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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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

Plaintiffs,

vs.

XCENTRIC VENTURES, LLC, *et al.*

Defendants.

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

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Hearing Date: Nov. 1, 2010
Time: 1:30 PM
Courtroom: 6 (Hon. Stephen Wilson)

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TABLE OF CONTENTS

GINGRAS LAW OFFICE, PLLC
4072 EAST MOUNTAIN VISTA DRIVE
PHOENIX, ARIZONA 85048

GINGRAS LAW OFFICE, PLLC
4072 EAST MOUNTAIN VISTA DRIVE
PHOENIX, ARIZONA 85048

TABLE OF AUTHORITIES

GINGRAS LAW OFFICE, PLLC
4072 EAST MOUNTAIN VISTA DRIVE
PHOENIX, ARIZONA 85048

Statutes

Rules

GINGRAS LAW OFFICE, PLLC
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PHOENIX, ARIZONA 85048

I. INTRODUCTION

For all its unfortunate complexity, this case can be reduced to two simple parts. The first part (which is what this case is *really* about) involves defamation and related claims which seek to impose liability on Defendants for "publishing" negative complaints which Plaintiffs claim are defamatory. As explained below, these claims are clearly and completely barred by the Communications Decency Act. For that reason, Defendants are entitled to summary judgment as to causes of action 3–8 in the First Amended Complaint because those claims require treating Defendants as the "publisher" or "speaker" of material they did not create.

The second part of this case is nothing more than a red herring intended to distract the court from the lack of merit in the first part. Initially, this red herring was a federal RICO/racketeering claim based on a fabricated allegation that Plaintiffs were victims of extortion and wire fraud. In its detailed order issued on July 19, 2010 (Doc. #94) this court granted summary judgment as to the extortion claim and also dismissed (with leave to amend) the wire fraud claim pursuant to Fed. R. Civ. P. 9(b).

After their wire fraud claim was dismissed, Plaintiffs filed an 84-page First Amended Complaint (Doc. #96; "FAC") with extensive additional allegations supporting their RICO/wire fraud claim. The FAC also included new state-law claims for "deceit" and "fraud" which appeared to be predicted on the same facts as the wire fraud claim. Defendants promptly filed a Motion to Dismiss (Doc. #110) arguing that the repleaded wire fraud claim was still legally groundless and that the new state-law fraud claims were insufficiently pleaded under both Rule 9(b) and 12(b)(6). Shortly thereafter, Plaintiffs voluntarily withdrew their RICO/wire fraud claim but did not withdraw either of their new state-law fraud claims.

Plaintiffs' new fraud claims are nothing more than surrogate red herrings intended to serve the same purpose as their failed extortion claim (which was disposed on summary judgment) and the meritless wire fraud claim (which Plaintiffs abandoned). None of these claims have any merit, and summary judgment is therefore appropriate.

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II. SUMMARY OF UNDISPUTED MATERIAL FACTS

This court has previously received extensive briefing on the facts of this case in Defendants' first Motion for Summary Judgment (Doc. #40; filed 5/24/10) and Defendants' subsequent Motion to Dismiss (Doc. #110; filed 8/6/10). As such, this brief will contain only a short summary of the facts required for the disposition of this motion.

Defendant XCENTRIC VENTURES, LLC ("Xcentric") operates the website www.RipoffReport.com. Defendants' Separate Statement of Material Facts ("DSOF") ¶ 1. Defendant ED MAGEDSON ("Mr. Magedson") is the manager of Xcentric and the founder and "ED"itor of the Ripoff Report site which he started in 1998. DSOF ¶ 2. Plaintiffs RAYMOND MOBREZ ("Mr. Mobrez") and his wife ILIANA LLANERAS ("Ms. Llaneras") are the principals of ASIA ECONOMIC INSTITUTE, LLC ("AEI"). DSOF ¶ 3.

A. Facts Related to CDA Immunity

As of September 2010, six complaints (called "reports") have been posted about AEI on the Ripoff Report site. DSOF ¶ 4. All of these reports and any comments thereto are attached as Exhibit 22 to the First Amended Complaint and are summarized as follows:

Report #	Dated Posted	FAC Exhibit/Doc #	Doc. Page Nos.
502429	Sept. 30, 2009	Ex. 22, Doc. 96-22	1–2
457433	June 1, 2009	Ex. 22, Doc. 96-22	3–5
423987	Feb. 13, 2009	Ex. 22, Doc. 96-22	6–8
571232	Feb. 19, 2010	Ex. 22, Doc. 96-22	9–10
564331	Feb. 3, 2010	Ex. 22, Doc. 96-22	11–12
417493	Jan. 28, 2009	Ex. 22, Doc. 96-22	13–17

All of these reports were created solely by third parties, not by Defendants Magedson or Xcentric. DSOF ¶ 5.

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Before they appeared on the site, and as is true of all reports submitted by users, each report about AEI was reviewed by one of Xcentric's staff of content monitors. DSOF ¶ 6. Xcentric's servers automatically record the name of each content monitor who reviews a post made to the site. DSOF ¶ 7. Each content monitor who reviewed the posts about AEI has testified that no changes, additions, or deletions were made to any of these reports, nor were any changes, additions or deletions made to the comments/rebuttals. DSOF ¶ 8. The text of each report and each comment/rebuttal originated entirely with the third party author and was not created or altered by either Xcentric or Magedson. DSOF ¶ 9.

