DEPARTMENT 34 LAW AND MOTION RULINGS

Please call the clerk at (213) 633-0154 by 4:00 pm. the court day before the hearing if you wish to submit on the tentative.

Case Number: BC556600 **Hearing Date:** February 23, 2015 **Dept:** 34

Moving Party: Defendant City of Glendale ("defendant")

Resp. Party: Plaintiffs Michiko Shiota Gingery, Koichi Mera, GHAT-US Corporation, and Masatoshi Naoki ("plaintiffs")

Defendant's special motion to strike is GRANTED.

INTRODUCTION

There can be no legitimate dispute that the Japanese government engaged in a horrendous crimes against the Comfort Women prior to and during World War II. The United States House of Representatives – and even the Japanese government itself – has recognized these abuses. Even Plaintiffs themselves do not dispute this historical truth.

Nonetheless, plaintiffs ask that this Court to order the City of Glendale to remove a public monument in Glendale Central Park which recognizes the suffering of the Comfort Women. Plaintiffs' main argument is that the creation and public display of this monument interferes with the federal government's right to conduct foreign policy, and hence is unconstitutional under the Supremacy Clause.

Cities and states have routinely – and historically – passed resolutions in support or, or in opposition to, various foreign policy issues. In the 1960's and 1970's, hundreds if not thousands of local governmental bodies passed resolutions supporting or opposing America's involvement in the Vietnam War. In the 1980's and 1990's, states and localities passed resolutions in opposition to the Contra War in Nicaragua, apartheid in South Africa and genocide in Rwanda. More recently, we have seen resolutions and proclamations recognizing the Armenian genocide of 1915.

If plaintiffs' argument were correct, then such historically routine activities undertaken by state and local governments throughout the Country would all be unconstitutional. There is no constitutional difference between the monument and plaque at issue in this lawsuit and a proclamation by the City with the same wording.

However, plaintiffs are wrong; such local pronouncements – and this monument – are not unconstitutional. For the reasons indicated below, plaintiffs' complaint must be dismissed.

PRELIMINARY ISSUES:

1. The Parties' Request for Judicial Notice:

The Court GRANTS Defendant's Request for Judicial Notice as to Exhs. 2-20 and 22-23. The Court DENIES Defendant's Request for Judicial Notice as to Exh. 1 as this is not a proper matter for judicial notice.

The Court GRANTS Plaintiffs' Request for Judicial Notice as to Exhs. A, B, E and G. The Court DENIES plaintiffs' Request for Judicial Notice as to Exhs. C, D and F. News articles are not proper items for judicial notice.

As to the documents for which judicial notice has been granted, the Court takes judicial notice of the existence of these documents and statements, but does not take judicial notice of the truth of the matters asserted. (See Evid. Code, § 452(c), (d); Aquila, Inc. v. Sup. Ct. (2007) 148 Cal.App.4th 556, 569; Day v. Sharp (1975) 50 Cal.App.3d 904, 914; Sosinsky v. Grant (1992) 6 Cal.App.4th 1548, 1565.)

2. The Parties' Evidentiary Objections:

Plaintiffs' Objections to Defendant's Evidence

Objection
1 SUSTAINED OVERRULED
2 OVERRULED
3 OVERRULED
4 OVERRULED
5 OVERRULED
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Defendant's Objections to Plaintiffs' Evidence:

Objection	
1	OVERRULED
2	OVERRULED
3	OVERRULED
4	SUSTAINED
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6	SUSTAINED
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31	OVERRULED
32	SUSTAINED
33	OVERRULED
34	OVERRULED
35	OVERRULED
36	OVERRULED
37	SUSTAINED
38	OVERRULED

3. Normally, the motions and oppositions on an anti-SLAPP motion are limited to 15 pages. (See CRC rule 3.1113(d).) At the parties' request, the Court allowed each party up to a maximum of 20 pages for their

pleadings. (Minute Order, 1/7/15.) The Court notes that both parties – but particularly plaintiffs – have included substantive, extended, single-spaced footnotes in their memoranda in an apparent attempt to circumvent the extended 20-page limit. The Court has not considered the points raised in these footnotes.

