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12
 13
 14 **UNITED STATES DISTRICT COURT**
 15 **CENTRAL DISTRICT OF CALIFORNIA**

16 **ASIA ECONOMIC INSTITUTE, LLC,**
 17 ***et al.*,**

18 **Plaintiffs,**

19 v.

20 **XCENTRIC VENTURES, LLC, *et al.*,**

21 **Defendants.**

Case No: 2:10-cv-01360-RSWL-PJW

**MOTION TO DISMISS FIRST
 AMENDED COMPLAINT PURSUANT
 TO FED.R.CIV.P. 12(b)(6) AND
 FED.R.CIV.P. 9(b)**

Hearing Date: **September 20, 2010**

Time: **1:30 p.m.**

Courtroom: **6**

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiffs' First Amended Complaint (Doc. #96; "FAC") does not assert any cause
4 of action upon which relief may be granted. Rather, this document is a rhetorical political
5 manifesto designed to delight critics of Ripoff Report while falsely smearing Defendants
6 in retaliation for their efforts to defend the First Amendment.¹ Plaintiffs' new fraud-
7 based allegations should be dismissed pursuant to *Fed. R. Civ. P. 12(b)(6)* and/or *Fed. R.*
8 *Civ. P. 9(b)*.

9 **II. PRELIMINARY STATEMENT**

10 Defendants recognize that under Rule 12(b)(6), all well-pleaded factual allegations
11 are to be construed in the light most favorable to the pleader, and accepted as true.
12 *Movsesian v. Victoria Versicherung AG*, 578 F.3d 1052, 1056 (9th Cir. 2009). However,
13 courts faced with a 12(b)(6) motion "are not bound to accept as true a legal conclusion
14 couched as a factual allegation," and as such, "[t]hreadbare recitals of the elements of a
15 cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v.*
16 *Iqbal*, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell Atlantic Corp. v. Twombly*,
17 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)).

18 Although a court normally cannot consider matters outside the pleadings in
19 deciding a motion under Rule 12(b)(6), the court can consider materials attached to the
20 complaint as exhibits. See *Falcone v. DLA Piper U.S. LLP Profit Sharing and 401(k) Sav.*
21 *Plan Comm.*, 2010 WL 2280543 (N.D.Cal. 2010) (citing *Amfac Mtg. Corp. v. Arizona*
22 *Mall of Tempe*, 583 F.2d 426, 429–30 (9th Cir. 1978) (in context of a motion under Rule
23 12(b)(6), "The court is not limited by the mere allegations contained in the complaint,"
24 and may properly consider any documents attached to the complaint as exhibits).

25
26
27 ¹ Plaintiffs are wrongfully misusing the process of this court to publicly lobby for the eradication of the Ripoff Report
28 website by presenting false and misleading statements of fact and law. This conduct is sanctionable and should not
be tolerated by this court. This is particularly true where, as here, Plaintiffs have repeatedly engaged in a pattern of
such conduct. Defendants have served a Rule 11 Motion on Plaintiffs and will file that Motion if the complaint is not
withdrawn or amended.

1 When a complaint contains exhibits or references documents, a court “need not
2 accept as true allegations contradicting documents that are referenced in the complaint ...
3 .” *Spinedex Physical Therapy USA, Inc. v. United Health Care of Arizona, Inc.*, 661 F.
4 Supp.3d 1076, 1083 (D.Ariz. 2009). In fact, a “court may disregard allegations in the
5 complaint if contradicted by facts established by exhibits attached to the complaint.”
6 *Durning v. First Boston Corp.*, 815 F.2d 1265, 1267 (9th Cir. 1987) (emphasis added).

7 These points carry special importance here because many of the key factual
8 allegations in the FAC are not only false, they are contradicted by the documents
9 referenced in, and attached to, the FAC. In light of the Supreme Court’s clarification of
10 Rule 8’s pleading standards set forth in *Twombly*, plaintiffs hoping to avoid dismissal
11 under Rule 12(b)(6) must do more than offer “an unadorned, the defendant unlawfully-
12 harmed-me accusation.” *Twombly*, 550 U.S. at 555. Specifically, plaintiffs must show
13 they have “nudged their claims across the line from conceivable to plausible”
14 *Twombly*, 550 U.S. at 570. As explained herein, Plaintiffs have not satisfied this burden
15 because their RICO and fraud claims are so clearly lacking the mandatory elements of
16 damages and causation that those claims are not remotely plausible and are therefore
17 appropriate for dismissal under Rule 12(b)(6).

18 **A. The Elements of a RICO Claim Predicated on Wire Fraud**

19 The elements that a plaintiff must prove (and therefore plead) to recover under 18
20 U.S.C. § 1962(c) are: (1) conduct; (2) of an enterprise; (3) through a pattern; (4) of
21 racketeering activity (known as “predicate acts”); (5) causing injury to plaintiff’s
22 “business or property” See *Living Designs, Inc. v. E.I. Dupont de Nemours & Co.*, 431
23 F.3d 353, 361 (9th Cir. 2005) *cert. denied*, 126 S. Ct. 2861 (2006); *Sedima, S.P.R.L. v.*
24 *Imrex Co., Inc.*, 473 U.S. 479, 496, 105 S.Ct. 3275 (1985).

25 Plaintiffs allege that the predicate acts are wire fraud. Plaintiffs must plead, with
26 particularity, each of the following elements: Xcentric (1) participated in a scheme to
27 defraud; and (2) used the wires to further the scheme. Ninth Circuit Model Criminal Jury
28

1 Instructions, 8.103 (wire fraud); *United States v. Ciccone*, 219 F.3d 1078, 1083 (9th Cir.
2 2000). In addition, there is an element of specific intent. *Id.* Materiality is an essential
3 element of the crime of wire fraud. *Neder v. United States*, 527 U.S. 1 (1999).

