Superior Court of California
Superior County of Los Angeles

JAN 25 2013

John A. Clarke, Executive Officer/Clerk

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SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

JAMES DEMETRIADES,	,	Case No.: BC484055
Plaintiff,	. ,) ATAMANA
vs.	,	
YELP, INC.,	,	RULINGS/ORDERS
Defendant.)))
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 Defendant's Special Motions to Strike are GRANTED.

Defendant's Demurrers are OFF CALENDAR.

I.

INTRODUCTION

James Demetriades ("Plaintiff") commenced action against Yelp, Inc. ("Defendant"). Plaintiff's First Amended Complaint (FAC) alleges causes of action for: (1) untrue or misleading

advertising (Bus. & Prof. C. §§17500, et seq.); and (2) unfair business practices (Bus. & Prof. C. §§17200, et seq.) Plaintiff alleges that Defendant falsely represents the efficacy and ability of its system for filtering comments and reviews.

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 Defendant filed two special motions to strike. After the filing of the first motion, Plaintiff filed a FAC. The second motion is therefore addressed to the FAC. Defendant argues that the complaints should be stricken because they target speech concerning matters of public interest and speech protected by the First Amendment. Defendant then argues that Plaintiff will not be able to establish a likelihood of prevailing on the merits because Plaintiff lacks standing, because the claims are barred by the Communications Decency Act, and because the alleged misrepresentations are mere puffery that could not have deceived a reasonable consumer.

In Opposition, Plaintiff argues that Defendant fails to comprehend that this lawsuit is concerned with misrepresentations Yelp made regarding its filter and not the comments that were posted on Yelp concerning Plaintiff's restaurants. Plaintiff then argues that the conduct at issue does not arise from a protected activity because the FAC falls within the commercial speech exception and the public interest exception. Plaintiff next argues that it can establish a probability of prevailing on the merits. Plaintiff states that

he has standing because he is the sole owner of the LLC that owns the restaurants and paid for the advertising. Plaintiff further argues that the CDA does not apply because the statements at issue are not third party statements posted on Defendant's website. Finally, Plaintiff argues that the statements are not mere puffery but instead are statements of fact, and that, even if they are opinions, they are still actionable because Defendant held itself out as an expert regarding the filtering process.

In Reply, Defendant argues that the commercial speech exception does not apply because the statements were not statements of fact, because Defendant's primary business is not selling advertising, and because the misrepresentations did not relate to the advertising. Defendant next argues that the public interest exception does not apply because Plaintiff clearly did not file this lawsuit solely for the public interest. Defendant further argues that Plaintiff lacks standing because the injury was to the LLC, not to him. Defendant further argues that the claims will also fail because they are protected by the CDA and because the statements are not actionable.

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DISCUSSION

Α. Generally

In a motion to strike under CCP §425.16, the court engages in a two-part analysis: (1) the court decides whether defendant has made a threshold showing that the challenged cause of action arises from a protected activity; and (2) if such a showing has been made, the burden then shifts to plaintiff to demonstrate a probability of prevailing on the merits of his or her claims. Equilon Enterprises, LLC v. Consumer Cause, Inc. (2002) 29 Cal.4th 53. The purpose of this statute is to respond to lawsuits that chill citizens from exercising their political rights to free speech and activities.

Arising From Prong

A defendant has the initial burdening of showing a cause of action arises from a protected activity. CCP §425.16(e)¹.

Martinez v. Metabolife Inter. Ins. (2003) 113 Cal.App.4th 181,

¹ Section 425.16(e) provides:

⁽e) As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

186; Fox Searchlight Pictures Inc. v. Paladino (2001) 89

Cal.App.4th 294, 304. Specifically, courts decide whether moving parties have made a prima facie showing that the attacked claims arise from a protected activity, including defendants' right of petition, or free speech, under a constitution, in connection with issues of public interest. Soukup v. Law

Offices of Herbert Hafif (2006) 39 Cal.4th 260, 278; Paulus v.

Bob Lynch Ford, Inc. (2006) 139 Cal.App.4th 659, 671; Equilon

Ent., supra, 29 Cal.4th at 67; Gov. Gray Davis Committee v.

Amer. Taxpayers Alliance (2002) 102 Cal.App.4th 449, 458-59;

Weil & Brown, Cal. Prac. Guide: Civ. Pro Before Trial (The Rutter Group 2006) ¶7:244.1; CCP \$425.16(e).

