

EXHIBIT

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9
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Relations of Santa Clara, Inc.

11
12 IN THE UNITED STATES DISTRICT COURT
13 THE NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO DIVISION

15 MICHAEL SAVAGE,
16 Plaintiff,

17 v.

18 COUNCIL ON AMERICAN-ISLAMIC
RELATIONS, INC., COUNCIL ON
19 AMERICAN ISLAMIC RELATIONS ACTION)
NETWORK, INC., COUNCIL ON AMERICAN)
20 ISLAMIC RELATIONS OF SANTA CLARA,)
INC., and DOES 3-100,)
21 Defendants.)

) Case No. CV07-06076 SI

) **DEFENDANT'S NOTICE OF MOTION**
) **AND MOTION FOR JUDGMENT ON**
) **THE PLEADINGS; MEMORANDUM OF**
) **POINTS AND AUTHORITIES**
) **SUPPORTING MOTION FOR**
) **JUDGMENT ON THE PLEADINGS**

) [Fed. R. Civ. P. 12(c)]

) Date: March 7, 2008

) Time: 9:00 a.m.

) Courtroom 10, 19th Floor

) Honorable Susan Illston

22
23 TO PLAINTIFF MICHAEL SAVAGE AND HIS COUNSEL OF RECORD:

24 PLEASE TAKE NOTICE that on March 7, 2008, at 9:00 a.m. or as soon thereafter as
25 counsel may be heard in the Courtroom of the Honorable Susan Illston, located at 450 Golden
26 Gate Avenue, San Francisco, California, defendant Council on American-Islamic Relations of
27 Santa Clara, Inc., referred to herein as ("CAIR"), will and hereby does move this Court, pursuant
28 to Federal Rule of Civil Procedure 12(c), for an order granting judgment on the pleadings to it on

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1 the ground that Plaintiff Michael Savage has failed to state a claim upon which relief can be
2 granted.

3 Plaintiff fails to plead a claim for copyright infringement (his first cause of action) because
4 CAIR's use of limited audio excerpts of Plaintiff's radio program is protected by the First
5 Amendment and the Copyright Act. 17 U.S.C. § 107; *see Hustler Magazine Inc. v. Moral*
6 *Majority, Inc.*, 796 F.2d 1148, 1153-1155 (9th Cir. 1986).

7 Plaintiff also fails to plead a claim for civil RICO (his second cause of action) for four
8 independent reasons:

9 (1) Plaintiff has no standing because he has not alleged an injury (i.e., an actual, out-
10 of-pocket financial loss) resulting from any conduct by CAIR, and any possible injury was self-
11 inflicted;

12 (2) Plaintiff has failed to give CAIR notice of the portions of the RICO statutes upon
13 which he is making his claims, as he must, and has failed to meet the heightened pleading
14 requirements mandated by Federal Rule 9(b) for racketeering claims that are predicated on mail
15 fraud, wire fraud, or any other type of fraud;

16 (3) Plaintiff has substantively failed to alleged an association-in-fact enterprise against
17 CAIR with the necessary shared purpose;

18 (4) Even if Plaintiff could show some injury as a result of CAIR's alleged conduct,
19 which he cannot, Plaintiff still has not stated a RICO claim because he has not pled (and cannot
20 plead) that CAIR's conduct proximately caused any injuries to Plaintiff.

21 Finally, Plaintiff's claims for copyright infringement and RICO are also independently
22 barred by the protections for free speech guaranteed by the First Amendment and California's
23 Constitution.

24 CAIR's Motion for Judgment on the Pleadings is based on this Notice; on the attached
25 Memorandum of Points and Authorities; on the accompanying declaration of Dr. Parvez Ahmed
26 and attached exhibits, all pleadings, files and records in this action; and on such other argument as
27 may be received by this Court at the hearing on this Motion. CAIR respectfully requests that this
28 Court grant its Motion for Judgment on the Pleadings and enter judgment in its favor against

1 Plaintiff Michael Savage on each of his claims.

2 DATED this 30th day of January 2008.

3 DAVIS WRIGHT TREMAINE LLP

4 ELECTRONIC FRONTIER FOUNDATION

5 By: /s/ Thomas R. Burke
6 THOMAS R. BURKE
7 Attorneys for Defendant Council on
8 American-Islamic Relations of Santa
9 Clara, Inc.

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1 **MEMORANDUM OF POINTS & AUTHORITIES**

2 **I. SUMMARY OF ARGUMENT**

3 In Plaintiff Michael Savage’s view, Muslims in this country are “throwbacks” who should be
4 deported “without due process.” He believes the Quran is a “book of hate” that teaches slavery.
5 Savage is not at all secretive about these beliefs: taking full advantage of his First Amendment
6 freedoms, he broadcast these views on his nationally syndicated daily radio talk show – “The
7 Savage Nation” – which reportedly reaches millions of listeners. It should go without saying that
8 Savage’s critics have an equally strong First Amendment right to criticize and even condemn what
9 they believe is Savage’s outright bigotry. After all, even Savage believes that “[i]t is the essence of
10 freedom that voices can be raised strongly and without fear of illegal retaliation.” See Plaintiff’s
11 Amended Complaint¹ (“Compl.”) at ¶ 42.

12 But Savage cannot handle criticism. Not content with his talk show megaphone, he filed a
13 172-paragraph legal broadside laced with falsities and xenophobic fantasies to punish and intimidate
14 the Council for American-Islamic Relations (“CAIR”).² In CAIR’s role as the nation’s largest
15 Muslim civil rights organization, it responded to anti-Muslim and anti-CAIR remarks broadcast by
16 Savage with a detailed criticism on its web site (www.cair.com) that included audio excerpts from
17 Savage’s radio program. See Declaration of Dr. Parvez Ahmed (“Ahmed Decl.”), Exhibit A.
18 CAIR’s actions, Savage alleges, led several national advertisers to abandon his program. Compl. at
19 ¶ 36. Notably, Savage does not bring any claims that CAIR made any false or tortious statement
20 about him. Instead, he complains that CAIR infringed his copyright and engaged in a fantastic
21 RICO scheme. This Court should immediately recognize Savage’s frivolous copyright and RICO
22 claims for what they are: an assault on CAIR’s First Amendment-protected free speech rights –
23 claims that should be summarily dismissed with prejudice.

24
25 ¹ Savage’s original Complaint for copyright infringement only, against defendant Council on
26 American-Islamic Relations, Inc., was filed on December 3, 2007. On December 25, 2007, Savage
27 amended his action to name additional defendants and added the civil RICO claim. No other CAIR
28 entity has been served by Savage.

² For the purposes of this motion, defendant Council on American-Islamic Relations of Santa Clara,
Inc. is referred to as (“CAIR”).

1 CAIR's use of limited audio excerpts from Savage's radio program is, without question,
 2 speech protected not only by the First Amendment but explicitly by the Copyright Act. 17 U.S.C.
 3 § 107; see *Hustler Magazine Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1153-55 (9th Cir. 1986).
 4 The fair use doctrine exists precisely to prevent copyright holders from doing what Savage attempts
 5 here – abusing a limited monopoly granted to encourage creativity to punish dissenters and to chill
 6 speech aimed at criticizing copyrighted works. For all of his ironic appeals to the First Amendment,
 7 Savage asks this Court to punish CAIR for publicly criticizing the offensive content of his radio
 8 program. That CAIR's criticism might result in Savage losing popularity (and advertisers) is of no
 9 moment to either a free speech or copyright infringement analysis and indeed, should be expected in
 10 the marketplace of ideas that the First Amendment and Copyright Act strongly protect. As a matter
 11 of law, Savage's copyright infringement claim must be dismissed.