4 Plaintiffs have not sufficiently pled wire fraud as a predicate act because they have
5 not pled facts that constitute a scheme to defraud, and they have not pled facts that
6 constitute causation between their alleged injury and the alleged predicate act.
7 Additionally, it is impossible to infer materiality or intent based on the plain reading of the
8 complaint and its attachments.

9 In *United States v. Stapleton*, 293 F.3d 1111 (9th Cir. 2002) the Court affirmed and
10 held that the following jury instructions were appropriate:

11 In order for the defendant to be found guilty of wire fraud, the
12 government must prove each of the following elements
beyond a reasonable doubt.

13 First, the defendant made up or participated in a scheme or
14 plan for obtaining money or property by making false
promises or statements with all of you agreeing on at least one
15 particular false promise or statement that was made.

16 Second element is that the defendant knew that the promises
or statements were false.

17 The third element is that the promises or statements were of a
18 kind that would reasonably influence a person to part with
money or property.

19 The fourth element is that the defendant acted with the intent
20 to defraud.

21 And the fifth element is that the defendant used or caused to
22 be used wire or radio or television communication in interstate
or foreign commerce to carry out or attempt to carry out an
23 essential part of the scheme.

24 **B. Summary Of New/Repled Fraud Claims In FAC**

25 Following the Rule 9(b) dismissal of the wire fraud claim for failure to plead fraud
26 with particularity, the FAC contains voluminous allegations which attempt to demonstrate
27 the presence of a RICO/wire fraud claim, but which fall far short of doing so. Despite
28 dozens of bizarre insults such as: “The Ripoff Report enterprise takes advantage of the

1 average person’s lack of sophistication in technology, reliance on Internet search engines,
2 and general lack of time[]”, FAC ¶ 16, the true factual basis of Plaintiffs’ wire fraud
3 remains elusive.

4 This is so because the Complaint includes a baffling array of criticisms of
5 seemingly every aspect of the Ripoff Report website, no matter how irrelevant or obscure.
6 For instance, FAC ¶¶ 56–58 accuses Defendants of deliberately designing the Ripoff
7 Report website in such a way that certain pages are *hard to print*. Of course, given
8 Plaintiffs’ demonstrated ability to print pages from Defendants’ site, it is unclear why or
9 how this “anti-printing scheme” is evidence of wire fraud.

10 Culling through the hundreds of abstruse, inflammatory and irrelevant allegations,
11 the core of the wire fraud claim (and two newly added state-law fraud claims) appear to be
12 based on six primary representations that Plaintiffs claim are false, material, and resulted
13 in harm to them:

- 14 1) Defendants represent that “reports never come down”; FAC ¶¶ 196–204
- 15 2) Defendants state that victims can file a free rebuttal and that rebuttals are
16 effective and helpful; FAC ¶¶ 227–229
- 17 3) Defendants state that they have never done anything to cause Google to rank
18 their website higher in search results; FAC ¶¶ 247–248
- 19 4) Defendants present themselves as authorities in Internet and Technology
20 Law, etc.; FAC ¶¶ 254–256
- 21 5) Defendants state that they do not filter or suppress results, unlike the Better
22 Business Bureau; FAC ¶¶ 261–264
- 23 6) Defendants present CAP members as safe, reliable, and trustworthy; FAC ¶¶
24 266–272

25 Based on these representations, Plaintiffs claim they were harmed in four different
26 ways. First, they claim: “If Plaintiffs had known the true facts they would have sued ROR
27
28

1 *earlier* and not delayed in trying to resolve this issue by any means other than a lawsuit
2” FAC ¶ 260 (emphasis added).

3 Next, Plaintiffs allege a second type of generalized harm which is as follows:

4 The false statements lead those victimized to believe they have
5 very limited courses of action [for dealing with reports]. If
6 they wish to mitigate the damage caused by these reports, they
7 must either pay Defendants to be in the CAP or pay an
8 information technology (“IT”) consultant to publish
9 alternative online content to repair their reputations via search
10 engines. FAC ¶ 212.

11 As to this allegation, Plaintiffs claim that instead of paying anything to Defendants,
12 they tried some alternative solutions which included paying \$25 for a “listing on Craigslist
13 seeking an on site web product developer with SEO skills in order to combat the
14 defamatory reports.” FAC ¶ 213. Plaintiffs further claim to have paid \$2,390 to various
15 third-party IT/SEO consultants who promised to help hide reports about Plaintiffs in
16 Google’s search results but who apparently failed to deliver those results. *See* FAC ¶¶
17 214–217. Plaintiffs do not, however, allege that Defendants ever recommended either of
18 these methods for dealing with reports or that Defendants knew or intended that the third-
19 party SEO consultants hired by Plaintiffs would fail to deliver whatever results they may
20 have promised.

21 Third, Plaintiffs claim that on the advice of Mr. Magedson in which he suggested
22 that “the best thing you can do is to post a rebuttal,” Mr. Mobrez filed a rebuttal to one or
23 more reports on April 3, 2009. *See* FAC ¶¶ 244–45.