4. The Court wishes to thank defendant for providing the Court with a hyperlinked DVD of the cases and exhibits in its pleadings, in compliance with the Court's trial orders, ¶ VII(A).

BACKGROUND:

Plaintiffs commenced this action on 9/3/14 against defendant for declaratory and injunctive relief. On 9/18/14, plaintiffs filed a first amended complaint ("FAC") for: (1) violation of the Glendale Municipal Code; (2) violation of the Equal Protection Clause of the California Constitution; and (3) violation of the Privileges and Immunities Clause of the California Constitution. On 1/7/15, plaintiffs filed a second amended complaint ("SAC") against defendant for: (1) unconstitutional interference with foreign affairs power; (2) violation of the Glendale Municipal Code; (3) violation of the Equal Protection Clause of the California Constitution; and (4) violation of the Privileges and Immunities Clause of the California Constitution. Plaintiffs are seeking injunctive and declaratory relief ordering the removal of a monument authorized by the City of Glendale recognizing and honoring individuals known as "Comfort Women."

ANALYSIS:

I. CCP section 425.17(b) Does Not Apply

Plaintiffs argue that this action is exempt from the anti-SLAPP statute. Even though an action may otherwise qualify under the anti-SLAPP statute, it may nonetheless be exempt from dismissal under certain "safe harbor" provisions. (Weil & Brown, Civ. Proc. Before Trial (The Rutter Group 2014) ¶ 7:530 [citing Holbrook v. City of Santa Monica (2006) 144 Cal.App.4th 1242, 1249].)

Pursuant to Code Civ. Proc., § 425.17(b):

"Section 425.16 does not apply to any action brought solely in the public interest or on behalf of the general public if all of the following conditions exist:

"(1) The plaintiff does not seek any relief greater than or different from the relief sought for the general public or a class of which the plaintiff is a member. A claim for attorney's fees, costs, or penalties does not constitute greater or different relief for purposes of this subdivision.

"(2) The action, if successful, would enforce an important right affecting the public interest, and would confer a significant benefit, whether pecuniary or nonpecuniary, on the general public or a large class of persons.

"(3) Private enforcement is necessary and places a disproportionate financial burden on the plaintiff in relation to the plaintiff's stake in the matter.

All of these conditions must be met in order to exempt the action from the anti-SLAPP statute. (See Weil & Brown, ¶ 7:540.) Whether this exemption applies is a threshold issue, as determined by examining the complaint type and prayer, to ascertain whether it seeks to vindicate public policy goals, without getting into evidence. (Tourgeman v. Nelson & Kennard (2014) 222 Cal.App.4th 1447, 1463.)

The relief sought by plaintiffs includes a declaration that the installation of the monument was unconstitutional and null and void, an injunction compelling defendant to remove the monument and its plaque, an award of attorney's fees and costs, and any further relief the Court deems just and proper. (See Prayer ¶¶ 1-4.) This relief does not appear to be any greater than or different from relief that could be sought by the general public or members of plaintiffs' class (i.e., persons of Japanese origin or descent). These remedies allege – at least according to the allegations of the complaint – to enforce important rights and to confer significant benefits to plaintiffs' class of persons. Other than appealing to the electoral process, defendant fails to show that the purported rights of plaintiffs' class can be litigated outside of a private action. There is no dispute that plaintiffs have accepted a disproportionate financial burden in relation to their stake in this matter. (See Mera Decl., ¶ 25; Naoki Decl., ¶ 17.)

