David S. Gingras, CSB #218793
Gingras Law Office, PLLC
4072 E Mountain Vista Dr.
Phoenix, AZ 85048
Tel.: (480) 668-3623
Fax: (480) 248-8326
David.Gingras@webmail.azbar.org

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

Paul S. Berra, CSB #186675
Law Offices of Paul S. Berra
1404 3rd Street Promenade, Suite 205
Santa Monica, CA 90401
Tel: (310) 394-9700
Fax: (310) 394-9755
Paul@Berra.org

Attorneys for Defendants
Xcentric Ventures, LLC and
Edward Magedson

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

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-RSWL-PJW **REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** Hearing Date: June 28, 2010 Time: 1:30 PM Courtroom: 6 (Hon. Stephen Wilson)

TABLE OF CONTENTS

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

TABLE OF AUTHORITIES

Cases

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

Statutes

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

Rules

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

I. Plaintiffs Have Asserted No Claim For "Attempted Civil Extortion"

Plaintiffs argue that based on the district court's decision in *Monex Deposit Co. v. Gilliam*, 2010 U.S. Dist. LEXIS 9344 (C.D.Cal. 2010), it is possible for a plaintiff to state a viable cause of action for "attempted civil extortion" under California law (Cal. Penal Code §§ 519 & 523) even without any proof of damages. This argument is incorrect.

First, unlike in *Monex*, Plaintiffs have not asserted any cause of action for "attempted civil extortion" under California law. The Complaint is entirely devoid of any mention of either Cal. Penal Code § 519 or § 523, and it contains no set of facts which would support a finding that either law has been violated. As such, even assuming such a legal theory exists, Plaintiffs have not asserted one. In any event, for the reasons stated below, even if properly raised such a claim would be futile.

Second, unlike in *Monex* which involved a *real* extortion attempt, Plaintiffs have introduced no evidence whatsoever demonstrating that they were victims of any unlawful written threats by Defendants. As the *Monex* court explained, in order to state a claim for attempted civil extortion, the plaintiff must prove that the defendant used a "letter or other writing" to express "any such threat as is specified in [Penal Code] Section 519." *Monex,* 2010 U.S. Dist. LEXIS 9344, *7 (quoting Cal. Pen. Code § 523).

Plaintiffs correctly note that the threats specified in Penal Code § 519 include threats "to expose, or impute … any deformity, disgrace, or crime," or "To expose any secret affecting him or them." However, Plaintiffs have offered no evidence of any kind establishing that threats of this type were made to them in writing by Mr. Magedson or anyone else. Incredibly, Plaintiffs also argue that "[o]ne 'threat' is the implied threat that negative statements about the subject of a Ripoff Report will remain online and prominently featured in search results *unless the subject joins the Corporate Advocacy Program.*" Opp. at 5:28–6:2 (emphasis added). However, this argument (which lacks any evidence to support it) fails for several reasons. First, allowing "negative statements" created by someone else to remain online is *not* within the scope of Penal Code § 519 unless those statements include the specific types of threats enumerated in that statute;

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

i.e., threats to expose a deformity or expose a secret. Plaintiffs offer no evidence that Defendants made a threat to expose such types of information about Plaintiffs.

Second, Plaintiffs ignore the fact that the CDA prohibits treating Defendants as the "speaker or publisher" or any material posted on the site by a third party. Thus, even if a third party posts offensive material on the site and Mr. Magedson refuses to remove it, he cannot be said to have "exposed" this information because doing so requires treating him as a publisher of someone else's statements; "removing content is something publishers do, and to impose liability on the basis of such conduct necessarily involves treating the liable party as a publisher of the content it failed to remove." *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1103 (9th Cir. 2009), as amended (Sept. 28, 2009).

In addition, Ripoff Report's refusal to remove content has previously been found to fall squarely within the protections of the CDA; "Unless Congress amends the statute, it is legally (although perhaps not ethically) beside the point whether defendants refuse to remove the material, or how they might use it to their advantage." *Global Royalties, Ltd. v. Xcentric Ventures, LLC*, 544 F. Supp. 2d 929, 933 (D. Ariz. 2008). This is true notwithstanding the existence of the CAP program; "there is no authority for the proposition that [the CAP program] makes the website operator responsible, in whole or in part, for the 'creation or development' of every post on the site." *Id.*

Third, Plaintiffs misstate the undisputed fact that even when a company joins the program, complaints are never removed; "CAP membership never includes the removal of reports, nor is the text of existing reports changed in any way." Magedson Decl. (Doc. #42) ¶ 13. Thus, Plaintiffs have offered no evidence that Defendants made a written threat within the scope of Penal Code § 519. On the contrary, the evidence shows that even if Plaintiffs had joined CAP, none of the reports would have been removed.