24 Fourth and finally, Plaintiffs provide a generic laundry list of alleged damages
25 including, but not limited to: “Amounts expended in traveling to Washington, DC and
26 advocating to representatives and lawmakers for a change in the statute in the amount of
27 \$2,500 to date.” FAC ¶ 288(a). Plaintiffs also allege other damages including \$347,983
28 in “Rented office space,” “Phone and Internet Communications to date: \$34,809,” and so
forth. FAC ¶ 288. However, Plaintiffs do not allege or explain how these losses were
actually and proximately *caused* by any of Defendants’ alleged misrepresentations

1 *separate and apart* from the negative reports about Plaintiffs posted by third party users of
2 the Ripoff Report website.

3 As explained herein, the purported misrepresentations are non-actionable
4 expressions of opinion or law which are *per se* insufficient to state a claim for wire fraud
5 or any other type of fraud. However, even assuming Plaintiffs' allegations are true, they
6 are patently insufficient to state a viable claim for RICO/wire fraud because the
7 Complaint does not allege a plausible causal nexus between the alleged wrongful conduct
8 and the harm Plaintiffs claim to have suffered.

9 **III. ARGUMENT**

10 **A. The FAC Fails To Adequately Allege Causation In Support Of**
11 **Plaintiffs' RICO (Wire Fraud) And State-Law Fraud Claims**

12 Causation is the Achilles heel of any RICO claim. RICO claims are extremely
13 complicated and can fail for many reasons. However, the most frequent basis for a
14 12(b)(6) dismissal of a RICO claim is lack of either actual or proximate cause. These
15 common defects are present here and are fatal to Plaintiffs' Amended Complaint both as
16 to their RICO claim and their state-law fraud claims.

17 The FAC fails to show that any false statements made by Defendants were both a
18 "but for" and proximate cause of Plaintiffs' alleged harm. Insofar as Defendants
19 understand Plaintiffs' theory, it appears they allege that Defendants made six different
20 false statements on their website as quoted above. As a matter of law, these allegations
21 cannot support a RICO claim because the allegations are insufficient to show a plausible
22 causal connection between any false statements of fact and the specific harm allegedly
23 suffered by Plaintiffs. "It is well settled that, to maintain a civil RICO claim predicated on
24 mail [or wire] fraud, a plaintiff must show that the defendants' alleged misconduct
25 proximately caused the injury." *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 941 (9th Cir.
26 2006) (brackets in original) (quoting *Poulos v. Caesar's World, Inc.*, 379 F.3d 654, 664
27 (9th Cir. 2005)). Furthermore, as the U.S. Supreme Court has explained:
28

1 [T]o state a claim under civil RICO, the plaintiff is required to show that a
2 RICO predicate offense “not only was a ‘but for’ cause of his injury, but
3 was the proximate cause as well.” Proximate cause for RICO purposes, we
4 made clear, should be evaluated in light of its common-law foundations;
5 proximate cause thus requires “some direct relation between the injury
6 asserted and the injurious conduct alleged.” A link that is “too remote,”
7 “purely contingent,” or “indirec[t]” is insufficient.

8 *Hemi Group, LLC v. City of New York, N.Y.*, 130 S. Ct. 983, 989 (2010) (emphasis added)
9 (quoting *Holmes v. Securities Investor Protection Corporation*, 503 U.S. 258, 112 S.Ct.
10 1311, 117 L.Ed.2d 532 (1992)).

11 In *Holmes*, the Supreme Court held that a plaintiff may sue under § 1962(c) only if
12 the alleged RICO violation was the proximate cause of the plaintiff’s injury. In *Anza v.*
13 *Ideal Steel Supply Corp.*, 547 U.S. 451, 457, 126 S. Ct. 1991, 1996, 164 L. Ed. 2d 720
14 (2006), that theory was extended to claims, such as the one here, based on § 1962(c). As
15 the Court in *Anza* explained, the types of injuries asserted by Plaintiffs constitute a serious
16 discontinuity between the actions alleged giving rise to the RICO claim, and the actual
17 damages being asserted. *See Anza*, 547 U.S. at 459, 126 S.Ct. at 1997 (explaining that
18 because “Businesses lose and gain customers for many reasons,” plaintiff’s “alleged
19 injury was not the direct result of a RICO violation”). The theory behind this requirement
20 is simple:

21 The requirement of a direct causal connection is especially warranted where
22 the immediate victims of an alleged RICO violation can be expected to
23 vindicate the laws by pursuing their own claims. *See Holmes*, 503 U.S. at
24 269-270, 112 S.Ct. 1311 (“[D]irectly injured victims can generally be
25 counted on to vindicate the law as private attorneys general, without any of
26 the problems attendant upon suits by plaintiffs injured more remotely”)

27 *Id.* at 460, 126 S.Ct. at 1998. Proximate causation requires “some direct relation between
28 the injury asserted and the injurious conduct alleged.” *Holmes*, 503 U.S. at 268, 112 S.Ct.
1311. Under *Anza*, courts must scrutinize the causal link between the RICO violation and
the injury, identifying with precision both the nature of the violation and the cause of the
injury to the plaintiff. *Anza*, 547 U.S. at 1996-98. “Where the violation is not itself the
immediate cause of the plaintiff’s injury, proximate cause may be lacking.” *Canyon*

1 *County v. Syngenta Seeds, Inc.*, 519 F.3d 969, 981 (9th Cir. 2008) *cert. denied*, 129 S. Ct.
2 458, 172 L. Ed. 2d 327 (2008). Plaintiffs cannot, and have not, alleged appropriate injury
3 necessary to sustain their RICO claim.