12 In his second claim for alleged civil RICO violations, Savage casts CAIR as a menacing
 13 hydra, alleging – without any justification – CAIR's connection to every terrorist attack of the last
 14 fifteen years and, most incredibly, blaming this *civil liberties organization* for the 9/11 attacks in
 15 New York City and at the Pentagon. Savage's RICO claim must be dismissed as a matter of law for
 16 several independent reasons, including Savage's lack of standing (*e.g.*, he has not alleged any injury
 17 and any loss of advertisers he may have suffered was self-inflicted); his failure to provide CAIR
 18 with the required Rule 9 notice of what his RICO claims are based on or to satisfy the rule's
 19 heightened pleading requirements; failure to allege an association-in-fact enterprise against CAIR;
 20 and failure to plead how CAIR's conduct proximately caused him any injury. *See infra* at 12 - 21.
 21 While Savage's wholly unsubstantiated RICO allegations – based on innuendo and patently false
 22 assertions of fact – may pass as entertainment on “The Savage Nation,” in this legal forum it is
 23 obvious that his RICO claim was added to harass and intimidate CAIR for exercising its
 24 constitutionally-protected rights. This Court should not countenance Savage's delusional scenarios
 25 and should summarily dismiss this claim.³

26
 27 ³ *See, e.g., Neitzke v. Williams*, 490 U.S. 319, 325 (1989) (dismissal of complaint appropriate when
 28 based on “fanciful factual allegation[s]”); *Lubin v. Sybendon Corp.*, 688 F. Supp. 1425, 1443 (S.D.
 Cal. 1988) (dismissing RICO causes of action for failure to state a claim and lambasting plaintiff for
 the “dragnet tactic of indiscriminately grouping all of the individual defendants into one *wrongdoing*
monolith”) (emphasis added); *Binghamton Masonic Temple, Inc. v. Bares*, 168 F.R.D. 121, 127

II. FACTUAL SUMMARY

Plaintiff Michael Savage is the host of "The Savage Nation," a nationally-syndicated radio program that Savage alleges "reaches eight million listeners per week." Compl. at ¶ 2.⁴ On October 29, 2007, during his two-hour long radio program, among other things, Savage said the following about Muslims and, specifically, about CAIR:

I'm not gonna put my wife in a hijab and I'm not gonna put my daughter in a burqa. And I'm not getting on my all fours and praying to Mecca. And you can drop dead if you don't like it. You can shove it up your pipe. I don't want to hear any more about Islam. I don't want to hear one more word about Islam. Take your religion and shove it up your behind. I'm sick of you....

Your Bible has been revised several times. The Jewish Bible has been revised several times. Not the Quran though. They still live in the 7th century. Kill homosexuals. Cut the clitoris off women. Put women in dark clothing. Cut off anyone's head who doesn't agree with you. [Yells] What kind of religion is this? What kind of world are you living in that you let them in here with that throw back document in their hand, which is a book of hate. Don't tell me I need reeducation. They need deportation. I don't need reeducation. Deportation not reeducation. You can take C-A-I-R and throw them out of my country. I'd raise the American flag, and I'd get out my trumpet if you did it. Without due process. You can take your due process and shove it....

Throwback bastards. I'm so sick of them. I'm so sick of the brainwashing about Islam and Muslims and the Quran [Yells] shove it! Shove it all! I'm sick of it! Take the music off. I have never lived through a brainwashing like I've lived through for the past 5 years. Everyday another story sweet-selling Islam and the Quran. It goes in the face, it's so counter-intuitive. Wherever you look on the Earth there's a bomb going off or a car going up in flames, and its Muslims screaming for the blood of Christians or Jews or anyone they hate. And everyday we're told the opposite here. Everything we know to be true, we're told 'oh don't believe what your mind tells you, believe what the diversity trainers tell you, believe what the government tells you: it's a religion of peace.' Well why don't they prove it's a religion of peace? Why don't they put down their hateful little book for a few minutes and tell us why when we pick up their hateful little book. I can read chapter and verse. I can see what it says in their book of hate. It says that if you see a stranger who is not a Muslim, either convert him or kill him. You want me to quote the Sutra? [Yells] I'll quote the Sutra! Page after page after page is about religion, a religion that teaches convert or kill, a religion that says oppress women, kill homosexuals, kill the Jew, kill the Christian, kill the infidel, page after page after page, and we're supposed to sit here and listen to this rubbish about a religion of peace, and every day Bush brings in thousands or more of these throwbacks. Throwbacks! Wearing medieval costumes, walking around, spitting on the ground every time they see a Christian or a Jew or a so-called infidel. These throwbacks think they're better than you underneath it all. And 90% of them are on welfare. [Yells] 90% of them come in here, and all they do is breed more bombers. [Yells] More bombers and more

(N.D.N.Y. 1997) (finding plaintiffs' RICO claim "has no chance of success" and sanctioning plaintiffs because they "believed that a *compilation of unsubstantiated allegations* was all that was necessary to bring a claim before the Court") (emphasis added).

⁴ Savage further alleges that his web site, www.MichaelSavage.com, where his radio program may be heard every weekday, "receives 2.3 million page views per month." Compl. at ¶ 2.

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1 bombers! And you're telling me this is a sane country? There I gave it to you from the
bottom of my heart. If you don't like it, it's too damn bad. Go write the FCC....

2 It's time to stop hiding behind your pillow. [Yells] Speak it out at the supermarket! Tell
3 them what you think of Islam. Tell them what you think of Muslims. Tell them what you
4 think of these things. Stop hiding what you feel. Say it to everybody that you meet. Let
5 them prove it's a religion of peace! Say it on the supermarket line, and don't care what stares
6 you get from those dumb idiots who are checking out behind you with their Cracker Jacks.
7 Say it to everybody you meet wherever you go. If America started to say it like it is, we
could take the country back from the maniacs who are bringing them in by the tens of
thousands. What sane nation that worships the U.S. Constitution, which is the greatest
document of freedom ever written, would bring in people who worship a book that tells them
the exact opposite?

8 Make no mistake about it, the Quran is not a document of freedom. The Quran is a
document of slavery and chattel. It teaches you that you are a slave.

9 In response to Savage's remarks, CAIR posted on its website, www.cair.com, a detailed
10 criticism of Savage's anti-Muslim and anti-CAIR commentary entitled, "National Radio Host Goes
11 On Anti-Muslim Tirade," explaining CAIR's vigorous objections to Savage's remarks and placing
12 its criticisms in a larger cultural and historical context. *See* Ahmed Decl., Exhibit A. CAIR also
13 posted an audio file containing the above-quoted excerpts from "The Savage Nation," which when
14 played in its entirety, runs for four minutes and 13 seconds. Compl. at ¶ 24. Savage alleges that
15 CAIR's unauthorized use of his remarks was taken out of context and that CAIR's "misportrayals"
16 destroyed the value of his material and led to lost advertisers. Compl. at ¶¶ 34, 35; *see also* Ahmed
17 Decl., Exhibits A & B.

18 When considering a motion on the pleadings, courts may consider exhibits submitted or
19 referenced in the complaint and matters that may be judicially noticed pursuant to Federal Rule of
20 Evidence 201. *See, e.g., Burnett v. Twentieth Century Fox Film Corp.*, 491 F.Supp.2d 962, 966
21 (C.D.Cal. 2007). Indeed, "documents specifically referred to in a complaint, though not physically
22 attached to the pleading, may be considered where authenticity is unquestioned." *Id.*, citing *Daly v.*
23 *Viacom, Inc.*, 238 F.Supp.2d 1118, 1121-22 (N.D. Cal. 2002) (considering television program
24 referenced in, but not attached to, complaint). *See e.g., Ahmed Decl., Exhibits A & B.*

25 III. ARGUMENT

26 A. Savage's Copyright Infringement Claim is Barred by the Doctrine of Fair Use.

27 Savage's copyright infringement claim alleges that CAIR "misappropriated copyright
28 protected material from Michael Savage and made this material available on its website."

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1 Complaint at ¶ 27.⁵ Savage’s copyright claim is barred as a matter of law by the doctrine of fair use.

2 Section 107 of the Copyright Act of 1976 protects the fair use of another's copyrighted work:

3 [T]he fair use of a copyrighted work ... for purposes such as criticism [and] comment ... is
 4 not an infringement of copyright. In determining whether the use of a made work in any
 particular case is a fair use the factors to be considered shall include:

- 5 (1) the purpose and character of the use, including whether such use is of a
 commercial nature or is for nonprofit educational purposes;
- 6 (2) the nature of the copyrighted work;
- 7 (3) the amount and substantiality of the portion used in relation to the copyrighted work
 8 as a whole; and
- 9 (4) the effect of the use on the potential market for or value of the copyrighted work.

10 17 U.S.C. § 107.

