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12 TRACY COENEN and SEQUENCE, INC.

13 **UNITED STATES DISTRICT COURT**
14 **SOUTHERN DISTRICT OF CALIFORNIA**

15 MEDIFAST, INC., a Delaware
16 Corporation and BRADLEY
17 MacDONALD, an individual,

18 Plaintiffs,

19 v.

20 BARRY MINKOW, an individual;
21 FRAUD DISCOVERY INSTITUTE,
22 INC., a California corporation; ROBERT
23 L. FITZPATRICK, an individual; TRACY
24 COENEN, an individual; SEQUENCE,
25 INC., a Wisconsin service corporation;
26 WILLIAM LOBDELL, an individual;
27 iBUSINESS REPORTING, a California
28 business organization of unknown form;
and 'ZEEYOURSELF,' an individual,

Defendants.

Case No. 10CV0382 JLS (WMc)

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF TRACY
COENEN AND SEQUENCE, INC.'S SPECIAL
MOTION TO STRIKE PLAINTIFFS'
COMPLAINT
[CAL. CODE CIV. PROC. § 425.16]**

Date: June 3, 2010
Time: 1:30 P.M.
Courtroom: 6
Judge: Janis L. Sammartino
Magistrate Judge: William McCurine, Jr.
Complaint Filed: February 17, 2010
Trial Date: None set

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TABLE OF CONTENTS

1		<u>Page</u>
2		
3	I. INTRODUCTION	1
4	II. FACTUAL BACKGROUND.....	2
5	A. Tracy Coenen and Sequence, Inc.....	2
6	B. Multilevel Marketing Programs and Pyramid Schemes	3
7	C. Medifast, Inc. and Take Shape for Life	4
8	D. The FitzPatrick Report.....	5
9	1. May 2009	7
10	2. June 2009	7
11	3. September 2009	7
12	4. January 2010	8
13	E. Medifast Files Suit.....	9
14	III. LEGAL STANDARD.....	10
15	IV. ARGUMENT.....	11
16	A. Coenen’s Blog Posts Are Constitutionally-Protected Consumer Protection Information Within the Ambit of the Anti-SLAPP Statute	11
17	1. Medifast’s Operations and the Viability of the TSFL Program are Issues of Public Concern.....	12
18	2. Consumer Protection Information Warning Consumers and Potential Investors of Apparent Hazards Underlying Medifast’s TSFL Business Model Is Protected by the Anti-SLAPP Statute	13
19	2. Consumer Protection Information Warning Consumers and Potential Investors of Apparent Hazards Underlying Medifast’s TSFL Business Model Is Protected by the Anti-SLAPP Statute	13
20	2. Consumer Protection Information Warning Consumers and Potential Investors of Apparent Hazards Underlying Medifast’s TSFL Business Model Is Protected by the Anti-SLAPP Statute	13
21	B. Medifast Cannot Establish a Probability of Prevailing on its Claims against Coenen and Sequence, Inc.	15
22	1. Section 230(c)(1) of the Communications Decency Acts Immunizes Coenen from Liability for Republishing the Statements of FDI and FitzPatrick	15
23	1. Section 230(c)(1) of the Communications Decency Acts Immunizes Coenen from Liability for Republishing the Statements of FDI and FitzPatrick	15
24	2. Medifast Cannot Establish a Probability of Prevailing on its Claim for Defamation.....	17
25	2. Medifast Cannot Establish a Probability of Prevailing on its Claim for Defamation.....	17
26	a. The Statements Made in Coenen’s Blog Are Fully Protected by the First Amendment	18
27	i. June 24, 2009: "Conflict of interest for Medifast auditors?"	19
28	i. June 24, 2009: "Conflict of interest for Medifast auditors?"	19

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25
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ii. **September 14, 2009: "Medifast and Take Shape For Life: Weight loss pyramid scheme?"**20

iii. **January 13, 2010: "Medifast continues to mislead shareholders."**22

3. Medifast Cannot Establish That Coenen Made a Provably False Statement of Fact with Actual Malice23

4. Medifast’s Derivative Claims for Violation of Corporations Code § 25400 and Violation of Business and Professions Code § 17200 Fail24

C. Defendants Are Entitled To Recover Their Costs And Attorney’s Fees25

V. CONCLUSION25

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TABLE OF AUTHORITIES

1
2
3
4
5
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12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page(s)

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42 Cal. 3d 254, 260 (Cal. 1986)..... 18

Barrett v. Rosenthal
40 Cal.4th 33, 41, n. 4 (Cal. 2006)..... 11, 15, 16

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333 F.3d 1018, 1024 (9th Cir. 2003) 10, 16

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42 Cal.3d 1033, 1042 (Cal. 1986)..... 24

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19 Cal. 4th 1106..... 1, 12

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148 Cal. App. 4th 71, 81 (Cal. Ct. App. 2007)..... 18

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29 Cal.4th 53, 67 (Cal. 2002)..... 10

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74 Cal.App.4th 1394, 1401 (Ct. App. 1999)..... 19

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116 Cal.App.4th 375, 385 (Cal. Ct. App. 2004)..... 18

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147 Cal. App. 4th 13, 23 (Cal. 2007)..... 10, 12, 14, 15, 18

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17 Cal. 3d 596, 601 (Cal. 1976)..... 19

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 491 U.S. 657, 666–667 and n. 7 (1989)..... 23

2 *Hilton v. Hallmark Cards*
 580 F.3d 874, 880 (9th Cir. 2009) 10

3 *Milkovich v. Lorain Journal Company*
 497 U.S. 1, 20 (1990)..... 18

4 *Morningstar, Inc. v. Sup. Ct.*
 23 Cal.App.4th 676, 693 (Cal. Ct. App. 1994) 18

5 *Pham v. Pham*
 182 Cal.App.4th 323, 328 (Cal. Ct. App. 2010) 16

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 37 Cal.3d 244, 257 (Cal. 1984)..... 23

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 21 Cal.App.4th 434, 445-445 (Cal. Ct. App. 1993)..... 20

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 97 Cal.App.4th 798, 809 (Cal. Ct.App. 2002) 18

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 55 F.3d 1430, 1440 (9th Cir. 1995) 19, 22

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 126 Cal.App.4th 635, 657 (2005) 10

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 46 Cal.4th 1, 20 (Cal. 2009)..... 11

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 121 Cal.App.4th 883, 897-98 (Cal. Ct. App. 2004)..... 11, 12, 13, 14

13

14

15 **Statutes**

16 47 U.S.C. § 230(c)(1)..... 15

17 Business and Professions Code § 17200..... 2, 25

18 California Penal Code § 327 4

19 Civil Code § 45 2

20 Code of Civil Procedure § 425.16..... 10

21 Code of Civil Procedure § 425.16(a)..... 11

22 Code of Civil Procedure § 425.16(c)..... 25

23 Code of Civil Procedure § 425.16(e)..... 11

24

25

26

27

28

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3

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I.

INTRODUCTION

Medifast has made clear the cost of criticism: \$270 million. That is the bounty placed on Tracy Coenen's head in retaliation for criticizing the weight loss company in her consumer protection blog. Coenen is an expert in corporate fraud and pyramid schemes who uses her blog to warn consumers of businesses taking advantage of the recession by promising to turn a pink slip into a pink Cadillac overnight. Medifast's meteoric rise to prominence on the back of its multilevel marketing program Take Shape for Life ("TSFL") raised a host of red flags from consumer protection advocates such as Coenen, who are wary of the instability that accompanies the rapid growth of such programs.