When an author submits a report to the Ripoff Report site, they are presented with a series of blank forms that help them to construct their report. DSOF ¶ 10. The forms ask the author for basic information such as the name of the person or company they want to write about, and the address and phone number of the company at issue. DSOF ¶ 11.

During this process, the author is asked to prepare a title for their report by entering data into four boxes. The first box asks for the name of the company being reported, the second box asks for "descriptive words" explaining what the report is about, the third box asks for the city, and the fourth box asks for the state. DSOF ¶ 12. During this process, the site explains "The title of your report is divided into four boxes below but will appear as one line after your report is submitted." DSOF ¶ 13. The site also shows the author a sample of how the report title will appear based on the data they have entered. DSOF ¶ 14.

At the screen where the actual report text is entered, the author is presented with a blank box. DSOF ¶ 15. Xcentric makes no suggestion as to what the author should say other than offering generic comments about style such as "DO NOT use ALL CAPITAL LETTERS, it makes it hard to read." DSOF ¶ 16.

Before the author is allowed to submit their report, they are required to review and agree to certain terms which state, among other things: "By posting this report/rebuttal, I attest this report is valid." The author must also separately agree to Xcentric's Terms of

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Service which state, among other things, "You will NOT post on ROR any defamatory, inaccurate, abusive, obscene, profane, offensive, threatening, harassing, racially offensive, or illegal material, or any material that infringes or violates another party's rights." DSOF ¶ 17.

When a report is finally submitted to the site, Xcentric's servers automatically combine the unique text supplied by the author with various HTML code that is generic to every page on the site. DSOF ¶ 18. During this process and using keywords supplied by the author (such as the name of the company being reported), Xcentric's servers automatically create "meta tags" which are used by search engines to index the contents of the page. DSOF ¶ 19. The meta tags for each page are not normally visible to viewers, but they can be seen by individuals with basic technical knowledge who choose to view the HTML code for a report's webpage. DSOF ¶ 20.

The term "Rip-off Report" is a federally registered trademark, USPTO Registration #2958949, used to identify the website www.RipoffReport.com. DSOF ¶ 21. Every report page on the Ripoff Report site includes meta tags based on unique keywords supplied from the author such as the name of the company involved and other words used by the author to create the title for their report. DSOF ¶ 22. Xcentric's servers also automatically include three different keywords—rip-off, ripoff, rip off—into the meta tags of every page on the site. DSOF ¶ 23. Again, these words are NOT visible in the title or body of any particular report; they are simply indexing references used by search engines in order to accurately reflect the source of the indexed page. DSOF ¶ 24. If the keywords "rip-off, ripoff, rip off" were removed from the meta tags for each report page, the page would appear physically unchanged to anyone viewing it. DSOF ¶ 25.

B. Facts Related To Non-CDA (Fraud-based) Claims

Although Plaintiffs' claims should begin and end with defamation, they do not. In an effort to plead around the CDA, Plaintiffs also attempt to assert two fraud-based claims—one cause of action for "deceit" and one cause of action for fraud. The true factual basis for these fraud-based claims is extremely difficult to discern from the

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PHOENIX, ARIZONA 85048

vitriolic and meandering narrative contained in the 84-page FAC, but both claims appear to be based on the allegation that Defendants defrauded Plaintiffs by making the following statements/representations:

> (1) they have not and will not remove reports published on their Web site; (2) that victims have the option of filing a free rebuttal to the negative complaints; (3) that filing a rebuttal has only a positive effect; (4) that Defendants have done nothing to curry favor with Google; (5) that Defendants do not filter or suppress reports; and (6) that members of the CAP have been investigated and found to be safe and secure. At the time these suggestions were made, Defendants did not believe this to be true.

These allegations are pleaded in support of both Plaintiffs' California statutory "deceit" claim, *see* FAC ¶ 360, and also Plaintiffs' fraud claim. *See* FAC ¶ 367. As explained at length in Defendants' Motion to Dismiss (Doc. #110) which the court has not yet ruled upon, Defendants' position is that even assuming *arguendo* that Plaintiffs' allegations quoted above are true, the FAC nevertheless fails to properly plead fraud as a matter of law for several different reasons.

Bearing in mind the context of a Motion for Summary Judgment (where even a properly pleaded claim can still fail due a lack of evidence) Defendants assert that even if Plaintiffs' fraud claims were properly pleaded in the abstract, summary judgment is appropriate because many of the facts alleged in the FAC are simply false, did not occur, and are not supported by any evidence whatsoever. For example, Plaintiffs allege that Defendants committed fraud by, *inter alia*, representing to Plaintiffs that "filing a rebuttal has only a positive effect … ." FAC ¶¶ 360, 367 (emphasis added). Plaintiffs contend this statement is fraudulent because "filing a rebuttal gives more prominence to the report on Internet search results." FAC ¶ 362. Plaintiffs perceive this "increased prominence" as an undisclosed negative aspect of filing a rebuttal, so they claim Defendants committed fraud by affirmatively representing that "filing a rebuttal has only a positive effect … ."

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Beyond the obvious point that whether or not posting a rebuttal is helpful or positive is a matter of *opinion*, not fact, the problem with this theory is that no such representation was ever made. DSOF ¶ 28. At no time did Defendants ever inform Plaintiffs that filing a rebuttal has *only* a positive effect. DSOF ¶ 29.

The facts on this point are entirely undisputed. When contacted by Plaintiff Raymond Mobrez in May 2009, Mr. Magedson sent Mr. Mobrez a lengthy "form email" response (a copy of which is attached at Exhibit 10 to the FAC) which contained Mr. Magedson's views and opinions on several topics, including how to respond to criticism contained in a Ripoff Report. DSOF ¶ 30. This form email includes a lengthy discussion of Mr. Magedson's "philosophy" that filing a free rebuttal is a good way to mitigate the effects of online criticism.

