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Edward Magedson

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ASIA ECONOMIC INSTITUTE, LLC a California limited liability company; RAYMOND MOBREZ, an individual; and ILIANA LLANERAS, an individual,

Plaintiffs,

vs.

XCENTRIC VENTURES, LLC, an Arizona limited liability company, d/b/a BADBUSINESSBUREAU.COM and/or RIPOFFREPORT.COM; BADBUSINESSBUREAU.COM, LLC, organized and existing under the laws of St. Kitts/Nevis, West Indies; EDWARD MAGEDSON, an individual,

Defendants.

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

NOTICE OF MOTION AND SPECIAL MOTION TO STRIKE AND MOTION TO REQUIRE RICO CASE STATEMENT [Cal. Code Civ. P. § 425.16]

Hearing Date: April 19, 2010
Time: 1:30 PM
Courtroom: 6 (Hon. Steven Wilson)

Complaint Filed: Jan. 27, 2010

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SPECIAL MOTION TO STRIKE

TABLE OF CONTENTS

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TABLE OF AUTHORITIES

GINGRAS LAW OFFICE, PLLC
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Statutes

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TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that on April 19, 2010 at 1:30 PM or as soon thereafter as counsel may be heard in courtroom 6 of the above-entitled court located at 312 North Spring Street Los Angeles, CA 90012, Defendants XCENTRIC VENTURES, LLC ("Xcentric") and EDWARD MAGEDSON ("Magedson"; collectively "Defendants") will move the Court for an order striking certain claims in the Complaint pursuant to California Code of Civil Procedure § 425.16. Defendants further request an award of attorney's fees and costs incurred pursuant to CCP § 426.16(c).

In addition, Defendants move the Court for an order requiring Plaintiffs to file a RICO case statement in the form attached hereto as **Exhibit A**.

The motion will be based on this Notice, the accompanying Memorandum of Points and Authorities, Affidavit of Edward Magedson and exhibits, all pleadings and records on file herein, and upon such other and further oral and documentary evidence as may be presented prior to or at the time of the hearing.

This motion is made following the conference of counsel pursuant to L.R. 7-3 which took place on various dates including February 3, 2010, March 1, 2010, March 15, 2010 and March 22, 2010.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This is a case about incorrectly assigning blame to the *wrong* party. As explained below, Plaintiffs are trying to blame a website (RipoffReport.com) for "publishing" material that the site did not create. This theory is directly prohibited by federal law and for that reason, Plaintiffs cannot establish their burden of showing a likelihood of success at trial as required by California's anti-SLAPP statute, Cal. Code Civ. P. § 425.16.

Prior to 1996, if a website published defamatory content written by a third party, the site itself could be held legally responsible. Concerned about the dramatic impact this would have on Internet speech, Congress expressly abrogated this theory in 1996 by enacting the Communications Decency Act, 47 U.S.C. § 230(c) ("CDA"). With very limited exceptions, the CDA prohibits holding website operators liable for user-generated content ("UCG") unless the site itself created or materially altered the offending material.

Some litigants dislike the CDA because it prevents them from assigning blame to, and seeking compensation from, the presumably deeper pockets of website *operators* as opposed to the actual *author* of the offending statements who may be judgment-proof. Nevertheless, courts have unanimously and repeatedly found that Ripoff Report is entitled to full immunity under the CDA. The facts of this case are identical to prior cases where courts have reached that conclusion, and the same result should follow here.

II. BACKGROUND

A. Parties

Defendant Xcentric Ventures operates the website www.RipoffReport.com which was founded in 1998 by Defendant ED MAGEDSON ("Mr. Magedson"). *See* Affidavit of Edward Magedson ("Magedson Aff.") ¶ 2. The Ripoff Report site allows consumers to post free comments, criticism, and complaints about companies who they feel have wronged them in some manner. As of March 2010, the site contains in excess of 500,000 unique complaints (called "reports"). When expanded to include responses to reports (called "rebuttals"), the site contains millions of original entries. Magedson Aff. ¶ 5.

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According to ¶ 3 of its Complaint, Plaintiff ASIA ECONOMIC INSTITUTE ("AEI") is a "free on-line non-governmental publication, that publishes current news that is not involved in sales or marketing." The Complaint further asserts that "AEI was in the process of providing work opportunities for numerous Americans who are currently unemployed," though it is unclear whether this means that AEI was also an employment or job placement agency helping third parties to find jobs. AEI's Complaint (¶¶ 4, 5) briefly mentions Plaintiffs RAYMOND MOBREZ ("Mr. Mobrez") and ILIANA LLANERAS ("Ms. Llaneras"), though their relationship to AEI is not clear. Presumably, Mr. Mobrez and/or Ms. Llaneras are owners or principals of AEI.

B. Factual Allegations

The Complaint is founded on two primary theories: 1.) defamation (arising from statements posted on the Ripoff Report website); and 2.) RICO/racketeering/extortion (arising from discussions between Plaintiffs and Mr. Magedson). To be clear—both theories are entirely meritless. However, the RICO claims are (arguably) not based on "protected conduct" within the meaning of CCP § 425.16 and therefore those two claims are not included in this motion; they will be addressed at a later time.