After looking at the structure of the program and the financial data that Medifast was disclosing (and not disclosing), Robert FitzPatrick and the Fraud Discovery Institute ("FDI") published a report concluding that TSFL was a pyramid scheme whose continued success was unsustainable: it depended on endless, exponential recruitment of new salespeople to the program. Medifast responded with a series of non-denial denials, but refused to confront the substance of FitzPatrick's allegations. When FDI and FitzPatrick persisted, Medifast convened a secret committee to evaluate the allegations. According to the company, the secret committee dismissed the allegations. But Medifast never plainly or publicly refuted the allegations, and its stock price plummeted.

Medifast now seeks retribution against FDI and FitzPatrick for blowing the whistle on the company, and against Coenen for joining the chorus of consumer protection advocates critical of Medifast's business model and skeptical of the company's reaction to FitzPatrick's allegations. This is a classic SLAPP¹ suit: a large company takes aim at a citizen to squelch constitutionally-protected criticism.² Coenen is faced with the prospect of long, costly litigation against an opponent with extensive resources.

///

¹ "SLAPP" is an acronym for "Strategic Lawsuit Against Public Participation."

² See *Briggs v. Eden Council for Hope & Opportunity*, 19 Cal. 4th 1106, 1125-26 (Cal. 1999).

1 California's anti-SLAPP statute provides relief. Coenen's blog posts provide consumer
 2 protection information about the operations of a large publicly-traded company embroiled in an
 3 ongoing controversy about the stability of its business model. These statements are plainly within
 4 the protection of the anti-SLAPP statute.

5 Medifast bears the burden of establishing a probability of success on its claims. The
 6 company cannot satisfy this burden for multiple reasons, including:

- 7 • Section 230(c)(1) of the Communications Decency Act provides blanket immunity
 8 to Coenen for republishing the statements of FDI, FitzPatrick, and others;
- 9 • The statements made by Coenen are not actionable statements of fact;
- 10 • Medifast cannot demonstrate that Coenen made any false statement with "actual
 11 malice";
- 12 • Medifast's derivative claims for market manipulation and unfair business practices
 13 are barred because they depend on Coenen's constitutionally protected statements;
 14 and
- 15 • Medifast's claims for market manipulation and unfair business practices fail
 16 because Coenen did not participate in any market activity related to Medifast stock,
 17 nor did she make any statement with the specific intent to induce market activity.

18 Therefore, the special motion to strike Medifast's complaint must be granted.

19 II.

20 FACTUAL BACKGROUND

21 Medifast and the Chairman of its Board of Directors, Bradley MacDonald, filed this
 22 lawsuit against FitzPatrick, FDI, Barry Minkow, Coenen and her company Sequence, Inc.,
 23 William Lobdell, iBusiness Reporting, and "Zeeyourself," an anonymous internet poster.
 24 Plaintiffs allege three claims under California state law: defamation,³ market manipulation,⁴ and
 25 unfair business practices.⁵

26 A. Tracy Coenen and Sequence, Inc.

27 Tracy Coenen is a forensic accountant who specializes in the investigation and prevention
 28 of corporate fraud. (Dec. T. Coenen, ¶ 2.) She is the author of two books and over 100 articles on
 corporate fraud detection, and has been featured in national print and cable media for her

³ Civ. Code § 45.

⁴ Corp. Code § 25400.

⁵ Bus. & Professions Code § 17200.

1 expertise. (*Id.* ¶ 4 and Exh. A.⁶) Through her company Sequence, Inc., Coenen provides
 2 comprehensive services to corporate clients, including in-house fraud detection and prevention
 3 training seminars, fraud investigation, and forensic examination. (*Id.* ¶ 3.) She has served as a
 4 consultant, investigator, and expert witness in several civil and criminal cases. (*Id.*)

5 Since 2005, Coenen has published the consumer protection blog “Fraud Files” to inform
 6 consumers about corporate fraud investigations and litigation and to educate the public about
 7 potentially fraudulent business opportunities. (Dec. T. Coenen, ¶¶ 6-7.) To facilitate ongoing
 8 debate with her readers, all posts are open to comment from the general public.⁷ (*Id.* ¶ 7.)

9 **B. Multilevel Marketing Programs and Pyramid Schemes**

10 Among the frequent topics of discussion at the blog are multilevel marketing programs and
 11 pyramid schemes. (Dec. T. Coenen, ¶ 6.) Multilevel marketing programs are a method to sell a
 12 product directly to consumers through a network of salespeople. (*Id.* ¶ 5; see also Exhs. B-C.)
 13 Well-known examples are Tupperware, Avon, Mary Kay Cosmetics, and Amway. While these
 14 programs purport to be focused on consumer sales, revenue is generated by recruitment of
 15 additional salespeople. (Exhs. B & C.) Participants in these programs are compensated both for
 16 the amount of retail sales they make and for a portion of the sales or purchases made by
 17 salespeople they have recruited to join the program—often called a participant’s “downline.”
 18 (Exh. C.) Participants’ compensation increases as their downline grows—as people they recruit
 19 attract additional participants, who in turn attract more participants, and so on. (Dec. T. Coenen, ¶
 20 6.)

21 These programs are often called “pyramid schemes” because of the tiered structure
 22 developed by the chain of downline recruits. Because the revenues that support the commissions
 23 are funded primarily by payments made for the right to participate, a pyramid depends on the
 24 continual recruitment of new participants. (Exh. D.) This revenue structure makes pyramid

25 _____
 26 ⁶ Exhibits identified by letter are attached in support of this motion. Exhibits identified by
 number are attached to the complaint, also attached (as Exh. Y) for the convenience of the court.

27 ⁷ The Sequence, Inc. website, which hosts Fraud Files, averages 30,000 visitors a month.
 28 To date, over 1,600 articles have been posted on Fraud Files, generating nearly 6,000 comments.
 Coenen also founded a companion site called Pink Truth to provide consumer information about
 multilevel marketing programs that target women, focusing largely on Mary Kay Inc. The sites
 combine for over 2,500 posts and 150,000 posts and comments by community members.

1 schemes inherently unstable, as the majority of participants will lose money when recruitment
2 reaches an unsustainable level and the pyramid collapses. (See *id.*)

3 Multilevel marketing programs that generate revenue primarily by recruiting downline
4 participants are considered a form of fraud and are outlawed in many states, including California.⁸
5 (Exh. D.) Fraudulent business schemes have attracted public attention in the last two years as the
6 economic downturn precipitated the collapse of pyramid-structured Ponzi funds run by Bernie
7 Madoff and Allen Stanford. In this state, the Attorney General used the high-profile prosecutions
8 of two Internet-based pyramid schemes to trumpet his “commitment to protect Californians from
9 the get-rich-quick schemes that proliferate in a down economy.” (Exhs. E & F.)

10 The proliferation of fraudulent business schemes during a down economy is a subject of
11 concern at the federal level as well. (See Exh. G.) The Federal Trade Commission (“FTC”)
12 polices multilevel marketing programs and brings enforcement actions to halt pyramid schemes.
13 (Exhs. H-K.) In addition, the FTC publishes a variety of information to educate consumers about
14 multilevel marketing programs and thwart the growth of pyramid schemes. (See Exhs. B & C.)

15 **C. Medifast, Inc. and Take Shape for Life**

16 Medifast, Inc. is a publicly-traded weight loss company with more than 13 million
17 outstanding shares of common stock. (Exh. L.) In 2009, the company’s revenue exceeded \$165
18 million. (Exh. M.)