Nothing in Mr. Magedson's email states that "filing a rebuttal has *only* a positive effect …" nor is that statement found elsewhere on the Ripoff Report website. The reason for this is simple—Mr. Magedson honestly believes that filing a rebuttal is the best way of responding to a complaint. DSOF ¶ 31. At the same time, Mr. Magedson has no control over how Google or any other search engine decides to rank content, and he does not know and does not believe that filing a rebuttal always increases the prominence of a report in search engines such as Google. DSOF ¶ 32. On the contrary, Mr. Magedson is aware of reports containing rebuttals which are *not* prominently located in search engine results such as Google. DSOF ¶ 33. Because filing a rebuttal does not always affect how Ripoff Report pages are ranked on Google, Mr. Magedson's form email does not contain any discussion of this point.

Although Defendants are highly doubtful that a fraud claim could ever be based on an allegation concerning the future impact of filing a rebuttal on the actions of third parties such as Google, this point is irrelevant for the purposes of this motion because Defendants never made any representation to Plaintiffs suggesting that filing a rebuttal could "only" have a positive effect. As was true during the last round of briefing, Plaintiffs cannot defeat summary judgment by fabricating untrue factual allegations.

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III. ARGUMENT

A. The Communications Decency Act Bars Plaintiffs' Defamation and Publisher-Based Tort Claims

There is no dispute as to what this case is really about—Plaintiffs want to impose liability on a website operator for "publishing" derogatory material created solely by a third party. That core legal theory is barred by the Communications Decency Act, 47 U.S.C. § 230(c)(1) (the "CDA"), and as Defendants have explained before, since the CDA was enacted in 1996 every state and federal court that has considered the merits of a claim against the Ripoff Report has—without exception—agreed that Xcentric and Mr. Magedson are entitled to immunity under the CDA for statements posted by third party users. *See*, *e.g.*, *GW Equity, LLC v. Xcentric Ventures, LLC*, 2009 WL 62173 (N.D.Tex. 2009) (holding Xcentric and Magedson entitled to immunity under the CDA); *Intellect Art Multimedia, Inc. v. Milewski*, 2009 WL 2915273 (N.Y.Sup. 2009) (same); *Whitney Info. Network Inc. v. Xcentric Ventures, LLC*, 2008 WL 450095 (M.D.Fla. 2008) (same); *Global Royalties, Ltd. v. Xcentric Ventures, LLC,* 544 F.Supp.2d 929 (D.Ariz. 2008) (same). In its discussion of the CDA's underlying policy, the Ninth Circuit has described the CDA as not merely protecting website operators from liability, but also from the burden of defending "protracted legal battles" pursed by "clever lawyers":

> We must keep firmly in mind that this is an immunity statute we are expounding, a provision enacted to protect websites against the evil of liability for failure to remove offensive content. Websites are complicated enterprises, and there will always be close cases where a clever lawyer could argue that something the website operator did encouraged the illegality. Such close cases, we believe, must be resolved in favor of immunity, lest we cut the heart out of section 230 by forcing websites to face death by ten thousand duck-bites, fighting off claims that they promoted or encouraged-or at least tacitly assented to-the illegality of third parties. Where it is very clear that the website directly participates in developing the alleged illegality … immunity will be lost. But in cases of enhancement by implication or development by inference … section 230 must be interpreted to protect websites not merely from ultimate liability, but from having to fight costly and protracted legal battles.

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PHOENIX, ARIZONA 85048

Fair Housing Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1174–75 (9th Cir. 2008) (emphasis added).

Despite its very broad reach, Defendants agree that the CDA does *not* necessarily apply to all claims in the FAC because not all of the claims require treating Defendants as the publisher or speaker of third party material. However, as reflected in the following chart, the CDA certainly bars most of Plaintiffs' claims to the extent those claims treat Defendants as the publisher/speaker of material created by a third party:

FAC Claim #	Cause of Action	CDA Applies?
3	Unfair Business Practices; Bus. & Prof. Code § 17200	**Yes**
4	Common Law Defamation	**Yes**
5	Defamation Per Se	**Yes**
6	False Light	**Yes**
7	Intentional Interference w/ Prospective Econ. Relations	**Yes**
8	Negligent Interference w/ Prospective Econ. Relations	**Yes**
9	Negligent Interference w/ Economic Relations	**Yes**
10	Injunction	**Yes**
11	Deceit — Cal. Civ. Code §§ 1709–10	?
12	Fraud — Cal. Civ. Code § 1572	?

As demonstrated in Defendants' Statement of Facts, none of the six reports about AEI were created or altered by Defendants. To the extent that Defendants' website automatically creates various HTML coding (such as indexing tags incorporating variations of Defendants' "ripoff" trademark) in every page on the site, this is simply not sufficient to make Defendants responsible for the accuracy of every posting on the site; "It is obvious that a website entitled Ripoff Report encourages the publication of defamatory content. However, there is no authority for the proposition that this makes the website operator responsible, in whole or in part, for the 'creation or development' of every post on the site." *Global Royalties*, 544 F.Supp.2d at 933. This is precisely the argument Plaintiffs are making – that because Defendants' website is *called* "Ripoff Report" (and the site contains HTML code which includes that name), Defendants are therefore responsible for the accuracy of all 600,000+ reports on the site. As numerous other state and federal courts have held, this is wrong as a matter of law.

