UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 10-01360 SVW (PJWx)	Date	May 4, 2011
Title	Asia Economic Institute v. Xcentric Ventures LLC, et al.		

JS-6

Present: The Honorable	STEPHEN V. WILSON, U.S. DISTRICT JUDGE	
Paul M. Cruz	N/A	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
N/A	N/A

Proceedings: IN CHAMBERS ORDER re GRANTING Defendant's Motion for Summary Judgment [145]; DENYING Defendants' Motions for Sanctions [157, 158]; DENYING Defendants' Special Motion to Strike [154]; and DENYING Plaintiff's Rule 56(f) Motion [173]

I. INTRODUCTION AND PROCEDURAL BACKGROUND

Plaintiffs Asia Economic Institute, LLC ("AEI") and its principals, Raymond Mobrez and Iliana Llaneras (collectively "Plaintiffs") brought this action on January 27, 2010. The case was removed to this Court in February 2010 on the grounds of both federal question and diversity jurisdiction. Plaintiffs generally allege that Defendants Xcentric Ventures, LLC ("Xcentric"), Bad Business Bureau, LLC, and Edward Magedson (collectively "Defendants") own and operate a website at www.RipoffReport.com ("Ripoff Report") and that defamatory comments regarding Plaintiffs were posted on the website. Plaintiffs assert several claims arising out of these allegedly defamatory posts and Defendants' conduct related thereto, including: (1) violation of 18 U.S.C. § 1962(c) – civil RICO; (2) violation of 18 U.S.C. § 1962(d) – RICO conspiracy; (3) unfair business practices under Cal. Bus. & Prof. Code § 17200 *et seq.*; (4) defamation; (5) defamation per se; (6) false light;[1] (7) intentional interference with prospective economic relations; (8) negligent interference with prospective economic relations; (9) negligent interference with economic relations; (10) injunction; (11) deceit; and (12) fraud.[2] Plaintiffs' claims

[1] False light is not listed on the front of the Complaint, but it is listed on page 73 as a Sixth Cause of Action.

[2] The numbers listed here reflect the numbers and causes of action listed by Plaintiffs in the body of their

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under RICO have previously been rejected by the Court or dropped by Plaintiffs. The operative complaint is Plaintiffs' First Amended Complaint (the "Complaint").

Defendants filed a Motion for Summary Judgment as to the remaining claims on September 27, 2010 ("the Motion"). Defendants also filed a Special Motion to Strike (which included anti-SLAPP allegations) and two separate Motions for Sanctions Pursuant to Fed. R. Civ. P. 11. While Plaintiffs did not file a formal opposition brief to Defendants' summary judgment Motion, they did file a Request for Judicial Notice in Opposition to Defendants' Motion for Summary Judgment on October 4. Plaintiffs also filed two timely declarations on October 4. Subsequently, Plaintiffs filed an additional untimely declaration on October 5 with several exhibits attached. Plaintiffs also filed an untimely Statement of Genuine Issues in Support of Plaintiff's Opposition to Summary Judgment as to Entire Case on October 6. The Court has considered all of these filings in deciding the motions at bar.

On the morning of November 1, 2010, two hours before the motion hearing, Plaintiffs filed a Motion Under Rule 56(f) To Deny or to Continue Defendants' Motion for Summary Judgment to Conduct Further Discovery. Defendants' included an additional Cross-Motion for Sanctions in their Opposition to the 56(f) Motion.

Having read and considered the parties' briefing, the evidence submitted therewith, and the parties' oral arguments, and for the reasons stated below, Motion for Summary Judgment is GRANTED. Defendants' first two Motions for Sanctions are DENIED. Defendants' Cross-Motion for Sanctions is also DENIED. Plaintiffs' Motion Under Rule 56(f) is DENIED. Defendants' Special Motion to Strike is DENIED.

II. FACTUAL BACKGROUND[3]

The facts of this case were extensively discussed in the Court's July 19, 2010 Order Granting in Part Defendant's Motion for Summary Judgment as to the Rico Claims. The following is intended to supplement the factual record. The following material facts are undisputed unless otherwise noted.

