

1 David S. Gingras, CSB #218793
Gingras Law Office, PLLC
 2 4072 E Mountain Vista Dr.
 Phoenix, AZ 85048
 3 Tel.: (480) 639-4996
 Fax: (480) 668-3623
 4 David.Gingras@webmail.azbar.org

5 Maria Crimi Speth, (Admitted *Pro Hac Vice*)
Jaburg & Wilk, P.C.
 6 3200 N. Central Ave., Suite 2000
 Phoenix, AZ 85012
 7 Tel: (602) 248-1000
 Fax: (602) 248-0522
 8 mcs@jaburgwilk.com

9
 10 Attorneys for Defendants
 Xcentric Ventures, LLC and
 Edward Magedson
 11

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

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

14
 15 **ASIA ECONOMIC INSTITUTE, LLC, et al.,**
 16
 17 **Plaintiffs,**
 18 **vs.**
 19 **XCENTRIC VENTURES, LLC, et al.**
 20
 21 **Defendants.**

Case No: 2:10-cv-01360-SVW-PJW
SPECIAL MOTION TO STRIKE
 Hearing Date: Nov. 1, 2010
 Time: 1:30 PM
 Courtroom: 6 (Hon. Stephen Wilson)

DEFENDANTS' SPECIAL MOTION TO STRIKE

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that on November 1, 2010 at 1:30 PM or as soon thereafter as counsel may be heard in Department 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 from the First Amended Complaint pursuant to Cal. Code Civ. P. § 425.16.

The motion will be based on this Notice, the accompanying Memorandum of Points and Authorities, 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 September 27, 2010.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I. INTRODUCTION

As the court is aware, on March 22, 2010, Defendants brought a Special Motion to Strike (Doc. #9) pursuant to Cal. Code. Civ. P. § 425.16. The court denied this motion based on its determination that the speech at issue in the initial Complaint did not involve a matter of public concern.

Since that ruling, the case has expanded significantly. Following the disposition of Defendants’ first Motion for Summary Judgment, on July 27, 2010, Plaintiffs filed an 84–page First Amended Complaint (Doc. #96) which, unlike their original Complaint, was not limited to the six derogatory Internet posts that Plaintiffs claim were defamatory. Rather, the FAC constitutes an all-out assault on Defendants, their lawyers, and their customers. It is no exaggeration to say the FAC constitutes a literal declaration of war on the First Amendment rights of Defendants.

As explained herein, by expanding their claims to include Defendants’ actions and speech, Plaintiffs have once again subjected their pleading to scrutiny under the anti-SLAPP law. However, this time the First Amended Complaint includes claims (including Plaintiffs’ claims for deceit, fraud, and unfair competition) which arise from conduct and speech that is *per se* within the scope of Cal. Code Civ. P. §§ 425.15(e)(3) and (e)(4). Because these claims have no merit whatsoever, this court should enter an order striking them and awarding Defendants’ their attorney’s fees pursuant to CCP § 425.16(c).

II. ARGUMENT

A. The Anti-SLAPP Law Applies

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 ...

1 .” *Thomas v. Fry’s Electronics, Inc.*, 400 F.3d 1206 (9th Cir. 2005); *see also Global*
2 *Telemedia Int’l, Inc. v. Doe*, 132 F.Supp.2d 1261 (C.D.Cal. 2001) (applying anti-SLAPP
3 statute to defamation claims pending in federal court).

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

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

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

17 California Courts have consistently interpreted the words “public place or public forum”
18 to include websites; “Web sites accessible to the public ... are ‘public forums’ for
19 purposes of the anti-SLAPP statute.” *Barrett v. Rosenthal*, 40 Cal.4th 33, 41, n. 4, 51
20 Cal.Rptr.3d 55, 59 n. 4, 146 P.3d 510, 514 n. 4 (2006) (citing extensive authority for
21 premise); *Kronemyer*, 150 Cal.App.4th at 950, 59 Cal.Rptr.3d at 55 (finding, “We are
22 satisfied that respondent’s website constitutes a public forum.”) Here, it is clear that a
23 publicly accessible website such as the Ripoff Report is a “public forum” within the
24 meaning of the anti-SLAPP statute. *See Global Telemedia*, 132 F.Supp.2d at 1264
25 (finding statements posted on Internet message board were made in a ‘public place or
26 public forum’ within the meaning of CCP § 425.16(e)).

27 Next, a defendant must establish that the Complaint arises from conduct within
28 either CCP § 425.16(e)(3) (speech in a public forum relating to “an issue of public

1 interest”) or CCP § 425.16(e)(4) (“any other conduct in furtherance of the exercise of ...
2 the constitutional right of free speech in connection with a public issue or an issue of
3 public interest.”) In this case, both CCP §§ 425.16(e)(3) and (e)(4) are implicated for the
4 reasons stated below.