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Because Defendants are immune from liability based on material they did not create, and because the undisputed facts show that Defendants did not create any of the statements which Plaintiffs allege are defamatory, the court should find that the CDA applies and enter summary judgment as to causes of action 3–10 in the First Amended Complaint, including Plaintiffs' tenth cause of action for injunctive relief; "Indeed, given that the purpose of § 230 is to shield service providers from legal responsibility for the statements of third parties, § 230 should not be read to permit claims that request only injunctive relief … . Accordingly, under § 230, plaintiff may not seek recourse against AOL as publisher of the offending statements; instead, plaintiff must pursue his rights, if any, against the offending AOL members themselves." *Noah v. AOL Time Warner, Inc.*, 261 F.Supp.2d 532, 540 (E.D.Va. 2003) (citing *Ben Ezra, Weinstein, & Co. v. America Online, Inc*., 206 F.3d 980, 986 (10th Cir. 2000); *Katheleen R. v. City of Livermore*, 87 Cal.App.4th 684, 698, 104 Cal.Rptr.2d 772 (Cal.App.4th 2001); (holding, "claims for declaratory and injunctive relief are no less causes of action than tort claims for damages, and thus fall squarely within the section 230(e)(3) prohibition.")

B. Defendants Are Entitled To Summary Judgment As To Plaintiffs' Fraud Claims

As noted above, Defendants allege that Plaintiffs' two fraud claims are nothing more than red herrings intended to distract the court from treating this case as the simple defamation action that it is. On their face, the fraud claims are legally insufficient to survive dismissal under Rule 12(b)(6), and they are certainly without any sufficient evidentiary basis to survive summary judgment. Those points are discussed fully below. However, this sort of sharp practice for pleading around the CDA has been unsuccessfully attempted by others and it should likewise be rejected here.

For instance, in *Doe v. Myspace, Inc*., 528 F.3d 413 (5th Cir. 2008) the plaintiff sued the operator of a social networking site for, *inter alia*, fraud and negligence arising from a sexual assault committed by a third party whom the plaintiff met using the defendant's website. After some initial motion practice, the plaintiff withdraw her fraud

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claim but then argued that her negligence claim was not barred by the CDA because that claim was not based on material posted by a third party. Rather, according to the plaintiff, the claim was "predicated solely on MySpace's failure to implement basic safety measures to protect minors." *Doe*, 528 F.3d at 419. Despite her attempt to characterize her claims as something other than an attempt to plead around the law, the district court rejected this effort:

> The Court, however, finds this artful pleading to be disingenuous. It is quite obvious the underlying basis of Plaintiffs' claims is that, through postings on MySpace, Pete Solis and Julie Doe met and exchanged personal information which eventually led to an in-person meeting and the sexual assault of Julie Doe. If MySpace had not published communications between Julie Doe and Solis, including personal contact information, Plaintiffs assert they never would have met and the sexual assault never would have occurred. No matter how artfully Plaintiffs seek to plead their claims, the Court views Plaintiffs' claims as directed toward MySpace in its publishing, editorial, and/or screening capacities.

Doe, 528 F.3d at 419–20 (emphasis added).

Because Doe's negligence claim was nothing more than an effort to impose vicarious liability on a website operator for the actions of a third party, the district court found the claim was barred by the CDA. On appeal, the Fifth Circuit affirmed, finding Doe's "claims are barred by the CDA, notwithstanding their assertion that they only seek to hold MySpace liable for its failure to implement measures that would have prevented Julie Doe from communicating with Solis. Their allegations are merely another way of claiming that MySpace was liable for publishing the communications and they speak to MySpace's role as a publisher of online third-party-generated content." *Id*. at 420.

The same logic applies here. At their core, Plaintiffs' fraud claims are nothing more than an attempt to blame Xcentric for harm resulting from the publication of the six negative complaints about AEI on the Ripoff Report site. Plaintiffs seek this result by, among other things, suggesting Defendants owe a duty to warn them of the possible consequences of using the Ripoff Report site. This is exactly the same theory rejected by the Fifth Circuit in *Doe*, and this court should reach the same result.

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However, even if the CDA did not apply to Plaintiffs' fraud claims, summary judgment as to those claims is still appropriate due to the complete lack of legal and/or factual merit in the claims. Turning to the specific factual allegations, Plaintiffs present six distinct representations which they claim were fraudulently made by Defendants:

(1) Defendants have not and will not remove reports published on their Web site;
(2) Victims have the option of filing a free rebuttal to the negative complaints;
(3) Filing a rebuttal has only a positive effect;
(4) Defendants have done nothing to curry favor with Google;
(5) Defendants do not filter or suppress reports; and
(6) Members of the CAP have been investigated and found to be safe and secure.

FAC ¶¶ 360, 367. To the extent Plaintiffs' fraud claims are based on these allegations, the court should enter summary judgment in favor of Defendants for the reasons stated below.

1. The Statement That "Reports Never Come Down" Is Not Pleaded With Particularity And Did Not Actually Or Proximately Cause Any Alleged Harm

In a highly conclusory fashion, Plaintiffs claim they were harmed by Defendants' statement that "reports are never removed". The actual facts alleged, however, cannot support a fraud claim because Plaintiffs do not explain how they relied on this specific statement. Instead, Plaintiffs make a generic allegation that Defendants' website contained the statement: "[we] will not remove complaints even if you sue" followed by a conclusory allegation that "Plaintiffs viewed the page containing this statement on those dates, and relied thereon." FAC ¶ 172 (emphasis added). No further explanation is provided as to how Plaintiffs relied, whether the reliance was reasonable and justified, and/or how Plaintiffs were damaged as a result of their reliance.