4 Applying RICO's strict causation requirements to the alleged fraudulent
5 representations set forth in the FAC demonstrates that Plaintiffs' RICO claim should be
6 dismissed pursuant to Fed. R. Civ. P. 12(b)(6). This result is appropriate for the same
7 reason discussed by the Ninth Circuit in *Sosa v. DirectTV* in which the court found a lack
8 of proximate cause as to Plaintiffs' allegation "that DIRECTV's threat to sue 'within 14
9 days' was false and constituted mail fraud." *Sosa*, 437 F.3d at 941. Even assuming this
10 statement was factually false, the Ninth Circuit concluded that RICO's proximate cause
11 requirement had not been met because "Sosa utterly fails to show how DIRECTV's false
12 threat to sue within 14 days proximately caused him any injury." *Id.*

13 **1. The Statement That "Reports Never Come Down" Did Not**
14 **Actually Or Proximately Cause Any Alleged Harm**

15 Here, Plaintiffs allege, in a conclusory fashion, that they were harmed by
16 Defendants' false statement that "reports are never removed".² The actual facts alleged,
17 however, cannot support a wire fraud or state-law fraud claim because both "but for" and
18 proximate causation are clearly lacking. Plaintiffs never allege what damages they
19 incurred that they would not have incurred if Defendants had instead stated, "we
20 sometimes remove reports" (which is the statement that the FAC alleges is true). Not one
21 category of the damages that Plaintiffs claim to have incurred could possibly be causally
22 connected to Defendants stating that reports are never removed instead of stating that
23 reports are sometimes removed. This is because even if Defendants had announced that
24 reports are sometimes removed, there is no allegation that Defendants were ever willing to
25 remove the reports about Plaintiffs. If Plaintiffs were harmed, it was solely because a
26 third party former employee of Plaintiffs authored content posted on Ripoff Report and

27 _____
28 ² Later this Motion will address why the allegation that statement is false is contradicted by the very exhibits that
Plaintiffs attach to their FAC.

1 Defendants refused to remove the content. Of course, Defendants always have a lawful
2 right and editorial discretion to refuse to remove reports. *See generally Global Royalties,*
3 *Ltd. v. Xcentric Ventures, LLC*, 544 F. Supp.2d 929 (D. Ariz. 2008).

4 Under these facts, Plaintiffs cannot establish a plausible link between any damage
5 they incurred and any false statements made to them about Defendants’ report removal
6 policy. *See Canyon County*, 519 F.3d at 982 n. 12 (“It is therefore evident that courts
7 need not allow RICO plaintiffs leeway to continue on with their case in an attempt to
8 prove an entirely remote causal link.”)

9 **2. The Statement That The Subject of A Report Can File a Free**
10 **Rebuttal and That Rebuttals Can Be Effective Did Not Actually**
11 **Or Proximately Cause Any Alleged Harm**

12 Plaintiffs claim that Defendants made a series of statements about filing rebuttals,
13 to the effect that “we offer you the opportunity to file a rebuttal,” “you can write a rebuttal
14 explaining your position,” “rebuttals are free,” and “we strongly encourage you to use
15 this resource since they can be extremely effective.” FAC ¶¶228, 229. Plaintiffs claim that
16 these statements are false. Plaintiffs also allege in ¶244 that Plaintiffs did file a rebuttal.
17 Putting aside the Rule 11 implications of alleging both that the statement that you can file
18 a rebuttal is false and that Plaintiffs in fact filed a rebuttal, Plaintiffs once again have
19 failed to plead facts that demonstrate causation. Since Plaintiffs did file a rebuttal, they
20 could not be harmed by allegedly false statements that rebuttals can be filed.

21 Plaintiffs also state that after they filed a rebuttal, one of the reports about AEI was
22 moved from the third page of Google’s search results to the first page, *see* FAC ¶ 246, but
23 they do not allege that filing the rebuttal actually caused this to occur, nor do they allege
24 that Defendants knew this would occur. In addition, Plaintiffs do not allege that any harm
25 occurred as a result of this change in ranking; *i.e.*, conceding that the report about AEI
26 was already found on page three of Google before Mr. Mobrez posted his rebuttal.
27 Plaintiffs do not allege that this change in ranking resulted in any *additional* harm to
28

1 Plaintiffs beyond whatever harm would have occurred if the report remained on page
2 three.

3 **3. The Statement That Defendants Have Never Done Anything to**
4 **Cause Google to Rank Their Website Higher in Search Results**
5 **Did Not Actually Or Proximately Cause Any Alleged Harm**

6 Here again, assuming that Defendants actually engage in search engine
7 optimization, but claim they do not, the claim fails for lack of causation between that
8 allegedly false statement and any harm. Plaintiffs allege that Ripoff Report ranks high in
9 the Google searches. Whether or not that ranking is the result of something that Ripoff
10 Report did is entirely immaterial to Plaintiffs' purported damages. Plaintiff also alleges
11 that they were damaged in money paid to IT consultants, loss of contacts and business
12 opportunities. ¶253. Nothing in the FAC, however, explains how Plaintiffs' position
13 would have been different if Ripoff Report had announced that it shows favor to Google
14 in reports, which causes Google to show favor to Ripoff Report in search rankings (Ripoff
15 Report denies this).

