were delayed by procedural issues following Chuck Smith's death. This cause of action simply has no basis in fact or law.

B. Constructive Trust Is a Remedy, Not a Cause of Action

The eighth cause of action purports to be an independent cause of action for constructive trust. However, constructive trust is an equitable remedy, not an independent cause of action. "In an action for constructive trust one must plead facts constituting the cause of action, such as fraud, breach of fiduciary duty,... and specifically identifiable property." (*Ehret v. Ichioka* (1967) 247 Cal.App.2d 637, 642.) Even if she were a party, Catheryn Smith has not alleged a valid predicate cause of action upon which the remedy of constructive trust could be pursued. In addition, the FAC alleges no facts or law establishing a fiduciary duty owed by Defendants to Catheryn Smith. Therefore, even if Catheryn Smith were properly a party in this litigation, she could not prevail as to the eighth cause of action.

VII. TWFT'S COPYRIGHT CLAIMS ARE PREEMPTED BY FEDERAL LAW

All seven causes of action alleged by TWFT amount to claims of copyright infringement. TWFT alleges that it owns the copyrights to Chuck Smith's pastoral messages, writings and teachings, as well as those of his widow, Catheryn Smith. (See, e.g., FAC, ¶17.) TWFT alleges that, in the time since Chuck Smith's death, the Church, by and through its officers, directors, and employees has wrongfully disseminated copyrighted materials that rightfully belong to TWFT. (See, e.g., FAC, ¶25.) The state court lacks jurisdiction to address these exclusively federal claims.

The federal Copyright Act of 1976 specifically preempts "all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright" as specified in the Copyright Act "in works of authorship that are fixed in a tangible medium of expression" and come within the subject matter of copyright defined in the Act. (17 USC §301(a).) The pastoral works at issue – writings and audio recordings – are the type of subject matter that the Copyright Act expressly protects. (See 17 USC §102(a) (defining subject matter of copyright protection as subsisting in "literary works," "audiovisual works," and "sound recordings").) Federal statute further provides that the federal courts have exclusive jurisdiction over copyright claims. (28 USC

§1338.) Therefore, the Copyright Act's preemption of state law copyright claims is jurisdictional. (*Balboa Ins. Co. v. Trans Global Equities* (1990) 218 Cal.App.3d 1327, 1338.)

The courts use a two-part test for determining whether a state law claim is preempted by the Copyright Act. A claim is preempted if: (1) "the subject of the claim [is] a work fixed in a tangible medium of expression… within the general scope of copyright;" and (2) "the right asserted under state law [is] equivalent to the exclusive rights contained in [the Copyright Act]." (*Kabehie v. Zoland* (2002) 102 Cal.App.4th 513, 520.) "[A] right which is 'equivalent to copyright' is one which is infringed by the mere act of reproduction, performance, distribution or display…. If, under state law the act of reproduction, performance, distribution or display, … will in itself infringe the state created right, then such right is preempted." (*Motown Record Corp. v. George A. Hormel & Co.* (C.D. Cal. 1987) 657 F.Supp. 1236, 1239 (quoting 1 M. Nimmer, The Law of Capyright §1.01[B][3] at 1-11-12 (1984)).)

Although the FAC is convoluted, it is clear that all claims pertaining to alleged misappropriation and infringement of pastoral materials are tantamount to claims of copyright infringement. TWFT alleges that it possesses the exclusive right to:

> "own, disseminate (including by broadcast) and control the dissemination of all of Pastor Chuck's work output and related intellectual property, including all of Pastor Chuck's written teachings, works, notes, authored materials (including books), sermons, master recordings, edited recordings of sermons, messages, tapes, videos, pamphlets, CD's… and other documentary or recorded materials relating to Pastor Chuck's pastoral work and appearances, as well as any intellectual property and/or copies thereof." (FAC, ¶17.)

The rights TWFT claims, including distribution rights, duplication rights, and licensing rights, are the same exclusive rights that the Copyright Act grants to copyright holders. (17 USC §106.)

TWFT alleges seven causes of action: constructive trust, fraud, accounting, unfair business practices, conversion, breach of fiduciary duty, and injunctive relief. All seven are equivalent to copyright claims. The court in *Motown Record Corp.*, *supra*, explicitly held that a cause of action for unfair business practices does not add an "extra element" to a copyright infringement claim and is therefore preempted by the Copyright Act. (657 F.Supp. at p. 1239.) The *Motown* court also held that claims for the remedies of constructive trust and accounting are preempted because they are the same remedies provided under the Copyright Act. (*Id.* at p. 1241.) By the same logic, a claim for injunctive relief must also be preempted, as that is a further remedy for copyright owners who prove infringement under the Copyright Act. (See 17 USC §502.) In *Melchior v. New Line Prods., Inc.* (2003) 106 Cal.App.4th 779, the court similarly held that a conversion claim is preempted where the property allegedly taken is copyrighted materials. (*Id.* at pp. 791-792.)

TWFT's remaining two causes of action, fraud and breach of fiduciary duty, are also preempted. Both are premised on the Church's continued use of the pastoral materials despite its alleged transfer of the copyrights in the pastoral materials to TWFT. Misrepresentation claims are preempted to the extent they are predicated on allegations of wrongful copying of copyrighted materials. (*Litchfield v. Spielberg* (9th Cir. 1984) 736 F.2d 1352, 1358.) Similarly, a cause of action for breach of fiduciary duty based on unauthorized use of copyrighted materials "does not add any 'extra element' which changes the nature of the action" and is therefore preempted. (*Del Madera Properties v. Rhodes and Gardner, Inc.* (9th Cir. 1987) 82 F.2d 973, 977.)