Plaintiff Asia Economic Institute ("AEI") is owned and operated by its principals, Plaintiffs Raymond Mobrez and his wife Iliana Llaneras. (Plaintiff's Statement of Genuine Issues [hereinafter "PSGI"] ¶ 3). The company operated as a free, on-line, non-governmental publication of current news and events. (Declaration of Raymond Mobrez, dated May 3, 2010, ¶ 2). At the times relevant to this

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Complaint, not the front page, which fails to mention the false light claim and numbers the claims differently.

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This factual summary is intended to provide context for the parties' dispute and is not meant to constitute factual findings or a ruling on the parties' evidentiary disputes.

lawsuit, AEI was planning to produce seminars and conferences, and was considering selling memberships to some of those programs. However, AEI never actually produced any seminars. During its nine years in operation, AEI did not have any revenues. AEI ceased all business operations in June 2009.

Xcentric operates the Ripoff Report website, which started in 1998. (PSGI ¶¶ 1-2). Edward Magedson is the founder and manager of Xcentric and the "ED"itor of the website. The website is a consumer reporting website where third party consumers can document complaints about companies or individuals. Magedson contends that the Ripoff Report is the leading complaint reporting website on the Internet. (Magedson Decl., dated May 24, 2010, ¶ 2). The posting service is free to use – the Ripoff Report does not charge users who create reports, viewers who read reports, or persons who post comments or rebuttals to the reports. (Id. ¶ 4).

If an author wants to submit a report on the Ripoff Report website, he must first create a free user account. (Smith Decl. ¶ 4). Users are required to provide their names, addresses, phone numbers, and other information. (Id.). The user is then required to provide an email address, which the server automatically confirms by sending an email to that address prior to allowing the user to post a complaint. (Id.). To draft a report, users are guided through a process. First, the user must input certain information about the company they are reporting about, including the company's name, address, and phone number. (PSGI ¶ 11). Next, the user is asked to create a "report title" by filing out a series of four boxes into which the user can enter (a) the company name; (b) "descriptive words" explaining what the report is about; (c) the city where the company is located, and (d) the state where the company is located. (Id. ¶ 12). Plaintiffs allege that these titles are not solely prepared by the third party user because "Defendants combine certain elements furnished by the contributor with a code written by the Defendants to create the title." (Id.). Next, users are presented with a blank box in which they can add the substantive text of their complaint/report. Generic style guidelines are included, such as "DO NOT use ALL CAPITAL LETTERS," "DO NOT sign your name, or include any e-mail addresses in the report," and "The more information you provide, the better." (Id. ¶¶ 11, 16). However, the page does not encourage, solicit, or instruct users with respect to the substance of their message. Finally, users are asked to review the Terms of Service, which require the users to (among other things) refrain from posting anything false or defamatory. (Id. ¶ 17).

Finally, when a report is submitted to the Ripoff Report website, Xcentric's servers automatically combine the unique text supplied by the author with various HTML code. (Id. ¶ 18).[4]

[4] Plaintiffs dispute whether this process is "automatic." They argue that "For members of the Corporate Advocacy Program and subjects that have entered into private agreements with defendants, Defendants have offered to and will manually insert 250 to 350 words chosen by the subject into the title meta tag of the HTML for the Report in a way that changes the Google search results." Id. Even if Plaintiffs' allegations are true, this would not alter the analysis. Furthermore, Plaintiffs here did not enter the CAP.

During this process, and using keywords supplied by the author in the text of the report (such as the name of the company being reported), Xcentric's servers automatically create "meta tags," which are used by search engines such as Google and Yahoo to index the contents of the specific page at issue. (Id. ¶ 19). Xcentric's servers also automatically include three different keywords – rip-off, ripoff, rip off – into the meta tags of every page on the website. (Id. ¶ 23). The meta tags are not visible in the title or body of a report; they are indexing references used by search engines in order to reflect the source of the indexed page. (Id. ¶¶ 20, 24). However, individuals with basic technical knowledge who choose to view the actual HTML code for a report's webpage can view the meta tags that are used for indexing purposes. (Id. ¶ 20).

