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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

AR PILLOW INC., et al.,

Plaintiffs,

v.

MAXWELL PAYTON, LLC, et al.,

Defendants.

CASE NO. C11-1962RAJ

ORDER GRANTING SPECIAL  
MOTION TO STRIKE PURSUANT  
TO WASHINGTON ANTI-SLAPP  
ACT

**I. INTRODUCTION**

This matter comes before the court on the special motion to strike filed by Defendants Maxwell Payton, LLC, Annette Cottrell, and Jared Pfof. Dkt. # 43. Defendants seek to strike Plaintiffs’ state law claims for unfair competition,<sup>1</sup> defamation, and tortious interference. Plaintiffs AR Pillow Inc. and Elizabeth Goutevenier oppose the motion. On August 10, 2012, Plaintiffs moved the court for an order striking the Anti-SLAPP motion. Dkt. # 51. The court DENIES Plaintiffs’ motion to strike.<sup>2</sup> Having

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<sup>1</sup> On June 4, 2012, Plaintiffs filed a motion for extension of time to address their unfair competition claim and to obtain a signature. Dkt. # 47. Defendants did not oppose this motion, and the court GRANTS this motion. On June 7, 2012, Plaintiffs withdrew their unfair competition claim under RCW 19.86.020. Dkt. # 48. Accordingly, the only claims at issue in Defendants’ motion are defamation and tortious interference.

<sup>2</sup> In their motion, Plaintiffs argue that Defendants did not comply with the timing rules set forth in “RCW 4.24.535(5)(a).” Dkt. # 51. However, the text of that statute specifically provides that “[a] hearing shall be held on the motion not later than thirty days after the service of the motion *unless the docket conditions of the court require a later hearing.*” 4.24.525(5)(a) (emphasis

1 considered the memoranda, exhibits, oral argument, and the record herein, the court  
2 GRANTS Defendants’ special motion to strike Plaintiffs’ state law claims.

## 3 **II. BACKGROUND**

4 Ms. Goutevenier started AR Pillow in 2007 to help prevent harm associated with  
5 infant reflux. Dkt. # 42 (First Am. Compl.) ¶ 7. Defendant Cottrell is the owner of  
6 Defendant Maxwell Payton, LLC, which she formed to provide information about infant  
7 health and parenting issues through the website pollywogbaby.com, such as infant reflux.  
8 *Id.* at ¶¶ 6, 8; Dkt. # 44 (Cottrell Decl.) ¶ 2. Maxwell Payton also provides reviews of  
9 infant health and safety products, and it sells products such as foam wedge pillows that  
10 could assist with infant reflux and other problems. Dkt. # 44 (Cottrell Decl.) ¶ 2.  
11 Through Maxwell Payton, Cottrell sold the AR Pillow from October 2005 to December  
12 2008. *Id.* She stopped selling the AR Pillow based on concerns regarding the AR  
13 Pillow’s design. *Id.* Cottrell wrote a critical review of the AR Pillow, and that review  
14 forms the basis of part of Plaintiffs’ law suit, filed on November 23, 2011. On May 17,  
15 2012, Defendants filed the present special motion to strike pursuant to the Washington  
16 Act Limiting Strategic Lawsuits Against Public Participation (the “Act”) in response to  
17 Plaintiffs’ First Amended Complaint.

## 18 **III. DISCUSSION**

### 19 **A. The Act**

20 For many years, the Act intended to address lawsuits brought primarily to chill the  
21 valid exercise of the constitutional rights of free speech and petition for redress. RCW  
22 4.24.510. In 2010, the Washington State Legislature revised the Act by not only  
23 broadening the scope of the protected communication, but creating an efficient, uniform,  
24 and comprehensive method for speedy adjudication of lawsuits targeting persons  
25 communicating on matters of public or governmental concern. RCW 4.24.525; Senate

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26 added). Here, the court’s docket conditions required a later hearing. Accordingly, the court  
27 DENIES Plaintiffs’ motion to strike.