Such a bare recital of the element of a claim would not be sufficient even under the most lenient pleading standards; "a plaintiff's obligation to provide the 'grounds' of his

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"entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do … ." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 1964–65 (2007). Because Plaintiffs' fraud claims and their Unfair Business Practices claim under Bus. & Prof. Code § 17200 are all subject to Rule 9(b) heightened pleading requirements, this lack of specificity and clarity is especially unacceptable. *See Kearns v. Ford Motor Co.*, 567 F.3d 1120 (9th Cir. 2009) (explaining that Rule 9(b) applies to UCL actions in federal court under Bus. & Prof. Code § 17200).

In addition to the Rule 9(b) violation, Plaintiffs fail to explain *how* the allegedly false statement "we never remove reports" actually damaged them any more than the 'truth' would have. In other words, assume *arguendo* that Defendants' site contained the statement: "we *sometimes* remove reports" (which is what the FAC alleges is true). Even with this corrected statement in place, Defendants always retain complete editorial discretion to refuse to remove reports because doing so is "an 'exercise of a publisher's traditional editorial functions' and does not defeat CDA immunity." *Global Royalties, Ltd. v. Xcentric Ventures, LLC*, 2007 WL 2949002, *3 (D.Ariz. 2007).

Thus, even if Plaintiffs are correct and even if the statement "we don't remove reports" is technically inaccurate, Plaintiffs could not possibly have been damaged by this statement because they would be in exactly the same position whether this statement appeared on the site or whether a different statement was used such as "we *sometimes* remove reports, but usually we don't." Put simply, the FAC contains no allegation that Defendants were ever legally obligated to remove the reports about Plaintiffs upon request. Therefore, if Plaintiffs were harmed at all, it was not caused by Ripoff Report's inaccurate description of its non-removal policy or its failure to explain that very rare exceptions to that policy had been made in the past. Rather, Plaintiffs' injury was caused purely as a result of the decision not to remove the six complaints about Plaintiffs. This editorial activity is squarely within the protection of the CDA; "Unless Congress amends the CDA, it is not a bar to immunity for an Internet provider to refuse to remove

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PHOENIX, ARIZONA 85048

defamatory material created by a third party … ." *GW Equity, LLC*, 2009 WL 62173, *19 (N.D.Tex. 2009) (emphasis added). Because the undisputed facts show that Plaintiffs could not have been harmed as a result of Defendants' description of their non-removal policy, Plaintiffs cannot prevail on their fraud-based claims as to this statement.

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

Plaintiffs next claim that Defendants made a series of false statements about the availability and efficacy of rebuttals, such as: "we offer you the opportunity to file a rebuttal," "you can write a rebuttal explaining your position," "rebuttals are free," and "we strongly encourage you to use this resource since they can be extremely effective." FAC ¶¶ 228, 229, 360, 367. Plaintiffs claim that these statements are false. *See* FAC ¶¶ 361, 368. However, Plaintiffs also allege in FAC ¶ 244 that they in fact did file rebuttals. Plaintiffs do not allege that they were ever unable to file rebuttals.

Putting aside the Rule 11 implications of alleging such directly inconsistent statements, Plaintiffs once again have failed to plead facts that demonstrate either causation or damages. Since Plaintiffs did in fact file rebuttals, they could not have been harmed by a false statement about the availability of rebuttals.

In terms of the efficacy of rebuttals, Plaintiffs also state that after they filed a rebuttal, one of the reports about AEI was moved from the third page of Google's search results to the first page, *see* FAC ¶ 246, but they do not allege that filing the rebuttal actually caused this to occur, nor do they allege that Defendants knew this would occur. In addition, Plaintiffs do not allege that any harm occurred as a result of this change in ranking; *i.e.*, conceding that the report about AEI was already found on page three of Google before Mr. Mobrez posted his rebuttal, Plaintiffs do not allege that this change in ranking resulted in any *additional* harm to Plaintiffs beyond whatever harm would have occurred if the report remained on page three. Given these facts, summary judgment is appropriate as to Plaintiffs two fraud claims and their UCL claim under Bus. & Prof.

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PHOENIX, ARIZONA 85048

Code § 17200 to the extent those claims are based on Defendants statements regarding either the availability or the efficacy of rebuttals.

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

The FAC claims that Defendants have done favors for Google by "alter[ing] content concerning Google to maintain its good favor." FAC ¶ 185. Plaintiffs also allege the Defendants "give Google special treatment in reports to maintain their high organic Google search authority and favorable ranking." FAC ¶ 249. Plaintiffs then accuse Defendants of generally defrauding the public by denying the existence of any special relationship with Google. *See* FAC ¶ 252.

It is entirely unclear how or why this conduct is unlawful or actionable, nor is it clear how this conduct actually caused any damage to Plaintiffs. At best, the FAC alleges the most remote form of causation/damages: "The public relies on the false statement as true, and gives greater credence to the illusion that Ripoff Report is a legitimate site if it ranks so highly with common search engines like Google." FAC ¶ 252. In other words, it appears that Plaintiffs are suing Defendants for having an "unfairly high Google ranking".