Of the remaining claims, two (the first and sixth) are simple defamation claims. All of the other causes of action are "defamation-related" in the sense that they are premised on the same nucleus of facts—*publication* of allegedly false statements about Plaintiffs on the Ripoff Report website resulting in damage. As explained herein, these claims all fail for the same reason. As such, Xcentric will address these claims together:

Claim #	Defamation-Related Cause of Action/Title
1	Common Law Defamation
2	Unfair Business Practices
5	Civil Conspiracy
6	Defamation Per Se
7	False Light
8	Intentional Interference w/ Prospective Economic Relations
9	Negligent Interference w/ Prospective Economic Relations
10	Inducing Breach of Contract

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The factual basis of these is simple. According to ¶¶ 24 and 25 of the Complaint, AEI claims that four "reports" (complaints) about AEI, Mr. Mobrez and/or Ms. Llaneras were posted on the Ripoff Report website containing various inaccurate statements which are outlined in some detail in ¶ 28. AEI claims these statements are untrue and its first cause of action (common-law defamation) alleges: "Defendants published defamatory materials on Defendants' websites regarding Plaintiffs." Compl. ¶ 44 (emphasis added). AEI's sixth cause of action (defamation per se) contains similar allegations of wrongful publication; "Defendants published the statements attached hereto …." Compl. ¶ 81. The seventh cause of action (false light) does not mention the word "publish", but it clearly seeks to treat Xcentric and Magedson as the "speakers" of the words contained in the four reports about AEI; "*Defendants' statements* have placed Plaintiffs in a false light … ." Compl. ¶ 88 (emphasis added).

Although not directly labeled as "defamation", AEI's other claims seek to impose liability on Xcentric and Magedson based on harm arising indirectly from the publication of these four reports. For example, AEI's eighth cause of action for intentional interference with economic relations is based on the same acts—publishing derogatory statements—as the defamation claims: "Defendants intentionally and wrongfully interfered with these relationships by knowingly publishing, creating, and soliciting negative, false, and defamatory content in exchange for their own business profit." Compl. ¶ 95 (emphasis added). This identical allegation supports AEI's ninth cause of action (*see* Compl. ¶ 101) and tenth cause of action (*see* Compl. ¶ 107).

As explained below, such claims fall within the aegis of California's anti-SLAPP law and, furthermore, the Communications Decency Act bars these claims because it expressly provides that website operators such as Xcentric and Magedson cannot be treated as the "speaker or publisher" of material created by someone else. Because the CDA bars these types of claims, AEI cannot meet its burden of establishing a probability of success as a matter of law. For that reason, the court should strike AEI's defamation and defamation-related claims pursuant to CCP § 425.16.

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III. ARGUMENT

A. The Anti-SLAPP Law Applies To This Action

As the court is aware, California's anti-SLAPP law "was enacted to allow early dismissal of meritless first amendment cases aimed at chilling expression through costly, time-consuming litigation." *Metabolife Int'l v. Wornick*, 264 F.3d 832, 839 (9th Cir. 2001). Despite being a creature of state-law, "California anti-SLAPP motions to strike and entitlement to fees and costs are available to litigants proceeding in federal court … ." *Thomas v. Fry's Electronics, Inc.*, 400 F.3d 1206 (9th Cir. 2005); *see also Global Telemedia Int'l, Inc. v. Doe*, 132 F.Supp.2d 1261 (C.D.Cal. 2001) (applying anti-SLAPP statute to defamation claims pending in federal court).

When considering an anti-SLAPP motion, the court must first perform a two-step analysis. In the first step, "the court decides whether the defendant has made a threshold showing that the challenged cause of action is one 'arising from' protected activity [within the meaning of § 425.16]." *Kronemyer v. Internet Movie Data Base, Inc.*, 150 Cal.App.4th 941, 946, 59 Cal.Rptr.3d 48, 52 (2007). As explained by the California Supreme Court, this showing is met "by demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in section 425.16, subdivision (e) ... ." *City of Cotati v. Cashman*, 29 Cal.4th 69, 78, 52 P.3d 695 (2002).

The acts set forth in CCP § 425.16(e) include, *inter alia*, the following:

> (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest;
> (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

California Courts have consistently interpreted the words "public place or public forum" to include websites; "Web sites accessible to the public … are 'public forums' for purposes of the anti-SLAPP statute." *Barrett v. Rosenthal*, 40 Cal.4th 33, 41, n. 4, 51 Cal.Rptr.3d 55, 59 n. 4, 146 P.3d 510, 514 n. 4 (2006) (citing extensive authority for premise); *Kronemyer*, 150 Cal.App.4th at 950, 59 Cal.Rptr.3d at 55 (finding, "We are

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satisfied that respondent's website constitutes a public forum.") Here, it is clear that a publicly accessible website such as the Ripoff Report is a "public forum" within the meaning of the anti-SLAPP statute. *See Global Telemedia*, 132 F.Supp.2d at 1264 (finding statements posted on Internet message board were made in a 'public place or public forum' within the meaning of CCP § 425.16(e)).