16 **4. That Defendants Present Themselves as Authorities in Internet**
17 **and Technology Law Did Not Actually Or Proximately Cause**
18 **Any Alleged Harm**

19 Plaintiffs allege that the claims on the Ripoff Report website about its past
20 litigation experiences are false. FAC ¶254-256. Plaintiffs then allege that they were
21 injured "both by the public's perception and in the form of fees paid to IT consultants,
22 loss of business over time and lost contract." FAC ¶259. Plaintiffs further allege that if
23 they had known the true facts, they would have sued Ripoff Report earlier and not delayed
24 in trying to resolve this issue by any means other than a lawsuit. FAC ¶260. Plaintiffs do
25 not, however, allege how suing earlier would have benefited them in any tangible way. In
26 other words, Plaintiffs do not point to any harm caused by the short delay in commencing
27 litigation.
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5. The Statement That Defendants Do Not Filter or Suppress Results Did Not Actually Or Proximately Cause Any Alleged Harm

Plaintiffs claim that Ripoff Report claims that it does not hide reports of satisfied complaints and that all complaints remain public. FAC ¶261. Plaintiffs claim this is false because Ripoff Report does not post negative reports about certain businesses, such as CAP members. FAC ¶263. Plaintiffs claim that they were injured by fees paid to IT contractors and loss of business contracts and that if they had known the true facts they would have sued Ripoff Report earlier. FAC ¶265. Once again, Plaintiffs make no factual allegation that causally connects Ripoff Report’s statements about not hiding reports of satisfied complaints to Plaintiffs hiring IT contractors or delaying this lawsuit.

6. That Defendants Present CAP members as Safe, Reliable, and Trustworthy Did Not Actually Or Proximately Cause Any Alleged Harm

Plaintiffs allege that Defendants’ statements of investigation of CAP members are false. FAC ¶267, 268. Plaintiffs then claim that they were injured by fees paid to IT contractors and loss of business contracts. FAC ¶271. Plaintiffs plead no causal connection between the allegedly false statement and any damage they incurred. Plaintiffs do not and cannot claim that they did business with a CAP member and were harmed by a CAP member who Ripoff Report did not properly investigate.

B. Fraud Cannot Be Based On Statements About Future Events

Whether based on California state law (Cal. Civ. Code §§ 1572, 1710), common-law, or federal law, a fraud claim generally requires proof that the Defendant made a false representation “as to a past or existing material fact.” *See Cedars Sinai Medical Center v. Mid-West Nat. Life Ins. Co.*, 118 F. Supp.2d 1002, 1010 (C.D.Cal. 2000) (emphasis added) (citing *Gagne v. Bertran*, 43 Cal.2d 481, 487-88, 275 P.2d 15 (1954); *Continental Airlines, Inc. v. McDonnell Douglas Corp.*, 216 Cal.App.3d 388, 402, 264 Cal.Rptr. 779 (1989). Because human beings are not psychic and cannot predict the future, fraud cannot be based on false statements concerning future events; “‘predictions as to future events are ordinarily non-actionable expressions of opinion’ under basic principles of the

1 tort of fraudulent misrepresentation.” *Bayview Hunters Point Comm. Advocates v.*
2 *Metropolitan Transp. Com’n*, 366 F.3d 692, 698 (9th Cir. 2004) (quoting *In re Jogert, Inc.*,
3 950 F.2d 1498, 1507 (9th Cir. 1991)); *Richard P. v. Vista Del Mar Child Care Serv.*, 165
4 Cal.Rptr. 370, 372 (Cal.Ct.App. 1980).

5 The purportedly false statement that Ripoff Report does not remove reports, was
6 not fraud because, among other reasons, it is a true statement of Ripoff Report’s policy.
7 Specifically, beginning with ¶ 205, the FAC alleges that “the true facts are that Reports
8 do, in fact, come down ... ” implying that Mr. Magedson lied to Mr. Mobrez in May and
9 July 2009 when he informed him “We do not remove reports.”

10 The FAC purports to offer proof that reports “do come down” based on a
11 settlement agreement dated May 15, 2009 attached as Exhibit 8 to the FAC in a case
12 styled *Xcentric Ventures, LLC v. QED Media Group, LLC*. By its own terms, nothing in
13 the settlement agreement requires or provides for the removal of any reports from the
14 Ripoff Report site. Rather, ¶ 2(e) of the settlement agreement states that for a period of 2
15 years, Xcentric will agree to monitor incoming reports about QED and “attempt to verify
16 whether the author is or was an actual customer of QED.” In the event an author was
17 unable to prove that they were an actual customer of QED, ¶ 2(e) of the settlement
18 agreement provides that the report would not be posted.

19 According to a declaration from the lawyer for QED, Kenton Hutcherson, attached
20 as Exhibit 12 to the FAC, in October 2009, a report about QED was subsequently posted
21 without the pre-posting verification required by ¶ 2(e) of the settlement agreement. Based
22 on the requirements of the settlement agreement, on October 29, 2009 Xcentric’s counsel
23 informed Mr. Hutcherson that the report at issue was removed.

24 The FAC also alleges that David Gingras responded “YES” on January 15, 2010 to
25 a request to remove a report. ¶206. This allegation is directly contradicted by the actual
26 email which is Exhibit 11 to the FAC which reveals that Mr. Gingras actually stated that
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1 they said “yes” to helping a 16 year-old girl during the Christmas season. The email does
2 not say that they said “yes” to removing a report.