If this is a tort, it is certainly not fraud, nor does it appear to be a recognized tort in any court in California or anywhere else the United States. On the contrary, Defendants note that other district courts in California have awarded Rule 11 sanctions against other counsel for making similarly groundless allegations as to the factors they suspect might affect Google's content ranking decisions. *See Kinderstart.com, LLC v. Google, Inc.*, 2007 WL 831811 (N.D.Cal. 2007) (ordering Rule 11 sanctions against attorney who made groundless allegation that Google showed favoritism to competitors of plaintiff in exchange for non-monetary compensation). Of course, Defendants admit that many years ago they changed a name in a single report about one of Google's co-founders based on a determination that the report was obviously false.

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PHOENIX, ARIZONA 85048

This non-controversial fact does not remotely support the paranoid inferences drawn by Plaintiffs. Indeed, Plaintiffs do not allege and cannot offer any evidence showing that Google knew of this action or that it made the incredible decision to repay the favor by placing Ripoff Report higher in its search results than any of the *billions* of other sites in Google's index who may not have performed the same favor. As in *Kinderstart.com*, making such an inflammatory allegation without any investigation and without any evidence to support it is yet another of Plaintiffs' violations of Rule 11.

Put simply, whether or not Ripoff Report's favorable ranking on a private website such as Google is the result of pure luck or some mutual favoritism is entirely immaterial to Plaintiffs' purported damages in the form of money paid to IT consultants, loss of contacts and business opportunities. *See* FAC ¶ 253. In other words, nothing in the FAC explains how Plaintiffs' position would have been different if Ripoff Report announced that it shows favor to Google in reports, which causes Google to show favor to Ripoff Report in search rankings. Plaintiffs' position would be exactly the same either way and for that reason, they cannot establish either causation or damages.

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

On pages 58–63 of the FAC, Plaintiffs accuse Defendants of committing fraud in a series of statements posted on the Ripoff Report site in which Defendants falsely represent themselves as "authorities in internet and technology law" and then discuss some legal issues. To support this bizarre allegation, Plaintiffs cite a series of statements made on the Ripoff Report website as shown in Exhibit 15 to the FAC (Doc. #96-15). This exhibit contains Xcentric's answers to a series of "frequently asked questions" under the topic heading, "Want to sue Ripoff Report?" Although nothing in this section states that Defendants are "authorities in internet and technology law", and without actually identifying a single incorrect or false assertion of law, Plaintiffs make a general blanket allegation that "*Many of these contentions* … are either false or opinion wrongly

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4072 EAST MOUNTAIN VISTA DRIVE
PHOENIX, ARIZONA 85048

presented as fact or partial truths." FAC ¶ 257 (emphasis added). To the extent Plaintiffs' fraud claims are based on this page, dismissal or summary judgment is appropriate under either Rule 9(b), 12(b)(6) or Rule 56.

As this court has already recognized, Fed. R. Civ. P. 9(b) expressly requires any allegations sounding in fraud to be pleaded with particularity. To the extent the FAC contains page after page of material quoted from the "Want to Sue Ripoff Report?" page followed by a conclusory assertion to the effect that "something in there is false," this is insufficient under Rule 9(b). Having already been allowed leave to amend once, the fraud-based claims in the FAC should be dismissed without leave to amend on that basis.

Furthermore, even if Plaintiffs could find any inaccurate statements of law on the Ripoff Report website, "It is well established … that misrepresentations of the law are not actionable as fraud … because statements of the law are considered merely opinions and may not be relied upon absent special circumstances not present here." *Sosa v. DirectTV, Inc*., 437 F.3d 923, 940 (9th Cir. 2006) (emphasis added) (citing *Miller v. Yokohama Tire Corp.*, 358 F.3d 616, 621 (9th Cir. 2004)); *see also Caroselli v. First Interstate Bank of Denver*, 15 F.3d 1083 (9th Cir. 1993) ("Relying on an adverse party's statement of the parties' legal rights is generally not reasonable … ."); *California Pharmacy Mgmt., LLC v. Zenith Ins. Co.*, 669 F.Supp.2d 1152, 1161 (C.D.Cal. 2009) (same). Of course, these cases recognize that "special circumstances" can create an exception to this rule such as when the defendant stands in a *fiduciary* relationship to the plaintiff. *See Miller*, 358 F.3d at 621. However, no facts in the FAC are sufficient to show that this case presents "special circumstances" which would make Defendants' legal comments actionable in fraud.

As for fraudulent factual representations, Plaintiffs point to Defendants' statement that they have "NEVER LOST A CASE", FAC ¶ 256(iii), and then allege "Defendants have settled cases and defaulted on cases, which is considered tantamount to an unfavorable resolution." FAC ¶ 257. The problem with this allegation (in addition to the obvious fact that settlement of a case is *not* tantamount to losing a case) is that as

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reflected in the exhibits to the Complaint, Defendants did not fail to disclose the fact that a default was entered in the past. Rather, as indicated on page 3 of Exhibit 15 (Doc. #96-15) to the FAC, this issue was fully disclosed: "Now, to be 100% accurate – there was ONE case where a predecessor website to Ripoff Report was sued in a foreign country and a default judgment was entered in the plaintiff's favor." Because the exhibits to the Complaint show this issue *was* disclosed, and because Plaintiffs have failed to satisfy Rule 9(b) as to any of the statements contained in the "Want to Sue Ripoff Report?" page, Defendants are entitled to summary judgment as to any claims based on this page.

5. The Statement That Defendants Do Not Filter or Suppress Results Did Not Actually Or Proximately Cause Any Harm

Plaintiffs claim that Ripoff Report falsely represents 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 shows Ripoff Report's statements about not hiding reports actually *caused* any harm. On the contrary, whether or not Ripoff Report removed this statement from its site or otherwise corrected/clarified it, Plaintiffs would be in exactly the same position as they are with the statement as-written. As such, the issue of whether Ripoff Report has accurately described its policies of removing or not removing reports did not cause any damage to Plaintiffs.