Next, Plaintiffs argue, "[t]he other type of 'threat' is that Defendants threaten to counter-sue anybody that sues them and that such litigants always lose and always pay Defendants' attorneys' fees." Opp. at 6:22–24. Of course, threatening to assert legal rights is an activity protected under the First Amendment and cannot constitute extortion

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

absent a showing that the claim being asserted is a sham. *See Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 942 (9th Cir. 2006) (affirming 12(b)(6) dismissal of class-action RICO claims based demand letters threatening to sue parties defendant believed had unlawfully pirated satellite TV because such demands were constitutionally protected absent a showing that the threatened claims were shams).

While parties who assert false or groundless claims against Defendants may be deterred by the threat of a countersuit, this deterrent is clearly lawful and Plaintiffs have offered no evidence showing that this threat is a sham or that it proximately caused them harm or that it actually deterred them from commencing this action. *See Sosa*, 437 F.3d at 941 (finding that even if defendant made false statement about its intent to sue plaintiffs "within 14 days", such falsity was not actionable without proof of injury proximately caused by the false statement) (citing *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 664 (9th Cir. 2004); *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992)). Because Defendants' threats to countersue are lawful, legitimate, and caused no harm to Plaintiffs, they are not actionable.

Finally, Plaintiffs fail to recognize that threats cannot, standing alone, qualify as extortion if the party making the threat has a lawful right to engage in the threatened activity. *See Rothman v. Vedder Park Mgmt.*, 912 F.2d 315, 318 (9th Cir. 1990) (landlord's threat to raise rent as to any tenant who refused to agree to new rental terms was not extortion and could not support a RICO claim because raising rent was lawful); *All Direct Travel Services, Inc. v. Delta Air Lines, Inc.*, 120 F. App'x. 673 (9th Cir. 2005) (claims could not be based on airline's threat to fire employees unless they paid certain disputed debts because, "it is not extortion to threaten economic harm when you have a legal right to engage in the activity you threaten"); *Cintas Corp. v. Unite Here*, 601 F. Supp. 2d 571 (S.D.N.Y. 2009) *aff'd*, 355 F. App'x. 508 (2d Cir. 2009) (RICO/extortion claims dismissed against defendant who created website containing damaging information about plaintiff in an effort to pressure plaintiff to allow defendant to create labor union because, "When a party does not have the right to pursue its business

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

interests unchecked and receives a benefit [from defendant's conduct], it cannot be the victim of extortion."); *Am. Computer Trust Leasing v. Jack Farrell Implement Co.*, 763 F. Supp. 1473 (D. Minn. 1991) *aff'd and remanded sub nom. Am. Computer Trust Leasing v. Boerboom Int'l, Inc.*, 967 F.2d 1208 (8th Cir. 1992) (same).

Defendants have the lawful right to refuse to remove content from the Ripoff Report website. *See Global Royalties, Ltd.*, 544 F. Supp. 2d at 933. Likewise, just as the Los Angeles Times has a right to choose which advertising and stories to run and which ones to reject, Defendants have a First Amendment right to say positive things about companies in exchange for compensation and to refuse to endorse companies such as AEI; "freedom of thought and expression 'includes both the right to speak freely and the right to refrain from speaking at all.'" *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 559, 105 S. Ct. 2218, 2230, 85 L. Ed. 2d 588 (1985).

Applying all of these points demonstrates that *Monex* does not support the denial of summary judgment in this case. In short, *Monex* involved *pro se* defendants who created a derogatory website about the plaintiff called MonexFraud.com and then demanded $20 million from the plaintiff to remove the site. *See Monex*, 2010 U.S.Dist. LEXIS 9344, *19. The district court concluded that the actions of the defendants—creating derogatory statements and then demanding $20 million to remove them—amounted to attempted civil extortion under California state law. *See Id.* at *7.