19 According to Medifast, its weight management program has been recommended by over
20 20,000 doctors, and its products have been used by over 1 million people. (Exh. M.) Among its
21 celebrity spokespeople are actress Kristy Swanson and Emmy-Award-winning soap opera star
22 Genie Francis. (Exh. N.) Medifast sells its products through four distribution channels: (1) direct
23 sales via internet or phone order, (2) at Medifast-operated weight loss clinics, (3) through
24 partnerships with physicians, and (4) through the multilevel marketing program “Take Shape for
25 Life,” where participants (known as “Health Coaches”) sell the company’s products directly to
26 consumers. (Exh. M.)

27 ///

28 ⁸ See Cal. Penal Code § 327 (prohibiting “endless chain” schemes).

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1 Medifast has experienced significant growth over the past two years. The company's
 2 revenue increased from \$83.8 million in 2007 to \$105.4 million in 2008, a 26% year-to-year
 3 increase. (Exh. O.) That year, Fortune Small Business magazine identified Medifast as number
 4 47 on its list of fastest-growing small public companies. (Exh. P.) Forbes named Medifast
 5 number 85 on its 2008 list of "America's 200 Best Small Companies." (Exh. Q.) When total
 6 revenue increased another 57% to \$165.6 million in 2009, Medifast climbed to number 26 on
 7 Fortune's list and to 16 in the Forbes rankings. (Exhs. M, P & Q.)

8 Medifast's meteoric rise is directly tied to explosive growth in the Take Shape for Life
 9 program. In 2008, TSFL's revenue increased 79% from \$27.6 million the prior year to \$49.5
 10 million. (Exh. O.) In 2009, program revenue more than doubled, accounting for more than 60%
 11 of Medifast's total revenue. (Exh. M.) The total number of participants in the program more than
 12 tripled over the same time period, growing from 1,850 in 2007 to 6,000 at the end of 2009. (Exhs.
 13 M, O & R.)

14 **D. The FitzPatrick Report**

15 In September 2008, Robert FitzPatrick completed a report analyzing Medifast's growth
 16 and the Take Shape for Life business model.⁹ (Exh. Y: Compl. At ¶¶ 44, 46-48; Exh. 1.) After
 17 evaluating financial data and marketing materials published by Medifast, FitzPatrick concluded
 18 that TSFL operated as an unlawful pyramid scheme under California law. This conclusion was
 19 based on a number of observations, including:

- 20 • Due to the rapid growth of TSFL, Medifast's revenues increased while similar
 21 companies experienced losses consistent with the economic climate;
- 22 • TSFL's rapid growth is inconsistent with Medifast's non-TSFL product sales,
 23 which declined;
- 24 • TSFL's compensation plan is weighted to favor recruitment and sales within the
 25 program, rather than product sales to consumers outside the program;
- 26 • TSFL's success is dependent on continual recruitment of health coaches;

26 ///

27 ⁹ FitzPatrick is an expert in multilevel marketing programs and pyramid schemes. He is
 28 the author of numerous books and articles on consumer fraud, has been featured in national and
 large market news media for his expertise, and has served as an expert witness or consultant in
 nearly twenty court cases. (Exh. X.)

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- The true nature of the TSFL compensation structure was obscured by Medifast’s failure to publish key financial data related to commission payments; and
- Though Medifast did not disclose financial data related to commission payments, there is evidence that Medifast paid out over 50% of all revenue as commissions to TSFL participants.

(See FitzPatrick report; Exh. Y, Exh. 1.)

FitzPatrick updated his report in February 2009 to incorporate data from the third quarter of 2008. On February 17, 2009, the Fraud Discovery Institute published FitzPatrick’s updated report on its website. In conjunction with the publication of the report, FDI launched the website www.medifraud.net. The website contained a series of documents, including a press release that quotes Barry Minkow, a former white collar criminal who co-founded FDI to expose investment scams. (Exh. Y at ¶ 44, Exhs. 2-5.)

Medifast issued a press release in response. (Exh. S.) It identified Minkow as the author of the report and focused an attack on him, twice pointing out that Minkow is a “convicted felon” and claiming that he “is a liar [who] can’t be trusted.” The release offered only one fact to refute FitzPatrick’s report:

Of Medifast’s 2008 revenues less than one percent (1%) is related to recruiting and none of that revenue is paid out to coaches as part of their compensation. This fact alone completely refutes Mr. Minkow’s major premise that our growth is based on recruiting and not increased product sales. [Exh. S.]

This “1%” figure refers to fees generated when new participants sign up as Health Coaches—an issue not raised by FitzPatrick’s report, which focused on TSFL’s share of Medifast’s total revenue and the failure of Medifast to disclose data related to commissions paid. FDI and Minkow responded with a press release stating that Medifast failed to respond to the thrust of FitzPatrick’s report: the majority of TSFL revenue is transferred from recruits to participants higher up in the multi-level program. (Exh. Y, Exh. 6.)

Medifast issued no further public response.

This cycle continued between February 2009 and January 2010 as FDI continued its investigation into Medifast, and FitzPatrick updated his report to analyze Medifast’s quarterly financial reports. FDI periodically issued press releases about the investigation. And Medifast

1 failed to directly confront FitzPatrick's allegations. When Medifast did respond, it responded by
2 denouncing the allegations generally and attacking Minkow personally. Medifast never directly
3 confronted the substance of the reports to refute FitzPatrick's conclusions. Medifast's claims
4 against Coenen are based on a series of Fraud Files posts discussing this controversy.

5 **1. May 2009**

6 On May 21, 2009, FDI published a second series of documents related to Medifast,
7 including a press release about an updated report from FitzPatrick to analyze Medifast's first
8 quarter financial disclosure and a document entitled "5 Points of Similarity Between Medifast and
9 YTB (YourTravelBiz.com)." (Exh. Y at ¶ 52, Exhs. 7 and 10.)

10 That same day Coenen republished, without alteration, the press release and the "5 Points"
11 document as posts to Fraud Files. (Exh. Y at ¶ 54, Exhs. 12-13.)

12 **2. June 2009**

13 On June 9, 2009, FDI published two documents attacking the independence and
14 competence of Medifast's auditor, Bagell Josephs Levine & Company. (Exh. Y at ¶ 58, Exhs. 15
15 and 16.) According to the documents, a wealth management firm that shares an address with, and
16 appears to be connected to, the auditor recommended the purchase of Medifast stock to an
17 investigator hired by FDI.

18 On June 24, 2009, Coenen published a post entitled "Conflict of interest for Medifast
19 auditors?" (Exh. Y at ¶ 61, Exh. 17.) The post discusses the duties of an auditor working in the
20 capacity of an investment advisor and the independence issues that may arise out of working in
21 that dual capacity. In that context, Coenen outlines what would and would not constitute a
22 conflict of interest under the scenario alleged by FDI. Coenen does not provide an opinion as to
23 whether there actually was a conflict of interest. (Exh. 17.)

24 **3. September 2009**

25 By September 2009, nearly eight months had passed since FDI first published
26 FitzPatrick's report, and Medifast had failed to refute FitzPatrick's claims. On September 11,
27 2009, David Phillips published a two-part article entitled "Medifast: Weight-Loss Miracle or
28 Pyramid Scheme?" on a popular financial news site. (Exh. T.) As with FitzPatrick, Phillips

1 questioned Medifast's counter-market growth and evaluated the business model of Take Shape for
 2 Life. Phillips concluded that there was "a troubling lack of transparency at Medifast" regarding
 3 the payment of program participants and observed that:

4 Medifast does not disclose actual incomes, costs incurred, attrition
 5 rates, or even a breakdown of the total number of sales
 6 representatives who are active or inactive. In fact, one could infer
 7 from available data found in the compensation plan table that the
 8 only way a health coach can earn significant income is through
 9 recruiting to advance to higher payout levels-the classic recruitment
 10 con of a multilevel pyramid scheme. [Exh. T.]

