

1 David S. Gingras, CSB #218793
Gingras Law Office, PLLC
 2 3941 E. Chandler Blvd., #106-243
 Phoenix, AZ 85048
 3 Tel.: (480) 668-3623
 Fax: (480) 248-3196

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

8 Attorneys for Defendants
 Xcentric Ventures, LLC and
 9 Edward Magedson

10 **UNITED STATES DISTRICT COURT**
 11 **CENTRAL DISTRICT OF CALIFORNIA**

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

13 **Plaintiffs,**

14 **vs.**

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

16 **Defendants.**

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

**REPLY IN SUPPORT OF
 DEFENDANTS'
 SPECIAL MOTION TO STRIKE**

Hearing Date: Nov. 1, 2010

Time: 1:30 PM

Courtroom: 6 (Hon. Stephen Wilson)

17 **I. INTRODUCTION**

18
 19 Occasionally, litigants and lawyers may cross the line, transforming legitimate
 20 proceedings into weapons of economic destruction in which frivolous claims are
 21 presented for no reason other than to inflict financial damage on a hapless defendant.
 22 This is the case here. The claims in Plaintiffs' FAC are so utterly groundless and
 23 meritless, Plaintiffs cannot (and do not) seriously attempt to defend them with a straight
 24 face. Rather, Plaintiffs have repeated their familiar pattern of presenting bogus
 25 arguments and then withdrawing or abandoning them (albeit only after causing
 26 Defendants to incur significant fees seeking relief). Plaintiffs appear to believe their
 27 misconduct has no consequences. Plaintiffs are wrong.
 28

REPLY ISO DEFENDANTS' SPECIAL MOTION TO STRIKE

1 Specifically, Plaintiffs argue that Defendants’ second anti-SLAPP motion (Doc.
2 #154) must be denied because it presents three main arguments, two of which are moot
3 based on Plaintiffs’ voluntary withdrawal of the offending allegations. This argument is
4 incorrect because Plaintiffs have NOT withdrawn their claims based on the issues
5 described in Defendants’ motion.

6 Plaintiffs further argue that the motion should be denied because they have
7 demonstrated a likelihood of success on their theory that Defendants have engaged in
8 actionable fraud and unfair competition “by claiming that they have never removed
9 Ripoff Reports for money” Opp. at 3:15–16. As explained herein, this position is
10 also without merit.

11 For these reasons, the Special Motion to Strike should be granted.

12 **II. ARGUMENT**

13 **A. Plaintiffs’ Opposition Is Untimely And Should Be Stricken**

14 Before considering Plaintiffs’ arguments, the Court should note that Plaintiffs’
15 opposition was untimely and should be rejected/stricken without consideration.
16 Specifically, Defendants’ motion was filed on September 27, 2010 with a hearing date of
17 November 1, 2010. Per Central District Local Rule L.R. 7–9, Plaintiffs’ opposition was
18 due “not later than twenty-one (21) days before the date designated for the hearing of the
19 motion ...” which made the opposition due no later than October 11, 2010.

20 Rather than complying with this deadline, Plaintiffs ignored it, filing their
21 opposition two days late on October 13, 2010 without any explanation. While
22 Defendants do not allege specific prejudice as a result of the delay, this does not mean
23 that compliance with important rules is optional. At some point, this Court’s rules must
24 be enforced or they will become meaningless.

25 **B. Plaintiffs Cannot Moot An Anti-SLAPP Motion**

26 On page three of their opposition, Plaintiffs argue that they have mooted
27 Defendants’ motion by voluntarily withdrawing claims based on two distinct things: 1.)
28 threats made in purported settlement discussions ... and [2.]) the discussion of legal

1 issues on the portion of Defendants’ website entitled ‘Want to sue Ripoff Report?’” Opp.
2 at 3:13–17.

3 Although Plaintiffs claim that they have voluntarily withdrawn any and all claims
4 based on these issues, that position is factually incorrect and legally irrelevant because a
5 plaintiff cannot moot a motion under C.C.P. § 425.16 by withdrawing or dismissing
6 claims or theories *after* the motion has been filed. *See Moore v. Lui*, 69 Cal.App.4th 745,
7 81 Cal.Rptr.2d 807 (App. 2nd Dist. 1999) (explaining that when claims are “voluntarily
8 dismissed, with or without prejudice, after filing a section 415.16 motion to strike, [the
9 defendant] is nevertheless entitled to have the merits of such motion heard as a predicate
10 to a determination of the defendant’s motion for attorney’s fees and costs under
11 subdivision (c) of that section.”) As such, even if Plaintiffs actually withdrew all
12 offending claims (which they have not), the instant motion is *not* moot.

13 Furthermore, Plaintiffs have not actually withdrawn all of the allegations which
14 gave rise to the current motion. Rather, they have repeatedly asserted that they were
15 “threatened” during a settlement conference which took place on July 20, 2010, and they
16 continue to take that groundless position today. Indeed, far from withdrawing any claims
17 based on these alleged threats, Plaintiffs devote more than three full pages of their
18 opposition to explaining why they believe such threats are actionable and not protected
19 by the anti-SLAPP law.

20 In addition, Plaintiffs claim that they offered to file a Second Amended Complaint
21 which would withdraw all of their claims based on the “Want to Sue Ripoff Report?”
22 section of Defendants’ site, *see* Opp. at 11, but this is simply not true. Before the instant
23 anti-SLAPP motion was filed, Plaintiffs did, in fact, file a Proposed Second Amendment
24 Complaint on August 17, 2010 (“SAC”; Doc. #122), but this pleading clearly continues
25 to assert claims arising from Defendants’ speech on the “Want to Sue...” portion of their
26 site. For example, ¶ 189 of the SAC continues to quote text from the “Want to Sue...”
27 page, and the SAC asserts fraud and related claims based solely on this page. *See* SAC
28 ¶¶ 233–34, 239, 320–23, and 328–29.