11 The fair use doctrine is a necessary limitation to the exclusive rights granted to copyright
 12 holders and “is intended to preserve the values enshrined in the First Amendment.” *Elvis Presley*
 13 *Enterprises v. Passport Video*, 357 F.3d 896, 898 (9th Cir. 2003). *See also Eldred v. Ashcroft*, 537
 14 U.S. 186, 219-20 (2003) (“copyright law contains built-in First Amendment accommodations,”
 15 including the fair use defense, which “allows the public to use not only facts and ideas contained in
 16 a copyrighted work, but also expression itself in certain circumstances.”); *Campbell v. Acuff-Rose*
 17 *Music, Inc.*, 510 U.S. 569, 579 (1994) (parody and other forms of criticism “can provide social
 18 benefit, by shedding light on an earlier work, and, in the process, creating a new one.”); *NXIVM*
 19 *Corp. v. Ross Institute*, 364 F.3d 471, 482 (2nd Cir. 2004) (“If criticisms on defendants' websites kill
 20 the demand for plaintiffs' service, that is the price that, under the First Amendment, must be paid in
 21 the open marketplace for ideas.”) As now Second Circuit Judge Pierre Leval put it, “[f]air use
 22 should not be considered a bizarre, occasionally tolerated departure from the grand conception of

23 ⁵ Savage fails to plead that he has registered the copyright to the material in question, a prerequisite
 24 to bringing a copyright infringement claim. 17 U.S.C. § 411. *See e.g., S.O.S., Inc. v. Payday Inc.*,
 25 886 F.2d 1081, 1085 (9th Cir. 1989) (“Registration is not a prerequisite to a valid copyright,
 26 although it is a prerequisite to a suit.”). However, based on a review of the Copyright Office’s
 27 online searchable database, it appears that registration for the October 29, 2007 broadcast was
 28 granted to Savage on December 12, 2007. Without waiving its right to contest Savage’s ownership
 of the work should this action not be dismissed, CAIR hereby consents to a supplementation of
 Savage’s Complaint (under, for example, Federal Rule of Civil Procedure 12(d) and/or 28 U.S.C. §
 1653) to include an allegation that Savage has registered the copyright to the October 29, 2007,
 episode of the “Michael Savage Show.” *See, e.g., Roth Greeting Cards v. United Card Co.*, 429
 F.2d 1106, 1009 (9th Cir. 1970) (pretrial conference order constituted in effect an amended pleading
 resolving jurisdictional problems related to copyright registration requirement).

1 the copyright monopoly. To the contrary, it is a necessary part of the overall design.” Pierre Leval,
2 *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1110 (1990).

3 Fair use is a “mixed question of law and fact.” *Harper & Row, Publishers, Inc. v. Nation*
4 *Enterprises*, 471 U.S. 539, 560 (1985). However, the Court may make a fair use determination as a
5 matter of law – and should not hesitate to do so in this case where the operative facts are presumed
6 or admitted. *See, e.g., Fisher v. Dees*, 794 F.2d 432, 435-36 (9th Cir. 1986) (finding fair use where
7 the material facts were not at issue or were admitted; judgments pertaining to fair use “are legal in
8 nature” and are to be made by the court); *Abend v. MCA, Inc.*, 863 F.2d 1465, 1468 (9th Cir. 1988)
9 (stating that appellate court may decide fair use defense as a matter of law if the district court found
10 sufficient facts to evaluate each of the statutory factors); *Burnett v. Twentieth Century Fox Film*
11 *Corp.*, 491 F.Supp.2d 962, 967 (C.D. Cal. 2007) (finding fair use for defendant at motion to dismiss
12 stage where all allegations in the complaint were viewed in the light most favorable to the plaintiff).

13 Applying the four fair use factors to this case, there can be no question that CAIR is entitled
14 to dismissal of Savage’s copyright infringement claim.

15 **1. Factor 1: The Purpose and Character of the Use Favors CAIR.**

16 The first factor examines the “purpose and character of the use.” The use of copyrighted
17 works for criticism and commentary is expressly contemplated by the Copyright Act. *See* 17 U.S.C.
18 § 107; *see, e.g., Campbell*, 510 U.S. at 583 (commentary and criticism “traditionally have had a
19 claim to fair use protection”).

20 There is no dispute that the purpose and character of CAIR’s use of the limited audio
21 excerpts of “The Savage Nation” was to publicly criticize and comment on Savage’s anti-Muslim
22 commentary. Savage alleges, for example:

- 23 • “At all times relevant herein, CAIR was and is a political organization that advocates
24 a specific political agenda on behalf of foreign interests.” Compl. at ¶ 26.
- 25 • “The CAIR misappropriation was done for political purposes unrelated to civil rights
26 and unrelated to CAIR’s tax exempt status.” Compl. at ¶ 28.
- 27 • “The stolen material as repackaged by CAIR was intended to portray both the
28 material and the creator of the material, Michael Savage as having a blanket
opposition to a particular religion.” Compl. at ¶ 32.
- “The conduct of CAIR (in addition to raising money) in violating the copyright

1 interests of Michael Savage was to gain media attention and control so that CAIR
would be seen as the 'moderate' voice in the media." Compl. at ¶ 42.

2 Collectively, these paragraphs and the other paragraphs in the Complaint merely allege that
3 CAIR used the limited audio excerpts to attract public criticism of Savage's comments. The
4 monopoly bestowed by copyright does not entitle the copyright holder to insulate himself from
5 criticism of his work. Indeed, the fair use doctrine assures just the opposite.

6 That Savage further alleges that CAIR's posting of the limited audio excerpts on its web site
7 was for "fundraising" purposes is of no consequence. First, the CAIR materials referenced in the
8 Complaint⁶ do not support this conclusion and instead underscore that CAIR primarily posted the
9 audio excerpts on its web site to publicly criticize Savage's repeatedly articulated negative opinions
10 of Muslims and the Islamic faith. Its online criticism to which Savage objects in his Complaint – a
11 web page entitled, "National Radio Host Goes On Anti-Muslim Tirade" – explains CAIR's
12 vigorous objections to Savage's rants against Islam, Muslims, and CAIR, and places its criticisms in
13 a larger cultural and historical context. See Ahmed Decl., Exhibit A. Similarly, in the letter to
14 advertisers also cited by Savage (see Complaint at ¶ 36), CAIR criticizes the content of Savage's
15 radio program and asks Savage's national advertisers to consider withdrawing their support; no
16 discussion of fundraising is made. See Exhibit B (CAIR's letter to AT&T). Situated to the right of
17 CAIR's detailed criticism is a single small "Donate" button, the entirety of the "fundraising" to
18 which Savage could object on the relevant web page. See Ahmed Decl., Exhibit A.

19 Second, even assuming *arguendo* that CAIR used the limited audio excerpts as part of its
20 "fundraising" efforts, that fact would not invalidate the fair use protection of CAIR's commentary
21 and criticism. The Ninth Circuit has refused to extend copyright liability when a defendant uses
22 allegedly copyrightable material to criticize or comment on the material – even when the use
23 includes a direct solicitation for money. *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d
24 1148, 1153-55 (9th Cir. 1986) is squarely on point. *Hustler* published a parody of Jerry Falwell
25 depicting him as engaged in an incestuous relationship. In response, Moral Majority, Inc. and Old

26
27 ⁶ See Ahmed Decl., Exhibits A & B. The specific CAIR web page referenced in the Complaint can
also be found at
28 <<http://www.cair.com/ArticleDetails.aspx?mid1=777&&ArticleID=23608&&name=n&&currPage=3>

1 Time Gospel Hour mailed hundreds of thousands of copies of the parody as part of a solicitation
2 drive. Falwell also solicited contributions while displaying the parody on the Old Time Gospel
3 Hour, a television show.

4 *Hustler* sued Moral Majority, Old Time Gospel Hour, and Falwell for copyright
5 infringement. The Ninth Circuit affirmed the district court's granting of summary judgment, holding
6 that the copying by Falwell and the other defendants constituted fair use. The Ninth Circuit stated
7 that, "Section 107 expressly permits fair use for the purposes of criticism and commentary."
8 Although *Hustler* claimed "Falwell copied more than was necessary for his response," the court
9 found that:

10 [An] individual in rebutting a copyrighted work containing derogatory information about
11 himself may copy such parts of the work as are necessary to permit understandable
12 comment. Falwell did not use more than was reasonably necessary to make an
13 understandable comment when he copied the entire parody from the magazine. Therefore,
14 the public interest in allowing an individual to defend himself against such derogatory
15 personal attacks serves to rebut the presumption of unfairness.