However, section 425.17(b) does not apply to "[a]ny action against any person or entity based upon the creation, dissemination, exhibition, advertisement, or other similar promotion of any dramatic, literary, musical, political, or artistic work, including, but not limited to, a motion picture or television program, or an article published in a newspaper or magazine of general circulation." (Code Civ. Proc., § 425.17(d)(2).) Plaintiffs' action concerns a public monument. Neither party argues that this monument is an artistic creation. However, the monument, as plaintiffs acknowledge in their complaint, "is intended to send a political message." (See SAC ¶ 30. See also id., ¶¶ 11, 22, 28 [describing the comfort women issue as part of a political debate].)

The Court finds that plaintiffs' action is based on the creation, exhibition and promotion of a political work, and thus section 425.17(b) does not apply.

II. Defendant has Engaged in Protected Activity

In determining whether a defendant seeking to strike a claim under the anti-SLAPP statute has made a prima facie showing that the plaintiff's action arises from activity protected by statute, the critical consideration is whether the plaintiff's cause of action itself, and the act of which the plaintiff complains, is based on an act taken by defendant in furtherance of his right of petition or free speech. (See, e.g., Philipson & Simon v. Gulsvig (2007) 154 Cal.App.4th 347, 358; Birkner v. Lam (2007) 156 Cal.App.4th 275, 281.) "The anti-SLAPP statute's definitional focus is not on 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." (Navellier v. Sletten (2002) 29 Cal.4th 82, 92 [emphasis in original].) The statute is to be broadly applied and includes four categories of protected conduct:

(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(e).)

Defendant argues that its actions are protected under each of the four prongs of § 425.16(e). Defendant argues that plaintiffs' claims are based on conduct falling within sections 425.16(e)(1) and (2) because plaintiffs are challenging decisions made during a meeting of the City Council. Defendant argues that the claims are also based on conduct falling under sections 425.16(e)(3) and (4) because the placement of the monument and plaque constitutes an exercise of free speech and addresses an issue of public interest.

Plaintiffs argue that the protected activity is merely collateral and incidental to plaintiffs' claims. "[W]hen the allegations referring to arguably protected activity are only incidental to a cause of action based essentially on nonprotected activity, collateral allusions to protected activity should not subject the cause of action to the anti-SLAPP statute." (Martinez v. Metabolife Intern., Inc. (2003) 113 Cal.App.4th 181, 188 ["The bulk of the complaint alleges garden-variety personal injury claims for physical injuries proximately caused by activity apart and distinct from any protected conduct, and the allegedly protected activity mentioned in the complaint comprises only a small and insignificant portion of each of the causes of action."].) This argument is not well taken. "A cause of action 'arising from protected activity' means that the defendant's acts underpinning the plaintiff's cause of action involved an exercise of the right of petition or free speech." (Gerbosi v. Gaims, Weil, West & Epstein, LLP (2011) 193 Cal.App.4th 435, 443.) While it is true that plaintiffs' claims are based on defendant's alleged constitutional and Municipal Code violations, such violations do not exist in a vacuum and must be the result of actual conduct by the defendant. Here, the defendant's alleged acts which constitute these violations, and therefore the underlying conduct upon which plaintiffs' claims are based, include the erection of the monument and placement of the plaque. If the placement of the monument and wording of the plaque constitute protected activity, such activity is not merely collateral to, and is instead the primary basis of, plaintiffs' claims.

Plaintiffs argue that sections 425.16(e)(1) and (2) relate only to statements made to a governing body and not to statements made by the governing body. The Court does not find plaintiffs argument to be persuasive. First, Plaintiffs' argument also does not comport with the clear wording of section 425.16(e).

Subsection (e)(1) immunizes "any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law." The Court recognizes that the wording of this subsection is ambiguous, and it is possible to read this subsection as plaintiff suggests. However, this would create an absurd result. It would be anomalous for the same statement to be protected activity if made by a speaker addressing the City Council, but not to be protected if made by a member of the City Council in response to the speaker. Similarly, under plaintiff's analysis, an attorney would be engaged in protected activity if she made a specific statement before a court, but the judge's uttering of the same statement would not be protected activity. This could not be what the Legislature intended.