11 Three days later, Coenen published a post entitled "Medifast and Take Shape For Life:
 12 Weight loss pyramid scheme?" (Exh. Y at ¶ 62, Exh. 18.) The post uses the Medifast controversy
 13 as a case study to further the ongoing discussion of the potential dangers that multilevel marketing
 14 programs pose to consumers. Referencing both the Phillips article and FitzPatrick's report,
 15 Coenen lists a number of factors that suggest that TSFL may be a pyramid scheme, including:

- 16 • TSFL has experienced rapid growth while similar weight loss companies are in
 17 decline due to the economy;
- 18 • TSFL's growth is inconsistent with Medifast's non-TSFL product sales; and
- 19 • TSFL's compensation plan is weighted to favor recruitment and sales within the
 20 program, rather than product sales outside of the program. [Exh. 18.]

21 4. January 2010

22 On January 8, 2010, FDI released a third updated report by FitzPatrick along with a press
 23 release announcing the report. (Exh. Y at ¶ 63, Exhs. 19 and 20.) Medifast responded with a press
 24 release regarding the allegations of "convicted felon Barry Minkow." (Exh. U.) The release
 25 states that "[a]n Independent Directors' Committee" concluded that the allegations made in the
 26 FitzPatrick reports were "false, misleading, and/or without merit." (*Id.*) The release does not
 27 directly refute any of the claims made in the reports.

28 Minkow countered with a press release stating that Medifast was misleading its
 shareholders by failing to acknowledge that the author of the report was FitzPatrick, not Minkow.
 (Exh. Y, Exh. 21.) Minkow then sent a letter to Medifast's Board of Directors, offering to retract
 all of FDI's statements if Medifast showed that FitzPatrick's claims were factually incorrect.
 (Exh. Y, Exh. 22.)

1 Once again, Medifast did not respond.

2 Coenen republished portions of the January 8 press release and FitzPatrick's updated
3 report in two posts later that week. (Exh. Y, Exhs. 23-24.) Coenen published a third post on
4 January 13 echoing Minkow's claim that Medifast was misleading its shareholders by claiming
5 that Minkow was the author of the report, rather than FitzPatrick. (Exh. Y, Exh. 25.)

6 **E. Medifast Files Suit**

7 On February 17, 2010, Medifast filed this lawsuit against FDI, Minkow, FitzPatrick,
8 Coenen, and others, asserting a primary claim for defamation under California law.¹⁰ (Exh. Y at
9 ¶¶ 86-94.) In addition, Medifast claims that these statements were made to drive down the price
10 of Medifast stock, allowing Minkow to profit by taking a short position in Medifast's stock prior
11 to releasing negative information about the company. (Exh. Y at ¶¶ 39-43.) On this basis,
12 Medifast makes derivative claims for market manipulation and unfair business practices, both
13 under California law. Both claims arise from the allegedly defamatory statements. (See Exh. Y at
14 ¶¶ 96-97 and 102-103.) The company seeks \$270 million in damages.

15 Medifast's defamation claim against Coenen is based on two types of Fraud Files posts:
16 (1) statements originally published by FDI or FitzPatrick and republished to Fraud Files, and (2)
17 statements attributable to Coenen. The first category includes the following four posts:

- 18 1. A May 21, 2009 post entitled "Fraud Discovery Institute blasts Medifast,"
19 republishing in its entirety the FDI press release of the same date and title [Exh. Y,
20 Exh. 12];
- 21 2. A May 21, 2009 post republishing "5 Points of Similarity Between Medifast and
22 YTB" [Exh. Y, Exh. 13];
- 23 3. A January 12, 2010 post entitled "Medifast mult-level marketing scheme called
24 into question by expert," which republishes portions of FDI's January 8, 2009 press
25 release [Exh. Y, Exh. 23]; and
- 26 4. A January 13, 2010 post entitled "More on the endless chain recruitment scheme of
27 Medifast and Take Shape for Life," which republishes portions of FitzPatrick's
28 January 8, 2009 updated report [Exh. Y, Exh. 24].

¹⁰ MacDonald joins in Medifast's general claims, and also asserts claims against a variety of anonymous internet posters for making allegedly defamatory remarks about him personally. (Exh. Y at ¶ 74.) Coenen is not alleged to be involved in the alleged attack against MacDonald. For clarity, this brief refers solely to Medifast in the singular. However, this motion is directed at the complaint as a whole, including any claims made by MacDonald.

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The second category includes three posts authored by Coenen:

- 5. A June 24, 2009 post entitled “Conflict of interest for Medifast auditors?” [Exh. Y, Exh. 17];
- 6. A September 14, 2009 post entitled “Medifast and Take Shape For Life: Weight loss pyramid scheme?” [Exh Y, Exh. 18]; and
- 7. A January 13, 2010 post entitled “Medifast continues to mislead shareholders” [Exh. Y, Exh. 25].

At no point has Medifast contacted Coenen to request that these posts be retracted.

Medifast has never provided Coenen with information to contradict the information contained in these posts. (Dec. T. Coenen, ¶ 21.)

III.

LEGAL STANDARD

Code of Civil Procedure § 425.16, California’s anti-SLAPP statute, is designed to discourage lawsuits “brought to deter common citizens from exercising their political or legal rights or to punish them for doing so.” *Batzel v. Smith*, 333 F.3d 1018, 1024 (9th Cir. 2003). The statute provides a defendant the opportunity to dismiss at an early stage nonmeritorious litigation meant to chill the valid exercise of the constitutional rights of freedom of speech and petition in connection with a public issue. *Gilbert v. Sykes*, 147 Cal. App. 4th 13, 23 (Cal. 2007). The archetypal SLAPP complaint is a “generally meritless suit[] brought by large private interests to deter common citizens from exercising their political or legal rights or to punish them for doing so.” *Thomas v. Quintero*, 126 Cal.App.4th 635, 657 (2005) (quotations and citations omitted). State law claims that federal courts hear pursuant to diversity jurisdiction are subject to the statute. *Hilton v. Hallmark Cards*, 580 F.3d 874, 880 (9th Cir. 2009).

California courts evaluate a defendant's anti-SLAPP motion in two steps. First, the moving party has the initial burden to show that the cause of action arises from an “act...in furtherance of the moving party’s right of petition or free speech.” *Equilon Enters. v. Consumer Cause, Inc.*, 29 Cal.4th 53, 67 (Cal. 2002).

Once that burden is met, the burden shifts to the plaintiff to demonstrate the “probability that [it] will prevail on the claim.” Code Civ. Proc., § 425.16, subd. (b)(1). The plaintiff must

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1 demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie
2 showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is
3 credited. *Vargas v. City of Salinas*, 46 Cal.4th 1, 20 (Cal. 2009).

4 The statute defines four categories of protected communications. Relevant here are the
5 third and fourth categories:

6 (3) Any written or oral statement or writing made in a place open to
7 the public or a public forum in connection with an issue of public
interest; or

8 (4) Any other conduct in furtherance of the exercise of the
9 constitutional right of petition or the constitutional right of free
speech in connection with a public issue or an issue of public
interest.