14 *Id.* at 1153.

15 Similarly, other courts around the country (including the Supreme Court) have routinely
16 rejected, on fair use grounds, copyright infringement claims that are based on commentary and
17 criticism of copyrighted works. *See e.g., Campbell*, 510 U.S. at 578 (finding that use of some of
18 Roy Orbison's "Oh Pretty Woman" lyrics by 2 Live Crew in the song "Pretty Woman" was a
19 protected fair use because it commented on and criticized Orbison's work); *Jartech, Inc. v. Clancy*,
20 666 F.2d 403 (9th Cir. 1982) (affirming jury verdict of fair use where defendant made still
21 photographs and sound recordings of motion pictures on behalf of City Council seeking to abate
22 movies as obscene nuisance); *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253 (2d Cir. 1986) (court
23 held that copying of portions of plaintiff's pro-abortion book containing interviews of women with
24 unwanted pregnancies by defendant in anti-abortion book is criticism or comment that is protected
25 by fair use); *New Era Publications Int'l Aps v. Carol Pub. Group*, 904 F.2d 152 (2d Cir. 1990)
26 (court held that critical biography of L. Ron Hubbard is strongly entitled to fair use in quoted
27 passages from Hubbard's published works to show boastfulness, deceitfulness, and other undesirable
28 characteristics of Hubbard). Political comment or criticism – like CAIR is sued for engaging in here

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1 – is especially entitled to fair use protection because of its importance as a favored freedom of
2 speech right. *See Keep Thomson Governor Committee v. Citizens for Gallen Committee*, 457 F.
3 Supp. 957 (D.N.H. 1978) (reversing district court and finding that political advertisement using
4 portions of opponent's copyrighted song is excused as fair use, especially considering that use of the
5 song is part of a political message of advertisement).

6 The Ninth Circuit's decision in *Hustler* is controlling in this case. CAIR used the limited
7 audio excerpts from "The Savage Nation" to criticize and comment in response to Savage's political
8 commentary on Muslims and Islam as well as to directly address Savage's assault on CAIR as a
9 civil rights organization. Just as the Ninth Circuit recognized the Moral Majority defendants' right
10 under the fair use doctrine to completely republish *Hustler's* parody to rebut *Hustler's* attacks and to
11 raise money, CAIR's actions at issue here are squarely protected by the fair use doctrine.

12 In light of the extensive commentary and criticism that CAIR provided to accompany the
13 limited audio excerpts on its web site, even assuming the *de minimis* "fundraising" activities to
14 which Savage alleges in his Complaint, the first fair use factor heavily weighs in CAIR's favor.

15 **2. Factor 2: The Nature of the Copyrighted Work Favors CAIR.**

16 The second fair use factor considers the nature of the copyrighted work at issue.
17 Traditionally, this factor distinguishes "informational" and works from "creative" works,
18 considering creative works as falling "closer to the core of intended copyright protection."
19 *Campbell*, 510 U.S. at 586. *See also Wall Data Inc. v. Los Angeles County Sheriff's Dept.*, 447 F.3d
20 769, 780 (9th Cir. 2006) (same). In addition, published works enjoy lesser protection from
21 unauthorized uses than do unpublished ones. *See, e.g., Harper*, 471 U.S. at 563-64.

22 There is no dispute that the work at issue is a radio talk program about matters of public
23 affairs. For the purpose of this motion, even assuming the purported uniqueness of Savage's radio
24 program, for copyright infringement purposes it amounts to little more than a forum for Savage and
25 his listeners to comment on matters of public interest. As a matter of law, "The Savage Nation" is
26 less creative than a work of fiction and thus less worthy of strong protection from uses by
27 unauthorized parties. Indeed, courts have repeatedly found that newspapers, television news
28 reporting broadcasts, and the content of talk shows are subject to liberal appropriation for fair use

1 purposes. *See, e.g., Los Angeles News Service v. Reuters Television Intern., Ltd.*, 149 F.3d 987, 994
 2 (9th Cir. 1998) (“factual and informational nature” of television news footage weighed in favor of
 3 fair use determination); *Nat’l Ass’n of Gov’t Employees v. BUCI Television, Inc.*, 118 F. Supp. 2d
 4 126, 129 (D. Mass. 2000) (reporter’s acquisition, alteration, and distribution of videotape of
 5 copyrighted talk show program constituted fair use). Regardless, given CAIR’s unambiguous use of
 6 the limited audio excerpts as a part of its public criticism and commentary in direct response to
 7 Savage’s remarks, “this factor may be of less (or even of no) importance when assessed in the
 8 context of certain transformative uses,” *e.g., as here, for purposes of criticism. Castle Rock*
 9 *Entertainment, Inc. v. Carol Publishing Group, Inc.*, 150 F.3d 132, 144 (2d Cir. 1998). The second
 10 factor too, strongly supports CAIR.

11 **3. Factor 3: The Amount and Substantiality of the Portion Used Favors CAIR.**

12 The third fair use factor considers “the amount and substantiality of the portion used in
 13 relation to the copyrighted work as a whole.” 17 U.S.C. § 107(3). This factor considers both the
 14 quantity and importance of the material used. *See Campbell, supra*, at 586. Specifically, courts
 15 consider whether the portion used is reasonably necessary to accomplish the purpose of the second
 16 work and whether it supersedes or constitutes the heart of the original work. *Id.* at 587.

17 On both amount and substantiality grounds, the third fair use factor also strongly favors
 18 CAIR. Savage alleges, for example, that CAIR excerpted a segment “in excess of four minutes” of
 19 the October 29, 2007, episode of his daily talk show. Complaint at ¶ 24. Not only does this only
 20 amount to a small fraction of this particular show’s two hour total length, Savage’s own allegations
 21 confirm that the limited audio excerpts do not amount to a substantial portion of the copyrighted
 22 material.

23 If anything, Savage alleges that CAIR misrepresented “The Savage Nation” by excerpting
 24 too *little* of his program. Repeatedly, Savage alleges that the true meaning of his commentary was
 25 obscured by the fact that CAIR chose not to excerpt more of the broadcast. *See, e.g., Compl.* at ¶ 31
 26 (“The CAIR repackaging damaged the work and damaged the public image of the work because it
 27 was taken out of context, the introductory remarks were omitted and the context of ‘The Savage
 28 Nation’ were removed.”); *Compl.* at ¶ 32 (“The stolen material as repackaged by CAIR was

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1 intended to portray both the material and the creator of the material, Michael Savage as having a
2 blanket opposition to a particular religion. This was not the context of the statement and it is not
3 consistent with the content of the programming as a whole.”). See also Compl. at ¶¶ 33, 35, 36, 37,
4 39, and 42. Indeed, in the Complaint, in his sole attempt to cast a more favorable light to his
5 remarks, Savage compares the limited audio excerpts that CAIR posted on its website with nearly
6 four pages worth of transcripts of other portions of “The Savage Nation” from November 29, 2006
7 and March 27, 2007. CAIR presumably *could* have excerpted these additional audio excerpts to
8 provide what Savage believes to be a more accurate representation of his positions and beliefs. See
9 Compl. at ¶ 34.

10 Nothing that Savage alleges can support a conclusion that CAIR has excerpted the “heart” of
11 the October 29, 2007, episode of his radio program, nor could he. Savage’s own allegations confirm
12 just the opposite. This factor too weighs heavily in CAIR’s favor.

13 **4. Factor 4: The Effect of the Use Upon the Potential Market For or Value of the**
14 **Copyrighted Work Favors CAIR.**

15 The fourth and final fair use factor considers “the effect of the use upon the potential market
16 for or value of the copyrighted work.” 17 U.S.C. § 107(4). This factor “requires courts to consider
17 not only the extent of market harm caused by the particular actions of the alleged infringer, but also
18 ‘whether unrestricted and widespread conduct of the sort engaged in by the defendant ... would
19 result in a substantially adverse impact on the potential market’ for the original.” *Campbell*, 510 US
20 at 590 (citing *Nimmer* § 13.05[A] [4], p. 13-102.61 (footnote omitted)).