Even if there is some ambiguity as to the wording of subsection (e)(1), subsection (e)(2) is unambiguous. Subsection (e)(2) immunizes "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." It refers to "any written or oral statement or writing" – regardless of who makes it.

Thus, the Court finds that under both subsections (e)(1) and (e)(2), defendant was engaged in protected activity.

However, even if section 425.16(e)(1) and (2) do not apply, defendant's conduct falls under sections 425.16(e)(3) and (4). The challenged plaque constitutes a written statement and there is no dispute that it was placed in a public forum. (See SAC ¶¶ 1-3.) Plaintiffs make the conclusory assertion that the "placement" of the monument and plaque cannot be considered speech. Plaintiffs provide no authority

which holds that the placement of a monument, especially an admittedly political monument, cannot constitute an exercise of free speech in connection with a public issue. Plaintiffs do not dispute that the issue of the mistreatment of – and crimes committed against – Comfort Women preceding and during World War II issue is one of public interest. (See SAC ¶¶ 7-10; Def. Exhs. 2-17.) Instead, plaintiffs once again assert that their claims are based on defendant's alleged constitutional and Code violations and not on its speech. As stated above, the underlying conduct against which plaintiffs complain is the placement of the monument and plaque. Plaintiffs' assertion that they are not challenging the content of defendant's speech is specious. It is clear that it is the message conveyed by the monument and plaque that offends plaintiffs; had the monument contained a different message or no message at all, plaintiffs would have no complaint.

Finally, to the extent that plaintiffs argue that defendant's conduct is not protected because it consists of constitutional violations, this argument is rejected because it goes to the merits of its allegations. Arguments by opposing parties as to the merits cannot be considered in the threshold analysis of whether causes of action arise from protected activity. (Freeman v. Schack (2007) 154 Cal.App.4th 719, 733 ["merits based arguments have no place in our threshold analysis of whether plaintiffs' causes of action arise from protected activity."]; Birkner v. Lam (2007) 156 Cal.App.4th 275, 284-285.) "If . . . a factual dispute exists about the legitimacy of the defendant's conduct, it cannot be resolved within the first step but must be raised by the plaintiff in connection with the plaintiff's burden to show a probability of prevailing on the merits." (Flatley v. Mauro (2006) 39 Cal.4th 299, 316.)

The Court finds that plaintiffs' claims are based on defendant's protected activity under each of the four subsections of CCP § 426.16(e).

III. Plaintiffs' Have Not Met Their Burden of Showing a Probability of Prevailing on the Merits

Because defendant has shown that the anti-SLAPP statute applies to the complaint, the burden now shifts to plaintiff to demonstrate a "probability" of success on the merits. (Code Civ. Proc., § 425.16(b); Equilon Enterprises LLC v. Consumer Cause, Inc. (2002) 29 Cal.4th 53, 67.) "[A claimant] 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 [claimant] is credited." (Matson v. Dvorak (1995) 40 Cal.App.4th 539, 548.)

The evidentiary showing by the claimant must be made by competent and admissible evidence. (Morrow v. Los Angeles Unified School District (2007) 149 Cal.App.4th 1424, 1444; see also Evans v. Unkow (1995) 38 Cal.App.4th 1490, 1497-98 [proof cannot be made by declaration based on information and belief]; Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist. (2003) 106 Cal.App.4th 1219, 1236-38 [documents submitted without proper foundation could not be considered in determining plaintiff's probability of prevailing on its claim].) The trial court properly considers the evidentiary submissions of both the plaintiff and the defendant, but it may not weigh the credibility or comparative strength of the evidence and must instead simply determine whether the claimant's evidence would, if believed by the trier of fact, be sufficient to result in a judgment for claimant. (McGarry v. University of San Diego (2007) 154 Cal.App.4th 97, 108-09.) Further, "[w]hether or not the evidence is in conflict, if the [claimant] has presented a sufficient pleading and has presented evidence showing that a prima facie case will be established at trial, the [claimant] is entitled to proceed." (Moore v. Shaw (2004) 116 Cal.App.4th 182, 193.)