1 Bill 6395, Laws of 2010, Ch. 118, § 1. These amendments are patterned after  
2 California’s anti-SLAPP act and expand the types of speech protected to five categories.  
3 Because the Act is closely modeled after the California statute, courts have applied  
4 California law as persuasive authority in interpreting the Act. *See, e.g., Castello v. City*  
5 *of Seattle*, No. C10-1456MJP, 2010 WL 4857022, at \*4 (W.D. Wash. 2010); *Aronson*,  
6 738 F. Supp. 2d at 1110. The court is to liberally construe and apply the Act in order to  
7 effectuate its general purpose of protecting participants in public controversies from an  
8 abusive use of the courts. *Aronson v. Dog Eat Dog Films, Inc.*, 738 F. Supp. 2d 1104,  
9 1110 (W.D. Wash. 2010).

10 **B. Legal Standard**

11 There are two stages the court must analyze to determine whether the moving  
12 party will prevail on a special motion to strike. The moving party has the initial burden  
13 of showing by a preponderance of the evidence that the claim is based on an action  
14 involving public participation and petition. RCW 4.24.525(4)(b). If the moving party  
15 meets this burden, the burden shifts to the responding party to establish by clear and  
16 convincing evidence a probability of prevailing on the claim. *Id.* If the responding party  
17 meets this burden, the court shall deny the motion. *Id.* Although the revised Act is  
18 modeled after the California law, Washington applies a higher burden at the second stage.  
19 RCW 4.24.525(4)(b) (“clear and convincing evidence of a probability of prevailing”).

20 The Ninth Circuit, applying California’s statute, has noted that the second stage  
21 determines whether the complaint is both legally sufficient and supported by a sufficient  
22 prima facie showing of facts to sustain a favorable judgment if the evidence submitted by  
23 the plaintiff is credited. *Hilton v. Hallmark Cards*, 599 F.3d 894, 902 (9th Cir. 2010).  
24 “Such a test is similar to one courts make on summary judgment, though not identical.  
25 Thus, if a plaintiff has stated a legal claim but has no facts to support it, a defendant could  
26 prevail on an anti-SLAPP motion, though he would not have been able to win a motion to

1 dismiss.” *Id.* The court also noted that it does not weigh the credibility or comparative  
2 probative strength of competing evidence, but should grant the motion if, as a matter of  
3 law, the moving party’s evidence supporting the motion defeats the responding party’s  
4 attempt to establish evidentiary support for the claim. *Id.* at 903.

5 However, in a recent unpublished case, the Ninth Circuit has indicated that with  
6 respect to California’s statute, if a defendant makes an anti-SLAPP motion to strike  
7 founded on purely legal arguments, the court should apply Federal Rules of Civil  
8 Procedure 8 and 12, but if it is a factual challenge, then the motion must be treated as  
9 though it were a motion for summary judgment. *Z.F. v. Ripon Unified Sch. Dist.*, Case  
10 No. 11-15377, 2012 WL 1857521, \*1 (9th Cir. 2012). Other courts applying the  
11 California statute that have come to similar conclusions apply the *Erie* doctrine. *See e.g.*,  
12 *Rogers v. Home Shopping Network, Inc.*, 57 F. Supp. 2d 973, 982-84 (C.D. Cal. 1999).  
13 The *Rogers* court reasoned that where a special motion to strike only alleges legal  
14 deficiencies, imposing standards that puts a more onerous burden on the nonmoving party  
15 would conflict with Rules 8 and 12. *Id.* at 982-83.

16 Here, Defendants make the special motion to strike based on Plaintiffs’ failure of  
17 proof.<sup>3</sup> Accordingly, the court applies the standard articulated in *Hilton* to the Act.