Members of the Ripoff Report's Corporate Advocacy Program ("the CAP"), which AEI was not, receive preferential treatment. For example, negative reports about CAP members are less prominent in internet searches. (Id. ¶ 19). In order to join the CAP, a company must pay a fee to Xcentric; however, non-members may respond to a report if they create a free account with the Ripoff Report website.[5]

C. Reports About AEI

Generally, the reports written about Plaintiffs purport to be written by former employees of AEI and state that AEI is a bad place to work. (See Gingras Decl. Ex. A). Among other things, the reports state the following: "They reduce pay illegally;" "Complete disorganization;" "[T]hey have no idea to [sic] run any business and just continue to ruin people's lives . . .;" "[O]nce you start working, nothing ever gets done. . . . There are a couple of theories that could explain this paradox. One is that they are laundering money . . .;" "They treat their employees like dirt;" "Asia Economic Institute it's a SCAM;" and "They routinely ignore employment laws." (Id.). The reports also call into question whether Mobrez's stated credentials are accurate and state that Mobrez hires and fires on the basis of race, religion and gender. (Id.). Other more innocuous comments include that Mobrez and Llaneras are "boring," "crazy," and "secretly married." (Id.).

The six reports about Plaintiffs were created by third parties, not by Defendants Magedson or Xcentric.[6] (PSGI ¶ 5). Before the reports were posted on the site, each report was reviewed by one of

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There are no disputes as to the procedures involving non-CAP members, including Plaintiffs.

[5] Plaintiffs contend that "Subjects cannot always post rebuttals." (Id. ¶ 63). However, Plaintiffs acknowledge that they themselves were able to file a free rebuttal. Thus, whether third parties faced difficulties filing rebuttals is immaterial.

[6] Plaintiffs dispute this fact, alleging that: "Defendants have not yet disclosed the identity of the posters. (PSGI ¶ 5). Defendants have declared that they did not create the reports, and Plaintiffs have not come forward with any evidence rebutting that assertion. Thus, the Court accepts as undisputed the testimony of Magedson, Craven, Thompson, and Jordan that they did not create the reports at issue. Nor have Plaintiffs identified any source of relevant evidence to the contrary in their Motion Under Rule 56(f).

Xcentric's staff of content monitors. (Id. ¶ 6). Ripoff Report's servers automatically create a log showing the identity of each content monitor who reviewed the reports about AEI before they were posted. (Id. ¶ 7). The reports in question were reviewed by Amy Thompson, Kim Jordan, and Linda Craven. All three witnesses have submitted undisputed declarations stating that they did not create or alter any part of these reports about AEI. (Thompson Decl. ¶ 7; Jordan Decl. ¶ 7; Craven Decl. ¶ 7).

D. Communications Between the Parties Regarding the AEI Reports

Plaintiffs and Defendants had several communications in which they discussed the reports at issue in this case. Their exchange is largely summarized in the Summary Judgement Order issued on July 19, 2010. Generally, Defendants refused in these conversations to remove the objectionable reports despite repeated requests by Plaintiffs to do so. Defendants informed Plaintiffs that they never remove reports as a matter of company policy. Defendants also suggested that Plaintiffs file a free rebuttal, which Plaintiffs did. (PSGI ¶ 28).

III. SUMMARY JUDGEMENT LEGAL STANDARD

Rule 56(c) requires summary judgment for the moving party when the evidence, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); Tarin v. County of Los Angeles, 123 F.3d 1259, 1263 (9th Cir. 1997).

The moving party bears the initial burden of establishing the absence of a genuine issue of material fact. See Celotex Corp v. Catrett, 477 U.S. 317, 323-24 (1986). The moving party may satisfy its Rule 56(c) burden by "'showing' -- that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case." Celotex, 477 U.S. at 325. The moving party bears the burden of affirmatively establishing all elements of its legal claim. See Southern Cal. Gas Co. v. City of Santa Ana, 336 F.3d 885 (9th Cir. 2003) (per curiam) (adopting District Court order as its own); see also Fontenot v. Upjohn Co., 780 F.2d 1190, 1194 (5th Cir. 1986) ("[I]f the movant bears the burden of proof on an issue, either because he is the plaintiff or as a defendant he is asserting an affirmative defense, he must establish beyond peradventure *all* of the essential elements of the claim or defense to warrant judgment in his favor.") (emphasis in original).

Once the moving party has met its initial burden, Rule 56(e) requires the nonmoving party to go beyond the pleadings and identify specific facts that show a genuine issue for trial. See id. at 323-24; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A scintilla of evidence or evidence that is

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Plaintiffs also alleges that "Defendants create portions of the title and all the HTML computer code . . . that influences Google Search Results for the Reports." (Id.). This allegation is discussed in greater detail *infra*.

merely colorable or not significantly probative does not present a genuine issue of material fact. Addisu v. Fred Meyer, 198 F.3d 1130, 1134 (9th Cir. 2000). Only genuine disputes "where the evidence is such that a reasonable jury could return a verdict for the nonmoving party" over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. See Anderson, 477 U.S. at 248.