Next, a defendant must establish that the Complaint arises from conduct within either CCP § 425.16(e)(3) (speech in a public forum relating to "an issue of public interest") or CCP § 425.16(e)(4) ("any other conduct in furtherance of the exercise of … the constitutional right of free speech in connection with a public issue or an issue of public interest.") In this case, both CCP §§ 425.16(e)(3) and (e)(4) are implicated, albeit in two completely different ways—one relates to the speech of the author(s) of the four reports about AEI, while the other relates to the speech and conduct of Mr. Magedson and the Ripoff Report as entirely separate and apart from anything written by Ripoff Report's users.

1. The Reports Involve Public Issues Under CCP § 425.16(e)(3)

First, as explained in ¶ 37 of the affidavit of Ed Magedson, AEI's Complaint alleges that four separate postings on the Ripoff Report website contain various false statements. Copies of these reports are attached as Exhibits to Mr. Magedson's affidavit as follows:

Exhibit	Report #	Submission Date
F	417493	January 28, 2009
G	423987	February 13, 2009
H	457433	June 1, 2009
I	502429	September 30, 2009

In ¶ 28 of the Complaint, AEI describes these reports as containing statements which accuse it of systematically mistreating employees in various ways. Most specifically, the allegations accuse AEI of failing to pay employees, reducing pay

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'illegally', promising to help employees obtain work visa and then failing to do so, ignoring employment laws, and hiring/firing based on race, religion and gender, among other things. Reduced to their simplest possible terms, these statements can be summarized as suggesting that AEI is a bad place to work.

Based on conversations with AEI's counsel during the meet-and-confer process, it became apparent that the parties strongly disagree as to whether these statements involve "public issues" or "public interest" as required by CCP § 425.16. Xcentric's position is that this type of "consumer protection information" and "information ostensibly provided to aid consumers ..." generally does involve matters of public concern. *See Wilbanks v. Wolk*, 121 Cal.App.4th 883, 89–900, 17 Cal.Rptr.3d 497, 507–08 (2004); *see also Church of Scientology of Cal. v. Wollersheim*, 42 Cal.App.4th 628, 651, 49 Cal.Rptr.2d 620, 633 (1996) (*disapproved of on other grounds by Equilon Enters. v. Consumer Cause, Inc.*, 29 Cal.4th 53, 124 Cal.Rptr.2d 507 (2002). In addition, statements posted on Internet message boards which question and criticize the business practices or ethics of individuals who interact with the public are matters of public interest and concern. *See Sipple v. Foundation For Nat'l Progress*, 71 Cal.App.4th 226, 238–40, 83 Cal.Rptr.2d 677 (App. 1999) (statement that a nationally known political consultant abused his former wife was a matter of public interest); *Barrett*, 40 Cal.4th at 40, 146 P.3d at 513–14 (finding statements posted on Internet which criticized character and competence of doctor were within scope of anti-SLAPP statute); *Global Telemedia*, 132 F.Supp.2d at 1265–66 (holding statements posted on Internet by investors criticizing business practices of company were matters of public concern).

However, Xcentric concedes that authority exists for the principle that "Unlawful workplace activity below some threshold level of significance is not an issue of public interest, even though it implicates a public policy." *Rivero v. American Federation of State, County, and Municipal Employees, AFL-CIO*, 105 Cal.App.4th 913, 924, 130 Cal.Rptr.2d 81 (1st DCA 2003) (noting "a 'public concern' test, amounts to little more than a message to judges and attorneys that no standards are necessary because they will,

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or should, know a public concern when they see it.") (quoting *Briggs v. Eden Council for Hope & Opportunity*, 19 Cal.4th 1106, 1122, 81 Cal.Rptr.2d 471, 969 P.2d 564 (1999)).

Despite this, Xcentric contends that AEI has viewed the law too narrowly and that when considered in their broader context, the statements at issue involve obvious matters of public interest and concern—e.g., the question of whether this company is a good and safe place to work. Indeed, with the United States currently experiencing record levels of unemployment with millions of people looking for work, discussions about which companies may not pay their employees in a timely fashion or which companies mistreat their employees on a regular basis are matters of substantial public interest. The reports at issue relate directly to that topic and nothing further is needed to find that the "public issue" requirement of CCP § 425.16(e)(3) has been met.

This was the holding in *Gilbert v. Sykes*, 147 Cal.App.4th 13, 53 Cal.Rptr.3d 752 (3rd DCA 2007) which involved a patient who was unhappy with some plastic surgery performed by her doctor. The patient sued her doctor for malpractice and also created a website (www.mysurgerynightmare.com) where the patient posted photos and stories outlining her dissatisfaction with her doctor. Based on statements made on the website, the doctor counterclaimed against the patient for defamation and the patient moved to strike under the anti-SLAPP statute. The trial court denied the motion, in part, but the Court of Appeals *reversed* finding that the comments about the doctor were within the scope of CCP § 425.16. *See Gilbert*, 147 Cal.App.4th at 22–23, 53 Cal.Rptr. at 760–61.