3 Far from demonstrating that Mr. Mobrez was a victim of fraud, these events
4 involving the removal of a report in October 2009 show that Mr. Magedson’s statements
5 concerning the non-removal of reports were true at the time they were to Mr. Mobrez in
6 May and July 2009 because at that time, the report about QED media had not been
7 removed. A timeline of Plaintiffs’ allegations is helpful to better illustrate this point:

- 8 • June/October 2009 — Ripoff Report website contains statement saying: “We
9 do not remove any Rip-off Reports.” FAC ¶ 171
- 10 • May/July 2009 — Magedson sends response email to Mobrez stating, “We do
11 not remove reports.” FAC ¶ 204
- 12 • March/May 2009 — AEI allegedly relies on statements; pays \$2,390 for third
13 party SEO services; FAC ¶¶ 213–217
- 14 • October 24, 2009 — AEI allegedly relies on statements; AEI pays \$25 for
15 Craigslist ad; FAC ¶ 213
- 16 • October 29, 2009 — Xcentric agrees to remove report #510675 regarding
17 QED Media in response to demand from Kenton Hutcherson; FAC Exhibit 12
(Doc. #96-12)

18 To support this, ¶ 175 of the FAC discusses (and seriously misrepresents) one
19 example of a settlement Defendants reached in a previous lawsuit in which Xcentric and
20 Magedson were plaintiffs. The settlement agreement (attached as **Exhibit 8** to the FAC)
21 does not require Defendants to remove any existing reports, nor does it make any promise
22 to remove reports in the future. Nevertheless, Plaintiffs falsely allege in FAC ¶ 173 that
23 as part of this settlement, Defendants agreed to remove two reports.

24 Representations on Ripoff Report about Defendants’ policies or willingness to
25 remove reports in the future are simply not actionable fraud under any circumstances,
26 even if shown to be false in some hyper-technical sense. However, even if the
27 representation regarding reports could support a fraud claim, the facts set forth in the
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1 Complaint fail to allege a viable claim because they do not establish that Mr. Magedson’s
2 representations to Mr. Mobrez were false at the time they were made in May and July
3 2009. At that time, the removal of the report about QED Media had not yet occurred and
4 the email that Mr. Gingras sent about helping a 16-year old girl had not yet occurred.

5 In addition, by the time Xcentric removed the report about QED in late October
6 2009, Mr. Mobrez had already purportedly relied on Mr. Magedson’s representations by
7 paying money to third party SEO/IT consultants in March and May 2009, *see* FAC ¶¶
8 214–217, and allegedly paying \$25 for a listing on Craigslist on October 24, 2009. *See*
9 FAC ¶ 213. Plaintiffs do not allege that any reliance damages occurred *after* October 29,
10 2009. Given these facts and even assuming the allegations in the FAC are true, Plaintiffs
11 have failed to assert a viable claim for wire fraud or any other type of fraud. Here, while
12 it indirectly refers to past events (whether Xcentric ever removed reports in the past)
13 Plaintiffs’ fraud claim is actually predicated entirely upon an assumption about future
14 events—i.e., that because Xcentric may have agreed to remove a report in the past, it
15 should be assumed that Xcentric might also agree to do so in the future for Mr. Mobrez.
16 At its core, this theory requires the court to infer that just because Defendants settled a
17 case based on one set of terms in the *past* necessarily makes it a fact that all future cases
18 would be settled under the exact same terms. There is no basis for this conclusion and to
19 the extent it requires the Court to draw an inference as to future events based on
20 allegations of how past cases were settled, this is insufficient to state a claim and
21 insufficient to survive dismissal under Rule 12(b)(6); “unwarranted inferences are
22 insufficient to defeat a motion to dismiss for failure to state a claim.” *Barnes v. Yahoo!*,
23 *Inc.*, 570 F.3d 1096, 1098 n.1 (9th Cir. 2009) (quoting *Anderson v. Clow (In re Stac*
24 *Electronics Securities Litig.)*, 89 F.3d 1399, 1403 (9th Cir. 1996)).

25 **C. Fraud Cannot Be Based On A Statement Of Discretionary Policy**

26 It is axiomatic that fraud generally requires a false statement of material *fact*; “The
27 law is quite clear that expressions of opinion are not generally treated as representations of
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1 fact, and thus are not grounds for a misrepresentation cause of action.” *Gentry v. eBay,*
2 *Inc.*, 99 Cal.App.4th 816, 835, 121 Cal.Rptr.2d 703, 718 (4th Dist. 2002) (quoting *Neu-*
3 *Visions Sports, Inc. v. Soren/McAdam/Bartells*, 86 Cal. App. 4th 303, 308, 103 Cal. Rptr.
4 2d 159 (4th Dist. 2000)).

5 To the extent Plaintiffs’ fraud claims are based on Defendants’ statements
6 regarding whether they would agree to the removal of reports in future cases, these
7 statements are plainly couched as a *policy statement*; “we have a uniform policy against
8 removing reports.” FAC ¶ 203(iii). As explained in detail in the “Want to Sue Ripoff
9 Report?” section attached as Exhibit 13 to the FAC, Ripoff Report extensively discusses
10 and describes its decision not to remove reports as a matter of policy:

11 FAC Exhibit 13 (Doc. 96-13)

12
13 **2. Our Policy: Why We NEVER Remove Reports**

14
15 Since the Ripoff Report was started in 1998, our policy has always remained the
16 same – we never remove reports. We will not remove reports even when they
17 are claimed to contain defamatory statements and even if the original author
18 requests it. Some people have criticized this policy as being unfair, but we
19 strongly feel this policy is essential, fair, and far better than the alternative –
20 rampant censorship.

21 As a matter of law, statements like this describing a company’s policy are
22 construed as expressions of opinion, not representations of fact. *See Neben v. Thrivent*
23 *Financial for Lutherans*, 2004 WL 251838, *6 (D.Minn. 2004) (allegations failed to state
24 a viable fraud claim because defendant’s “description of the process by which it selected
25 general agents to become managing partners is a general statement of policy, not a
26 representation of fact.”) (emphasis added) (citing *Martens v. Minn. Mining & Mfg. Co.*,
27 616 N.W.2d 732, 740 (Minn. 2000)).