Under Local Rules 56-2 and 56-3, these triable issues must be identified in the non-moving party's "Statement of Genuine Issues" and supported by "declaration or other written evidence." If the non-moving party fails to identify the triable issues of fact, the court must treat the moving party's evidence as uncontroverted. Local Rule 56-3; see also International Longshoremen's Ass'n, AFL-CIO v. Davis, 476 U.S. 380, 398 n.14 (1986) ("[I]t is not [the Court's] task *sua sponte* to search the record for evidence to support the [parties'] claim[s]."); Carmen v. San Francisco United School District, 237 F.3d 1026, 1029 (9th Cir. 2001) ("A lawyer drafting an opposition to a summary judgment motion may easily show a judge, in the opposition, the evidence that the lawyer wants the judge to read. It is absurdly difficult for a judge to perform a search, unassisted by counsel, through the entire record, to look for such evidence.").

IV. SUMMARY JUDGMENT DISCUSSION

A. Claims (4), (5), (6), (7), (8), (9) and (10)

The majority of the claims in this suit implicate the Communications Decency Act, 47 U.S.C. § 230 (the "CDA"). The CDA provides that "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). The CDA was considered important enough for Congress to specify that "No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. § 230(e)(3). As explained by the Ninth Circuit, through the CDA "Congress granted most Internet services immunity from liability for publishing false or defamatory material so long as the information was provided by another party." Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1122 (9th Cir. 2003).

"The majority of federal circuits have interpreted the CDA to establish broad 'federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of a service.'" Almeida v. Amazon.com, Inc., 456 F.3d 1316, 1321 (11th Cir. 2006) (quoting Zeran v. American Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997)). This broad approach was discussed by the Ninth Circuit in Fair Housing Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1174–75 (9th Cir. 2008) (en banc).

We must keep firmly in mind that this is an immunity statute we are expounding, a

> provision enacted to protect websites against the evil of liability for failure to remove offensive content. Websites are complicated enterprises, and there will always be close cases where a clever lawyer could argue that something the website operator did encouraged the illegality. Such close cases, we believe, must be resolved in favor of immunity, lest we cut the heart out of section 230 by forcing websites to face death by ten thousand duck-bites, fighting off claims that they promoted or encouraged-or at least tacitly assented to-the illegality of third parties. Where it is very clear that the website directly participates in developing the alleged illegality . . . immunity will be lost. But in cases of enhancement by implication or development by inference … section 230 must be interpreted to protect websites not merely from ultimate liability, but from having to fight costly and protracted legal battles.

Id.

Whether Defendants are shielded from liability by the CDA is at the heart of this case. The Court notes that this very issue has been litigated by several district courts to date, where nearly identical allegations against Xcentric (and Magedson where applicable) based on Ripoff Report postings have been barred under the CDA. See GW Equity, LLC v. Xcentric Ventures, LLC, 2009 WL 62173 (N.D. Tex. 2009); Intellect Art Multimedia, Inc. v. Milewski, 2009 WL 2915273 (N.Y. Sup. 2009); Whitney Info. Network Inc. v. Xcentric Ventures, LLC, 2008 WL 450095 (M.D. Fla. 2008); Global Royalties, Ltd. v. Xcentric Ventures, LLC, 544 F. Supp. 2d 929 (D. Ariz. 2008). The Court also finds that the CDA applies to Defendants here.

The relevant inquiry is whether Defendants are "information content providers" under the statute. The CDA defines an "information content provider" as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." 47 U.S.C. § 230(f)(3). If an interactive computer service does not function as an information content provider with regard to the statements underlying the lawsuit, that service is entitled to immunity under the CDA. Carafano, 339 F.3d at 1123. In this case, the purportedly defamatory statements in question are the six reports disparaging Plaintiffs that appeared on Defendants' website. These reports underlie the majority of Plaintiffs' claims.