Obviously, most elective medical procedures such as cosmetic plastic surgery are uniquely private. In addition, the doctor/patient relationship is so inherently private that it is among those few important relationships protected by privilege laws including Cal. Evid. Code § 994 (recognizing doctor-patient privilege). Despite this, the court in *Gilbert* rejected the doctor's arguments that the anti-SLAPP statute did not apply because the statements were not public issues; "Sykes asserts that statements on the Web site do not contribute to the public debate because they only concern Gilbert's interactions with him. He is wrong." *Gilbert*, 147 Cal.App. at 23; 53 Cal.Rptr.3d at 760–61 (emphasis added).

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Instead, the *Gilbert* court noted that the website contributed to the broader discussion about the topic of plastic surgery *in general*, and that because the public viewed that topic as important and interesting, CCP § 425.15(e)(3) applied because the site, "contributes toward public discussion about the benefits and risks of plastic surgery in general, and particularly among persons contemplating plastic surgery as a means of looking younger or improving their appearance." *Gilbert*, 147 Cal.App. at 23; 53 Cal.Rptr.3d at 761.

Applying this logic here, the statements which give rise to AEI's claims involve matters of public interest because they discuss whether or not AEI is a good company to work for. Regardless of whether AEI agrees with the views expressed in the reports, this general topic is certainly one of major public interest during these difficult economic times and therefore these statements relate to "public issues" within the meaning of CCP § 425.16(e)(3). In fact, AEI essentially concedes this point in ¶ 3 of its Complaint wherein it alleges, "Plaintiffs' business is an asset to the economy. AEI was in the process of providing work opportunities for numerous Americans who are currently unemployed."

While it is certainly commendable and laudable for AEI to provide jobs and employment opportunities to the public at large, it is hardly unexpected for the public to engage in discussions about AEI's suitability as an employer, or its lack thereof. This important topic is covered by the national news media on a frequent basis, *see*, *e.g.* http://money.cnn.com/magazines/fortune/bestcompanies/2010/ (Fortune Magazine's list of "Top 100 Best Companies To Work For"), and the four postings at issue each contribute something to the public discussion of that issue.

In addition, to the extent the statements are critical of AEI and its principals, the California Supreme Court has found this type of criticism is within the scope of the anti-SLAPP statute. *See Barrett*, 40 Cal.4th at 40 note 2, 146 P.3d at 513 note 2 (statements concerned public issues where they criticized the plaintiff as being "arrogant, bizarre, closed-minded; emotionally disturbed, professionally incompetent, intellectually

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dishonest, a dishonest journalist, sleazy, unethical, a quack, a thug, a bully, a Nazi, a hired gun for vested interests, the leader of a subversive organization, and engaged in criminal activity (conspiracy, extortion, filing a false police report, and other unspecified acts.)")

2. ROR/Magedson's Conduct Implicates CCP § 425.16(e)(4)

Entirely separate and apart from AEI's claims arising from the four user-generated reports on the Ripoff Report site, it is worth noting that portions of AEI's claims appear to be focused on *other* conduct on the part of Mr. Magedson and Xcentric. As explained below, Mr. Magedson's conduct and his operation of the Ripoff Report website clearly qualify as "conduct in furtherance of the exercise of … the constitutional right of free speech in connection with a public issue or an issue of public interest," within the meaning of CCP § 425.16(e)(4).

For instance, ¶ 18 of the Complaint alleges that Xcentric and Magedson use the Ripoff Report site to "organize class action lawsuits …" while ¶ 19 asserts that Defendants use the website to "solicit 'non-tax deductible donations' … ." Of course, Mr. Magedson has a First Amendment right to solicit donations (whether or not they are tax deductible) and to organize class-action lawsuits if he believes such action is warranted. Furthermore, the Complaint is permeated by various claims of misconduct relating to Xcentric's Corporate Advocacy Program which, as explained in the affidavit of Ed Magedson submitted herewith, is a customer service program offered by Xcentric in conjunction with reports appearing on the Ripoff Report website. But again, Mr. Magedson's decision to engage in either consumer advocacy, corporate advocacy, or a combination of the two fields is clearly "conduct in furtherance of the exercise of … the constitutional right of free speech in connection with a public issue or an issue of public interest," within the meaning of CCP § 425.16(e)(4). In other words, Mr. Magedson has a First Amendment right to act as a consumer advocate and to post speech on the Ripoff Report website explaining his views and opinions on matters of importance to consumers such as informing the public of a company that has joined the CAP program.