28 Like any other policy, exceptions may be made, but this does not transform
Defendants’ policy statement into actionable fraud. To illustrate why this is so, imagine a
customer enters an Apple retail store and asks for a free iPhone. Not surprisingly, the

1 clerk responds, “Sorry, we never give out free iPhones. That’s our policy.” Relying on
2 this representation, the disappointed customer then pays \$25 for an advertisement on
3 Craigslist asking if anyone would like to donate a free iPhone to him. Later, the customer
4 learns that, in fact, Apple CEO Steve Jobs once gave a free iPhone to someone else as part
5 of the settlement of a dispute. No one would dispute that the clerk did not commit fraud.

6 Like the statement “we do not remove reports,” the statement that people can file
7 rebuttals is also a policy statement. Plaintiffs claim in FAC ¶228 that statement is false,
8 but also allege in FAC ¶244 that they DID file a rebuttal. Obviously, since Plaintiff did
9 file a rebuttal, it is ludicrous for Plaintiff to allege that it is false for Defendant to state that
10 people can write rebuttals. The Court need not accept as true an allegation that is directly
11 contradicted by another allegation. At best, Plaintiffs’ allegations establish that there
12 may be exceptions to Ripoff Report’s policy of accepting rebuttals to reports.

13 Plaintiff also alleges in ¶230 that the “true facts” are that Ripoff Report makes it
14 “much more difficult to file rebuttals.” Even accepting that allegation as true, it does not
15 state a claim for fraud because (1) there is no allegation that Defendants ever said that
16 filing a rebuttal is just as easy as filing a report; and (2) if Defendants were alleged to have
17 made such a statement it would merely be an opinion.

18 Paragraph 239 of the FAC alleges that filing a rebuttal refreshes Google’s search
19 indexing and raises the page ranking of the negative Report. But, once again, this “fact”
20 does not render any statement alleged to be made by Defendants false. Plaintiff seems to
21 be alleging that the fraud is based upon the omission or the failure to disclose. Defendants
22 however, have no duty to hire search engine experts, research Google rankings and
23 disclose the results to its readers.

24
25 **D. The Fraud Claim as Related to the Legal Opinions Fails Under Fed. R.**
26 **Civ. P. 9(b) and 12(b)(6)**

27 On pages 58–63 of the FAC, Plaintiffs accuse Defendants of committing fraud/wire
28 fraud by falsely representing themselves as “authorities in internet and technology law”

1 and then discussing some legal issues. To support this bizarre allegation, Plaintiffs rely
2 heavily on a series of statements made on the Ripoff Report website as reflected in
3 Exhibit 15 (Doc. #96-15) which are essentially Xcentric’s answers to a series of
4 “frequently asked questions” under the topic heading, “Want to sue Ripoff Report?”
5 Although nothing in this section states that Defendants are “authorities in internet and
6 technology law”, and without actually identifying a single incorrect or false assertion of
7 law, Plaintiffs make a general blanket allegation that “*Many of these contentions ... are*
8 *either false or opinion wrongly presented as fact or partial truths.*” FAC ¶ 257 (emphasis
9 added). To the extent Plaintiffs’ fraud claims are based on this page, dismissal is
10 appropriate under both Rule 9(b) and Rule 12(b)(6).

11 As this court has already recognized, Fed. R. Civ. P. 9(b) expressly requires any
12 allegations sounding in fraud to be plead with particularity. *See Kearns v. Ford Motor*
13 *Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009) (explaining “[a]verments of fraud must be
14 accompanied by ‘the who, what, when, where, and how’ of the misconduct charged ... so
15 that [defendants] can defend against the charge and not just deny that they have done
16 anything wrong.”) (quoting *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1105 (9th Cir.
17 2003); *Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001)). To the extent the
18 FAC contains page after page of material quoted from the Ripoff Report website followed
19 by a conclusory assertion to the effect that “something in there is false,” this is insufficient
20 under Rule 9(b). Having already been allowed leave to amend once, the fraud-based
21 claims in the FAC should be dismissed without leave to amend on that basis.

22 In addition, even if Plaintiffs could find any inaccurate statements of law on the
23 Ripoff Report website, “It is well established ... that misrepresentations of the law are not
24 actionable as fraud, including under the mail and wire fraud statutes, because statements
25 of the law are considered merely opinions and may not be relied upon absent special
26 circumstances not present here.” *Sosa*, 437 F.3d at 940 (citing *Miller v. Yokohama Tire*
27 *Corp.*, 358 F.3d 616, 621 (9th Cir. 2004); *see also Caroselli v. First Interstate Bank of*
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1 *Denver*, 15 F.3d 1083 (9th Cir. 1993) (“Relying on an adverse party’s statement of the
2 parties’ legal rights is generally not reasonable”); *California Pharmacy Mgmt., LLC*
3 *v. Zenith Ins. Co.*, 669 F.Supp.2d 1152, 1161 (C.D.Cal. 2009) (same).

4 Of course, these cases recognize that “special circumstances” can create an
5 exception to this rule such as when the defendant stands in a *fiduciary* relationship to the
6 plaintiff. *See Miller*, 358 F.3d at 621. However, no facts in the FAC are sufficient to
7 show that this case presents “special circumstances” which would make Defendants’ legal
8 comments actionable in fraud.