Both of these factual elements are absent here—there is no evidence whatsoever that Defendants have created any derogatory information about the Plaintiffs and there is no evidence whatsoever that Defendants asked for money to remove such statements or that such removal was ever part of the CAP program. *See* Defendants' Statement of Facts (Doc. #41) ¶¶ 39, 64, 88. To the contrary—it is an undisputed fact in this case that even when a person joins Defendants' CAP program, any negative or derogatory reports about that person are never removed from Ripoff Report. (Doc. #42) ¶ 13.

Further, Plaintiffs misunderstand the holding in *Monex* as standing for the premise that a claim for "attempted civil extortion" under California law does *not* require proof of

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

damages. Specifically, Plaintiffs argue "[b]ecause Penal Code 523 penalizes attempts to extort as long as the threat is evidenced in writing, it is immaterial that Plaintiffs never entered into the Corporate Advocacy Program or never paid money to the Defendants." Opp. at 5:24–26 (emphasis added). Plaintiffs apparently believe that damages are not required under *Monex*. This is an erroneous interpretation of *Monex* which held both damages and causation are required:

> As a civil tort action, Monex agrees that it must also establish injury and causation. In sum, Monex must show that (1) the [defendants] sent or delivered to Monex written correspondence; (2) that this writing expressed or implied a threat listed in [Penal Code] Cal. Penal Code § 519; (3) the [defendants] intended to extort money or property from Monex; (4) Monex suffered harm; and (5) the harm was caused by the [defendants].

Monex, 2010 U.S.Dist. LEXIS 9344, * 7 (emphasis added). In *Monex*, unlike here, the plaintiff offered evidence showing the written extortion attempts actually and directly caused harm to the plaintiff. *See Id.* at *20–21. Because the derogatory information was created by the defendants as part of their unlawful threat to create and post additional information unless they were paid, the CDA was not implicated and the district court concluded that *Monex* had shown both elements of damages and causation resulting from the defendants' unlawful acts. *See Id.*

Plaintiffs have made none of these required showings here, so even if they had properly pleaded and raised a *Monex*-type claim under California law, such a claim would be futile and Defendants would still be entitled to summary judgment.

II. Plaintiffs' RICO Claims Fail As A Matter Of Law

Plaintiffs defend their RICO claims with little more than name-calling, asserting that "Defendants fail to address the evidence which suggests that Defendants' Corporate Advocacy Program is a sham." Opp. at 8:4–5. Although this argument is wrong, Defendants decline to waste their limited pages responding to petty insults. As for the merits of their arguments, Plaintiffs suggest they have demonstrated the existence of

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

every element of a RICO claim including showing that they have been victimized by a *pattern* of predicate acts (albeit acts directed at non-parties) and that such acts caused injury to their "business or property" within the meaning of 18 U.S.C. § 1962. In addition, Plaintiffs imply that they have raised a colorable claim for *wire fraud* in violation of 18 U.S.C. § 1343. These arguments are each meritless.

A. Plaintiffs Have Failed To Satisfy The Heightened Pleading Requirements Of Fed. R. Civ. P. 9(b)

Citing nothing more than unsupported *allegations* in ¶ 66 of their Complaint, Plaintiffs suggest they have presented a viable claim for *wire fraud* under 18 U.S.C.A. § 1343 and therefore Plaintiffs contend this allegation can be used as one of the predicate acts supporting their RICO claims. Plaintiffs further argue that they have no burden of proof on summary judgment and therefore "it is not necessary to address proof of this allegation at this stage. Plaintiffs will prove a pattern of RICO wire fraud at trial." Opp. at 9:13–15. This argument is fundamentally wrong for numerous reasons.

First, as explained in Defendants' motion, "[b]ecause Defendants have no burden of proof as to the affirmative elements of Plaintiffs' claims, summary judgment may be granted in favor of Defendants based solely on a lack of evidence supporting Plaintiffs' claims." As a matter of law, Defendants are entitled to summary judgment merely upon "showing that the nonmoving party has not adduced sufficient evidence of an essential element to carry its ultimate burden of persuasion at trial … ." *Farrakhan v. Gregoire*, 590 F.3d 989, 1003 *reh'g en banc granted,* 603 F.3d 1072 (9th Cir. 2010)). This rule fully applies to Plaintiffs' wire fraud claim which is plainly frivolous.