6. Defendants' Statements About CAP Members Did Not Actually Or Proximately Cause Any Alleged Harm

Finally, Plaintiffs allege that Defendants' favorable statements about its CAP members are false. *See* FAC ¶¶ 267, 268. Plaintiffs claim these statements injured them by causing them to pay fees to IT contractors who promised (but failed) to hide the reports about Plaintiffs on the Ripoff Report site. FAC ¶ 271.

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PHOENIX, ARIZONA 85048

Once again, Plaintiffs plead no legally sufficient causal connection between the allegedly false statement and any damage they incurred. Plaintiffs never allege that they did business with a CAP member or that they were harmed by a CAP member who Ripoff Report did not properly investigate. As such, Plaintiffs have failed to allege any facts showing that Defendants' favorable statements about its customers actually *caused* any harm to Plaintiffs.

C. Fraud Cannot Be Based On Statements About Future Events

Separate and apart from the specific factual defects in Plaintiffs' claims explained above, numerous other legal defects exist which are fatal to their claims. For instance, 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, 487-8, 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 tort of fraudulent misrepresentation." *Bayview Hunters Point Comm. Advocates v. Metropolitan Transp. Com'n*, 366 F.3d 692, 698 (9th Cir. 2004) (quoting *In re Jogert, Inc.*, 950 F.2d 1498, 1507 (9th Cir. 1991)); *Richard P. v. Vista Del Mar Child Care Serv.*, 165 Cal.Rptr. 370, 372 (Cal.Ct.App. 1980). Most if not all aspects of Plaintiffs' fraud claims are barred by this rule because most, if not all, of the allegedly fraudulent statements related to *future* events, not past or existing facts.

D. Defendants' Settlement With QED Media Does Not Support Plaintiffs' Position That Defendants Removed Reports For Money

The FAC purports to offer proof that Defendants have, in the past, removed reports for money (and have therefore defrauded Plaintiffs by denying this) based on a

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PHOENIX, ARIZONA 85048

settlement agreement dated May 15, 2009 attached as Exhibit 8 to the FAC in a case styled *Xcentric Ventures, LLC v. QED Media Group, LLC*. While the facts and circumstances of the *QED Media* case have no relevance whatsoever to this action, it is important to briefly explain why this is so.

The *QED Media* case involved a lawsuit brought by Ripoff Report against several individuals who engaged in a series of illegal attacks and threats against Mr. Magedson and Xcentric. In order to settle that case, one of the defendants (a party called QED Media Group) agreed to pay damages to Xcentric of $100,000 to partially compensate Xcentric for the substantial economic harm caused by these attacks.

By its own terms, nothing in the settlement agreement requires or provides for the removal of any reports from the Ripoff Report site. Rather, ¶ 2(e) of the settlement agreement states that for a period of 2 years, Xcentric will agree to monitor incoming reports about QED and "attempt to verify whether the author is or was an actual customer of QED." In the event an author was unable to prove that they were an actual customer of QED, ¶ 2(e) of the settlement agreement provides that the report would not be posted.

According to a declaration from the lawyer for QED, Kenton Hutcherson, attached as Exhibit 12 to the FAC, in October 2009, a report about QED was subsequently posted without the pre-posting verification required by ¶ 2(e) of the settlement agreement. After reviewing the matter, Xcentric ultimately decided to remove the erroneously posted report despite its non-removal policy.

Contrary to Plaintiffs' allegations, Xcentric was not paid to remove a report, nor do the facts of the *QED Media* case show otherwise. The $100,000 payment in that case constituted *damages* which Xcentric suffered as a result of the Defendants' attacks. No part of this payment related to the removal of existing reports, nor did the settlement agreement require Xcentric to remove reports in the future. Rather, the report in that case was removed solely because Xcentric inadvertently failed to comply with the agreement by failing to confirm a report about QED. These facts do not demonstrate that Xcentric removed a report for money or that Mr. Mobrez or Ms. Llaneras are fraud victims.

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4072 EAST MOUNTAIN VISTA DRIVE
PHOENIX, ARIZONA 85048

Representations on Ripoff Report about Defendants' policies or willingness to remove reports in the future are simply not actionable fraud under any circumstances, even if shown to be false in some hyper-technical sense. However, even if the representation regarding reports could support a fraud claim, the facts set forth in the Complaint fail to allege a viable claim because they do not establish that Mr. Magedson's representations to Mr. Mobrez were false at the time they were made in May and July 2009. At that time, the removal of the report about QED Media had not yet occurred (this did not happen until late October 2009).

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

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PHOENIX, ARIZONA 85048

E. Fraud Cannot Be Based On A Statement Of Discretionary Policy

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

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

FAC Exhibit 13 (Doc. 96-13)

2. Our Policy: Why We NEVER Remove Reports

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

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

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Like any other policy, exceptions may be made, but this does not transform Defendants' policy statement into actionable fraud. Like the statement "we do not remove reports," the statement that people can file rebuttals is also a policy statement. Plaintiffs claim in FAC ¶ 228 that statement is false, but also allege in FAC ¶ 244 that they DID file a rebuttal. Obviously, since Plaintiffs filed rebuttals, they cannot allege that it is false for Defendant to state that people can write rebuttals.