18 **C. Plaintiffs’ Belated Request for Discovery and to Supplement the Record**

19 During oral argument, Plaintiffs argued that discovery was automatically stayed  
20 when Defendants filed their special motion to strike, and that the court would create a  
21 manifest injustice if it granted the motion and held Plaintiffs to a summary judgment  
22 standard before discovery could be completed. Plaintiffs’ argument is disingenuous for  
23 at least two reasons. First, it appears from the docket that discovery has been ongoing  
24 and contentious, both before and after Defendants filed the special motion to strike. Dkt.

25 \_\_\_\_\_  
26 <sup>3</sup> Plaintiffs’ surprise that the court would apply a standard similar to summary judgment is  
27 bewildering. Defendants’ motion specifically relied on evidence outside of the complaint and  
28 challenged plaintiff’s failure of proof.

1 # 14 (Pls. Mot. To Compel), # 56 (Pls. Mot. To Compel). Additionally, at the hearing,  
2 counsel for Plaintiffs indicated that he had available expert testimony and at least some  
3 damages information, but inexplicably failed to provide such information to the court.  
4 Plaintiffs also could have put forth a detailed declaration from Ms. Goutevenier, instead  
5 of the four sentence declaration provided that vaguely references the allegations in the  
6 complaint. Neither party has asked the court to extend discovery, the dispositive motions  
7 deadline (which is December 18, 2012), or trial. Indeed, the discovery deadline has now  
8 passed. Second, the discovery stay does not apply when a special motion to strike is filed  
9 in federal court.

10 In *Metabolife International, Inc. v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001),  
11 the court addressed whether two provisions of California’s anti-SLAPP statute conflicted  
12 with the Federal Rules of Civil Procedure or are contrary to *Erie*’s purposes. The  
13 *Metabolife* court addressed California Code of Civil Procedure subsections 425.16(f),  
14 which provides that an anti-SLAPP motion may be filed within sixty days of the filing of  
15 the complaint, and 425.16(g), which provides that the filing of anti-SLAPP motion  
16 automatically stays all further discovery until the court rules on the motion. *Id.*  
17 “Together, these two subsections ‘create a default rule that allows the defendant served  
18 with a complaint to immediately put the plaintiff to his or her proof before the plaintiff  
19 can conduct discovery.’” *Id.* (quoting *Rogers*, 57 F. Supp. 2d 973, 980 (C.D. Cal. 1999)).  
20 The court adopted a district court holding that when the expedited procedure is used in  
21 federal court to test a plaintiff’s evidence before the plaintiff has completed discovery, it  
22 conflicts with Federal Rule of Civil Procedure 56. *Id.* Quoting and adopting the district  
23 court, *Metabolife* held:

24 Section 425.16 limits discovery and makes further discovery an exception,  
25 rather than the rule. Rule 56 does not limit discovery. On the contrary, it  
26 ensures that adequate discovery will occur before summary judgment is  
27 considered.

1 Because the discovery-limiting aspects of § 425.16(f) and (g) collide with  
2 the discovery-allowing aspects of Rule 56, these aspects of subsections (f)  
3 and (g) cannot apply in federal court.

4 *Id.*

5 Here, the Act has nearly identical provisions to subsections (f) and (g). RCW  
6 4.24.525(5)(a) (“special motion to strike may be filed within sixty days of the most recent  
7 complaint”) and (5)(c) (“All discovery and pending hearings or motions in the action  
8 shall be stayed upon the filing of a special motion to strike”). Accordingly, the Ninth  
9 Circuit’s holding that the automatic stay of discovery in California’s statute does not  
10 apply in federal court applies equally to the Act. Additionally, both the Federal Rules of  
11 Civil Procedure and the Act provided Plaintiffs an avenue to file a motion requesting  
12 additional discovery if they believed they could not adequately respond to the motion.  
13 Fed. R. Civ. Proc. 56(d); RCW 4.24.525(5)(c). Plaintiffs failed to do so, and only raised  
14 the issue for the first time at the hearing, approximately 6 months after the motion was  
15 filed. Having failed to properly file a motion requesting additional discovery, the court  
16 will not entertain Plaintiffs’ belated oral request at this time.