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Nevertheless, based on Mr. Magedson's actions, AEI has asserted a claim for Unfair Business Practices pursuant to Cal. Bus. & Prof. Code § 17200. Although some of the allegations in the Complaint are factually nebulous (i.e., "Defendants have engaged in conduct the utility of which is outweighed by the gravity of the consequences to the Plaintiffs and the public." Compl. ¶ 54(a)), it is equally clear that AEI's claim arises in part from Mr. Magedson's conduct and speech while acting as a consumer advocate; "Defendants represents themselves as consumer advocates. However, this description is false and misleading." Compl. ¶ 55(a).

Regardless of whether the four user-generated reports arise from "protected activity", it is clear that several of AEI's claims are not based on that speech, but rather they arise solely from the speech, actions and conduct of Mr. Magedson in his role as the "ED"itor of the Ripoff Report site. Because Mr. Magedson's conduct is itself "protected activity" under CCP § 425.16(e)(4), Defendants have shown that this action is subject to the anti-SLAPP statute.

B. Plaintiffs Must Establish A Probability of Success

Once the defendant establishes that the anti-SLAPP law applies, the burden shifts to the plaintiff to establish "a probability that the plaintiff will prevail on the claim." *Church of Scientology*, 42 Cal.App.4th at 646, 49 Cal.Rptr.2d 620; CCP § 425.16(b)(1). To satisfy this burden "plaintiff [is] required both to plead claims that were legally sufficient, and to make a *prima facie* showing, by admissible evidence, of facts that would merit a favorable judgment on those claims, assuming plaintiff's evidence [is] accepted." *1-800 Contacts, Inc. v. Steinberg*, 107 Cal.App.4th 568, 584, 132 Cal.Rptr.2d 789 (App. 2003) (citing *Wilson v. Parker, Covert & Chidester*, 28 Cal.4th 811, 821, 123 Cal.Rptr.2d 19, 50 P.3d 733 (2002)). When offered, the court must consider supporting and opposing affidavits in making its determination. *See* CCP § 425.16(b)(2).

In addition, an anti-SLAPP motion may be based on "any defect in the plaintiff's action," including failure to state a claim or failure to adduce evidence to support the claim. *Rogers v. Home Shopping Network*, 57 F.Supp.2d 973, 976 (C.D.Cal. 1999).

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This analysis also requires consideration of "defenses to the pleaded claims and, if so, whether there is evidence to negate any such defenses." *McGarry v. University of San Diego*, 64 Cal.Rptr.3d 467, 476, 154 Cal.App.4th 97, 108 (App. 2007).

As explained herein, pursuant to the Communications Decency Act, Xcentric cannot be held liable for the accuracy of material posted on the site by a third party user, nor can Xcentric or Magedson be treated as the "publisher or speaker" of any user-generated material. In this case, there is no allegation that Xcentric or Magedson created or changed any of the statements, and Defendants expressly deny doing so. *See* Magedson Aff. ¶ 38. As such, the defamation and defamation-related claims have no likelihood of success and they should be stricken from the Complaint.

C. Plaintiff Cannot Establish A Probability Of Success

1. Defendants Are Immune Under 47 U.S.C. § 230(c)(1)

Pursuant to the Communications Decency Act, 47 U.S.C. § 230(c)(1), website providers and operators are immune from liability based on any statements created by a third party. As the California Supreme Court has explained:

> [B]y its terms section 230 exempts Internet intermediaries from defamation liability for republication. The statutory immunity serves to protect online freedom of expression and to encourage self-regulation, as Congress intended. Section 230 has been interpreted literally. It does not permit Internet service providers or users to be sued as "distributors," nor does it expose "active users" to liability.
>
> Plaintiffs are free under section 230 to pursue the originator of a defamatory Internet publication. Any further expansion of liability must await Congressional action.

Barrett, 40 Cal.4th at 63, 146 P.3d at 529 (affirming order granting anti-SLAPP motion based on finding that defendant was entitled to immunity under Section 230 of the CDA).

Consistent with the rule expressed in *Barrett,* numerous courts have held that Xcentric, Mr. Magedson and the Ripoff Report website are entitled to complete immunity under the CDA. *See Global Royalties, Ltd. v. Xcentric Ventures, LLC*, 544 F.Supp.2d 929, 932 (D.Ariz. 2008) (finding Xcentric and Magedson immune under the CDA, and

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further noting, "the CDA is a complete bar to suit against a website operator for its 'exercise of a publisher's traditional editorial functions-such as deciding whether to publish, withdraw, postpone or alter content.'") (emphasis added) (quoting *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997)); *see also Whitney Information Network, Inc. v. Xcentric Ventures, LLC*, 2008 WL 450095 (M.D.Fla. 2008) (finding Xcentric and Magedson entitled to immunity under CDA); *GW Equity, LLC v. Xcentric Ventures, LLC*, 2009 WL 62173 (N.D.Tex. 2009) (same); *Intellectual Art Multimedia, Inc. v. Milewski*, 2009 WL 2915273 (N.Y.Sup. Sept. 11, 2009) (same).