10 Code Civ. Proc. § 425.16(e).

11
12 “The statutory phrase ‘cause of action . . . arising from’ means simply that the defendant's
13 act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right
14 of petition or free speech.” *City of Cotati v. Cashman*, 29 Cal.4th 69, 78 (Cal. 2002) (emphasis in
15 original). “[T]he critical point is whether the plaintiff's cause of action itself was based on an act
16 in furtherance of the defendant's right of petition or free speech.” *Id.* Because “it is in the public
17 interest to encourage continued participation in matters of public significance, and [because] this
18 participation should not be chilled through abuse of the judicial process,” the anti-SLAPP statute
19 is to be construed broadly. Code Civ. Proc., § 425.16(a).

20 IV.

21 ARGUMENT

22 A. Coenen’s Blog Posts Are Constitutionally-Protected Consumer Protection
23 Information Within the Ambit of the Anti-SLAPP Statute

24 Fraud Files, like all web sites accessible to the public, is a public forum for purposes of the
25 anti-SLAPP statute. *Barrett v. Rosenthal*, 40 Cal.4th 33, 41, n. 4 (Cal. 2006). There can be no
26 dispute that the act of posting consumer protection information is “conduct in furtherance of the
27 exercise of the constitutional right of free speech.” *See Wilbanks v. Wolk*, 121 Cal.App.4th 883,
28 897-98 (Cal. Ct. App. 2004).

1 Whether the anti-SLAPP statute applies depends on whether the posts were made “in
 2 connection with an issue of public interest.” *See* Cal. Code Civ. Proc. § 425.16(e)(3)-(4). The
 3 term “issue of public interest” is construed broadly “to encourage participation by all segments of
 4 our society in vigorous public debate related to issues of public interest.” *Gilbert v. Sykes*, 147
 5 Cal.App.4th 13, 23 (Cal. Ct. App. 2007). “The Legislature inserted the ‘broad construction’
 6 provision out of concern that judicial decisions were construing [the public interest] element of the
 7 statute too narrowly.” *Briggs v. Eden Council for Hope & Opportunity*, 19 Cal.4th 1106, 1120
 8 (Cal. 1999). Case law demonstrates that Coenen’s posts about Medifast’s growth, structure and
 9 financial stability meet the public interest requirement.

10 **1. Medifast’s Operations and the Viability of the TSFL Program are Issues of**
 11 **Public Concern**

12 The most commonly articulated definitions of “statements made in connection with a
 13 public issue” focus on whether (1) the subject of the statement or activity precipitating the claim
 14 was a person or entity in the public eye; (2) the statement or activity precipitating the claim
 15 involved conduct that could affect large numbers of people beyond the direct participants; and (3)
 16 whether the statement or activity precipitating the claim involved a topic of widespread public
 17 interest. *Wilbanks*, 121 Cal.App.4th at 898.

18 In addressing whether Internet postings about corporate activity are connected to an issue
 19 of public importance courts consider three factors: (1) whether the company is publicly traded, (2)
 20 the number of investors, and (3) whether the company has promoted itself by means of numerous
 21 press releases. *Ampex Corp. v. Cargle*, 128 Cal.App.4th 1569, 1576 (Cal. Ct. App. 2005).

22 In *Ampex*, a California Court of Appeal concluded that postings on an Internet message
 23 board critical of a company and its management were made in connection with a matter of public
 24 interest. *Id.* at 1576-77. The court reached this conclusion because Ampex was a publicly traded
 25 company with over 56 million outstanding shares of stock, and Ampex participated in the public
 26 debate by issuing press releases. *Id.* at 1577.

27 There is no doubt that statements critical of Medifast’s business model and operations are
 28 in connection with a matter of public interest. The potential for fraud and abuse associated with

1 multilevel marketing programs such as TSFL has drawn the attention of the California Attorney
 2 General and the Federal Trade Commission. (Exhs. B-K.) Medifast is publicly traded on the New
 3 York Stock Exchange with over 13 million outstanding shares. (Exhs. L & M.) Its revenue
 4 doubled in two years to exceed \$165 million, and the company was recognized in two prominent
 5 financial publications for its success. (Exhs. M, O, P & Q.) Medifast promotes its products
 6 through celebrity spokespeople and claims that its products have been used by over 1 million
 7 people. (Exhs. M & N.)

8 Through its website, Medifast publishes press releases on a wide array of topics. Since
 9 filing this lawsuit, for example, Medifast has issued releases to tout the introduction of a delicious
 10 new brownie to its meal replacement line, to broadcast its intent to file federal complaints against
 11 Minkow, and to announce its 2009 financial results. (Exhs. M, V & W.) Medifast published press
 12 releases to respond to FDI's allegations, and the company continues to use press releases to
 13 promote the TSFL as a viable program. (Exhs. M, S, U & W.)

14 Medifast is a large public company whose business practices affect a significant number of
 15 people. It has chosen to thrust itself into the public area through a variety of press releases and
 16 advertisements. Coenen's statements reporting on the FDI report and criticizing Medifast's
 17 business practices directly contribute to the public debate regarding the company. These posts are
 18 therefore made in connection with an issue of public concern and are protected by the anti-SLAPP
 19 statute.

20 **2. Consumer Protection Information Warning Consumers and Potential**
 21 **Investors of Apparent Hazards Underlying Medifast's TSFL Business Model**
 22 **Is Protected by the Anti-SLAPP Statute**

23 The content and purpose of Fraud Files reinforce the conclusion that the blog posts
 24 concern a matter of public interest. Courts have routinely extended the protection of the anti-
 25 SLAPP statute to websites created to convey consumer protection information to the general
 26 public.

27 In *Wilbanks v. Wolk*, a California Court of Appeal applied the anti-SLAPP statute to
 28 statements posted on a consumer advocacy website even though the subject of the cautionary

1 posts was a small business that was not in the public eye. *Wilbanks*, 121 Cal.App.4th 883. There,
2 a consumer advocate maintained a website devoted to viatical settlements. *Id.* at 889. A portion
3 of the site provided information about viatical settlement brokers, including information about
4 lawsuits brought by clients and investigations of brokers by governmental agencies. *Id.* The
5 advocate posted a series of statements on the website warning consumers to stay away from a
6 particular brokerage, claiming that it was under governmental investigation, incompetent, and
7 unethical. *Id.* at 890.

8 The Court of Appeal determined that the statements did not satisfy the general "public
9 interest" test because the brokerage was not in the public eye, its business practices did not affect
10 a large number of people, and those practices were not, by themselves, an issue of widespread
11 public interest. *Wilbanks*, 121 Cal.App.4th at 898.

12 Nevertheless, the Court of Appeal held that the statements were connected with a public
13 issue and applied the anti-SLAPP statute. The advocate's posts were warnings not to use the
14 broker's services published to the public at large. *Id.* at 900. The statements were consumer
15 protection information related to an industry that touches a large number of persons through sales
16 and investments. *Id.* Viewed in that context, the statements were directly connected to an issue of
17 public concern. *Id.*

18 Similarly, in *Gilbert v. Sykes*, the Court of Appeal found that statements on a patient's
19 website critical of her plastic surgeon met the public interest requirement. *Gilbert*, 147
20 Cal.App.4th at 23-24. There, a patient dissatisfied with the result of plastic surgery created a
21 website that related her experience with the surgeon, displayed before and after photos, offered
22 information and advice relating to plastic surgery, and solicited feedback and stories from the
23 public. *Id.* at 19-20. When the patient sued for medical malpractice, the surgeon filed a cross-
24 complaint, alleging that he was defamed and lost business as a result of the site. *Id.* at 18. The
25 Court of Appeal concluded that the website concerned a matter of public interest because it
26 contributed to the public debate about plastic surgery by relating her specific experience to the
27 public, and by providing general information advice concerning plastic surgery to the public. *Id.*
28 at 23-24.