In determining whether the burden has been satisfied, "the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." Brill Media Co., LLC v. TCW Group, Inc. (2005) 132 Cal.App.4th 324, 329. Moving parties can satisfy their burden by showing (1) statements made before legislative, executive or judicial proceedings, or made in connection with matters being considered in such proceedings, or (2) statements made in a public forum, or other conduct in furtherance of the exercise of the constitutional rights of petition or free speech, in connection with issues of public interest. CCP \$425.16(e); Equilon Ent., supra, 29 Cal.4th at 66. The motion must be

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supported by declarations stating facts upon which the liability or defense is based. CCP §425.16(b).

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Defendant met its initial burden in establishing that the alleged statements and alleged misrepresentations arise from a protected activity. Statements regarding the filtering of reviews on a social media site such as yelp.com are matters of public interest and are therefore protected. A public interest involves more than mere curiosity, a broad and amorphous interest, or private information communicated to a large number of people, and instead concerns a substantial number of people, some closeness between the statements and the public interest, and a focus upon the communications as being the interest and not upon a private controversy. McGarry v. Univ. Of San Diego (2007) 154 Cal.App.4th 97, 110. "Consumer information ..., at least when it affects a large number of persons, also generally is viewed as information concerning a matter of public interest." Wilbanks v. Wolk (2004) 121 Cal.App.4th 883, 898. The statements were also made in a public forum. Barrett v. Rosenthal (2006) 40 Cal.4th 33, 41 n.4 ("Web sites accessible to the public ... are 'public forums' for purposes of the anti-SLAPP statute.")

Plaintiff's opposition does not discuss whether the alleged statements qualify as protected speech concerning a matter of public interest pursuant to CCP §425.16. Instead, Plaintiff

argues that the protections of the anti-SLAPP statute do not apply because of the commercial speech exception and public interest exception found in CCP §425.17. "The burden of proof as to the applicability of the commercial speech exemption, therefore, falls on the party seeking the benefit of it—i.e., the plaintiff." Simpson Strong-Tie Company, Inc. v. Gore (2010) 49 Cal.4th 12, 26.

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The commercial speech exception in CCP §425.17(c) provides:

Section 425.16 does not apply to any cause of action brought against a person primarily engaged in the business of selling or leasing goods or services, including, but not limited to, insurance, securities, or financial instruments, arising from any statement or conduct by that person if both of the following conditions exist:

- (1) The statement or conduct consists of representations of fact about that person's or a business competitor's business operations, goods, or services, that is made for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services, or the statement or conduct was made in the course of delivering the person's goods or services.
- (2) The intended audience is an actual or potential buyer or customer, or a person likely to repeat the statement to, or otherwise influence, an actual or potential buyer or customer, or the statement or conduct arose out of or within the context of a regulatory approval process, proceeding, or investigation, except where the statement or conduct was made by a telephone corporation in the course of a proceeding before the California Public Utilities Commission and is the subject of a lawsuit brought by a competitor, notwithstanding that the conduct or statement concerns an important public issue.

"Code of Civil Procedure section 425.17, subdivision (c), simply does not provide... that every case arising from statements uttered by a commercial enterprise are exempted from the anti-SLAPP statute's purview." Mendoza v. ADP Screening and Selection Services, Inc. (2010) 182 Cal.App.4th 1644, 1652.

As recently stated by the Court of Appeals, the commercial special exception requires establishing all of the following elements:

Section 425.17, subdivision (c) exempts a cause of action arising from commercial speech from the anti-SLAPP law when '(1) the cause of action is against a person primarily engaged in the business of selling or leasing goods or services; (2) the cause of action arises from a statement or conduct by that person consisting of representations of fact about that person's or a business competitor's business operations, goods, or services; (3) the statement or conduct was made either for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services or in the course of delivering the person's goods or services; and (4) the intended audience for the statement or conduct meets the definition set forth in section 425.17[, subdivision] (c)(2) [i.e., an actual or potential buyer or customer, or a person likely to repeat the statement to, or otherwise influence, an actual or potential buyer or customer].'

Hawran v. Hixson (2012) 209 Cal.App.4th 256, 270, citing Simpson Strong-Tie, supra, 49 Cal.4th at 30. "The commercial speech exemption, like the public interest exemption, 'is a statutory exception to section 425.16' and 'should be narrowly construed.'" Simpson Strong-Tie, supra, 49 Cal.4th at 22.