A claimant need not establish a probability of prevailing on all theories presented. As long as the claimant

"shows a probability of prevailing on any part of its claim, the plaintiff has established that its cause of action has some merit and the entire cause of action stands." (Mann v. Quality Old Time Service, Inc. (2004) 120 Cal.App.4th 90, 106 [italics in original].)

A. First Amendment

Defendant argues that plaintiffs' claims are barred by the First Amendment. At least one court has found that the First Amendment may apply to a government entity where the statements involved a matter of public interest and the right to keep the public informed. (See Bradbury v. Superior Court (1996) 49 Cal.App.4th 1108, 1115-1116 [citing Nizam-Aldine v. City of Oakland (1996) 47 Cal.App.4th 364].) However, "[t]his does not mean that there are no restraints on government speech. For example, government speech must comport with the Establishment Clause. The involvement of public officials in advocacy may be limited by law, regulation, or practice." (Pleasant Grove City, Utah v. Summum (2009) 555 U.S. 460, 468.) "[I]t is to be hoped that the courts will recognize that limitations, both constitutional and otherwise derived, constrain the government's power to speak on controversial issues." (R.J. Reynolds Tobacco Co. v. Bonta (E.D.Cal. 2003) 272 F.Supp.2d 1085, 1106.) Therefore, even if the First Amendment applies to defendant's speech, it must still be determined whether the speech must be limited by other constitutional or legal requirements.

B. Plaintiffs' Have Not Met Their Burden of Showing a Probability of Prevailing on their First Cause of Action for Unconstitutional Interference with Foreign Affairs Power

While the federal court's decision is not controlling, the Court agrees with its analysis. Plaintiffs allege that defendant's action takes a position on matters of foreign policy and that this violates the Supremacy Clause. (See SAC ¶¶ 28-29.) As to this claim, the district court found:

Plaintiffs have alleged no well-pleaded factual allegations that could plausibly support a conclusion that the Comfort Women monument in Glendale's Central Park, with a plaque expressing "sincere hope that these unconscionable violations of human rights never recur," violates the Supremacy Clause or foreign affairs powers. See Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 421, 123 5. Ct. 2374, 2390, 156 L. Ed. 2d 376 (2003) ("The exercise of federal executive authority [over the conduct of foreign relations] means that state law must give way where, as here, there is evidence of clear conflict between the policies adopted by the two."). Plaintiffs' Complaint provides no well-pleaded allegations of the required "clear conflict" between the federal government's foreign relations policies concerning recognition of the plight of the Comfort Women and Glendale's placement of the monument in its Central Park. Id. Indeed, as alleged in the Complaint, the plaque accompanying the statue cites to House Resolution 121, passed by Congress on July 30, 2007, "urging the Japanese Government to accept historical responsibility for these crimes." (Compl. ¶ 11.)

Any contrary conclusion would invite unwarranted judicial involvement in the myriad symbolic displays and public policy issues that have some tangential relationship to foreign affairs. For instance, those who might harbor some factual objection to the historical treatment of a state or municipal monument to the victims of the Holocaust could make similar claims to those advanced by Plaintiffs in this action. Neither the Supremacy Clause nor the Constitution's delegation of foreign affairs powers to the federal government prevent a municipality from acting as Glendale has done in this instance:

Holding that cities are preempted under. . . federal law. . . from making pronouncements on matters of

public interest. . . would mark an unprecedented and extraordinary intrusion on the rights of state and local governments. An inherent power of any sovereign government and one that is fundamental to any form of democracy is the ability to communicate with the citizenry. . . . Absent explicit direction from Congress, we are not willing to conclude that our federal government has chosen to adopt a rule that is so antithetical to fundamental principles of federalism and democracy.

Alameda Newspapers, Inc. v. City of Oakland, 95 F.3d 1406, 1415 (9th Cir. 1996).