21 Savage does not allege that CAIR’s use of his work has impaired any market for the
22 October 29, 2007, broadcast. Rather his allegation is that CAIR’s posting of the limited audio
23 excerpts of one of Savage’s radio shows caused him financial harm because it led advertisers to
24 withdraw their financial support of the program. This alleged harm is not cognizable under
25 copyright law and is legally irrelevant to the fourth fair use factor. As the Supreme Court noted in
26 *Campbell*:

27 [W]hen a lethal parody, like a scathing theater review, kills demand for the original, it does
28 not produce a harm cognizable under the Copyright Act. Because “parody may quite
legitimately aim at garroting the original, destroying it commercially as well as artistically,”

1 ... the role of the courts is to distinguish between “[b]iting criticism [that merely] suppresses demand [and] copyright infringement[, which] usurps it.”

2 *Id.*, 510 U.S. at 591-92 (quoting *Fisher v. Dees*, 794 F.2d 432, 438 (9th Cir. 1986)) (internal
3 citations omitted). As courts have long recognized, there is no protectible market for criticism. *Id.*
4 Savage likely does not sell licenses to critics to comment on his work, nor does CAIR need to wait
5 for such permission to be granted. *See e.g., Hustler Magazine, Inc.*, 796 F.2d at 1153-1155.
6 Accordingly, any loss of advertising revenue to Savage that flows from CAIR’s commentary
7 regarding and criticism of “The Savage Nation” is not only self-inflicted but legally irrelevant to the
8 Court’s fair use analysis in this case. The fourth fair use factor, as do the other three, weighs
9 strongly in CAIR’s favor.

10 Savage’s copyright infringement claim fails every step of the fair use analysis. His
11 transparent attempt to misuse copyright law to punish and silence CAIR’s criticisms cannot prevail,
12 even assuming all of his allegations are true. A robust marketplace of ideas does not guarantee a
13 perpetual stream of advertiser-subsidized speech, and Savage’s attempt to transform declining
14 revenue – purportedly a direct result of CAIR’s effective criticisms – into a basis for squelching this
15 criticism must be dismissed as a matter of law.

16 **B. Savage’s RICO Claim Fails and Should be Dismissed As a Matter of Law.**

17 Savage’s RICO claim is littered with procedural and substantive deficiencies. First, Savage
18 has no standing to bring this RICO claim because he has not alleged an injury (i.e., an actual, out-of-
19 pocket financial loss) resulting from any conduct by CAIR, and any possible injury was self-
20 inflicted. As explained in more detail below, filing lawsuits and amicus briefs – constitutionally-
21 protected petitioning and free speech activity – is not a cognizable injury under the RICO statutes.
22 Second, Savage has made no effort to give CAIR notice of the portions of the RICO statutes upon
23 which Savage is making his claims, as he must, and Savage has failed to meet the heightened
24 pleading requirements mandated by Federal Rule 9(b) for racketeering claims that are predicated on
25 mail fraud, wire fraud, or any other type of fraud. Third, substantively, Savage has failed to allege
26 an association-in-fact enterprise with the necessary shared purpose. Moreover, Savage’s stringing
27 together of a disparate and unproven set of asserted “facts” is insufficient as a matter of law to show
28 a pattern of racketeering activity. Fourth, even if Savage could show some injury as a result of

1 CAIR's alleged conduct, which he cannot, Savage still has not stated a RICO cause of action
2 because he has not pled (and cannot plead) that CAIR's conduct proximately caused any injuries to
3 him. In other words, Savage has done nothing to establish (and could not) that the purported
4 wrongful conduct was a substantial and foreseeable cause of the injury alleged and that the
5 connection to this injury was logical and not speculative.

6 **1. Savage Lacks Standing To Bring A RICO Claim Against CAIR Because He Has**
7 **Not And Cannot Allege a Cognizable Injury.**

8 The United States Supreme Court held in *Holmes v. Securities Investor Protection Corp.*,
9 503 U.S. 258, 268-69 (1992), that a plaintiff has standing only if he or she has suffered an injury
10 caused "by reason of" defendant's RICO violations. The key inquiry is whether a direct relationship
11 exists between the injury asserted and the injurious conduct alleged. "A plaintiff who complains of
12 harm flowing merely from the misfortunes visited upon a third person by the defendant's acts
13 generally stands at too remote a distance to recover," the Court stated. *Id.* The Ninth Circuit has
14 further explained that under the *Holmes* notion of injury, "the plaintiff must show that he has
15 suffered a concrete financial loss." *Fireman's Fund Insurance Co. v. Stites*, 258 F.3d 1016, 1021
16 (9th Cir. 2001). In *Diaz v. Gates*, 420 F.3d 897, 900 (9th Cir. 2005) (en banc), the Ninth Circuit
17 clarified that an injury is only compensable under RICO if the injury constitutes "harm to a specific
18 business or property interest," and if the alleged business or property interest is cognizable under
19 state law.

20 Here, fundamentally, Savage has not pled any financial injury to his business or property
21 that he has suffered by reason of any of the purported RICO "violations" by CAIR. While the
22 Complaint is awash with incredible leaps of logic to blame CAIR for 9/11 and the terrorist actions
23 of Hamas and Al Qaeda, among others, *even if* Savage's fictional tales were to be believed, he still
24 lacks standing under RICO because he does not – and cannot – allege that he suffered a concrete
25 monetary injury as a result of these unfortunate events (which, in any case, have nothing to do with
26 CAIR). While Savage may allege that he lost revenue because of advertisers abandoning his radio
27 program, any such losses are immaterial to his RICO claim because they did not come about as a
28 result of any purported relationship with a RICO enterprise involving Al Qaeda and/or Hamas. *See*

1 Compl. at ¶¶ 36, 42. With regard to the advertisers, Savage pleads that "[a]ny success in this area
2 was due to the copyright infringement and the false context in which the material was presented."
3 *See id.* Neither of those claims has anything to do with an injury caused by reason of a RICO
4 violation. Moreover, Savage's purported loss of national advertising is self-inflicted – he would not
5 have lost any advertisers if he had not made the offensive remarks on his show.

6 In any event, the primary "injury" that Savage identifies in his Complaint does not have to
7 do with advertisers but involves CAIR's alleged filing of "frivolous lawsuits" and amicus briefs.
8 *See* Compl. at ¶¶ 45, 47, 50, 168. Savage does not establish that he has suffered any financial
9 loss because of any lawsuits filed by CAIR, nor could he. Filing lawsuits and amicus briefs does
10 not create any cognizable injury under the RICO statutes anyway. *See, e.g.*, 18 U.S.C. § 1961(1)
11 (listing the predicate crimes upon which a RICO claim must be based, none of which involves filing
12 "frivolous" lawsuits). To hold otherwise would be to criminalize CAIR's constitutionally-protected
13 petitioning activity, a time-honored American tradition, and to ensnare the tens of thousands of
14 organizations who file lawsuits and amicus briefs every day, a group that ranges across the political
15 and social spectrum, from the American Civil Liberties Union to the United States Chamber of
16 Commerce to the Federalist Society. Savage's attempt to turn the exercise of a critical right of our
17 legal system into "racketeering activity" is patently frivolous and grounds for immediate dismissal
18 with prejudice.

19 **2. Savage Fails to Satisfy the Heightened Pleading Requirements For a RICO**
20 **Claim.**

21 **a. Savage Fails to Specify Which RICO Causes of Action Apply to His**
22 **Claim.**

23 For recovery under the RICO statute, the plaintiff must plead that the defendant violated one
24 or more of the four RICO causes of action set forth in 18 U.S.C. § 1962(a) – (d) and then set forth
25 the specific elements of each claimed violation, which differ according to which § 1962 claim is
26 involved. *See Reddy v. Litton Industries, Inc.*, 912 F.2d 291 (9th Cir. 1990) (quoting *Sedima,*
27 *S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985)). Courts have dismissed RICO complaints that fail
28 to distinguish among the four separate prohibited acts specified in section 1962 and even found that
"shotgun" pleading of all four violations without a good-faith effort to satisfy the elements of each

1 individually can result in sanctions. *See, e.g., Pelletier v. Zweifel*, 921 F.2d 1465, 1518-19 (11th
2 Cir. 1991); *Slattery v. Costello*, 586 F. Supp. 162, 168 (D.D.C. 1983).