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Plaintiff failed to show that the commercial speech exception applies. Even if Plaintiff has met its burden to establish that Defendant is primarily engaged in the business of selling advertising, Plaintiff failed to show that the alleged misrepresentations arise from a statement of fact about that business's operations, goods, or services. First, the alleged misrepresentations concern the filtering process for reviews and do not relate to the selling of advertising. Second, Plaintiff failed to show that the alleged misrepresentations are statements of fact instead of opinions and puffery. A review of the statements² shows that these are typical representations made by a business about its product and are not actionable representations of fact. Each statement includes subjective language ("most trusted", "remarkable filtering process", "most trustworthy", "most established sources", "less trustworthy", "rest assured", "most unbiased and accurate information you will be able to find", "always working to do as good a job as possible"). These statements cannot be considered statements of fact sufficient to invoke the commercial speech exception because they are simply not misrepresentations of fact.

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 $^{^2}$ The five alleged misrepresentations are discussed in the Opposition at 6:12 - 7:14.

Plaintiff also argues that the public interest exception of CCP \$425.17(b) applies. That section states:

Section 425.16 does not apply to any action brought solely in the public interest or on behalf of the general public if all of the following conditions exist:

- (1) The plaintiff does not seek any relief greater than or different from the relief sought for the general public or a class of which the plaintiff is a member. A claim for attorney's fees, costs, or penalties does not constitute greater or different relief for purposes of this subdivision.
- (2) The action, if successful, would enforce an important right affecting the public interest, and would confer a significant benefit, whether pecuniary or nonpecuniary, on the general public or a large class of persons.
- (3) Private enforcement is necessary and places a disproportionate financial burden on the plaintiff in relation to the plaintiff's stake in the matter.

"Section 425.17(b)'s exception applies only to actions brought 'solely in the public interest or on behalf of the general public.' Use of the term 'solely' expressly conveys the Legislative intent that section 425.17(b) not apply to an action that seeks a more narrow advantage for a particular plaintiff. Such an action would not be brought 'solely' in the public's interest. The statutory language of 425.17(b) is unambiguous and bars a litigant seeking 'any' personal relief from relying on the section 425.17(b) exception." Club Members For An Honest Election v. Sierra Club (2008) 45 Cal.4th 309, 316-17. "Suits

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motivated by personal gain are not exempted from the anti-SLAPP motion." <u>Blanchard v. DIRECTV, Inc.</u> (2004) 123 Cal.App.4th 903, 916.

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Plaintiff failed to show that the public interest exception applies because this action is not brought solely in the public interest. Plaintiff's own opposition establishes his intense personal interest in this case because Plaintiff's claims were spurred in part by negative reviews posted by an anonymous user and the filtering of allegedly proper reviews. Plaintiff repeatedly states that he has a significant financial interest in these same restaurants whose reviews have been negatively affected by Yelp's filter. Indeed, Plaintiff seeks an injunction enjoining defendants from "filtering reviews of Users of the Yelp website while falsely advertising to the public that the unfiltered reviews posted on the Yelp website are fair, trustworthy or unbiased." FAC prayer, ¶2b. This prayer shows that Plaintiff's claims are not based solely on the public interest because Plaintiff himself has shown that he has an intensely personal and financial interest in the review filtering process and its resultant reviews for his own restaurants. Therefore, the public interest exception does not apply.

As such, for the above reasons, Defendant met its initial burden in establishing that the protection of CCP \$425.16 apply.

C. Probability of Success on the Merits

If moving parties successfully have shifted the burden, then opposing parties must demonstrate a probability of prevailing on the merits of the complaint. Equilon Ent., supra, 29 Cal.4th at 67; Matson v. Dvorak (1995) 40 Cal.App.4th 539, 548; §425.16(b)(1). To establish such a probability, a plaintiff must demonstrate that the complaint is both legally sufficient and supported by a prima facie showing of facts, which, if credited by the trier of fact, is sufficient to sustain a favorable judgment. Morrow v. Los Angeles Unified School Dist. (2007) 149 Cal.App.4th 1424, 1435; Navellier v. Sletten (2002) 29 Cal.4th 82, 88; Gilbert v. Sykes (2007) 147 Cal.App.4th 13, 31 (complaint must not be vulnerable to a successful demurrer). Hence, the evaluation includes reviews of the pleadings and moving and opposing declarations. Equilon Ent., supra, 29 Cal.4th at 67; CCP §425.16(b)(2). "The prima facie showing of merit must be made with evidence that is admissible at trial." Salma v. Capon (2008) 161 Cal.App.4th 1275, 1289.