As a species of fraud, claims of wire fraud are subject to the heighted pleading requirements of Rule 9(b). *See Desoto v. Condon*, 08-56832, 2010 WL 1141521 (9th Cir. 2010). In order to satisfy Rule 9(b), a plaintiff must "state the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation." *Schreiber Distrib. Co. v. Serv-Well Furniture Co., Inc.*, 806 F.2d 1393, 1401 (9th Cir. 1986). Nothing in Plaintiffs' Complaint remotely satisfies these

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

requirements as to the wire fraud claim, nor does the Complaint identify any of the mandatory elements of such a claim; e.g., false statements of material fact made to Plaintiffs which resulted in harm to them; "The essential elements of wire fraud are a scheme to defraud, the use of interstate wires incident to the scheme, and an intent to cause harm." *United States v. Treadwell*, 593 F.3d 990, 997 (9th Cir. 2010) (quoting *United States v. Edelmann*, 458 F.3d 791, 812 (8th Cir. 2006)); *Carpenter v. United States*, 484 U.S. 19, 27, 108 S. Ct. 316, 98 L. Ed. 2d 275 (1987) (noting that 18 U.S.C.A. § 1343 encompasses "any scheme to deprive another of money or property by means of false or fraudulent pretenses, representations, or promises.")

At best, the only "fraudulent" statement identified in the Complaint is set forth in ¶55(a) which alleges that "Defendants represent themselves as consumer advocates. However, this description is false and misleading." Whether or not Plaintiffs concur with Mr. Magedson's description of himself as a "consumer advocate" this is not a statement of fact which would support any form of fraud claim because "[s]tatements of opinion are not generally actionable in fraud." *InterPetrol Bermuda Ltd. v. Kaiser Aluminum Int'l Corp.*, 719 F.2d 992 (9th Cir. 1983). Moreover, Plaintiffs have not shown that they justifiably relied on this statement or that it caused any harm to them.

Because Plaintiffs have the burden of proving the existence of a triable issue of fact as to every claim in this case and since no colorable evidence of wire fraud has been offered, Defendants are entitled to summary judgment in their favor as to this claim.

B. "Pattern Evidence" Statements From Third Parties Are Irrelevant

In an apparent effort to establish a "pattern" of racketeering by Defendants (even though that point is immaterial for the purposes of Defendants' summary judgment motion), Plaintiffs offer declarations from two individuals—Tina Norris (Doc. #57) and Patricia Brast (Doc. #58). As is true of the Plaintiffs, neither witness joined the CAP program and neither witness paid anything whatsoever to Defendants.

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

These declarations are simply irrelevant to this case. They do not establish that any harm was caused *to Plaintiffs* by Defendants, nor do they reveal a pattern of any unlawful activity by Defendants. At most, these witnesses only establish something which was never disputed—that complaints on Ripoff Report may have a negative impact on the individuals named. This point is irrelevant and immaterial to any fact at issue.

C. Plaintiffs Have No Evidence Of RICO Damages

Defendants' summary judgment motion is *not* based solely on the argument that Plaintiffs' RICO claims are unsupported by any evidence of predicate acts (although this is true), nor is the motion based solely on the recordings which reveal Plaintiffs' perjury. Although these are important issues, the primary dispositive issues as to the RICO claims are Plaintiffs' lack of evidence of harm to their "business or property" which is mandatory for RICO standing, and the lack of evidence that any predicate acts actually and proximately caused such damages. As to these two mandatory RICO elements, the evidence is 100% undisputed—Plaintiffs have no evidence of RICO damages and no evidence of causation. Based on this and even accepting all of Plaintiffs' other arguments as true (fallacious as they may be), summary judgment is proper.

As for damages, Plaintiffs cite nothing but the familiar *Monex* case as support for the notion that their "unwillingness to accede to Defendants' extortionate demands does not indicate that the Plaintiffs were not injured." Opp. at 9:25–26. As explained before, *Monex* does not support this principle. On the contrary, *Monex* clearly held that damages and causation are both mandatory to prevail on a claim of civil extortion.