3 Here Savage fails to allege which of the separate RICO causes of action specified in section
4 1962 CAIR has allegedly violated and made no effort to satisfy the requirement in section 1962 that
5 he identify the elements of each act individually. This omission is fatal to his RICO claim as a
6 matter of law. Savage's shotgun pleading of "Racketeer Influenced and Corrupt Organizations
7 (RICO) Act (18 U.S.C. §§ 1961 – 1968)" does not give CAIR the required notice of which portions
8 of the RICO statutes are at issue, nor does it explain how CAIR purportedly breached those
9 provisions of section 1962. *See* Compl. unnumbered paragraph between ¶ 115 and ¶ 116. For this
10 reason alone, this Court should dismiss Savage's RICO claim as inadequately pled.

11 **b. The Sheer Volume of Savage's Fanciful, Non-Specific RICO Allegations**
12 **Is Insufficient to Satisfy Rule 9(b)'s Particularity Requirement.**

13 To show that a defendant has violated the RICO statutes, the plaintiff must prove that the
14 defendant engaged in "racketeering activity." Racketeering activity is defined in U.S.C. § 1961(1)
15 and includes the different species of fraud including mail and wire fraud. Savage alleges that CAIR
16 engaged in racketeering activity through the predicate acts of mail, financial institution,
17 identification documents, and wire fraud, as well as "defrauding the United States Government,"
18 among other claims. *See* Compl. at ¶ 124. However, Savage has failed to allege *with any specificity*
19 the predicate acts of mail, financial institution, identification documents, and wire fraud, as well as
20 defrauding the government. Merely listing these purported predicate offenses in the Complaint with
21 no explanation of the time, place, and manner of the purported misrepresentations, nor what
22 Defendant gained by any alleged fraud, is insufficient as a matter of law to state a claim under the
23 RICO statute. *See id.* Savage's RICO claim must therefore be dismissed.

24 When a Complaint, as here, incorporates fraud allegations, Federal Rule of Civil Procedure
25 9(b) obligates the plaintiff to plead with a heightened degree of particularity. *Wasco Prods. v.*
26 *Southwall Techs., Inc.*, 435 F.3d 989, 990 (9th Cir. 2005). Failure to plead with particularity
27 provides grounds for dismissal. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097 (9th Cir. 2003)
28 (dismissal with prejudice is proper where the defect is not curable by amendment). To satisfy the

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1 requirements of Rule 9(b), the plaintiff must provide details “specific enough to give defendants
 2 notice of the particular misconduct which is alleged to constitute the fraud charged so that they can
 3 defend against the charge and not just deny that they have done anything wrong.” *Bly-Magee v.*
 4 *California*, 236 F.3d 1014, 1019 (9th Cir. 2001). In the Ninth Circuit, Rule 9(b) has been read to
 5 require an account of the “time, place, and specific content of the false representations as well as the
 6 identities of the parties to the misrepresentations.” *Edwards v. Marin Park, Inc.*, 356 F.3d 1058,
 7 1066 (9th Cir. 2004).

8 Savage’s Complaint is utterly devoid of descriptions giving the time, place, and specific
 9 content of these purported predicate acts of mail fraud, wire fraud, financial institution fraud,
 10 defrauding the government, and fraud with identification documents. Cutting through the *sturm und*
 11 *drang* of the RICO allegations, the only three places that Plaintiff mentions fraud within 172
 12 paragraphs include (1) asserted “fraud” through filing of “frivolous” lawsuits, which is not fraud and
 13 is not actionable for the reasons stated above, *see* Compl. at ¶ 45; (2) the listing of mail fraud, wire
 14 fraud, financial institution fraud, defrauding the government, and fraud with identification
 15 documents as predicate acts without any specification of the basis for these claims as required under
 16 Federal Rule 9(b), *see* Compl. at ¶ 124; and (3) the allegation that a former CAIR employee,
 17 Bassam Khafasi, pleaded guilty to visa fraud and bank fraud for passing bad checks, which is
 18 irrelevant (and also denied by CAIR; *see* Answer at ¶ 152) since Savage has not pled (and cannot
 19 plead) that CAIR had anything to do with the alleged former employee’s alleged visa fraud or bank
 20 fraud. By failing to plead the time, place and manner of each claimed fraud violation and CAIR’s
 21 purported connection to it, Savage has failed to meet the heightened pleading requirements of
 22 Federal Rule 9(b), and his RICO claim therefore should be dismissed.

23 **c. The Complaint Does Not Allege Any Facts Sufficient to Establish The**
 24 **Non-Fraud Predicate Acts Mentioned Therein Such As Conspiracy to**
 25 **Commit Murder.**

26 Savage also alleges CAIR committed the RICO predicate acts of “[c]onspiracy to commit
 27 murder, ... [c]onspiracy to commit arson, ... [i]llegal transactions in monetary instruments, ...
 28 [m]oney laundering, ... Travel Act [violations]... [f]iling false or materially false tax returns, ...
 [e]ngaging in a corrupt endeavor to impede and impair the due administration of the internal

1 revenue laws, ... [p]roviding material support of [t]errorism. ... [c]riminal infringement of
 2 Copyright.” Compl. at ¶ 124. Again, Savage made no attempt to plead any facts to support these
 3 nine purported predicate acts. The alleged acts are not set forth with any specific allegations as to
 4 time, place, and manner, nor does Savage explain CAIR’s alleged role in any such acts. For
 5 example, Savage fancifully alleges CAIR engaged in conspiracy to commit murder and conspiracy
 6 to commit arson, but Savage does not explain anywhere what agreement CAIR made with whom to
 7 commit murder and/or arson, nor any sufficient acts in furtherance of such “conspiracies.” Savage’s
 8 assertion that CAIR conspired to commit the murders and arson that occurred on 9/11/2001 is
 9 particularly gross, offensive and without any factual foundation. Indeed, this Court should not
 10 permit Savage to get away with making these wholly conclusory assertions that CAIR was
 11 “providing funding for” Al Qaeda in support of the 9/11 attacks and “was a necessary component to
 12 the 9/11 Attack” without any facts supporting those obviously scurrilous assertions. *See* Compl. at
 13 ¶¶ 128, 131. Moreover, the few acts mentioned in the Complaint that Savage may argue would go
 14 in furtherance of such a “conspiracy” are baldly inadequate – calling for removal of a billboard in
 15 Los Angeles and advocating for religion are exercises of CAIR’s constitutionally-protected free
 16 speech rights, not acts in furtherance of conspiracies to commit mass murder and arson. *See* Compl.
 17 at ¶¶ 87, 88, 89.

18 **3. Savage Fails to Properly Plead the Required Elements of a RICO Claim.**

19 To state a civil RICO claim, plaintiffs “must allege (1) conduct (2) of an enterprise (3)
 20 through a pattern (4) of racketeering activity.” *Ove v. Gwinn*, 264 F.3d 817, 825 (9th Cir. 2001).
 21 Savage has failed to plead facts indicating that CAIR was engaged in an enterprise, and fails to
 22 allege facts that CAIR participated in a pattern of racketeering activity.

23 **a. Savage Has Not And Cannot Meet the “Enterprise” Pleading**
 24 **Requirement.**

25 The main RICO statute under which plaintiffs usually sue, Section 1962(c), makes it
 26 unlawful “for any person employed by or associated with any enterprise engaged in . . . interstate or
 27 foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such
 28 enterprise’s affairs through a pattern of racketeering activity.” 18 U.S.C. 1962(c). The Supreme

1 Court has explained that liability under Section 1962(c) requires that a defendant be a participant “in
 2 the operation or management of the enterprise itself.” *Reves v. Ernst & Young*, 507 U.S. 170, 185
 3 (1993) (finding that “to participate, directly or indirectly in the conduct of [an] enterprise’s affairs,
 4 one must have some part in directing those affairs”). The Ninth Circuit further clarified last year
 5 that to meet the “enterprise” element of a RICO claim, a plaintiff must allege facts which will
 6 demonstrate (1) that defendants have “associated for a common purpose of engaging in a course of
 7 conduct”; (2) that there is an “ongoing organization either formal or informal which “is a vehicle for
 8 the commission of two or more predicate crimes”; and (3) “that the various units function as a
 9 continuing unit,” meaning that the “associates’ behavior was ongoing rather than isolated activity.”
 10 *Odom v. Microsoft Corp.*, 486 F.3d 541 (9th Cir. 2007) (en banc). *See also United States v.*
 11 *Turkette*, 452 U.S. 576, 583 (1981) (“[t]he existence of an enterprise at all times remains a separate
 12 element which must be proved by the government” or, in a civil case, by the plaintiff).