17 **D. Act of Public Participation**

18 In order to prevail on their initial burden, Defendants must prove by a  
19 preponderance of the evidence that Ms. Cottrell’s online review of the AR Pillow was  
20 “an action involving public participation and petition.” RCW 4.24.525(2). An action  
21 involving public participation and petition includes, *inter alia*, “[a]ny oral statement  
22 made, or written statement or other document submitted, in a place open to the public or a  
23 public forum in connection with an issue of public concern . . . .” RCW 4.24.525(2)(d).

24 As a preliminary matter, Plaintiffs do not dispute whether the particular speech in  
25 this case was made in a public forum or whether the statement was written. *See Wilbanks*  
26 *v. Wolk*, 121 Cal. App. 4th 883, 897 (2004). Accordingly, the only issue the court must  
27 decide is whether the statement was made in connection with an issue of public concern.

1 Defendants contend that the online review is a matter of public concern because it  
2 is a commentary on the quality of a consumer good. Plaintiffs argue that the statements  
3 are purely commercial speech not covered by the Act, and that even if the speech was  
4 covered, the speech is not a matter of public concern.

5 With respect to Plaintiffs' argument that the statements are purely commercial  
6 speech and therefore not covered by the Act, Plaintiffs rely on the commercial speech  
7 exemption under the California law, codified in section 425.17(c). However, Washington  
8 has not codified a similar commercial speech exemption.

9 Nevertheless, preceding the enactment of section 425.17, questions arose about  
10 whether advertising statements concerning commercial products could qualify as free  
11 speech in connection with a public issue. *Metcalf v. U-Haul Int'l, Inc.*, 13 Cal. Rptr. 3d  
12 686, 689 (Cal. Ct. App. 2004) (citing *Nagel v. Twin Lab., Inc.*, 109 Cal. App. 4th 39, 134  
13 Cal. Rptr. 2d 420 (Cal. Ct. App. 2003), *Consumer Justice Ctr. v. Trimedica Int'l, Inc.*,  
14 107 Cal. App. 4th 595, 132 Cal. Rptr. 2d 191 (Cal. Ct. App. 2003), and *DuPont Merck*  
15 *Pharm. Co. v. Superior Court*, 92 Cal. Rptr. 2d 755 (Cal. Ct. App. 2000)). To correct  
16 what the legislature perceived as a "disturbing abuse of section 425.16," the legislature  
17 enacted section 425.17. *Id.*; see also 2003 Cal. Legis. Serv. Ch. 338 (S.B. 515) (West)  
18 ("This bill would provide that certain actions are not subject to a special motion to strike,  
19 as specified, including, but not limited to, any action brought solely in the public interest  
20 or on behalf of the general public, if specified conditions exist."). The pre-section 425.17  
21 cases did not hold that purely commercial speech is exempted or not covered by the  
22 statute. Rather, they address whether the commercial speech concerned a matter of  
23 public interest to bring the speech within the protection of the statute. See e.g., *Nagel*, 109  
24 Cal. App. 4th at 46-47 (analyzing whether commercial speech of a list of ingredients on a  
25 label was a matter in connection with a public issue); *Consumer Justice Ctr.*, 107 Cal.

1 App. 4th at 600-01 (analyzing whether purely commercial speech concerns a matter of  
2 public interest within the meaning of section 425.16).

3 Plaintiffs rely on three pre-section 425.17 cases for the proposition that  
4 “[s]tatements about a particular product are directed primarily at private commercial  
5 interests and do not generally involve issues that are ‘public’ concerns.” Dkt. # 46 at 3  
6 (citing *Commonwealth Energy Corp. v. Investor Data Exch., Inc.*, 110 Cal. App. 4th 26,  
7 34-35 (2003), *Nagel*, 109 Cal. App. 4th at 50-51, and *Consumer Justice Ctr.*, 107 Cal.  
8 App. 4th at 601). These three cases involved situations in which companies attempted to  
9 advance or promote their own products and services for sale to increase their own private  
10 profits. Such speech is based on the company or manufacturer’s private interest of  
11 increasing the sales of their products, not the public interest as contemplated by  
12 California’s statute and the Act.