The same result should occur here. As explained in the affidavit of Ed Magedson submitted herewith, none of the four postings at issue were created or altered by Xcentric or Magedson. *See* Magedson Decl. ¶ 38. Furthermore, nothing in AEI's Complaint alleges that Xcentric or Magedson wrote or changed any of the reports. Instead, liability is premised solely and exclusively on the fact that Ripoff Report has "published" material written by its users. This is exactly the type of case where the CDA applies:

> 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.

Fair Housing Council of San Fernando Valley v. Roommates.com, Inc., 521 F.3d 1157, 1174–75 (9th Cir. 2008) (en banc) (emphasis added). Interestingly, AEI's Complaint appears to anticipate this problem and avoid it by claiming that Defendants' unrelated business activities are sufficient to result in a loss of CDA immunity:

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PHOENIX, ARIZONA 85048
(480) 668-3623

> It is important to note that Defendant Magedson, by his own admission, clearly states that the [Corporate Advocacy Program] '… changes the negative listing on search engines into a positive along with all the Reports on Rip-off Report …' As a result, Defendants can not be afforded protection under § 230 of the CDA.

Compl. ¶ 32. Because it is anticipated that Plaintiffs will try to argue that Defendants' Corporate Advocacy Program or "CAP" is somehow unlawful and/or that it results in a loss of CDA immunity, it is important to briefly comment about the program. In general, plaintiffs who dislike Ripoff Report (because the site cannot be sued directly for the statements posted by its users) often claim that the CAP program is a form of "extortion". In a nutshell, proponents of this theory claim that Mr. Magedson creates phony reports about a victim's company and then demands huge sums ($100,000–250,000) in order to remove the fake posts. Since this conduct would clearly be unlawful, plaintiffs who dislike the CDA will sometimes raise this theory in the hopes of convincing courts to find that CDA immunity does not apply to the Ripoff Report.

To be clear—Ripoff Report does not engage in this conduct, period. In fact, in every single case where the plaintiff has asserted any type of "extortion" related argument based on the CAP program, such claims have always been dismissed on summary judgment for lack of evidence (because the claims are purely fictional), or the plaintiff has voluntarily dropped the claim immediately upon being ordered to file a RICO case statement.

So, if the CAP program is not extortion, what is it? Rather than re-inventing the wheel, the court is directed to a partial summary of the CAP program in the U.S. District Court's decision in *Whitney Information Network v. Xcentric*:

> [T]he ROR website offers a Corporate Advocacy Business Remediation and Consumer Satisfaction Program ("CAP Program") to companies which have had reports posted against them. In order to participate in the CAP Program, a company must pay a fee and fulfill other requirements. In the future, when a poster submits a report to the ROR website regarding this company, the report is not automatically posted on the ROR website. Instead, the ROR website sends an e-mail to the poster who submitted the

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> report to let him or her know about the company's participation in the program. The company is then given the opportunity to address the report with the poster. If the poster is satisfied with the response provided by the company, then the report is not published on the ROR website.

Whitney, 2008 WL 450095, * 6 (finding CAP irrelevant to application of the CDA).

In the *Whitney* case, the District Court noted that the plaintiff never participated in the Corporate Advocacy Program and none of the statements at issue in the case had anything to do with the program. *See Whitney*, 2008 WL 450095, * 6 note 16. Based on these facts, which are identical to the facts here, the court concluded that the CDA fully applied and that Xcentric and Magedson were entitled to summary judgment notwithstanding the CAP program; "the Court determines that Defendants have demonstrated that they are entitled to immunity under the CDA from the instant action, and Defendants' motion for summary judgment is due to be granted." *Id*. at *12.

The same result was reached by the District Court in *GW Equity, LLC v. Xcentric Ventures, LLC* in which the court unequivocally held that the Corporate Advocacy Program does not affect Ripoff Report's immunity under the CDA:

> The evidence demonstrates that Defendants have a "Corporate Advocacy Program," in which, for a fee, Defendants will investigate "rip-off reports" targeting a company and draft and post rebuttals to a negative report. The Court does not find this makes Defendants "information content providers" under the CDA. Plaintiff cites no case law demonstrating that such conduct bars CDA immunity, and has not demonstrated that the "Corporate Advocacy Program" has played any role in this case. Like other courts to consider this issue, this Court does not find the "Corporate Advocacy Program" prohibits Defendants from immunity under the CDA.

GW Equity, 2009 WL 62173, * 13 (emphasis added) (citing *Global Royalties, Ltd. v. Xcentric Ventures, LLC*, 544 F.Supp.2d 929, 932–33 (D.Ariz. 2007) (rejecting plaintiff's argument that CAP made defendants responsible for the creation or development of all of the posts on their website). Here, there is no serious question that AEI is attempting to hold Defendants liable for the statements posted by third parties on the Ripoff Report site. All of these statements were created by third party users of the website, not by

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Xcentric or Mr. Magedson. As such, the CDA stands as a complete bar to liability and therefore allowing this case to continue would be futile. Plaintiffs cannot establish any chance of success at trial and therefore their defamation and defamation-related claims should be stricken.