13 Here, Savage has pled no facts that demonstrate, nor could he, that CAIR “associated for a
 14 common purpose of engaging in a course of conduct” with Al Qaeda, Hamas, or any other terrorist
 15 group mentioned in the Complaint. *See id.* Nor has Savage offered facts that indicate CAIR
 16 participated in or directed any “ongoing organization” that is a “vehicle for the commission of ...
 17 crimes.” *See id.* Just as a San Francisco Giants fan saying he likes the Giants and Barry Bonds does
 18 not factually associate the fan in an enterprise with the Giants and Bonds, CAIR’s members making
 19 comments in favor of Islam or an independent Palestine does not associate CAIR in fact in an
 20 enterprise with terrorist groups such as Al Qaeda and Hamas. For all of the fanciful and spiteful
 21 rhetoric in Savage’s Complaint, he has utterly failed to present any facts indicating an actual
 22 relationship between CAIR and Al Qaeda or Hamas, let alone an association. Savage goes on for
 23 pages seeking to tether CAIR to Al Qaeda and Hamas, alleging facts that have nothing to do with
 24 CAIR. Without establishing *through facts* any association between CAIR and these groups, Savage
 25 utterly cannot show that CAIR played a role in any organization that was the vehicle for crimes.
 26 Having failed to establish the existence and the identity of an enterprise involving CAIR, Savage’s
 27 RICO claim cannot survive.

28

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1 **b. Savage Fails to Adequately Plead A “Pattern Of Racketeering Activity.”**

2 Savage’s failure to allege even a single predicate act necessarily means that he has failed to
3 allege a “pattern” of such acts. The failure to allege *facts* is even more critical when examining the
4 RICO pattern requirement. To establish a pattern, the plaintiff must allege “two or more predicate
5 acts occurring over a significant period of time, evidencing a threat of continuing activity....
6 Unrelated or discontinuous predicate acts will not suffice.” *United Energy Owners Comm., Inc. v.*
7 *United Energy Management Sys.*, 837 F.2d 356, 361 (9th Cir. 1988). As the Supreme Court has
8 stated, a pattern allegation requires facts sufficient to demonstrate “continuity” of the conduct, plus a
9 relationship between the predicate acts. *See H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229,
10 239-41 (1989). The Court further explained the test for relatedness of predicate acts: “Criminal
11 conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results,
12 participants, victims, or methods of commission, or are otherwise interrelated by distinguishing
13 characteristics and are not isolated events.” *See id.*

14 As explained above, Savage has failed to set forth the elements of any of the predicate acts
15 that he listed in a conclusory fashion, and he has not identified any of the participants in the
16 supposed predicate “crimes.” Because Savage has failed to identify the time, place and manner of
17 each purported predicate act, it follows logically that he has pled nothing about how any predicate
18 acts are related. Without demonstrating that any predicate acts are related, Savage cannot begin to
19 satisfy the pattern requirement that is a necessary element of any RICO claim. Boilerplate language
20 tracking the language of the statute will not save his Complaint, either. The Complaint, for
21 example, contains the conclusory allegation that “the predicate acts form a pattern of racketeering in
22 that they are repeated, ongoing, continuous, and are a part of the Rico Enterprise’s regular way of
23 doing business.” *See Compl. at ¶ 126.* Comparable allegations have been found inadequate because
24 “[n]o details of any separate schemes, other victims, or distinct injuries are provided.” *H.G.*
25 *Gallimore, Inc. v. Abdula*, 652 F. Supp. 437, 451 (N.D. Ill. 1987) (finding that “all [plaintiff] has
26 done is plead that the predicate offenses occurred repeatedly, and ... that is not enough to allege a
27 pattern”); *see also Plount v. American Home Assurance Co.*, 668 F. Supp. 204, 206 (S.D.N.Y. 1987)
28 (“Missing are allegations of how long the association lasted. Likewise, ... the complaint ... never

1 alleges who did what when, and consequently, fails in any meaningful way to show how the acts are
 2 related to the common purpose of the enterprise”). The acts described in Savage’s Complaint relate
 3 to the wrongful conduct of Al Qaeda and Hamas and are patently unrelated in any way to the
 4 legitimate civil rights advocacy work performed by CAIR, which includes filing lawsuits, and
 5 involve individuals other than Savage. As a matter of law, what Savage describes in his Complaint
 6 cannot constitute a RICO pattern, and the claim must be dismissed.

7 **c. Savage Fails to Allege Proximate Cause.**

8 Even if Savage could allege some injury as a result of CAIR’s alleged conduct, which he
 9 cannot, he *still* could not state a RICO cause of action because he has not alleged any proximate
 10 causation between the purported RICO violations and any injury. The United States Supreme Court
 11 has stressed repeatedly that civil RICO claims can survive as a matter of law “only if the alleged
 12 RICO violation was the proximate cause of the plaintiff’s injury.” *Anza v. Ideal Steel Supply Corp.*,
 13 547 U.S. 451 (2006) (quoting *Holmes v. Securities Investor Trust Protection Corp.*, 503 U.S. at 268.
 14 Courts in the Ninth Circuit have further explained that proximate cause requires a causal link
 15 between the conduct alleged and the injury suffered. *Ass’n of Wash. Pub. Hosp. Dists. v. Phillip*
 16 *Morris Inc.*, 241 F.3d 696, 701 (9th Cir. 2001) (finding three “relevant” factors in determining
 17 whether plaintiff has shown proximate cause: (1) whether there are more direct victims of the
 18 alleged conduct who can be counted on to vindicate the law as private attorneys general; (2) whether
 19 it will be difficult to ascertain the amount of the plaintiff’s damages attributable to defendant’s
 20 wrongful conduct; and (3) whether the courts will have to adopt complicated rules apportioning
 21 damages to obviate the risk of multiple recoveries”). If the injury was unforeseeable, illogical, or
 22 speculative in nature, courts may hold that a plaintiff’s injury was not proximately caused by the
 23 defendant’s conduct. *See Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602, 612-14 (6th Cir. 2003)
 24 (finding that RICO plaintiffs must “set out a reasonable and principled basis of recovery that is not
 25 based on mere speculation and surmise”). As such, the RICO plaintiff who shows a direct injury
 26 may nevertheless suffer a dismissal if the injury alleged does not satisfy the other traditional
 27 requirements of proximate cause; namely, that the wrongful conduct was a substantial and
 28

1 foreseeable cause of the injury alleged and that the connection to this injury was logical and not
2 speculative. *See id.*

3 Savage's Complaint is devoid of any proximate cause pleading, but even if it had, the
4 Complaint would still have to be dismissed as a matter of law because it is delusional and entirely
5 baseless for Savage to claim that CAIR's filing of lawsuits and amici briefs and engaging in
6 constitutionally protected speech regarding Islam would play a role in a "RICO conspiracy" that
7 "caused" the 9/11 attacks and terrorist activities allegedly perpetrated by terrorist groups. *See*
8 *Compl.* at ¶¶ 123, 124. Savage no doubt intentionally ignores the obvious intervening factors
9 between the alleged "misconduct" (i.e., filing lawsuits and engaging in speech that Savage does not
10 like) and the claimed injury (i.e., the 9/11 attacks and the alleged terrorist activities, which in any
11 case did not injure Savage personally in a concrete financial sense, as they must have for him to
12 satisfy the standing requirements explained above). These intervening factors include the plotting
13 of Osama bin Laden with the acquiescence of the Afghan Taliban government, the death of Yasser
14 Arafat and accompanying political vacuum that led to the takeover by Hamas in the Gaza Strip, the
15 failure of security at pre-9/11 U.S. airports to screen for terrorists, the missteps of the Federal
16 Bureau of Investigation and the Central Intelligence Agency in sharing information about several of
17 the 9/11 hijackers, and a hundred other factors too numerous to list here – none of which Savage
18 alleges (or could allege) involved CAIR in any way. In short, because Savage's entire RICO claim
19 is based on speculation and surmise, he cannot show a direct causal relationship between CAIR's
20 activities and the injuries caused by 9/11 and the other terrorist attacks. Since proximate cause is
21 entirely lacking, immediate dismissal of Savage's RICO claim – with prejudice – is warranted.