Despite this, Plaintiffs concede that during its nine years in existence, AEI had total revenues and profits of $0. Nevertheless, Plaintiffs suggest that "California recognizes damages for the loss of prospective profits so long as 'their nature and occurrence can be shown by evidence of reasonable reliability …" such as "expert testimony, economic and financial data, market surveys and analyses, business records of similar enterprises, and the like." This statement may be technically true but it ignores one small problem—Plaintiffs have produced no such evidence. Other than AEI's tax

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

returns which merely confirm that the business enjoyed total sales of $0 in 2006, 2007 and 2008 (before any complaints appeared on Ripoff Report), Plaintiffs have provided no evidence whatsoever upon which either the fact or the amount of their lost future profits could be determined. This failure is dispositive of Plaintiffs' entitlement to future lost profits because, "lost anticipated profits for an unestablished business whose operation is prevented or interrupted are generally not recoverable because their occurrence is uncertain, contingent and speculative." *Parlour Enterprises, Inc. v. Kirin Group, Inc.*, 152 Cal. App. 4th 281, 288, 61 Cal. Rptr. 3d 243, 249 (Cal. Ct. App. 2007) (emphasis added) (citing *Kids' Universe v. In2Labs*, 95 Cal. App. 4th 870, 884, 116 Cal. Rptr. 2d 158 (Cal. Ct. App. 2002)); *see also Resort Video, Ltd. v. Laser Video, Inc.*, 35 Cal. App. 4th 1679, 1698, 42 Cal. Rptr. 2d 136, 146 (Cal. Ct. App. 1995) ("if a business is new, it is improper to award damages for loss of profits because absence of income and expense experience renders anticipated profits too speculative to meet the legal standard of reasonable certainty.") (quoting *Gerwin v. Se. Cal. Assn. of Seventh Day Adventists*, 14 Cal. App. 3d 209, 221, 92 Cal. Rptr. 111 (Cal. Ct. App. 1971)).

Because AEI was a new business without any track record of sales, expenses, or profits, Plaintiffs have failed show any genuine factual dispute as to whether they suffered harm to their "business or property" as required for standing under RICO. Standing alone and without regard to any other defects in their case, this point requires summary judgment to be entered in favor of Defendants as to Plaintiffs' RICO claims.

D. Plaintiffs Have No Evidence Of Causation

As explained on pages 16–17 of Defendants' summary judgment motion, RICO claims require more than just proof of damages to "business or property" of the plaintiff; they also require proof that the harm was caused by the pattern of predicate acts committed by the defendant. *See Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496-97, 105 S. Ct. 3275, 3285, 87 L. Ed. 2d 346 (1985).

Plaintiffs respond to this argument on page 11 of their opposition by suggesting "this argument fails to consider the undisputed evidence that the Defendants themselves

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

create the defamatory meta tags which appear on popular search engines such as Google.com and use this position as a mechanism for extorting money from individuals and companies such as Plaintiffs." Opp. at 11:15–18. The "undisputed evidence" which Plaintiffs refer to is a three-page declaration from Kristi Jahnke who is apparently a law clerk employed by Plaintiffs. Even accepting her abbreviated testimony as true, Ms. Jahnke's declaration does *not* contain any evidence showing that Defendants have engaged in any unlawful acts which caused damage to Plaintiffs' business or property.

Ms. Jahnke merely explains that she conducted a Google search for "Asia Economic Institute" and that this search produced a result which included the words "Ripoff Report:" and a link to the reports about AEI. Next, Ms. Jahnke states that she located an Answer previously filed by Defendants in another lawsuit in which Defendants admitted that Ripoff Report's servers automatically include the words "rip-off", "ripoff" and "rip off" in certain HTML code common to every page on the Ripoff Report website in order to accurately reflect the website source and contents of each page.

Of course, even without Ms. Jahnke's input, none of these points were ever in dispute. Rather, ¶¶ 80–85 of Defendants' Statement of Facts (Doc. #41) explained the existence of the "rip-off", "ripoff" and "rip off" meta tags, and ¶ 86 explained "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." ¶ 87 of Defendants' Statement of Facts further explained, "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."