Although TWFT's copyright-related claims are intermingled with claims pertaining to the alleged misappropriation of personal property such as computers and files, the gravamen of the causes of action amounts to claims of copyright infringement. While the FAC explicitly refers to intellectual property in many instances, under the well-pleaded complaint rule, even other allegations that are not so explicit must be dismissed. A plaintiff's claim to ownership of works which fall within the scope of federal copyright protection is effectively a federal claim for copyright infringement, even if the plaintiff "artfully" seeks to avoid claiming the federal issues explicitly. (*JustMed, Inc. v. Byce* (9th Cir. 2010) 600 F.3d 1118, 1123.) Thus, TWFT cannot prevail on the merits of any of its seven causes of action, because relief for copyright infringement cannot be granted in state court.

VIII. <u>EVEN IF TWFT'S COPYRIGHT CLAIMS COULD BE ADJUDICATED IN STATE COURT, THE ALLEGATIONS IN THE FAC ARE UNTENABLE</u>

Even if TWFT's claims were not preempted by federal copyright law, the first, third, sixth, and ninth causes of action are untenable as a matter of law.

A. <u>As a Matter of Law, Defendants Owed No Fiduciary Duty to TWFT</u>

The sixth cause of action alleges Defendants owed a fiduciary duty to TWFT and seeks damages for breach of said fiduciary duty. As a matter of law, however, Defendants owed no fiduciary duty to TWFT. "Before a person can be charged with a fiduciary obligation, he must either knowingly undertake to act on behalf and for the benefit of another, or must enter into a relationship which imposes that undertaking as a matter of law." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 221.) Thus, there are two types of fiduciary duties: those imposed by law and those undertaken by agreement. (*GAB Business Services, Inc. v. Lindsey & Newsom Claim Services, Inc.* (2000) 83 Cal.App.4th 409, 416.)

Fiduciary duties are imposed as a matter of law "in certain technical, legal relationships." (*Ibid.*) These include relationships between principal and agent, attorney and client, partner and partner, corporate officers and their corporation, guardian and ward, et cetera. TWFT alleges in a conclusory fashion that "At all relevant times, the defendants stood in the position of fiduciaries toward the TWFT." (FAC, ¶ 96.) However, TWFT does not allege that any "technical, legal relationship" existed between Defendants and TWFT such as that between principal and agent or attorney and client. Therefore, as a matter of law, the only way that a fiduciary duty could be imposed on Defendants is if they knowingly agreed to act on TWFT's behalf. (*Committee on Children's Television, Inc. v. General Foods Corp.*, *supra*, 35 Cal.3d at p. 221.)

There is no evidence that Defendants, or any of them, agreed to act as fiduciaries on behalf of TWFT. The only agreement that is alleged is an agreement that CCCM would compensate TWFT for its use of the pastoral materials. (See FAC, ¶98.) The courts have been clear that "[a] mere contract or a debt does not constitute a trust or create a fiduciary relationship." (*Waverly Productions, Inc. v. RKO General, Inc.* (1963) 217 Cal.App.2d 721, 732.) Thus, even if TWFT had adequately alleged the existence of a contract between itself and Defendants (which it has not), the contract alleged does not create a fiduciary relationship. As a matter of law, Defendants owed no fiduciary duty to TWFT. TWFT cannot prevail on the merits of this cause of action.

B. <u>Constructive Trust, Accounting, and Injunctive Relief Are Remedies, Not Independent Causes of Action</u>

In addition to its tort causes of action, TWFT asserts separate causes of action for constructive trust, accounting, and injunctive relief. All three of these forms of relief are equitable remedies that may be awarded if certain criteria are met, including the insufficiency of legal damages. However, none of the three constitute separate causes of action independent of the underlying legal wrongs. As outlined above, all of TWFT's alleged tort causes of action are legally deficient. Therefore, TWFT cannot prevail on these remedial causes of action.

"In an action for constructive trust one must plead facts constituting the cause of action, such as fraud, breach of fiduciary duty,... and specifically identifiable property." (*Ehret v. Ichioka*, *supra*, 247 Cal.App.2d at p. 642.) The remedy of accounting is similarly available only where the plaintiff can plead and prove that there was a breach of fiduciary duty, that the balance due is complicated and unknown, and that actionable fraud was committed. (*Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 593.) As a matter of law, Defendants owed no fiduciary duty to TWFT. Absent a valid predicate cause of action or a breach of fiduciary duty, there can be no claims for constructive trust or accounting.

In addition, an "injunction is an equitable remedy for certain torts or wrongful acts of a defendant where a damage remedy is inadequate." (*Art Movers, Inc. v. Ni West, Inc.* (1992) 2 Cal.App.4th 640, 646.) An injunction "is a determination on the merits that a plaintiff has prevailed on a cause of action for tort or other wrongful act against a defendant and that equitable relief is appropriate." (*Id.* (emphasis added).) Therefore, injunctive relief is not an independent claim upon which relief may be granted.

IX. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the court strike Plaintiffs' FAC, in its entirety, pursuant to Code of Civil Procedure, section 425.16.

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By: ______________________________
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