"[A]n action may not be dismissed under this statute if the plaintiff has presented admissible evidence that, if believed by the trier of fact, would support a cause of action against the defendant." Taus v. Loftus (2007) 40 Cal.4th 683, 729. "The plaintiff need only establish that his or her claim has 'minimal

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merit'...to avoid being stricken as a SLAPP." Soukup v. Law

Offices of Herbert Hafif (2006) 39 Cal.4th 260, 291. Further, a
plaintiff need not address all alleged theories in order to show
that a cause of action has some merit. A.F. Brown Electrical

Contractor, Inc. v. Rhino Elec. Supply, Inc. (2006) 137

Cal.App.4th 1118, 1124. The opposing parties' burden as to an
anti-SLAPP motion is like that of a party opposing a motion for
summary judgment. See, e.g., DaimlerChrysler Motors Co. v. Lew

Williams, Inc. (2006) 142 Cal.App.4th 344, 352. Additionally,
whether complainants have satisfied their burden is a question
of law. Wilson v. Parker, Covert & Chidester (2002) 28 Cal.4th
811, 821.

Plaintiff failed to show that he has a probability of prevailing on the merits because Plaintiff has failed to show that he has standing and because the alleged misrepresentations that form the basis for his claims under the unfair business practices and unfair advertising statutes are opinions and puffery. The elements of a cause of action for false advertising are: (1) defendant intended to dispose of real or personal property or perform services; and (a) defendant publicly disseminated advertising containing an untrue or misleading statement; (b) defendant knew, or should have known, it was untrue or misleading; and (c) it concerned the real or personal property or services or their disposition or

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performance; or defendant publicly disseminated advertising with the intent not to sell the property or services at the price stated or as advertised. Bus. & Prof. C. §17500; William L. Stern, Bus. & Prof. C. §17200 Practice (The Rutter Group 2006) The elements of a cause of action for unfair business practices are: (1) a business practice; (2) that is unfair, unlawful or fraudulent; and (3) authorized remedy. Bus. & Prof. Code \$17200; Paulus v. Bob Lynch Ford, Inc. (2006) 139 Cal.App.4th 659, 676; Cruz v. PacifiCare Health Systems, Inc. (2003) 30 Cal.4th 303, 317 (damages cannot be recovered, but instead injunctive relief and restitution compelling defendant 12 to return money); William L. Stern, Bus. & Prof. C. \$17200 Practice (The Rutter Group 2005) ¶7:116 et seq.; 5 Witkin, California Pro. (4th ed. 1997) Pleading, §§735. 15 16 Consumer Advocates v. Echostar Satellite Corp. (2003) 113 Cal.App.4th 1351, 1362 (to be actionable unfair business 18 practices, representations must be likely to deceive a 19 reasonable consumer, and not akin to puffing). 20

"Proposition 64, which amended Business and Professions Code section 17204 to provide that a private individual has standing to assert a claim under the UCL only if he or she 'has suffered injury in fact and has lost money or property as a result of such unfair competition.'" Buckland v. Threshold Enterprises, Ltd. (2007) 155 Cal.App.4th 798, 812. "Proposition

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64 amended the unfair competition law to provide that a private plaintiff may bring a representative action under this law only if the plaintiff has 'suffered injury in fact and has lost money or property as a result of such unfair competition " Superior Court (2009) 46 Cal. 4th 969, 978. Under the UCL, an "'injury in fact' [is a]...'distinct and palpable injury' suffered 'as a result of the defendant's actions.' Alternatively, ... another definition of 'injury in fact' [is] as 'an invasion of a legally protected interest which is (a) concrete and particularized; and (b) 'actual or imminent, not conjectural or hypothetical." Peterson v. Cellco Partnership (2008) 164 Cal.App.4th 1583, 1590. See also Hall v. Time Inc. (2008) 158 Cal.App.4th 847, 854-55 ("[A] plaintiff suffers an injury in fact for purposes of standing under the UCL when he or she has: (1) expended money due to the defendant's acts of unfair competition; (2) lost money or property; or (3) been denied money to which he or she has a cognizable claim.") [citations omitted].

Similarly, Plaintiff must also allege that she has lost money or property as a result of such unfair competition. As stated recently by the Supreme Court:

There are innumerable ways in which economic injury from unfair competition may be shown. A plaintiff may (1) surrender in a transaction more, or acquire in a transaction less, than he or she otherwise would have; (2) have a present or future property interest diminished; (3) be deprived of money or property to which he or she has a cognizable claim; or (4) be

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required to enter into a transaction, costing money or property, that would otherwise have been unnecessary. Kwikset Corp. v. Superior Court (2011) 51 Cal.4th 310, 323.