1 Here, Fraud Files is dedicated to corporate fraud and commercial crime. Coenen provides
 2 information, advice, and commentary to professionals, consumers, and potential investors. Posts
 3 are open to comments from the general public. Coenen publishes a significant amount of
 4 information concerning the potential hazards presented by multilevel marketing programs such as
 5 TSFL. The posts at issue in this case were informative and cautionary, summarizing the report
 6 and controversy with Medifast, and warning consumers and investors of TSFL's multilevel
 7 marketing structure. This type of consumer protection information is protected by the anti-SLAPP
 8 statute.

9 **B. Medifast Cannot Establish a Probability of Prevailing on its Claims against Coenen**
 10 **and Sequence, Inc.**

11 Because Coenen has established that she was sued after exercising her First Amendment
 12 right to free speech in a public forum in connection with an issue of public interest, the burden
 13 shifts to Medifast to establish that there is a probability it will prevail on its claims. Code Civ.
 14 Proc., § 425.16, subd. (b)(1). To do so, Medifast must “demonstrate the complaint is legally
 15 sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable
 16 judgment if the evidence submitted by the plaintiff is credited.” *Gilbert*, 147 Cal.App.4th at 26.
 17 The showing must be made through “competent and admissible evidence.” *Id.* Medifast cannot
 18 meet this burden.

19 **1. Section 230(c)(1) of the Communications Decency Acts Immunizes Coenen**
 20 **from Liability for Republishing the Statements of FDI and FitzPatrick**

21 Medifast cannot succeed in its defamation claim against Coenen for republishing the
 22 statements of FDI or FitzPatrick. The Communications Decency Act of 1996, 47 U.S.C. §
 23 230(c)(1) confers broad immunity against defamation liability for republishing on the Internet
 24 information that originated from another source. *Id.*; see also *Barrett v. Rosenthal*, 40 Cal.4th 33,
 25 39 (Cal. 2006). This immunity extends to individuals who republish allegedly defamatory
 26 content, unless the individual “materially contributes” to the illegality of the statement. *Barrett*,
 27 40 Cal.4th at 58-63. The “material contribution” inquiry focuses on whether the republisher took
 28 action to create the alleged illegality of the statement. Exercising editorial functions of a publisher

1 does not deprive a defendant of section 230 immunity. *See Barrett*, 40 Cal.4th 33 at 60, n. 19, and
2 *Batzel*, 333 F.3d at 1031, n. 18.

3 In *Barrett*, the California Supreme Court held that section 230 immunized a defendant who
4 reposted an allegedly defamatory article to a newsgroup. *Barrett*, 40 Cal.4th 33. The court
5 observed that “Congress has comprehensively immunized republication by individual Internet
6 users.” *Id.* at 40–41. Because the defendant was not actively involved in the creation of the
7 defamatory posting, but only republished the unchanged posting to a website, section 230(c)(1)
8 immunity precluded liability. *Id.* at 40-41 and 60, n. 19; *see also Pham v. Pham*, 182 Cal.App.4th
9 323, 328 (Cal. Ct. App. 2010) (Section 230 immunity applied where the sender of an e-mail added
10 an introductory statement when forwarding an allegedly defamatory email because nothing
11 created by the sender was itself defamatory).

12 Here, Coenen cannot be liable for republishing the allegedly defamatory statements made
13 by FDI or FitzPatrick. This fact is fatal to Medifast’s claims related to the following four posts,
14 which were each wholesale republications of prior statements made by FDI or FitzPatrick:

- 15 1. The May 21, 2009 post entitled “Fraud Discovery Institute blasts Medifast,”
16 republishing in its entirety the FDI press release of the same date and title;
- 17 2. The May 21, 2009 post republishing “5 Points of Similarity Between Medifast and
18 YTB”;
- 19 3. The January 12, 2010 post entitled “Medifast multi-level marketing scheme called
20 into question by expert,” which republishes portions of FDI’s January 8, 2009 press
21 release; and
- 22 4. The January 13, 2010 post entitled “More on the endless chain recruitment scheme
23 of Medifast and Take Shape for Life,” which republishes portions of FitzPatrick’s
24 January 8, 2009 updated report.

25 Section 230(c)(1) immunity similarly applies to statement made by Phillips, FitzPatrick, or
26 FDI that Coenen republished as part of her coverage of the Medifast controversy. This includes,
27 for example:

- 28 • Medifast’s claim that the June 11 post falsely stated that “BJL Wealth Management
recommended the purchase of Medifast stock to an FDI operative.” (Exh. Y at ¶
61). This statement was originally published in an FDI press release on June 9,
2009. (Exh. Y, Exh. 15.)
- Medifast’s claim that the September 14 post falsely stated that health coaches are
required to put up their own money, and that “Medifast is not complying with some

1 unknown and undisclosed legally mandated reporting requirements.” (Exh. Y at ¶
2 62.) Neither of these statements appear in the post. They do, however, appear in
3 both the FitzPatrick report and the Phillips article.

- 4 • Medifast’s claim that the January 13 post falsely stated that Medifast was
5 misleading its shareholders by claiming that Minkow was the author of the critical
6 reports, rather than FitzPatrick. (Exh. Y at ¶ 68.) This accurate statement was
7 originally published in an FDI press release on January 8, 2009. (Exh. Y, Exh. 21.)

8 Thus, section 230(c)(1) immunity prevents Medifast from establishing a probability of
9 succeeding on its claims against Coenen and Sequence, Inc.

10 **2. Medifast Cannot Establish a Probability of Prevailing on its Claim for** 11 **Defamation**

12 Medifast brings this defamation claim under California law.¹¹ (Exh. Y at ¶ 87.) The
13 burden of proof in a defamation claim depends on whether the plaintiff is a private or public
14 figure. It is indisputable that Medifast is a public figure for the purposes of this lawsuit. “The
15 limited purpose public figure is an individual who voluntarily injects him or herself or is drawn
16 into a specific public controversy, thereby becoming a public figure on a limited range of issues.”
17 *Ampex*, 128 Cal.App.4th at 1577. Three elements must be present in order to characterize a
18 plaintiff as a limited purpose public figure: First, there must be a public controversy, which
19 means “the issue was debated publicly and had foreseeable and substantial ramifications for
20 nonparticipants.” *Id.* Second, the plaintiff must thrust itself into the debate and try to influence the
21 debate through a voluntary act. *Id.* In this regard it is sufficient that the plaintiff attempts to thrust
22 him or herself into the public eye. Third, the alleged defamation must be related to the plaintiff’s
23 participation in the controversy. *Id.*

24 Medifast meets the definition of a limited purpose public figure. First, there is a public
25 controversy. The growth of Medifast and the viability of the TSFL program are the subject of
26 public debate with substantial ramifications for Medifast’s stockholders, TSFL program
27 participants, and consumers of Medifast’s products and services. FDI and FitzPatrick investigated
28 and evaluated Medifast’s growth and business model, and began a public debate about the
company. Second, Medifast voluntarily injected itself into the controversy. Medifast issued

¹¹ Cal. Civ. Code § 45.

1 numerous press releases to publicize its growth and the success of the TSFL program. Medifast
 2 issued press releases refuting the FDI report and continued the debate via subsequent press
 3 releases and through other media. (See Exhs. M, S, U & W.) Third, Coenen's blog posts track
 4 the ongoing controversy over Medifast's growth and business practices.