As outlined above, the content that appears on the website originates with the site's users (the third parties who write and submit the reports), not the site itself. The content of the reports was prepared solely by the user. It is undisputed that the only advice that Defendants offer to users is generic and stylistic in nature. More specifically, users are only instructed, "DO NOT use ALL CAPITAL LETTERS," "DO NOT sign your name, or include any e-mail addresses in the report," and "The more information you provide, the better." (Id. ¶¶ 11, 16). As a matter of law, these statements can not amount to encouragement, solicitation, or instruction to say anything in particular that might warrant labeling Defendants as "information content providers." See Carafano, 339 F.3d at 1124-25 (concluding

defendant was immune, even though "the content was formulated in response" to its questionnaire).

The users who wrote the report in question all allege to be former employees of Plaintiffs or interviewees of Plaintiffs. (See Gingras Decl. Ex. A). All three of the Ripoff Report website's content monitors who reviewed the relevant reports about AEI before they were posted have submitted unrefuted declarations stating that they did not create or alter any part of these reports about AEI. (Thompson Decl. ¶ 7; Jordan Decl. ¶ 7; Craven Decl. ¶ 7).

Plaintiffs do not contend that Defendants were the primary creators of the disputed reports' content in the traditional sense. Rather, Plaintiffs contend that Defendants alter the reports by creating various HTML coding for all the pages on the site and also by modifying the reports' titles.

With regard to the HTML coding, Defendants add indexing tags incorporating variations of Defendants' "Ripoff" trademark to the coding "in order to accurately reflect the source of the indexed page." (PSGI ¶ 23). Plaintiffs contend that such indexing has the effect of making the reports "highly visible and influential in Google search results" despite the fact that they are not visible in the title or body of the reports themselves. (Id. ¶ 24). Plaintiffs fail to cite any authority that increasing the prominence of a page in internet searches amounts to "creation or development of information" that would render Defendants "information content providers" under the CDA. The very purpose of consumer reports such as the Ripoff Report website is to provide accessibility to the public on a grand scale. Increasing the visibility of a statement is not tantamount to altering its message. This holding is bolstered by the Ninth Circuit's en banc opinion in Roommates.com, 521 F.3d at 1174–75. The Ninth Circuit asserted that "in cases of enhancement by implication or development by inference … section 230 must be interpreted to protect websites." Id. At best, increasing the visibility of a website in internet searches amounts to "enhancement by implication," which is insufficient to remove Defendants from the ambit of the CDA. Absent a changing of the disputed reports' substantive content that is visible to consumers, liability cannot be found. See also Black v. Google Inc., 2010 WL 3222147, at *3 (N.D. Cal. Aug. 13, 2010 ("Plaintiffs make no allegations that suggest any sponsorship or endorsement of the comment by Defendant. Even if they did, Defendant would remain entitled to immunity."); Goddard v. Google, Inc., 640 F.Supp.2d 1193, 1196 (N.D. Cal. 2009) ("a website operator does not become liable as an 'information content provider' merely by 'augmenting the content [of online material] generally.'") (quoting Roommates.com, 521 F.3d at 1167-68).

Plaintiffs' final attempt to circumvent the CDA is their contention that "Defendants combine certain elements furnished by the contributor with a code written by the Defendants to create the title." (PSGI ¶ 12). However, tThe Ripoff Report explicitly informs users that "The title of your report is divided into four boxes below but will appear as one line after your report is submitted." (Id. ¶ 13). The site also provides examples of how the titles of the reports will appear based on the data entered. (PSGI ¶ 14). Users thus know precisely how the titles of their submissions will appear before posting. Defendants need not present users with a completely blank slate from which to create their reports in order to be protected by the CDA.

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In determining which of Plaintiffs' claims should be barred by the CDA, the CDA should be given the expansive reading that Congress intended. See 47 U.S.C. § 230(e)(3) ("No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section."). As such, summary judgment is GRANTED on the basis of CDA immunity for the following causes of action: (3) unfair business practices under Cal. Bus. & Prof. Code § 17200 *et seq.*; (4) defamation; (5) defamation per se; (6) false light; (7) intentional interference with prospective economic relations; (8) negligent interference with prospective economic relations; (9) negligent interference with economic relations; and (10) injunction. Each of these claims stems exclusively from the purportedly defamatory statements that were posted by third parties onto the Ripoff Report. Because Defendants are not accountable for such postings under the CDA, they can not be liable for their effects in tort, and injunctive relief is similarly unavailable.