5 **B. The FAC Arises From Defendants’ Petitioning Activity**

6 In addition to providing additional protection to public *speech* relating to public
7 issues, California’s anti-SLAPP law also applies to claims arising from “any other
8 conduct in furtherance of the exercise of the constitutional right of petition” Cal.
9 Code. Civ. P. § 425.16(e)(4) (emphasis added). This protection applies to any act of
10 petition (including virtually all aspects of litigation activity) regardless of whether the
11 case at issue concerned a matter of public interest or concern. Indeed, pursuant to this
12 section, “[s]tatements and writings made in connection with litigation are therefore
13 covered by the anti-SLAPP statute, and that statute does not require any showing that the
14 litigated matter concern a matter of public interest.” *Genethera, Inc. v. Troy & Gould*
15 *Prof. Corp.*, 171 Cal.App.4th 901, 908, 90 Cal.Rptr.3d 218, 222 (2nd Dist. 2009).

16 Here Plaintiffs’ claims are based on Defendants’ petitioning activities in several
17 ways. First, Plaintiffs have repeatedly suggested that they were targeted by an unlawful
18 “threat” made during the course of a settlement conference in this case on July 20, 2010.
19 Of course, settlement offers made during the course of litigation are *per se* within the
20 scope of the anti-SLAPP law; “An attorney’s communication with opposing counsel on
21 behalf of a client regarding pending litigation directly implicates the right to petition and
22 thus is subject to a special motion to strike.” *Genethera*, 171 Cal.App.4th at 908 (citing
23 *Navellier v. Sletten*, 29 Cal.4th 82, 88–89, 124 Cal.Rptr.2d 530, 52 P.3d 703 (2002)).
24 This is true even when the plaintiff claims something in the settlement offer was unlawful
25 because that point goes to the probability of success, not whether the anti-SLAPP law
26 applies. *See generally Seltzer v. Barnes*, 182 Cal.App.4th 953, 964, 106 Cal.Rptr.3d 290,
27 298–99 (1st Dist. 2010) (explaining that question of whether settlement offer was
28 unlawful relates solely to likelihood of success, not whether anti-SLAPP law applies).

1 Second, Plaintiffs have argued and insinuated that Defendants defrauded them
2 (and the public as a whole) by denying that they have ever removed reports for money
3 when, according to Plaintiffs, this occurred during the course of a settlement in a case
4 entitled *Xcentric Ventures, LLC v. QED Media Group, LLC*. This point is discussed
5 extensively in the First Amendment Complaint as providing factual support for Plaintiffs’
6 fraud claims and their unfair competition claim. Of course, the *QED Media* case
7 involved Defendants’ right of petition, and to the extent Plaintiffs are alleging any
8 misconduct arising from that activity, their claims are within the scope of the anti-SLAPP
9 law. *See Kolar v. Donahue, McIntosh & Hammerton*, 145 Cal.App.4th 1532, 1537, 52
10 Cal.Rptr.3d 712 (2006) (explaining anti-SLAPP protection “applies not only to the filing
11 of lawsuits, but extends to conduct that relates to ... litigation, including statements made
12 in connection with or in preparation of litigation”)

13 Third, a substantial portion of the FAC arises from Defendants’ discussion of legal
14 issues set forth on the Ripoff Report website under the heading: “Want to Sue Ripoff
15 Report?” which was referenced in an email sent by Mr. Magedson to Mr. Mobrez in
16 response to Mr. Mobrez’s initial request for information in May 2009. As outlined over
17 the course of multiple pages (58–63) in the Complaint, Plaintiffs accuse Defendants of
18 using this discussion to defraud them by misrepresenting the law in an effort to
19 discourage them from bringing this lawsuit: “Defendants mislead the public when they
20 state that they are “immune” from legal action, “have never lost a case,” and present
21 numerous contentions of law as fact. They assert that the Communications Decency Act
22 insulates them from liability in all cases. These statements appeared on the ROR website
23 on June 26, 2009 and October 27, 2009. Plaintiffs viewed these statements on those
24 dates.” Plaintiffs expressly allege that these statements were material to their decision to
25 delay the commencement of this litigation, and that “[i]f Plaintiffs had known the true
26 facts they would have sued ROR earlier and not delayed in trying to resolve this issue by
27 any means other than a lawsuit, thereby taking early action to remedy the erosion in their
28 business and property interests and loss of valuable contracts.” FAC ¶ 260. Plaintiffs

1 allege these facts constitute, *inter alia*, deceit, fraud, and unfair competition in violation
2 of Cal. Bus. & Prof. Code § 17200.