9 As for fraudulent factual representations, Plaintiffs point to Defendants’ statement
10 that they have “NEVER LOST A CASE”, FAC ¶ 256(iii), and then allege “Defendants
11 have settled cases and defaulted on cases, which is considered tantamount to an
12 unfavorable resolution.” FAC ¶ 257. The problem with this allegation (in addition to the
13 obvious fact that settlement of a case is *not* tantamount to losing a case) is that as reflected
14 in the exhibits to the Complaint, Defendants did not fail to disclose the fact that a default
15 was entered in the past. Rather, as indicated on page 3 of Exhibit 15 (Doc. #96-15) to the
16 FAC, this issue was fully disclosed: “Now, to be 100% accurate – there was ONE case
17 where a predecessor website to Ripoff Report was sued in a foreign country and a default
18 judgment was entered in the plaintiff’s favor.” (emphasis added). Because the exhibits to
19 the Complaint show this issue *was* disclosed, Plaintiffs’ have not stated a claim based on
20 the non-disclosure of this point. *See Durning*, 815 F.2d at 1267 (when considering Rule
21 12(b)(6) motions, the “court may disregard allegations in the complaint if contradicted by
22 facts established by exhibits attached to the complaint.”)

23
24 **E. Fraud Cannot Be Based On Opinions About the Effectiveness of**
Rebuttals And About CAP Members

25 On pages 52–56 Plaintiffs claim they were defrauded by Defendants’ statements to
26 the effect that “filing a rebuttal is effective and helpful” as a way of responding to a
27 negative report posted on the Ripoff Report website. Plaintiffs claim that they relied on
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1 this representation by posting a rebuttal on April 3, 2009. FAC ¶¶ 244, 245. Plaintiffs
2 also claim that certain non-parties have had difficulty filing rebuttals, *see* FAC ¶ 232, and
3 that one non-party named Tina Norris was harmed as a result of paying \$600 to an SEO
4 consultant based on Defendants’ characterization of rebuttals as helpful. FAC ¶ 243.

5 Little discussion of this point is needed because as noted above, “The law is quite
6 clear that expressions of opinion are not generally treated as representations of fact, and
7 thus are not grounds for a misrepresentation cause of action.” are not generally treated as
8 representations of fact, and thus are not grounds for a misrepresentation cause of action.”
9 *Neu-Visions Sports, Inc. v. Soren/McAdam/Bartells*, 86 Cal. App. 4th 303, 308, 103 Cal.
10 Rptr. 2d 159 (4th Dist. 2000); 34A Cal. Jur. 3d *Fraud and Deceit* § 21 (noting that “as a
11 general rule, expressions of opinion are not generally treated as representations of fact and
12 thus are not grounds for a misrepresentation cause of action.”); *Gentry v. eBay, Inc.*, 99
13 Cal.App. 4th 816, 121 Cal. Rptr. 2d 703 (4th Dist. 2002); *Bulgo v. Munoz*, 853 F.2d 710,
14 716 (9th Cir. 1988).

15 Whether or not rebuttals are (or are not) “effective” or “helpful” is plainly a
16 statement of opinion, not fact. For that reason, Mr. Magedson’s suggestion that filing a
17 rebuttal is a good idea is not sufficient to state a viable claim for fraud.

18 The California Court of Appeal’s opinion in *Gentry v. eBay* is extremely useful in
19 demonstrating this point. In *Gentry*, the plaintiff sued eBay for, *inter alia*, falsely
20 advertising that its feedback system was helpful and trustworthy by making statements
21 such as: “A positive eBay rating is worth its weight in gold.” *Gentry*, 99 Cal.App.4th at
22 834. Although the Court of Appeal resolved virtually all of *Gentry*’s claims in favor of
23 eBay based on CDA immunity, the court also explained, “taking as true the fact eBay
24 makes the statement on its web site that a positive eBay rating is ‘worth its weight in
25 gold,’ such an assertion cannot support a cause of action for negligent misrepresentation
26 regardless of federal statutory immunity because it amounts to a general statement of
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1 opinion, not a positive assertion of fact.” *Id.* at 835 (emphasis added) (citing *Christiansen*
2 *v. Roddy*, 186 Cal.App.3d 780, 785, 231 Cal.Rptr. 72 (1986)).

3 This same logic applies to Plaintiffs’ assertion that Defendants “mislead the
4 public” by statements to the effect that CAP members are “safe, reliable, and
5 trustworthy”. FAC ¶¶ 266–267. In addition to the fact that Plaintiffs do not allege that
6 they ever did business with any CAP member, these statements are not actionable fraud
7 because they are plainly expressions of opinion, not fact.

8 **F. The FAC Fails to Allege A Plausible Claim For RICO Conspiracy**

9 Other than an incorporate-by-reference of all 288 previous paragraphs in the
10 Complaint, the FAC contains one single paragraph (FAC ¶ 290) which purports to outline
11 the factual basis for Plaintiffs’ claim that Xcentric and Magedson engaged in a conspiracy
12 to violate 18 U.S.C. § 1962(c). This paragraph contains nothing more than “[t]hreadbare
13 recital[] of the elements of a cause of action, supported by mere conclusory statements ...
14 ” *Twombly*, 550 U.S. at 555. Because the FAC fails to offer *any* factual explanation of
15 the RICO/conspiracy claim, this claim should be dismissed without leave to amend.

16 **IV. CONCLUSION**

17 For all of the foregoing reasons, Defendants request that the Court dismiss the
18 First, Second, Third, Eleventh, and Twelfth Causes of Action in Plaintiffs’ FAC with
19 prejudice for failure to state a claim under Fed.R.Civ.P.12 (b)(6).

20 DATED this 6th day of August, 2010.

21 **JABURG & WILK, P.C.**

22
23 /s Maria Crimi Speth
24 Maria Crimi Speth
25 Attorneys for Defendants
26
27
28

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on August 6, 2010 I emailed and mailed the attached document to:

3
4 Ms. Lisa Borodkin, Esq.
5 Mr. Daniel F. Blackert, Esq.
6 Asia Economic Institute
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10 /s/Maria Crimi Speth

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