The broad reach of the CDA to bar a panoply of torts is supported by other courts that have considered the CDA's reach. See, e.g., Noah v. AOL Time Warner, Inc., 261 F. Supp. 2d 532, 540 (E.D.Va. 2003) ("given that the purpose of § 230 is to shield service providers from legal responsibility for the statements of third parties, §230 should not be read to permit claims that request only injunctive relief"); Katheleen R. V. City of Livermore, 87 Cal.App.4th 681, 698 (2001) (barring state claims for misuse of public funds, nuisance and premises liability as well as declaratory and injunctive relief); Gentry v. eBay, Inc., 99 Cal.App.4th 816, 836 (2002) (UCL claims found to be "inconsistent with and barred by section 230"); Doe v. America Online, Inc., 783 So.2d 1010, 1013-1017 (Fla. 2001) (concluding that the CDA preempted a negligence action other cases); Schneider v. Amazon.com, Inc., 108 Wash.App. 454 (2001) (preempting claims for negligent misrepresentation, interference with business expectancy, and contractual liability under the CDA); PatentWizard, Inc. v. Kinko's Inc.; 163 F.Supp.2d 1069, 1071-1072 (D.S.D. 2001) (finding CDA immunity from defamation liability); Blumenthal v. Drudge, 992 F.Supp. 44, 49-52 (D.D.C. 1998) (barring defamation claims under the CDA for statements made in an on-line gossip column even though defendants had contracted for the reports, retained certain editorial rights as to its content, and aggressively promoted the reports).

B. Claim (3): Unfair Business Practices (Cal. Bus. & Prof. Code § 17200, *et seq.*)

Plaintiffs' next cause of action stems from alleged violations of California's Unfair Competition law, Cal. Bus. & Prof. Code § 17200, *et seq.* ("the UCL"). To the degree that Plaintiffs' allegations under the UCL stem from the posted reports allegedly defaming them, Defendants remain shielded from liability by the CDA. As described above, the CDA statute explicitly establishes that "No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. § 230(e)(3). This restriction includes state law claims under the UCL. Gentry, 99 Cal.App.4th at 836 (holding UCL claims barred by the CDA).

As an additional ground, Plaintiffs lack standing to sue under the UCL. "To have standing under

California's UCL, as amended by California's Proposition 64, plaintiffs must establish that they (1) suffered an injury in fact and (2) lost money or property as a result of the unfair competition." Birdsong v. Apple, Inc., 590 F.3d 955, 959 (9th Cir. 2009). Plaintiffs have not met their burden in establishing either prerequisite. Here, any harm suffered stemmed from the reports, which are shielded by the CDA, not from any of Defendants' independent acts. Plaintiffs also fail to establish the requisite injury based on Defendants' allegedly false marketing of themselves as "consumer advocates" or based on misrepresentations about the CAP program. Plaintiffs never relied on Defendants' statements. They did not become CAP members and had no relationship with any CAP members. As such, Plaintiffs lack standing to sue pursuant to the UCL. Id.

C. Claims (11) and (12): Deceit (Cal. Civ. Code §§ 1709-10) and Fraud (Cal. Civ. Code § 1572)

Plaintiffs allege fraud and deceit based on Defendants' alleged assertions that:

> (1) they have not and will not remove reports published on their Web site; (2) that victims have the option of filing a free rebuttal to the negative complaints; (3) that filing a rebuttal has only a positive effect; (4) that Defendants have done nothing to curry favor with Google; (5) that Defendants do not filter or suppress reports; and (6) that members of the CAP have been investigated and found to be safe and secure.

(Complaint ¶¶ 360, 361, 367, 368). Plaintiffs also posit a seventh ground for finding fraud or deceit in the body of their Complaint, alleging that Defendants falsely misrepresent the futility of suing them. (Complaint ¶¶ 254-60).

Plaintiffs' fraud allegations are vague and do not form a coherent basis for liability. More significantly, Plaintiffs have not provided any evidence of actual reliance on the alleged misstatements or a causal relationship to any damages stemming from the misstatements themselves (as opposed to from the underlying reports). The first claim fails because Plaintiffs offer no evidence that Defendants actually *would* remove the reports at issue here. Defendants unequivocally refused to do so in communications with Plaintiffs. Thus, Plaintiffs could not have detrimentally relied on the alleged misrepresentations. The second claim fails because Plaintiffs produce no evidence that they were unable to file a free rebuttal – indeed the undisputed evidence is that they did file a free rebuttal. The third claim fails because it was an unactionable statement of opinion. See In re Jogert, Inc., 950 F.2d 1498, 1507 (9th Cir. 1991). The fourth, fifth, and sixth claims were statements made to the public at large to promote the website to consumers and prospective CAP members. Plaintiffs were neither consumers nor CAP members and did not rely on these statements. Finally, the seventh claim fails because it amounts to a legal opinion, which is not actionable under a fraud theory in the circumstances of this case, and

because Plaintiffs have provided no evidence that the statements made were inaccurate. Finally, Plaintiffs have provided no evidence of damages.