13 The nature of Ms. Cottrell’s speech is fundamentally different here. Ms. Cottrell  
14 formed Maxwell Payton to provide information about infant health and parenting issues.  
15 Dkt. # 44 (Cottrell Decl.) ¶ 2. Her company offers infant reflux support information,  
16 reviews of infant health and safety products, and products such as foam wedge pillows  
17 that might assist others dealing with infant health issues and other problems. *Id.*  
18 Maxwell Payton does not and has never manufactured its own foam sleeping wedges. *Id.*  
19 Rather, her company offers wedges manufactured by others for sale on  
20 pollywogbaby.com. *Id.* Maxwell Payton offered the AR Pillow for sale from October  
21 2005 to December 2008, but ceased making Plaintiffs’ product available based on her  
22 concerns regarding the AR Pillow design. *Id.* Ms. Cottrell provided the following  
23 critique of the AR Pillow for potential AR Pillow consumers visiting her website:

24 The AR pillow has it's [sic] harness at the base of the wedge so your baby's  
25 head and back rest on the wedge but his bottom and legs are actually on the  
26 crib mattress. Because of this he can only be on his back in the Baby AR  
27 Pillow. All three wedges are 30 degree wedges but your baby's legs will be  
28 on the same plane as his body with the Tucker Wedge and RESQ wedge as



1           opposed to being flexed or bent on the AR Pillow. For babies with severe  
2           reflux the legs should not be flexed because that can increase refluxing. Leg  
3           flexing will also decrease oxygenation so if you have a preemie or baby  
4           with aspirational concerns be sure and get a Tucker wedge or RESQ wedge.  
5           Both the Tucker Wedge and the RESQ wedge will put your baby in a  
6           secure upright position and help reduce painful night wakings.

7           Dkt. # 1 (Compl.), Ex. 2. Here, Ms. Cottrell provides a general warning to consumers  
8           visiting her website regarding her concerns with the performance of another company's  
9           product. *See N.Y. Studio, Inc. v. Better Bus. Bureau of Alaska, Or., & W. Wash.*, Case  
10          No. C11-5012RBL, 2011 WL 2414452, at \*4 (W.D. Wash. 2011) (press release was a  
11          matter of public concern because it was a general caution to consumers, and multiple  
12          media outlets investigated the matter on their own); *see also Wilbanks*, 121 Cal. App. 4th  
13          at 899–900 (statements on consumer watchdog website critical of a broker were  
14          considered consumer protection information because they were a warning not to use  
15          broker's services and directly connected to an issue of public concern); *Paradise Hills*  
16          *Assoc. v. Procel*, 235 Cal. App. 3d 1528, 1544 (1991) (members of the public "clearly  
17          have an interest in matters which affect their roles as consumers"). The court finds that  
18          Ms. Cottrell's online product review about the quality of the AR Pillow was a matter of  
19          public concern.

20          Defendants have met their burden of showing by a preponderance of the evidence  
21          that Ms. Cottrell's online product review of the AR Pillow was a statement involving  
22          public participation and petition. Under the Act, the burden shifts to Plaintiffs to show by  
23          clear and convincing evidence a probability of prevailing on their claims of defamation  
24          and tortious interference.

#### 25          **E.     Defamation**

26          A plaintiff claiming defamation must establish four elements: (1) falsity, (2) an  
27          unprivileged communication, (3) fault, and (4) damages. *Mohr v. Grant*, 153 Wash. 2d  
28          812, 822 (2005). Plaintiffs fail to meet their burden because they have not demonstrated

1 that they can prove by clear and convincing evidence all of the required elements of their  
2 defamation claim.<sup>4</sup> Plaintiffs do not provide anything more than mere conclusions for  
3 three of the four elements, and for this reason alone, the court finds that Plaintiffs have  
4 not met their burden. Nevertheless, the court will address the first element of falsity.