2. Defendants Did Not Create Or Alter Any Content At Issue In This Case

Despite the robust nature of the CDA, it is well settled that a defendant who is otherwise entitled to immunity under Section 230 will lose that protection if he or she creates or materially changes the 3rd party/user-generated content and that edited/altered material is allegedly false. *See Fair Housing Council*, 521 F.3d at 1169 (explaining, "a website operator who edits in a manner that contributes to the alleged illegality-such as by removing the word 'not' from a user's message reading '[Name] did not steal the artwork' in order to transform an innocent message into a libelous one-is directly involved in the alleged illegality and thus not immune.") (brackets in original).

Of course, a website operator who creates or edits *some* content without changing its original meaning is still entitled to immunity. *See GW Equity*, 2009 WL 62173, * 3 (noting, "under the CDA, an interactive computer service qualifies for immunity so long as it does not also function as an information content provider for the portion of the content at issue.") (emphasis added) (citing *Carafano v. Metrosplash.com, Inc*., 339 F.3d 1119, 1123 (9th Cir. 2003)).

Based on these points and based on lengthy experience in defending numerous similar cases, it is anticipated that AEI may assert that the CDA does not apply here because Xcentric and/or Magedson created or materially altered some part of the four statements at issue. Because this allegation (if proven true) would defeat CDA immunity, many plaintiffs have been unable to resist the temptation of asserting such a claim even though they knew it was factually groundless.

If such an allegation is made in response to this motion, two points should be noted. First, in his affidavit Mr. Magedson states that neither he nor Xcentric created or

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alter any of the postings about AEI. *See* Magedson Aff. ¶ 38. Second, this is not a Rule 12(b)(6) motion wherein the facts in the Complaint are assumed true. Rather, a plaintiff opposing an anti-SLAPP motion must carry the burden of showing probable success at trial, and this burden requires proof in the form of admissible evidence, not speculation; "In opposing an anti-SLAPP motion, the plaintiff cannot rely on the allegations of the complaint, but must produce evidence that would be admissible at trial. Thus, declarations may not be based upon 'information and belief' and documents submitted without the proper foundation are not to be considered." *HMS Capital, Inc. v. Lawyers Title Co.*, 118 Cal.App.4th 204, 212 (2004).

Put simply, if AEI claims that Xcentric and/or Mr. Magedson created or altered the statements which give rise to this action, it is required to submit competent proof and admissible evidence supporting that allegation. Of course, because it is not true, no evidence whatsoever exists to support this claim.

3. Plaintiffs Cannot Prevail On Their Claims Under § 17200

As noted above, although most of the claims in this case arise from the statements contained in the four reports on the Ripoff Report website, Plaintiffs have at least one claim (their second Cause of Action asserting a claim under Cal. Bus. & Prof. Code § 17200) which appears to arise solely from the speech, actions, and conduct of Ed Magedson vis-à-vis his operation of the Ripoff Report site. Upon closer inspection, it is difficult to determine exactly what unlawful conduct this claim seeks to punish, nor is it apparent what relief Plaintiffs are seeking.

In terms of its factual basis, ¶ 53 of the Complaint appears to allege that Defendants have engaged in "unlawful business acts or practices" in violation of Bus. & Prof. Code § 17200 by attempting "to obtain AEI's property through wrongful use of actual or threatened fear … ." However, as explained in the affidavit of Ed Magedson, no such threat ever occurred. *See* Magedson Aff. ¶ 33. Likewise, ¶ 53(b) appears to accuse Mr. Magedson of extortion by virtue of having "repeatedly and intentionally used

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their Websites as a scheme to obtain money from AEI and other companies by means of false and defamatory complaints created or solicited by Defendants." Again, Mr. Magedson expressly denies ever engaging in this conduct. *See* Magedson Aff. ¶ 33.

While it is unclear whether this claim alleges conduct sufficient to state a claim, it is nevertheless clear that Plaintiffs cannot establish any probability of success for two reasons. First, Mr. Magedson flatly denies that any of this alleged conduct ever occurred. At no time did Mr. Magedson threaten Plaintiffs nor did Plaintiffs ever pay anything to Xcentric. Because Plaintiffs must carry the burden of introducing *admissible* evidence to support this claim and since no such evidence exists, they cannot meet their burden under CCP § 415.16.

Second, even if Plaintiffs could show that they had been threatened as they have alleged, this would still not entitle them to any relief. This is so because claims under Bus. & Prof. Code § 17200 are extremely narrow and the only available remedies are restitution and injunctive relief. *See Bradstreet v. Wong*, 161 Cal.App.4th 1440, 75 Cal.Rptr.3d 253 (1st DCA 2008) (noting "A UCL action [under Bus. & Prof. Code § 17200] is equitable in nature; damages cannot be recovered. Civil penalties may be assessed in public unfair competition actions, but the law contains no criminal provisions. [U]nder the UCL, '[p]revailing plaintiffs are generally limited to injunctive relief and restitution.'") (emphasis added) (quoting *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134, 1144, 131 Cal.Rptr.2d 29, 63 P.3d 937 (2003)).