V. PLAINTIFFS' RULE 56(f) REQUEST

Two hours before the hearing on the above Motion for Summary Judgment, Plaintiffs filed a Motion Under Rule 56(f) To Deny or to Continue Defendants' Motion for Summary Judgment to Conduct Further Discovery. [Docket no. 173].[7] Plaintiffs seek an opportunity to conduct further discovery. Defendants oppose the request.[8]

A. Legal Standard

Rule 56(f) provides that, "[i]f a party opposing the motion [for summary judgment] shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition," a court may deny the motion for summary judgment or continue the hearing to allow additional discovery or "issue any other just order." Fed. R. Evid. 56(f). To obtain a Rule 56(f) continuance the opposing party must "identify by affidavit the specific facts that further discovery would reveal, and explain why those facts would preclude summary judgment." Tatum v. City & County of San Francisco, 441 F.3d 1090, 1101 (9th Cir. 2006). The Ninth Circuit has held that Rule 56(f) motions require an opposing party to make (a) a timely application (b) that specifically identifies (c) relevant information, and (d) where there is some basis for believing that the information sought actually exists. Visa Int'l Service Ass'n v. Bankcard Holders of America, 784 F.2d 1472, 1475 (9th Cir. 1986).

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[7] The Court notes that this eleventh hour filing was consistent with Plaintiffs' pattern in this case. On Friday, July 9, 2010, one day before to the previous summary judgment hearing in this case, Plaintiffs also filed an Ex Parte Application to deny or continue Defendants' motion for summary judgment so as to allow Plaintiffs to conduct further discovery under Federal Rule of Civil Procedure 56(f). [Docket no. 87]. That ex parte application was denied in the Court's July [Docket no. 94]. Plaintiffs have demonstrated a pattern of filing papers late in this case and generally disregarding the scheduling orders of the Court.

[8] The Court could deny the Rule 56(f) motion because it is untimely. As a result of Plaintiffs' late filing of several documents in opposition to the summary judgment motion, the Court issued an Order on October 25, 2010 (after the deadline for the opposition): "The Court will not grant an enlargement, nor will it accept additional untimely filings in opposition." Plaintiffs' Rule 56(f) motion is in violation of that Order. The Court will nonetheless address the merits of the Rule 56(f) motion.

B. Analysis

Plaintiffs argue that additional discovery will aid their defense to summary judgment in the following areas: (1) yielding evidence to oppose Defendants' claim that all HTML code and meta tags are generated "automatically"; (2) yielding evidence to refute Defendants' claim that all meta tags are generated by content contributed by third-party users; and (3) yielding evidence to refute Defendants' claim that Mr. Magedson has no control over how Google or any other search engine decides to rank content. (56(f) Mot. at 3, 4). Plaintiffs' Motion Under Rule 56(f) is denied because the discovery sought could not defeat the Motion for Summary Judgment.

1) Defendants' claim that (1) all HTML code and meta tags are generated "automatically" and (2) that all meta tags are generated by content contributed by third-party users

Whether all HTML code and meta tags are generated "automatically" is irrelevant to the summary judgment motion. As discussed above, Plaintiffs have failed to cite any authority for the proposition that increasing the prominence of a page in internet searches amounts to "creation or development of information" that would make Defendants "information content providers" under the CDA. As discussed above, increasing the visibility of a statement is not tantamount to altering its message, particularly since the Ripoff Report is purportedly a consumer report website intended to be seen on a grand scale. See Roommates.com, 521 F.3d at 1174–75; Black, 2010 WL 3222147 at *3; Goddard, 640 F.Supp.2d at 1196. Absent alterations of the actual content of postings, which did not occur here, liability cannot be found. Moreover, Plaintiffs conceded that the HTML code and meta tags of the reports devoted *to them* were created automatically. They have only alleged non-substantive changes to the meta tags of CAP members – Plaintiffs were not CAP members.