5 As a limited purpose public figure, Medifast bears a high burden of proof on its
 6 defamation claim. It must prove both that the challenged statements are false, and that Coenen
 7 acted with actual malice. *Christian Research Institute v. Alnor*, 148 Cal. App. 4th 71, 81 (Cal. Ct.
 8 App. 2007). Medifast cannot establish either element.

9 a. **The Statements Made in Coenen's Blog Are Fully Protected by the**
 10 **First Amendment**

11 To state a defamation claim that survives a First Amendment challenge, Medifast must
 12 present evidence of a statement of fact that is provably false. *Milkovich v. Lorain Journal*
 13 *Company*, 497 U.S. 1, 20 (1990). "A defendant is not required in an action of libel to justify every
 14 word of the alleged defamatory matter; it is sufficient if the substance, the gist, the sting of the
 15 libelous charge be justified, and if the gist of the charge be established by the evidence the
 16 defendant has made his case." *Gilbert*, 147 Cal.App.4th at 28.

17 Whether a statement is reasonably susceptible of a defamatory interpretation is a question
 18 of law for the court. *Franklin v. Dynamic Details, Inc.*, 116 Cal.App.4th 375, 385 (Cal. Ct. App.
 19 2004). In drawing the distinction between opinion and fact, California courts apply the totality of
 20 the circumstances test to determine whether an allegedly defamatory statement is actionable.
 21 *Baker v. Los Angeles Herald Examiner*, 42 Cal. 3d 254, 260 (Cal. 1986). The test is a two-part
 22 inquiry. First, the language of the statement is examined—the words must be understood in a
 23 defamatory sense. *Seelig v. Infinity Broadcasting Corp.*, 97 Cal.App.4th 798, 809 (Cal. Ct.App.
 24 2002). Next, courts consider the context of the statement by "look[ing] at the nature and full
 25 content of the communication and to the knowledge and understanding of the audience to whom
 26 the publication was directed." *Id.* at 809-810.

27 In applying the test, "editorial context is regarded by the courts as a powerful element in
 28 construing as opinion what might otherwise be deemed fact." *Morningstar, Inc. v. Sup. Ct.*, 23

1 Cal.App.4th 676, 693 (Cal. Ct. App. 1994). “[T]he publication is to be measured...by the natural
2 and probable effect upon the mind of the average reader.” *Id.* at 688.

3 Part of the totality of the circumstances used in evaluating the language in question is
4 whether the statements were made by participants in an adversarial setting. *Ferlauto v. Hamsher*,
5 74 Cal.App.4th 1394, 1401 (Ct. App. 1999). “Where potentially defamatory statements are
6 published in a public debate...in which the audience may anticipate efforts by the parties to
7 persuade others to their positions by use of epithets, fiery rhetoric or hyperbole, language which
8 generally might be considered as statements of fact may well assume the character of statements
9 of opinion.” *Gregory v. McDonnell Douglas Corp.*, 17 Cal. 3d 596, 601 (Cal. 1976).

10 “A statement of opinion based on fully disclosed facts can be punished only if the stated
11 facts are themselves false and demeaning.” *Standing Comm. on Discipline of the United States*
12 *District Court v. Yagman*, 55 F.3d 1430, 1440 (9th Cir. 1995). When the facts underlying an
13 opinion are disclosed, readers will understand they are getting the publisher's interpretation of the
14 facts presented, and “are free to accept or reject the author's opinion based on their own
15 independent evaluation of the facts.” *Id.* Such statements of opinion are entitled to full
16 constitutional protection. *Id.*

17 Medifast's defamation claim is based on statements that appear in three posts authored by
18 Coenen. None of these statements is sufficient to subject Coenen to liability.

19 **i. June 24, 2009: "Conflict of interest for Medifast auditors?"**

20 Medifast takes issue with two statements made in the June 24 post: that a BJI Wealth
21 Management recommended the purchase of Medifast stock to an FDI operative and that the stock
22 recommendation would “certainly be a conflict of interest for Medifast and its auditor.” (Exh. Y at
23 ¶ 61). This statement cannot form a basis for a defamation claim because it does not convey a
24 defamatory meaning. And Coenen is immune from liability because the statement republishes
25 part of the June 9 FDI press release. (See Exh. Y, Exhs. 15 and 17.)

26 The second statement, that the stock recommendation would “certainly be a conflict of
27 interest” misstates the content of the post. The post does not say this. In fact, the post specifically
28 states: “An auditor working in the capacity of an investment advisor does not automatically give

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1 rise to independence issues.” (Exh. Y, Exh. 17.) Coenen outlines what would and would not
2 constitute a conflict of interest under the scenario alleged by FDI. Coenen does not provide an
3 opinion as to whether there actually was a conflict of interest. Furthermore, Medifast is not the
4 object of the statement, the auditing firm is. Medifast cannot assert a defamation claim on the
5 firm’s behalf.

6 Even if the post stated or implied that there was "certainly a conflict of interest," this
7 would be insufficient to support a claim for defamation as a matter of law. Whether a conflict of
8 interest exists is an opinion, and does not imply an objective fact that can be provably true or
9 false. *Savage v. Pac. Gas & Elec. Co.*, 21 Cal.App.4th 434, 445-445 (Cal. Ct. App. 1993).

10 ii. **September 14, 2009: "Medifast and Take Shape For Life:
11 Weight loss pyramid scheme?"**

12 Medifast identifies three statements in the September 14 post that allegedly support its
13 claim for defamation: (1) that TSFL participants "are required to put up their own money"; (2) that
14 TSFL is a pyramid scheme; and (3) that "Medifast is not complying with some unknown and
15 undisclosed legally mandated reporting requirements." (Exh. Y at ¶ 62.)

16 The first statement does not appear in the post. It does, however, appear in both the
17 FitzPatrick report and the Phillips article that are referenced within the post. The statement that
18 TSFL participants are required to put up their own money does not convey a defamatory meaning,
19 and is provably true—Health Coaches have to pay a registration fee and are encouraged to purchase
20 marketing materials.

21 As to the third statement, the post neither states nor implies that Medifast is not complying
22 with "unknown and undisclosed legally mandated reporting requirements." The post does state
23 that “Medifast doesn’t disclose how much money the coaches are making, how much they spend
24 on expenses of the business, what their attrition rates are, or how many recruits are actively selling
25 or recruiting.” This statement does not convey a defamatory meaning. Nor does it state or imply
26 any “legally mandated reporting requirements.” The statement only identifies information that
27 Medifast was, in fact, not disclosing.

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1 The crux of Medifast’s defamation claim is the implication that TSFL is a pyramid
2 scheme. Analysis of the statement in the context of the post as a whole demonstrates that the
3 claim that TSFL is a pyramid scheme is both true and a nonactionable statement of Coenen’s
4 opinion.

5 First, the gist of the statement is true. Black’s Law Dictionary defines a pyramid scheme
6 as “[a] property distribution scheme in which a participant pays for the chance to receive
7 compensation for introducing new persons to the scheme, as well as for when those new persons
8 themselves introduce participants.” BLACK’S LAW DICTIONARY 1272 (8th ed. 2004). The
9 mechanics of TSFL’s business model are undisputed: Recruits pay a registration fee to become
10 participants in TSFL, and the program is organized into a ten-level tiered compensation structure
11 where participants receive commission for additional Health Coaches recruited into their
12 downline.