Glendale's placement of the Comfort Women monument in its Central Park does not pose the type of interference with the federal government's foreign affairs powers that states a plausible claim for relief. Instead, even according to the facts alleged in the Complaint, Glendale's placement of the statue is entirely consistent with the federal government's foreign policy.

(Def. Exh. 20, pp. 6-7. See also SAC ¶ 2 [alleging that the plaque cites to H.R. 121].)

This Court sees no reason to deviate from this conclusion. Plaintiffs' citation to Movsesian v. Victoria Versicherung AG (9th Cir. 2012) 670 F.3d 1067 does not change this analysis. Movsesian concerned the enactment of a law concerning the Armenian genocide that was not "merely expressive" and instead "impose[d] a concrete policy of redress … subjecting foreign insurance companies to suit in California by overriding forum-selection provisions and greatly extending the statute of limitations for a narrowly defined class of claims." (Id. at p. 1077.) The court declined to "offer any opinion about California's ability to express support for Armenians by, for example, declaring a commemorative day." (Id. at p. 1077, fn. 5.) Here, it is not alleged that defendant attempted to regulate or conduct foreign affairs; instead, defendant at most expressed an opinion on the issue of comfort women. Plaintiffs provide no authority which has held that purely expressive conduct, such as the placement of a monument and plaque, intrudes upon the federal government's exclusive power to conduct and regulate foreign affairs. The cases cited by plaintiffs in the opposition concerned actions that went beyond mere expressive conduct. (See American Ins. Ass'n v. Garamendi (2003) 539 U.S. 396 [statute required disclosure of information about insurance policies]; Crosby v. National Foreign Trade Council (2000) 530 U.S. 363 [state law restricted ability of the state and its agencies to purchase goods or services from companies doing business with Burma (Myanmar)]; Foster v. Love (1997) 522 U.S. 67 [statute regulated election for congressional office]; Gade v. National Solid Wastes Management Ass'n (1992) 505 U.S. 88 [laws provided for the training, testing, and licensing of hazardous waste site workers]; In re World War II Era Japanese Forced Labor Litigation (N.D. Cal. 2001) 164 F.Supp.2d 1160 [statute allowed for suits seeking compensation for forced labor during World War II]; Deutsch v. Turner Corp. (9th Cir. 2003) 317 F.3d 1005 [same]; Zschernig v. Miller (1968) 389 U.S. 429 [statute provided conditions under which an alien not residing in the U.S. could take property by succession or testamentary disposition]; Hines v. Davidowitz (1941) 312 U.S. 52 [statute required aliens to annually register]; Von Saher v. Norton Simon Museum of Art at Pasadena (9th Cir. 2010) 592 F.3d 954 [statute allowed persons to bring actions against museums to recover art looted by the Nazis].)

The Court finds that plaintiffs have not established a probability of prevailing on their first cause of action.

C. Plaintiffs' Have Not Met Their Burden of Showing a Probability of Prevailing on their Second Cause of Action for Violation of the Glendale Municipal Code.

Plaintiffs' second cause of action alleges that defendant violated its Municipal Code because the monument was not properly approved by the City Council pursuant to Glendale Municipal Code section 2.04.140.

(See SAC ¶¶ 33-34.) Plaintiffs allege that this section provides: "In all matters and things not otherwise provided for in this chapter, the proceedings of the council shall be governed under Robert's Rules of Order, revised copy, 1952 edition." (Id., ¶ 33. See also Blecher Decl., Exh. G.) Plaintiffs allege: "Pursuant to Robert's Rules of Order, to introduce a new piece of business or propose a decision or action, a motion must be made by a group member. (Art. 1, Sec. 4.) A second motion must then also be made. (Art. I, Sec. 5.) And after limited discussion, the group then votes on the motion. (Art. I, Sec. 7 & 9.) A majority vote is required for the motion to pass. (Id.)" (SAC ¶ 33.) Plaintiffs allege that the monument was not properly before the City Council because the plaque was neither proposed to the Council nor made the subject of a motion that was approved. (Id., ¶ 34.)