5 Plaintiffs contend that the online review available on the Maxwell Payton website  
6 suggested “that babies can *only* be placed with bent legs on the AR Pillow.” Dkt. # 46 at  
7 7 (emphasis in original). However, this statement does not actually appear in the online  
8 review. Rather, the review states that the infant “can only be on his back in the Baby AR  
9 Pillow. All three wedges are 30 degree wedges but your baby's legs will be on the same  
10 plane as his body with the Tucker Wedge and RESQ wedge as opposed to being flexed or  
11 bent on the AR Pillow.” Dkt. # 1 (Compl.), Ex. 2. Regardless, Plaintiffs have not  
12 provided the court with any evidence to demonstrate the truth or falsity of the actual  
13 statements made by Defendants. Plaintiffs have failed to meet their burden by clear and  
14 convincing evidence that they would prevail on the falsity element of the defamation  
15 analysis.

16 **F. Tortious Interference with a Contract or Business Expectancy**

17 To satisfy a claim of tortious interference, Plaintiffs bear the burden of proving:

- 18 (1) the existence of a valid contractual relationship or business  
19 expectancy; (2) that defendants had knowledge of that relationship; (3) an  
20 intentional interference inducing or causing a breach or termination of the  
21 relationship or expectancy; (4) that defendants interfered for an improper  
purpose or used improper means; and (5) resultant damage.

22 *Pac. Nw. Shooting Park Ass’n v. City of Sequim*, 158 Wash. 2d 342, 351 (2006).

23 In their response to the special motion to strike, Plaintiffs contend that their  
24 tortious interference claims are rooted in Defendants’ unpermitted use of AR Pillow’s  
25 federally registered trademarks. However, in their first amended complaint, Plaintiffs’

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26 <sup>4</sup> The only evidence submitted by Plaintiffs is a declaration from Ms. Goutevenier providing five  
27 conclusory sentences.

1 tortious interference claim is rooted in “the publication of falsehood to third parties, *infra*,  
2 and/or the infringement of Plaintiffs’ trademarks.” Dkt. # 42 (First Am. Compl.) ¶ 38.

3 Regardless of the basis for Plaintiffs’ tortious interference claim, Plaintiffs simply  
4 conclude, without additional evidence, that the facts alleged in the complaint and  
5 amended complaint satisfy all the elements of tortious interference:

6 The facts alleged in the Complaint (Dkt No. 1) and the subsequent  
7 Amended Complaint (Dkt. No. 42) satisfy all of these elements. At all  
8 relevant times, AR Pillow has had valid business expectancies from their  
9 clientele, as numerous consecutive months of sustained profits had  
10 established. Declaration of Elizabeth Goutevenier. Defendant Cottrell, by  
11 virtue of her previous affiliation as a point of sale for AR Pillow, had  
12 knowledge of the relationship between AR Pillow and its clientele. Id.  
13 Defendants’ intentional, continued, and unsanctioned use of the federally-  
14 registered AR Pillow mark – as alleged (Dkt. No. 42) – has constituted their  
15 use of improper means. [These means are improper because they are  
16 unlawful under the Lanham Act].

17 Dkt. # 46 at 7. Ms. Goutevenier’s declaration merely provides conclusory  
18 sentences:

- 19 (1) At all relevant times, AR Pillow has had valid business expectancies  
20 from their clientele, as numerous consecutive months of sustained  
21 profits had established.
- 22 (2) Defendant Cottrell, by virtue of her previous affiliation as a point of sale  
23 for AR Pillow, had knowledge of the relationship between AR Pillow  
24 and its clientele.
- 25 (3) Defendants’ conduct has caused me and my business damages –  
26 specifically, Defendants [sic] interference significantly reduced  
27 revenues to AR Pillow’s business.
- 28 (4) In terms of chronology, these reductions in revenue tie strongly to  
29 Defendants’ activities as alleged in the Amended Complaint.