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

Paragraph 239 of the FAC alleges that filing a rebuttal refreshes Google's search indexing and raises the page ranking of the negative Report. But, once again, this "fact" does not render any statement alleged to be made by Defendants false. Plaintiffs seem to be alleging that the fraud is based upon the omission or the failure to disclose. Defendants however, have no duty to hire search engine experts, research Google rankings and disclose the results to its readers. In the absence of a duty to disclose, fraud cannot exist. *See Hanh v. Mirda*, 147 Cal.App.4th 740, 748, 54 Cal.Rptr.3d 526, 532 (Cal.App.1st Dist. 2007) (explaining elements of fraud and decent both require showing: "(1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff … .")

F. Fraud Cannot Be Based On Opinions About the Effectiveness of Rebuttals And About CAP Members

On pages 52–56 Plaintiffs claim they were defrauded by Defendants' statements to the effect that "filing a rebuttal is effective and helpful" as a way of responding to a negative report posted on the Ripoff Report website. Plaintiffs claim that they relied on this representation by posting a rebuttal on April 3, 2009. FAC ¶¶ 244, 245. Plaintiffs also claim that certain non-parties have had difficulty filing rebuttals, *see* FAC ¶ 232, and

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4072 EAST MOUNTAIN VISTA DRIVE
PHOENIX, ARIZONA 85048

that one non-party named Tina Norris was harmed as a result of paying $600 to an SEO consultant based on Defendants' characterization of rebuttals as helpful. FAC ¶ 243.

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

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

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

This same logic applies to Plaintiffs' assertion that Defendants "mislead the public" by statements to the effect that CAP members are "safe, reliable, and

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4072 EAST MOUNTAIN VISTA DRIVE
PHOENIX, ARIZONA 85048

trustworthy". FAC ¶¶ 266–267. In addition to the fact that Plaintiffs do not allege that they ever did business with any CAP member, these statements are not actionable fraud because they are plainly expressions of opinion, not fact.

G. Plaintiffs Lack Standing Under Bus. & Prof. Code § 17200

In the course of meeting and conferring with Plaintiffs' counsel about this motion, it became evident that Plaintiffs hope to survive summary judgment by making vague assertions of some type of unlawful activity which may be brought under the wide umbrella of California's Unfair Competition Law, Bus. & Prof. Code § 17200. Specifically, Plaintiffs have suggested that they intend to seek discovery as to every aspect of Defendants' "manipulation" of Google's search results, Defendants' provision of services to any of its customers, and so forth, under the theory that the UCL might somehow apply to these things.

Wishful thinking aside, Plaintiffs cannot use the UCL as a tool to authorize their private vendetta for one simple reason—following the passage of Proposition 64 in 2004, in order to maintain standing under Bus. & Prof. Code § 17200 Plaintiffs are required to establish standing through evidence of both injury-in-fact and damages caused by the unlawful acts; "To have standing under California's UCL, as amended by California's Proposition 64, plaintiffs must establish that they (1) suffered an injury in fact and (2) lost money or property as a result of the unfair competition." *Birdsong v. Apple, Inc.*, 590 F.3d 955, 959 (9th Cir. 2009) (citing Cal. Bus. & Prof. Code § 17204; *Walker v. Geico Gen. Ins. Co*., 558 F.3d 1025, 1027 (9th Cir. 2009)). Meeting this standard requires Plaintiffs to show "they suffered a distinct and palpable injury as a result of the alleged unlawful or unfair conduct." *Id*. at 960 (emphasis added).

The lack of evidence showing that Plaintiffs were actually harmed by Defendants' actions (as opposed to harm caused by the third party postings) is fatal to their UCL claim. As such, Plaintiffs lack standing to assert this claim, even if it was not barred by the CDA, which it plainly is. *See Gentry v. eBay, Inc.*, 99 Cal.App.4th 816, 121 Cal.Rptr.2d 703 (4th Dist. 2002) (holding UCL claims barred by CDA).

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1. No Evidence Exists That Defendants Intentionally Interfered With Plaintiffs' Economic Relations

The Complaint contains three separate claims of economic interference (the seventh, eighth and ninth causes of action). Each of these claims is based on the common allegation that Defendants either intentionally or negligently interfered with Plaintiffs' existing and prospective relationships with its current or would-be employees. *See*, *e.g.*, FAC ¶ 328; "AEI had valid contractual relationships with current and prospective employees and had expected relationships with persons who, but for Defendant's libelous publications, would have entered into valid contractual relationship [with Plaintiffs]."

Even if these three claims were not barred by the CDA, which they are, the claims fail on the merits for two reasons. First, it is undisputed that neither Xcentric nor Mr. Magedson had any knowledge of Plaintiffs' relationships with their employees at the time each report was posted. DSOF ¶ 34. Second, it is undisputed that at his deposition, Mr. Mobrez was unable to identify a single employee of AEI who quit as a result of any actions of Xcentric or Mr. Magedson. DSOF ¶ 35. In light of these undisputed facts, no evidence exists to support Plaintiffs' economic interference claims. As such, although summary judgment should be entered as to these claims based solely on the CDA, even if the CDA did not apply, no evidence exists to support these claims and summary judgment should be entered in favor of Defendants as to Plaintiffs' eighth, ninth, and tenth causes of action.

IV. CONCLUSION

For the reasons stated above, Defendants' Motion for Summary Judgment should be granted as to all claims in the First Amended Complaint.

DATED this 27th day of September 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2010 I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing, and for transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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And a courtesy copy of the foregoing delivered to:
Honorable Stephen V. Wilson
U.S. District Judge

/s/David S. Gingras

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