2) Defendants' claim that Mr. Magedson has no control over how Google or any other search engine decides to rank content

Plaintiffs generally assert that Defendants had greater credibility with the public at large because of their representation that they lack control over Google's searches. Even if the statements were false, Plaintiffs have produced no evidence of reliance on these statements or of injury-in-fact. See *supra* section IV(C).

VI. DEFENDANTS' SPECIAL MOTION TO STRIKE PURSUANT TO CAL. CODE CIV. P. § 425.16

Defendants have moved to strike under California's anti-SLAPP statute, Cal. Code Civ. P. §§ 425.16(e)(3) and (e)(4). Defendants argue that Plaintiff's claims for deceit, fraud, and unfair competition arise from statements made in connection with litigation, and therefore, are *per se* within the scope of § 425.16(e)(3). In the alternative, Defendants argue the claims involve matters of public concern. In addressing these arguments, the Court applies the legal standard and burdens set out in Hilton v. Hallmark Cards, 580 F.3d 874, 882-87 (9th Cir. 2009). Here, Defendants have failed to meet their burden in showing that the anti-SLAPP statute applies.

First, although Defendants argue that Plaintiffs have alleged that Defendants made threats in a settlement conference between the parties, no such allegation appears in the FAC. Thus, the anti-SLAPP statute is not triggered.

Second, Defendants contend that one of Plaintiffs' fraud claims[9] arises from settlement activity in a prior case between Defendant and a third party, and are therefore *per se* within the scope of the anti-SLAPP statute. Although a cause of action may be triggered by a protected act, this does not necessarily mean the cause of action *arises from* that act. Kolar v. Donahue, McIntosh & Hammerton, 145 Cal.App.4th 1532, 1537, 52 Cal.Rptr.3d 712 (2006). Here, though Plaintiffs' fraud claim may be triggered by Defendants' previous settlement, Plaintiffs do not allege that Defendants' statements in their prior settlement are false. Instead, Plaintiffs' fraud claim arises from Defendants' subsequent allegedly false statements claiming that Defendants never remove reports. These statements, made on Defendants' site and in e-mails, were not made in connection with any seriously considered litigation (as addressed below).

Defendants argue that statements on their website and in certain e-mails, allegedly stating that Defendants have never lost a case and are immune from suit, form the basis of Plaintiffs' claims. Even accepting this as true, these statements were not made in serious consideration of an anticipated lawsuit. A.F. Brown Elec. Contractor, Inc. v. Rhino Elec. Supply, Inc., 137 Cal.App.4th 1118, 1128 (2006) *as modified, rehearing denied, review denied* (holding that a defendant's mere threats of possible legal action did not demonstrate serious consideration of litigation despite having a viable legal claim); c.f. Neville v. Chudacoff, 160 Cal.App.4th 1255, 1269 (2008) (holding that letter sent by attorney accusing employee of breach of contract and misappropriation of trade secrets and signaling intention to sue employee was sent in serious consideration of anticipated litigation). Here, Defendants made blanket statements on their site and sent generic e-mails merely threatening their readers in a general fashion that litigation would be futile. There are no indicia of seriously considered anticipated litigation; rather, Defendants generally warn their readers not to litigate.

Finally, in the alternative, Defendants argue that statements on their site stating that it would be futile to sue them were made on a public forum and related to matters of substantial public interest under

[9] As previously discussed, Plaintiffs claim that Defendants' statements in e-mails and on their site stating that Defendants never remove reports for money are false. Plaintiffs allege that on at least one occasion Defendants removed a report from their site for money.

§ 425.16(e)(3). As discussed in Hilton, California Appellate Courts have formulated multiple tests to determine whether a defendant's activity is in connection with a public issue. Hilton, 580 F.3d at 886-87. However, Defendants fail to meet any of these tests. Rather than concerning matters of importance to the public, Defendants' statements were made in their private-interest (to avoid litigation).

VII. CONCLUSION

Defendants' Motion for Summary Judgment is GRANTED. Plaintiffs' Motion under Rule 56(f) is DENIED. Defendants' Motions for Sanctions pursuant to Fed. R. Civ. P. 11 are DENIED. Defendants' Special Motion to Strike is DENIED.

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