30 Dkt. # 48 (Goutevenier Decl.), Ex. 1 at ¶¶ 1–4. These four sentences are  
31 insufficient to meet Plaintiffs’ burden to show by clear and convincing evidence  
32 the probability of prevailing on the tortious interference claim.<sup>5</sup>

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33 <sup>5</sup> The court notes that even if it had found that Plaintiffs met their burden, the court would still  
34 find that their defamation and tortious interference claims were barred by the statute of

1 **G. Attorney’s Fees, Statutory Fees and Costs**

2 The Act provides the moving party with an award of attorney’s fees and costs,  
3 plus a statutory award of \$10,000, should the moving party prevail on the special motion  
4 to strike. RCW 4.24.525(6)(a)(i), (ii). Additional sanctions may be awarded to deter  
5 repetitive conduct. RCW 4.24.525(6)(a)(iii). However, if the court finds that the special  
6 motion to strike is frivolous or is solely intended to cause unnecessary delay, the court  
7 will award the prevailing responding party costs, attorney’s fees, and \$10,000. RCW  
8 4.24.525(6)(b).

9 The court awards the three Defendants \$10,000 each (for a total of \$30,000) in  
10 statutory fees, reasonable attorney’s fees, and costs. *See Castello v. City of Seattle*, Case  
11 No. C10-1457 MJP, 2010 WL 4857022, \*11 (W.D. Wash. 2010) (awarding \$10,000  
12 statutory fees for each defendant who was a moving party). Defendants shall submit their  
13 requests for costs and reasonable attorney’s fees within 7 days of this order. Plaintiff  
14 shall submit any response to those requests within 7 days thereafter.

15 **IV. CONCLUSION**

16 For the foregoing reasons, the court GRANTS Defendants’ special motion to  
17 strike Plaintiffs’ state law claims. Dkt. # 43. The Clerk is DIRECTED to terminate  
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20 limitations. Plaintiffs reviewed one of Ms. Cottrell’s critiques of the AR Pillow on April 2, 2008  
21 that included a critique that the “AR Pillow is designed so that your baby’s torso rests on it,  
22 while his bottom and legs extend off it and rest on the actual mattress” and that the infant “can  
23 only sleep on his back on the AR Pillow.” Dkt. # 44-4 at 3 (Cottrell Decl.) ¶ 8, Ex. 4. Plaintiffs  
24 argue that the discovery rule tolled the statute of limitations until Plaintiffs had notice that they  
25 were damaged by the review in 2011 when they learned that a customer cancelled her order for  
26 an AR Pillow based on unfavorable information she learned from Defendants’ website. The  
27 court assumes, without deciding, that the discovery rule applies to defamation and tortious  
28 interference claims. Under the discovery rule, the cause of action accrues when the plaintiff  
knew, or in the exercise of diligence should have known, the facts that give rise to the claim.  
*Parkridge Assoc., Ltd. v. Ledcor Indus., Inc.*, 113 Wn. App. 592, 608, 54 P.3d 225 (2002). The  
gravamen of Plaintiffs’ legal claims is the allegedly false statements in the review, which  
Plaintiffs had notice of on April 2, 2008. Accordingly, Plaintiffs’ claims for defamation (2-year  
statute of limitation) and tortious interference (3-year statute of limitation) are time-barred. *See*  
RCW 4.16.080; RCW 4.16.100.

1 plaintiffs' motion for extension of time and motion to strike the anti-SLAPP motion.  
2 Dkt. ## 47, 51.

3 DATED this 4<sup>th</sup> day of December, 2012.

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6 The Honorable Richard A. Jones  
7 United States District Judge  
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