Roberts' Rules of Order is a "parliamentary guide is adopted by legislative bodies to expedite the transaction of their affairs in an orderly fashion." (City of Pasadena v. Paine (1954) 126 Cal.App.2d 93, 96.) "Such rules are therefore procedural and their strict observance is not mandatory. Consequently, a failure to observe one of them is not jurisdictional and does not invalidate action which is otherwise in conformity with charter requirements." (Ibid.) "[T]he mere failure of a municipal legislative body to conform to parliamentary usage will not invalidate its action when the requisite number of members have agreed to the particular measure." (Ibid.)

Defendant provides evidence that defendant's City Council did comply with Robert's Rules of Order in approving the monument. (See Cruz Decl., Exh. A; Mera Decl., Exh. A.) However, plaintiffs' evidence suggests that the contents of the plaque were not discussed or known to the council members prior to approval of the monument. (See Mera Decl., ¶¶ 8, 16, Exh. A; Naoki Decl., ¶¶ 9, 13.) But the council later voted to defend the instant lawsuit. (See Cruz Decl., Exh. B.) There is no showing that the council members were unaware of the contents of the plaque at that time, and their decision to defend the monument and plaque can only be viewed as approval of its contents. Plaintiff makes no showing that a decision remains improper where it is later ratified.

Therefore, plaintiffs have not shown a probability of prevailing on the second cause of action.

D. Plaintiffs' Have Not Met Their Burden of Showing a Probability of Prevailing on Their Third Cause of Action for Violation of the Equal Protection Clause of the California Constitution

In the third cause of action, plaintiffs seek a declaration that the placement of the monument denies plaintiffs equal protection under the law because it expressly and impliedly disapproves of individuals of Japanese origin, because no monument exists in the park that honors any of Glendale's other sister cities, because the monument interferes with plaintiffs' use and enjoyment of the park and the nearby Adult Recreation Center, and because the monument discourages plaintiffs from equal and unfettered access to these areas. (See SAC ¶ 39.)

"[A]n equal protection claim contains the following essential elements: (1) plaintiff was treated differently from other similarly situated persons;[Fn. omitted.] (2) the difference in treatment was intentional; and (3) there was no rational basis for the difference in treatment." (Genesis Environmental Services v. San Joaquin Valley Unified Air Pollution Control Dist. (2003) 113 Cal.App.4th 597, 605.) "The equal protection clause contained in article I, section 7, of the California Constitution is coextensive with its federal counterpart found in the Fourteenth Amendment to the United States Constitution." (In re Conservatorship and Estate of Edde (2009) 173 Cal.App.4th 883, 891. See also People v. Shields (2011) 199 Cal.App.4th 323, 333 ["Federal and state equal protection analysis is substantially the same"].)

State actors may create classifications facially, when such categorization appears in the language of legislation or regulation, [citation], or de facto, through the enforcement of a facially neutral law in a manner so as to disparately impact a discernible group. The Supreme Court has instructed us time and again, however, that disparate impact alone cannot suffice to state an Equal Protection violation; otherwise, any law could be challenged on Equal Protection grounds by whomever it has negatively impacted. [Citation.] Thus, a party who wishes to make out an Equal Protection claim must prove "the existence of purposeful discrimination" motivating the state action which caused the complained-of injury. [Citations.] "Discriminatory purpose in an equal protection context implies that the decisionmaker selected a particular course of action at least in part because of, and not simply in spite of, the adverse impact it would have on an identifiable group."

(Johnson v. Rodriguez (5th Cir. 1997) 110 F.3d 299, 306-307. See also Coleman v. Miller (11th Cir. 1997) 117 F.3d 527, 529 [in a disparate impact claim, the plaintiff must show that the action produces disproportionate effects and that discrimination was a substantial or motivating factor].)