Nothing in Ms. Jahnke's declaration disputes any of these facts, nor does Ms. Jahnke offer any testimony showing that Defendants have created any meta tags beyond these three ("rip-off, ripoff, rip off"). Furthermore, Ms. Jahnke offers no testimony showing that Defendants have created any false or defamatory statements *about Plaintiffs*. Ms. Jahnke certainly offers no testimony showing that these tags have caused any harm to Plaintiffs; she does not identify any customers who refused to do business

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

with Plaintiffs because of these tags, nor does she speak about any economic losses resulting from these tags. It is undisputed that Defendants created the three tags "rip-off, ripoff, rip off" which exist in code on *every page* on the website and which are invisible to anyone viewing the site. However, as a matter of law these codes are irrelevant because they do not refer to the Plaintiffs and, in any case, the term "ripoff" is an opinion which is not defamatory. *See Beilenson v. Superior Court*, 44 Cal. App. 4th 944, 951, 52 Cal. Rptr. 2d 357 (Cal. Ct. App. 1996) ("ripping off" was non-defamatory opinion); *Jaillett v. Georgia Television Co.*, 238 Ga. App. 885, 891, 520 S.E.2d 721 (Ga. Ct. App. 1999) (ripoff is non-actionable opinion).

III. Defendants Are Entitled To CDA Immunity

Plaintiffs cite a single case, *Doctor's Assoc., Inc. v. QIP Holder, LLC*, for the premise that Defendants are not entitled to immunity under the CDA (notwithstanding the multiple state and federal cases cited in Defendants' motion which hold otherwise). This out-of-jurisdiction authority which involved the denial of summary judgment is not only non-binding, it is simply not helpful in any way. This is so because the court found that it was "unclear at this stage whether the Defendants have exercised the role of a traditional publisher .. or have gone further and actively participated in creating or developing the third-party content … ." *Doctor's Assoc.*, 06-cv-1710 (D.Conn. Feb. 19, 2010) at 48.

Here, unlike in *Doctor's Associates*, it is clear that Plaintiffs have offered no evidence whatsoever showing that Defendants have done anything to abrogate their immunity under the CDA. As such, this case is factually indistinguishable from any of the numerous prior cases in which Defendants have been found immune under the CDA.

IV. No Admissible Evidence Supports Plaintiffs' Business Tort Claims

As with their other claims, Plaintiffs' tortious interference claims require evidence of causation and damages. *See Della Penna v. Toyota Motor Sales, U.S.A., Inc.*, 11 Cal. 4th 376, 393, 902 P.2d 740 (1995); *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1153, 63 P.3d 937 (2003). Here, the only 'evidence' offered by Plaintiffs are declarations from non-parties which make general guesses as to the reasons behind other

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

non-parties' decisions to refrain from doing business with Plaintiffs. These statements are purely hearsay and/or double hearsay, *see* Fed. R. Evid. 801, and they fail to demonstrate that personal knowledge, as required by Fed. R. Evid. 602, as to the reasons third parties may have decided not to do business with Plaintiffs. These statements are insufficient to deny summary judgment; "[c]onclusory affidavits that do not affirmatively show personal knowledge of specific facts are insufficient [to defeat summary judgment]." *Casey v. Lewis*, 4 F.3d 1516, 1527 (9th Cir. 1993).

V. Plaintiffs Are Not Entitled To Rule 56(f) Relief

Plaintiffs make a passing reference to Rule 56(f) but clearly they are entitled to no relief under that rule. In order to satisfy Rule 56(f), "parties opposing a motion for summary judgment must make '(a) a timely application which (b) specifically identifies (c) relevant information, (d) where there is some basis for believing that the information sought actually exists.' " *Blough v. Holland Realty, Inc*, 574 F.3d 1084, 1091 (9th Cir. 2009). It is patently insufficient to make such a request, as Plaintiffs do here, without supporting affidavits and without a separately noticed motion:

> References in memoranda and declarations to a need for discovery do not qualify as motions under Rule 56(f). Rather, Rule 56(f) requires litigants to submit affidavits setting forth the particular facts expected from further discovery. We have stated that "[f]ailure to comply with the requirements of Rule 56(f) is a proper ground for denying discovery and proceeding to summary judgment."

State of Cal., on Behalf of California Dept. of Toxic Substances Control v. Campbell, 138 F.3d 772, 779 (9th Cir. 1998) (emphasis added). Plaintiffs have not explained what evidence they need in order to respond to Defendants' motion, nor have they explained why additional time would affect their ability to respond to the dispositive points raised in Defendants' motion. Rule 56(f) relief should be denied.

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

DATED this 24th day of June 2010.

GINGRAS LAW OFFICE, PLLC

/S/ David S. Gingras
David S. Gingras
Attorneys for Defendants
Ed Magedson and
Xcentric Ventures, LLC

CERTIFICATE OF SERVICE

I hereby certify that on June 24, 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