3 In their separately filed Motion to Dismiss (Doc. #110) and their concurrently
4 filed Motion for Summary Judgment, Defendants believe that these claims fail for
5 multiple evidentiary and/or legal reasons. However, it is clear that Plaintiffs are
6 attempting to assert claims arising from Defendants’ protected petitioning activities
7 insofar as they are alleging *fraud* based on Defendants’ alleged efforts to convince
8 Plaintiffs *not* to bring the current lawsuit. This type of petitioning activity is entitled to
9 anti-SLAPP protection because “[j]ust as communications preparatory to or in
10 anticipation of the bringing of an action or other official proceeding are within the
11 protection of the litigation privilege of Civil Code section 47, subdivision (b) [citation], ...
12 such statements are equally entitled to the benefits of section 425.16.” *Neville v.*
13 *Chudacoff*, 160 Cal.App.4th 1255, 73 Cal.Rptr.3d 383 (2nd Dist. 2008) (quoting *Briggs v.*
14 *Eden Council for Hope & Opportunity*, 19 Cal.4th 1106, 1115, 81 Cal.Rptr.2d 471, 969
15 P.2d 564 (1999).

16 C. **The FAC Arises From Defendants’ Public Speech on Matters of**
17 **Substantial Public Interest**

18 Separate and apart from the above, Defendants also contend their speech is
19 protected under § 425.16(e)(3) to the extent that the speech occurred in a public forum
20 (the Ripoff Report website) and related to matters of substantial public interest and
21 concern (such as the nature and extent to which the Communications Decency Act
22 protects Defendants). Even if it did not relate to any pending litigation (which it does),
23 the speech contained in Defendants’ page “Want to Sue Ripoff Report?” represents
24 Defendants’ efforts to explain their policies and position with respect to matters of
25 serious public interest such as whether Defendants will remove material from the Ripoff
26 Report site upon request, whether Defendants will allow authors to retract their
27 complaints, and whether Defendants will comply with *ex parte* injunctions entered in
28 cases when Defendants were not parties to the case.

1 Plaintiffs cannot seriously deny that these issues are matters of substantial public
2 interest and concern. Among other things, Defendants’ actions and positions on these
3 issues have led to a substantial amount of litigation on the issue of CDA immunity,
4 including several published decisions, and also litigation on collateral issues such as the
5 extent to which Fed. R. Civ. P. 65(d) allows a court to enforce an injunction requiring the
6 removal of speech against a non-party. Recently, Defendants prevailed in one such case
7 in the Northern District of Illinois, *Blockowicz v. Williams*, 675 F.Supp.2d 912 (N.D.Ill.
8 2009), which generated both an appeal to the Seventh Circuit and a substantial amount of
9 public discussion and criticism. *See, e.g.*, David Johnson, *Blockowicz v. Williams:*
10 *Online Publisher Not Subject to Injunction Against Original Author of Defamatory Posts*,
11 http://www.digitalmedialawyerblog.com/2010/01/blockowicz_v_williams_online_p.html
12 (visited September 27, 2010); Prof. Eric Goldman, *Ripoff Report Not Bound by*
13 *Takedown Injunction Against User--Blockowicz v. Williams*,
14 http://blog.ericgoldman.org/archives/2009/12/ripoff_report_n.htm (visited September 27,
15 2010).

16 While the public certainly has a right to freely discuss and debate the law and the
17 role played by Defendants, this is not a one-way street. Defendants have a right to
18 participate in this public debate and to respond to the criticism levied against them
19 without fear of being sued in a groundless action designed solely to discourage their
20 public participation. Indeed, this point is emphasized by one of the categories of
21 damages sought by Plaintiffs—their *lobbying* expenses; “Amounts expended in traveling
22 to Washington, DC and advocating to representatives and lawmakers for a change in the
23 statute in the amount \$2,500 to date.” FAC at 83, ¶ 1(i).

24 Defendants agree with Plaintiffs that the Communications Decency Act is an
25 extremely important law, and that a robust public debate of the law is important. Of
26 course, Plaintiffs remain free to lobby for a change in the law and/or to seek any available
27 redress from this court as permitted by law. At the same time, by using this action in an
28 effort to retaliate against Defendants for their public *speech* on this topic, Plaintiffs have

1 implicated the anti-SLAPP law and therefore must demonstrate a likelihood of success at
2 trial. For the reasons set forth in Defendants' concurrently filed Motion for Summary
3 Judgment, Plaintiffs cannot meet this burden. As such, the court should strike Plaintiffs
4 claims for deceit, fraud, and unfair competition and award Defendants their attorney's
5 fees pursuant to Cal. Code Civ. P. § 425.16(c).

6 **III. CONCLUSION**

7 For the reasons stated above, Defendants' Special Motion to Strike should be
8 granted.

9 DATED this 24th day of September 2010.

10 **GINGRAS LAW OFFICE, PLLC**

11
12 /s/ David S. Gingras
13 David S. Gingras
14 Attorneys for Defendants
15 Ed Magedson and
16 Xcentric Ventures, LLC
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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:

Ms. Lisa Borodkin, Esq.
Mr. Daniel F. Blackert, Esq.
Asia Economic Institute
11766 Wilshire Blvd., Suite 260
Los Angeles, CA 90025
Attorneys for Plaintiffs

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

/s/David S. Gingras

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