22 **C. The First Amendment Independently Bars Savage's Baseless Claims.**

23 Viewed in its entirety, Savage's Complaint is simply a camouflaged defamation or
24 disparagement claim dressed as bogus copyright and RICO claims. As such, Savage's Complaint is
25 cleverly calculated to avoid the protections for free speech recognized in California's anti-SLAPP
26 statute for defendants facing lawsuits that target First Amendment activity.⁷ Savage, however,

27 ⁷ Although the Ninth Circuit, with virtually no discussion, stated in *United States ex rel Newsham*
28 *v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 973 (1999), that the anti-SLAPP statute does not
apply to a federal question claim, the principles behind the statute still have resonance since they

1 cannot evade the First Amendment through the expedient of alleging claims under these two federal
 2 statutes instead of making a defamation claim. Constitutional protections “are not peculiar to
 3 [defamation] actions but apply to all claims *whose gravamen is the alleged injurious falsehood of a*
 4 *statement.*” *Blatty v. New York Times Co.*, 42 Cal.3d 1033, 1042-43 (Cal. 1986) (recognizing that if
 5 the constitutional limitations protecting free speech were not broadly applied to different causes of
 6 action, litigants would plead claims other than defamation to avoid the First Amendment
 7 restrictions, thereby “frustrat[ing] the[] underlying purpose” of the constitutional protections); *see*
 8 *also Films of Distinction, Inc. v. Allegro Film Productions, Inc.*, 12 F. Supp. 2d 1068, 1082 (C.D.
 9 Cal. 1998) (dismissing causes of action that, like the defamation claim, targeted defendant's free
 10 speech rights, and court wanted to avoid “‘creative pleading’ from ‘rendering nugatory the First
 11 Amendment limitations placed on litigation against speech’”) (quoting *Blatty*, 42 Cal.3d at 1045).

12 For more than four decades, the Supreme Court has recognized that First Amendment
 13 protection does not depend on the labels given to causes of action. *New York Times Co. v. Sullivan*,
 14 376 U.S. 254, 269 (1964); *see also Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S.
 15 485 (1984) (treating the fact that the case before it was one of product disparagement rather than
 16 defamation as *immaterial* and discussing the importance of “independent judicial review”). In
 17 *Hustler v. Falwell*, 485 U.S. 46, 50, 54-57 (1988), the Court held that the First Amendment barred
 18 not only the Reverend Jerry Falwell’s defamation claim arising from a satirical feature in *Hustler*
 19 magazine that depicted Falwell as engaged in an incestuous relationship, but also his intentional
 20 infliction of emotional distress claim arising from the same publication.

21
 22 are a means of protecting Californians’ free speech rights as guaranteed by the federal and
 23 California constitutions. Undeniably, Savage’s Complaint targets CAIR for engaging in
 24 constitutionally-protected free speech that publicly criticized CAIR for responding to his anti-
 25 Muslim and anti-CAIR tirade and for advocating political and social views that CAIR found
 26 repugnant. So that such speech may not be chilled, Section 425.16 of the California Code of Civil
 27 Procedure provides for quick disposal of those claims that do not “demonstrate[] a probability of
 28 prevailing on the claim,” as well as the awarding of attorneys’ fees and costs to the targeted
 defendant. *See Taus v. Loftus*, 40 Cal.4th 683 (2007); *Metabolife Int’l v. Wornick*, 213 F. Supp. 2d
 1220, 1228 (S.D. Cal. 2002). While the anti-SLAPP statute may not apply here, the Court should
 still use existing federal law and procedures to vindicate the statute’s core values of early dismissal
 of non-meritorious lawsuits targeting speech and the awarding of attorneys’ fees.

1 Savage's legal broadside specifically targets CAIR as a civil rights organization and its core
 2 political speech responding to and criticizing Savage's inflammatory political rhetoric. As the
 3 nation's largest civil rights organization for Muslims, CAIR appropriately characterized Savage's
 4 own words as an "Anti-Muslim Tirade" and publicly communicated a detailed response as part of its
 5 advocacy work. *See* Parvez Decl., Exhibit A. In response, Savage filed this lawsuit.

6 Although weakly pled as copyright and RICO violations,⁸ Savage's allegations confirm his
 7 real grievance. Specifically, Savage complains that CAIR's communication to its members "was
 8 intended to portray both the material and the creator of the material, Michael Savage [,] [sic] as
 9 having a blanket opposition to a particular religion. This was not the context of the statement and it
 10 is not consistent with the content of the programming as a whole." Compl. ¶ 33. After lamenting
 11 CAIR's alleged "misportraying" of his views, Savage pleads that the "misportrayals" have injured
 12 him financially, "destroyed" the value of his material, and caused him to lose advertisers. Compl. at
 13 ¶¶ 34, 35. In other words, Savage's *real* complaint is that CAIR portrayed him in a false light,
 14 disparaged him, misrepresented him, published false statements that injured him financially (i.e.,
 15 defamation) or that CAIR intentionally interfered with his economic relations, e.g., caused his
 16 national advertisers to withdraw their sponsorship of his radio show. However characterized, the
 17 common thread between these unstated causes of action is that they are all subject to the
 18 constitutional limitations protecting free speech because the "gravamen" of Savage's Complaint is
 19 the "alleged injurious falsehood of a statement." *See Blatty*, 42 Cal.3d at 1042-43.

20
 21
 22 ⁸ Because CAIR's First Amendment rights are implicated by this action, the Complaint is also
 23 subject to heightened pleading requirements that Savage has not met – and cannot meet. "Where a
 24 plaintiff seeks damages ... for conduct which is *prima facie* protected by the First Amendment, the
 25 danger that the mere pendency of the action will chill the exercise of First Amendment rights
 26 requires more specific allegations than would otherwise be required," the Ninth Circuit held in
 27 *Flowers v. Carville*, 310 F.3d 1118, 1130 (9th Cir. 2002) (quoting *Franchise Realty Interstate Corp.*
 28 *v. S.F. Local Joint Executive Bd. of Culinary Workers*, 542, F.2d 1076, 1082-83 (9th Cir. 1976)).
 Here, Savage's Complaint is silent on how CAIR's limited use of the audio excerpts to respond to
 his public criticisms violated his purported copyright interest. His pleading of the RICO claim is
 patently deficient for the multitude of reasons discussed *infra* at 12 - 21. Savage's complete failure
 to meet these basic pleading requirements, let alone the heightened ones, is independent grounds for
 dismissing his Complaint with prejudice.

1 In essence, Savage sued because CAIR’s constitutionally-protected opinions have harmed
 2 him professionally. See Compl. ¶ 35. The First Amendment protects such speech no matter the
 3 label placed on the claim. To hold otherwise would eliminate the required “breathing space”
 4 afforded by the First Amendment. See *Hustler*, 485 U.S. at 52. The Supreme Court recognized
 5 long ago that this country’s embrace of free speech “reflects a profound national commitment to the
 6 principle that debate on public issues should be uninhibited, robust, and wide-open...” *New York*
 7 *Times Co. v. Sullivan*, 376 U.S. at 270. Savage is, without question, a public figure, a nationally
 8 syndicated talk show host and the self-proclaimed “leader of the public opposition to the purchase of
 9 major U.S. ports by Dubai.” See Compl. at ¶¶ 2, 44. Both Savage’s remarks and CAIR’s public
 10 commentary and criticism at issue in this litigation relate to a public issue, the role of Muslims in
 11 post-9/11 American society and Savage’s apparently dim view of it. To allow Savage’s baseless
 12 lawsuit to move forward in these circumstances would contravene the bedrock principle of allowing
 13 robust debate set forth in *New York Times Co.*, 376 U.S. at 270.

14 **IV. CONCLUSION**

15 For each of the reasons stated herein, Savage’s Complaint against CAIR should be
 16 summarily dismissed with prejudice.

17 DATED this 30th day of January 2008.

18 DAVIS WRIGHT TREMAINE LLP

19 ELECTRONIC FRONTIER FOUNDATION

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