1 For these reasons, Plaintiffs have *not* withdrawn the offending claims that gave
2 rise to the current anti-SLAPP motion and the motion is therefore not moot. Moreover, it
3 is procedurally improper to allow Plaintiffs to avoid the mandatory sanctions of C.C.P. §
4 425.16(c) by withdrawing their claims after Defendants’ motion was filed.

5 **C. Plaintiffs Have Not Shown A Likelihood of Success**

6 Plaintiffs do not seriously dispute that their fraud, deceit, and unfair business
7 practices claim arise from Defendants’ petitioning activity and their public speech on
8 issues of public concern. Instead, Plaintiffs argue they have shown a likelihood of
9 success to the extent these claims are based on “allegations that Defendants lead subjects
10 of Ripoff Reports ... to believe that Defendants *never* take down Reports for money.”
11 Opp. at 7:6–8 (emphasis in original).

12 To support this claim, Plaintiffs suggest they have proof that the claim is
13 “demonstrably factually false” based solely on a settlement agreement reached in a
14 different case. A copy of this agreement is attached as Exhibit 12 to Plaintiffs’ First
15 Amended Complaint (Doc. #96-12).

16 As has already been explained in other pleadings, this “evidence” simply does not
17 show what Plaintiffs claim it shows; i.e., that Defendants “removed reports for money”.
18 On the contrary, the settlement agreement upon which Plaintiffs rely does *not* contain any
19 requirement for Defendants to remove reports, for money or otherwise. Instead, the
20 agreement merely required Defendants to verify the source of any new complaints as to
21 one company for a period of 24 months.

22 Defendants inadvertently failed to comply with that requirement and as a result,
23 the decision was made to remove two reports that were mistakenly posted without the
24 required confirmation. Nothing in these facts shows that Defendants removed reports for
25 money because Defendants *did not* remove any reports for money; they removed the
26 reports because of an existing contractual duty which they inadvertently failed to comply
27 with. As such, Plaintiffs have not shown that they are likely to prevail on their claim that
28 Defendants have removed a report *for money* because this allegation is simply false.

1 In addition and as explained in detail on pages 11–13 of Defendants’ Motion for
2 Summary Judgment (Doc. #145), even if Plaintiffs could show that this statement was
3 technically inaccurate (which it is not), this would still be insufficient to permit Plaintiffs’
4 fraud and related claims to survive. This is so because, among other things, Plaintiffs
5 have no evidence showing they were harmed by the alleged misstatement.

6 Plaintiffs have offered no opposition to this argument in Defendants’ Motion for
7 Summary Judgment and they offer none here. Put simply, Plaintiffs cannot meet their
8 burden of establishing a likelihood of success on the merits simply by pointing to a
9 statement on the Ripoff Report site and then claiming: “We have proof that’s false.”
10 Incomplete proofreading is not a tort, nor can Plaintiffs establish a likelihood of success
11 as to their fraud claims without proof of, *inter alia*, every mandatory element of such
12 claims including justifiable reliance and damages. Plaintiffs make no serious effort to
13 explain how they have made this showing here.

14 It is not helpful for Plaintiffs to make vague allegations that something Defendants
15 have done or said was unlawful. For instance, Plaintiffs suggest that “[m]any courts have
16 held that speech involving illegal activity cannot receive First Amendment protection.”
17 Opp. at 8:27–28 (citing *Flatley v. Mauro*, 39 Cal.4th 299, 317 (Cal. 2006)). However, this
18 position is wrong as a matter of law; “[C]onduct that would otherwise come within the
19 scope of the anti-SLAPP statute does not lose its coverage ... simply because it is *alleged*
20 to have been unlawful or unethical.” An exception to the use of section 425.16 applies
21 only if a “defendant concedes, or the evidence conclusively establishes, that the
22 assertedly protected speech or petition activity was illegal as a matter of law.” *Birkner*
23 *v. Lam*, 156 Cal.App.4th 275, 67 Cal.Rptr.3d 190 (Cal. 1st App. 2007) (quoting *Kashian v.*
24 *Harriman*, 98 Cal.App.4th 892, 910–11, 120 Cal.Rptr.2d 576 (2002))

25 Here, Defendants do not concede that any of their conduct was or is unlawful, and
26 Plaintiffs offer no evidence to the contrary. As such, Plaintiffs’ fraud, deceit, and UCL
27 claims are squarely within the scope of C.C.P. § 425.16. Because Plaintiffs have not
28 shown a likelihood of success as to *any* of these claims, they should be struck from the

1 First Amended Complaint and Defendants should be awarded attorney's fees pursuant to
2 C.C.P. § 425.16(c).

3 **III. CONCLUSION**

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

6 DATED this 18th day of October 2010.

7 **GINGRAS LAW OFFICE, PLLC**

8 /S/ David S. Gingras
9 David S. Gingras
10 Attorneys for Defendants
11 Ed Magedson and
12 Xcentric Ventures, LLC
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GINGRAS LAW OFFICE, PLLC
3941 E. CHANDLER BLVD., #106-243
PHOENIX, ARIZONA 85048

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CERTIFICATE OF SERVICE

I hereby certify that on October 18, 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
3941 E. CHANDLER BLVD., #106-243
PHOENIX, ARIZONA 85048