The monument and plaque do not create a classification that singles out Japanese persons. Though the plaque refers to the Japanese military, the Imperial Japanese Army, and the Government of Japan, it also states that it is dedicated to the memory of all comfort women, including women from Japan. (See SAC ¶ 2.) Plaintiffs are not alleged to be members of the Japanese armed forces. Further, being a member of the Imperial Japanese Army during World War II is not a suspect classification to which the Equal Protection Clause would apply.

Plaintiffs also allege that the monument impliedly condemns all persons of Japanese origin and descent. (See SAC ¶ 1.) Plaintiffs argue that the monument disparately impacts this class of people. To support this claim, plaintiffs must provide specific factual evidence which demonstrates that the monument imposes on persons of Japanese origin a measurable burden or denies them an identifiable benefit. (See Coleman, 117 F.3d at p. 530.) Plaintiff Gingery declares that she no longer feels comfortable or welcome at the park because of the presence of the monument. (Gingery Decl., ¶ 10.) Plaintiff Mera states that he feels compelled to avoid the area because of the presence of the monument and the plaque. (See Mera Decl., ¶ 20.) Plaintiff Naoki declares that he and his wife no longer feel comfortable in the park and avoid the area because of the monument. (Naoki Decl., ¶ 16.) At most, this merely suggests intangible harm to the plaintiffs based on their decisions to avoid the park; there is no evidence that other persons of Japanese descent similarly avoided the park, or that they were prohibited from going to the park simply because of the monument's existence. (See Coleman, 117 F.3d at p. 530 [anecdotal evidence of individual harm of two individuals was not sufficient to establish disparate impact].) The fact that plaintiffs and others find the message of the monument offensive is not sufficient, by itself, to support an equal protection claim. (See Freedom from Religion Foundation, Inc. v. City of Warren, Mich. (6th Cir. 2013) 707 F.3d 686, 698 [government's disparate treatment of a preferred message is not sufficient].)

Moreover, plaintiffs do not point to sufficient evidence that discrimination was a substantial motivating factor in defendant's decision. At most, plaintiffs show that defendant was aware that people of Japanese descent would be upset by the monument and that the monument would be controversial. (See Mera Decl., ¶¶ 9-10; Naoki Decl., ¶ 10.) There is no indication that the statement by Councilmember Quintero that certain persons present at the meeting discussing the monument "do not know your own history," was motivated by discrimination against persons of Japanese descent. (See Mera Decl., ¶ 9, Exh. A.) (The Court also notes that Councilmember Quintero was the one member of the Council who voted against approving the Comfort Women monument.) Further, a a review of the video of the meeting suggests that most of the council members expressed a lack of discriminatory intent with regard to persons of Japanese origin. (See id., Exh. A.)

Therefore, plaintiffs fail to establish a probability of prevailing on their third cause of action.

E. Plaintiffs' Have Not Met Their Burden of Showing a Probability of Prevailing on Their Fourth Cause of Action for Violation of the Privileges and Immunities Clause of the California Constitution

In the fourth cause of action, plaintiffs allege that defendant violated the Privileges and Immunities Clause of the California Constitution because the placement of the monument denies plaintiffs privileges and immunities on the same terms as non-Japanese citizens. (See SAC ¶ 41.) Plaintiffs allege the same violations as in the third cause of action. (See id., ¶¶ 39, 41.) "The California and United States privileges and immunities clauses call for the same analysis as called for by the equal protection provisions . . . ." (People v. Housman (1984) 163 Cal.App.3d Supp. 43, 52-53.) Plaintiffs do not present any additional arguments or evidence for the fourth cause of action that were not addressed for the third cause of action.

Therefore, plaintiffs fail to establish a probability of prevailing on their fourth cause of action.

Defendant has shown that it engaged in protected activity. Plaintiff's have failed to show that they have probability of succeeding on any of their causes of action.

Defendant's special motion to strike is GRANTED.