"Every action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute." CCP §367. Plaintiff filed this lawsuit in his own name. However, as established in Plaintiff's own opposition, the costs incurred in advertising with Defendant were incurred by Multiversal, LLC, which owns Rafters and Red Lantern, the two restaurants in question. Plaintiff attempts to argue that, because he is the sole owner of Multiversal, LLC, he has sufficient standing because he lost money because the LLC lost money. However, Plaintiff's argument essentially seeks to ignore the separate corporate identity of the LLC. ""A limited liability company is a hybrid business entity formed under the Corporations Code and consisting of at least two 'members' [citation] who own membership interests [citation]. The company has a legal existence separate from its members. provides members with limited liability to the same extent enjoyed by corporate shareholders [citation], but permits the members to actively participate in the management and control of the company [citation]." PacLink Communications Intern., Inc. v. Superior Court (2001) 90 Cal.App.4th 958, 963, citing 9 Witkin, Summary of Cal. Law (2001 supp.) Corporations, \$43A, p. 346. "[T]he principles of derivative lawsuits applicable to

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Corporations likewise apply to a limited liability company."

PacLink Communications Intern., Inc., supra, 90 Cal.App.4th at

963. See also California Corporations C. §17300.

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"Ignoring a corporation's separate existence is a rare occurrence, particularly where it is the shareholders who seek to pierce its veil, and the courts will do so only 'to prevent a grave injustice. [Citations.]'" Seretti v. Superior Nat. Ins. Co. (1999) 71 Cal.App.4th 920, 931. "Individuals are free to operate their business in their own names and accept all its debts and liabilities as their own. Having elected to avail themselves of the benefits of the corporate structure... they cannot be heard to complain of their inability to take personal advantage of a right belonging to the corporation alone." Id. "[T]he individual shareholder may not bring an action for indirect personal losses (i.e., decrease in stock value) sustained as a result of the overall harm to the entity." Bader v. Anderson (2009) 179 Cal.App.4th 775, 788. This prohibition also extends to claims for damages resulting from lost corporate profits:

Because corporate profits belong to the corporation, and not to its shareholders individually, lost profits are an "'injury to the corporation, or to the whole body of its stock'" (Jones v. H.F. Ahmanson & Co., [(1969) 1 Cal.3d 93, 106]) and therefore are derivative in nature. When corporate lost profits are sought as damages, the gravamen of the complaint is injury to the corporation, not injury to an individual shareholder.

Sole Energy Co. v. Petrominerals Corp. (2005) 128 Cal.App.4th 212, 232.

The injury allegedly suffered in this case - expending money to advertise on Yelp's website due to Defendant's false and misleading advertising - are injuries to the LLC, not to Plaintiff. "Because members of the LLC hold no direct ownership interest in the company's assets (Corp. Code, §17300), the members cannot be directly injured when the company is improperly deprived of those assets." PacLink Communications Intern., Inc., supra, 90 Cal.App.4th at 964. The injury is therefore derivative in nature and was only to the LLC. such, Plaintiff has no standing as an individual because he has suffered no separate and individual injury in fact or lost Therefore, his claims fail.

Second, the claims fail because the allegations do not include misrepresentations of fact. To be actionable unfair business practices, representations must be likely to deceive a reasonable consumer, and not akin to puffing. Consumer Advocates, supra, 113 Cal.App.4th at 1362. As discussed above, the alleged misrepresentations are puffery and opinions about the filter and its results and not representations of fact. They are "boasts, all-but-meaningless superlatives," and "claim[s] which no reasonable consumer would take as anything

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24 : 25, 1 i jinar أمج more weighty than an advertising slogan." Id. at 1361. As such, the statements cannot be actionable because the statements were not likely to deceive a reasonable consumer.

Therefore, for the above reasons, Plaintiff failed to show that he has a probability of prevailing on the merits.

III.

CONCLUSION

Based upon the foregoing, the court orders that:

- 1) Defendant's Special Motions to Strike are GRANTED.
- 2) Defendant's Demurrers are OFF CALENDAR.

MOVING PARTY TO GIVE NOTICE TO ALL PARTIES.

NON-COMPLIANCE WITH ANY ORDER HEREIN SHALL EXPOSE THE NON-COMPLIANT PARTY AND/OR COUNSEL TO ANY SANCTIONS AUTHORIZED BY LAW.

IT IS SO ORDERED.

DATED: January 24, 2013