Here, it appears to be undisputed that Plaintiffs never paid anything to either Xcentric or Magedson nor has Xcentric ever earned any money from anyone else as a result of the postings about AEI. As such, even assuming their allegations are true, there would seem to be no basis for Plaintiffs to recover anything under a restitution theory. Similarly, Mr. Magedson has never threatened Plaintiffs in any manner nor would he continue to do so in the future, so there is no basis for the court to issue an injunction of any kind. Because no other remedies are available under Bus. & Prof. Code § 17200, Plaintiffs cannot show any likelihood of success on this claim.

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D. The Court Should Order Plaintiffs To File A RICO Case Statement

Although His Honor has not done so, several judges in the Central District have issued standing orders requiring the plaintiff in any civil case asserting claims pursuant to 18 U.S.C. § 1961 (RICO) to file a "RICO Case Statement". For instance, attached hereto as **Exhibit A** is the standard RICO Case Statement form used by Judge Selna, and **Exhibit B** is the form used by Judge Matz.

In this case, AEI has asserted two RICO claims; one based on 18 U.S.C. § 1962(c) and the other based on 18 U.S.C. § 1962(d). As noted at the outset of this motion, these claims are arguably based on conduct outside the scope of California's anti-SLAPP statute. For that reason, Defendants have not asked the court the strike RICO claims under CCP § 425.16.

However, RICO claims are highly technical both factually and legally and therefore such claims may be uniquely appropriate for early disposition via Rule 56 or otherwise. Courts have also recognized that the "need for expeditious and orderly progress of ... litigation" is particularly pronounced in a civil RICO suit because of its "quasi-criminal" nature and consequent "stigmatizing effect on those named as defendants." *Figueroa Ruiz v. Alegria*, 896 F.2d 645, 646 (1st Cir. 1990).

For these reasons, district courts can and frequently do order any party asserting RICO claims to supply the defendant with a RICO case statement outlining the factual and legal bases for those claims. *See Wagh v. Metris Direct, Inc.*, 363 F.3d 821, 827 (9th Cir. 2003) (discussing "widespread use" of standing orders for RICO case statements), *overruled on other grounds by Odom v. Microsoft Corp.*, 486 F.3d 541, 551 (9th Cir. 2007) (citing *In re Bank of Credit and Commerce Int'l Depositors Litig.*, 1992 WL 696398 (C.D.Cal. 1992); *Gutierrez v. Givens*, 1 F.Supp.2d 1077, 1087 (S.D.Cal. 1998); *May v. U.S. Chamber of Commerce*, 1996 WL 116829 (N.D.Cal. 1996)).

Of course, RICO case statements are not specifically required by any Rule of Civil Procedure. Nevertheless, numerous courts have relied upon various rules including Rules 11, 12(e) and 16 as providing authority for this requirement. *See, e.g., Kingston Square*

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Tenants Ass'n v. Tuskegee Gardens, Ltd., 792 F. Supp. 1566, 1582 (S.D. Fla. 1992) (RICO case statement ordered *sua sponte* pursuant to Fed. R. Civ. P. 11); *Old Times Enterprises, Inc. v. International Coffee Corp.*, 862 F.2d 1213, 1217 (5th Cir. 1989) (affirming district court's requirement of a RICO case statement based on Fed. R. Civ. P. 12(e)); *United Power Ass'n, Inc. v. L.K Comstock & Co.*, 1990 WL 120674, *1 (D. Minn. 1990) (ordering plaintiff to file a RICO case statement pursuant to Fed. R. Civ. P. 16).

Whether based on Rule 11, 12, 16 or simply upon the court's inherent authority, Defendants respectfully request that the court issue an order requiring Plaintiffs to file a RICO case statement within a reasonable period of time (i.e., 30 days from the date of the court's order). Because it contains slightly more detail, Defendants further request that the court require Plaintiffs to use the sample form of order used by Judge Selna (**Exhibit A**) or any other such form as the court may deem appropriate.

IV. CONCLUSION

As the California Supreme Court clearly explained in *Barrett v. Rosenthal*, the CDA does not prevent defamation victims from seeking redress for any economic losses they have suffered. Rather, the only thing the CDA does is limit liability to the person or persons who created the false statements about them; "Plaintiffs are free under section 230 to pursue the originator of a defamatory Internet publication. Any further expansion of liability must await Congressional action." *Barrett*, 40 Cal.4th at 63, 146 P.3d at 529.

In this case, Plaintiffs can and should pursue any and all claims they have against the authors of the four postings at issue. However, under the law, website hosts and intermediaries like the Ripoff Report are simply not liable for material they did not create. As such, the Court should strike the defamation and defamation-related claims in Plaintiff's Complaint pursuant to CCP § 425.16.

DATED this 22 day of September, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on March 22, 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 Steven V. Wilson
U.S. District Judge

/s/David S. Gingras

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