13 Even if the statement were not true, Coenen’s claim that TSFL is a pyramid scheme is a
14 nonactionable statement of Coenen’s opinion. The statement was made by a consumer advocate,
15 on her own website, in the context of an ongoing public dispute about multilevel marketing
16 programs in general, and TSFL’s operations in particular. Fraud Files is a consumer protection
17 blog that focuses on exposing the dangers of multilevel marketing programs. Readers of Fraud
18 Files expect Coenen to take an aggressive stance against multilevel marketing companies to
19 persuade the public of her belief. As demonstrated within the post itself, the term is used to
20 describe multilevel marketing programs that attract participants to sell products as a money
21 making opportunity, when the only practical way to make significant money in the program is to
22 recruit downline salespeople:

23 Why is multi-level marketing such a cash cow for the owners and
24 executives of companies like these? Because product and service
25 sales become largely irrelevant. The company instead markets the
26 “opportunity” for making extra money and achieving financial
27 freedom. (Almost no one is able to actually achieve either of these
28 when they sign up to sell MLM junk, but that’s beside the point. Get
people to believe it’s possible, and you’re golden.) Recruit people
into the MLM, require “minimum purchases” from each to continue
to “qualify” in the pyramid, and you are likely going to have
exponential growth for the company.

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Take Shape For Life, however, makes it clear that to make real money, you have to recruit new people into the plan. This is where the allegations of being a pyramid scheme come in. Like all other MLMs that I've looked at, the product or service isn't really the focus. It's simply the bait to get someone in and make the company look legitimate. The real focus, however, is the recruiting of new marks into the scheme.

So the company's products haven't been proven to be stellar. The traditional outlets for the products are not doing well. And the MLM portion of the company is booming, even though there's no evidence that the products themselves are actually selling well. Everything points to the real deal being endless chain recruitment into a pyramid scheme.

(Exh. Y, Exh. 18.)

Simply establishing that TSFL does not violate California's "endless chain" statute—that 49% of its revenue is generated within the program, rather than 51%—would miss the point. This distinction is irrelevant to the context in which the statement was offered. The average reader of Fraud Files would not interpret the use of "pyramid scheme" in a strict, technical sense.

Furthermore, the claim that TSFL is a pyramid scheme is a nonactionable statement of opinion based on fully-disclosed facts. *Standing Comm.*, 55 F.3d at 1440. Within the post, Coenen identifies the facts that she relied on in forming this opinion. She references outside source material in support of the opinion, including FitzPatrick's report, Phillips' article, and documents released by Medifast itself. (Dec. T. Coenen, ¶ 16.) The post links to these materials directly. (See *Id.* and Exh. Y, Exh. 18.) Readers of Fraud Files understand that they are getting Coenen's interpretations of these facts. By identifying the facts that form the basis of her opinion and linking directly to the source material, readers are given the opportunity to draw their own conclusions. This opinion is entitled to full constitutional protection.

iii. January 13, 2010: "Medifast continues to mislead shareholders."

Finally, Medifast takes issue with the statement that the company was "misleading its shareholders" by claiming or implying that Minkow was the author of the critical reports, rather than FitzPatrick. (Exh. Y at ¶ 68.) The company's protest is without merit. The Form 10-Q filed

1 by the company in November 2009 implied that Minkow was the author of the report rather than
 2 FitzPatrick. The blog post identified the document and accurately quoted from it. (Exh. Y, Exh.
 3 25.) This is a nonactionable statement of Coenen's opinion based on a document released by
 4 Medifast itself. The statement cannot subject Coenen to liability for defamation.

5 Medifast cannot establish that any of the allegedly defamatory statements identified in its
 6 complaint is a provably false statement of fact. Therefore, the company cannot meet its burden of
 7 proof, and the complaint must be stricken.

8 **3. Medifast Cannot Establish That Coenen Made a Provably False Statement of**
 9 **Fact with Actual Malice**

10 Even if Medifast could establish that Coenen made a provably false statement of fact, it
 11 could not establish that she made the statement with actual malice. Medifast is faced with a high
 12 burden to establish the second element of its defamation claim. In order to demonstrate "actual
 13 malice," Medifast must produce clear and convincing evidence that the allegedly defamatory
 14 statements were made with knowledge of their falsity or with reckless disregard of their truth or
 15 falsity. *Ampex*, 128 Cal.App.4th at 1578-79. To meet this standard, the evidence presented must
 16 be sufficiently strong "as to command the unhesitating assent of every reasonable mind." *Id.* at
 17 1579.

18 "Reckless disregard" is a purely subjective test, "focused on the defendant's attitude
 19 toward the veracity of the published material, as opposed to his or her attitude toward the
 20 plaintiff." *Reader's Digest Ass'n v. Sup. Ct.*, 37 Cal.3d 244, 257 (Cal. 1984). Thus, evidence of
 21 ill will, personal spite or bad motive is insufficient to establish actual malice. *Harte-Hanks*
 22 *Communications, Inc. v. Connaughton*, 491 U.S. 657, 666-667 and n. 7 (1989). A plaintiff must
 23 present evidence that the defendant "in fact entertained serious doubts as to the truth of his
 24 publication." *Reader's Digest Association*, 37 Cal.3d at 256. "Gross or even extreme negligence
 25 will not suffice to establish actual malice; the defendant must have made the statement with
 26 knowledge that the statement was false or with actual doubt concerning the truth of the
 27 publication." *Annette F. v. Sharon S.*, 119 Cal.App.4th 1146, 1167 (Cal. Ct. App. 2004).

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1 Medifast cannot meet this burden. Coenen's posts and statements were based on
 2 FitzPatrick's reports, materials published by FDI, Medifast's public documents, and other articles
 3 about the company. (Dec. Coenen, ¶¶ 16 & 20.) Coenen believed each statement to be true at the
 4 time it was published. (*Id.* ¶ 20.)

5 And Medifast has given her no reason to doubt the veracity of the posts. In the eleven
 6 months between when FDI first published FitzPatrick's report and when Medifast filed this
 7 lawsuit, Medifast has never publicly refuted the substance of FitzPatrick's claim. The two press
 8 releases that responded to the FitzPatrick report contain vague denunciations of the report and
 9 level attacks on Minkow, rather than responding to FitzPatrick's allegations. Even a secret
 10 committee convened by Medifast to evaluate FitzPatrick's claims equivocated in its response,
 11 stating the the claims were "false, misleading, and/or without merit." The failure to plainly and
 12 publicly refute the substance of FitzPatrick's allegations at any time prior to filing a quarter-billion
 13 dollar lawsuit demonstrates, at least, a troubling lack of transparency at the company. Such
 14 secrecy and non-denial denials engender further suspicion.

15 **4. Medifast's Derivative Claims for Violation of Corporations Code § 25400 and**
 16 **Violation of Business and Professions Code § 17200 Fail**

17 Medifast's claims for market manipulation and unfair business practices are each explicitly
 18 based on the allegedly defamatory statements made by Coenen. Because Medifast cannot
 19 establish a probability of success on its claim for defamation, these derivative claims fail as a
 20 matter of law. See *Blatty v. New York Times Co.*, 42 Cal.3d 1033, 1042 (Cal. 1986)
 21 (constitutional privilege applies to all claims whose gravamen is the alleged injurious falsehood of
 22 a statement) and *Fellows v. Nat'l Enquirer, Inc.* 42 Cal.3d 234, 245 (Cal. 1986) (derivative tort
 23 cannot based on the same acts which would not support a defamation action).

24 Even if that were not the case, Medifast could not establish a probability of success of its
 25 claim for violation of Corporations Code § 25400. Coenen has never taken a short position in
 26 Medifast's stock. (Dec. Coenen, ¶ 22.) Neither has Coenen made any statement with the specific
 27 intent of "inducing the purchase or sale of a security." See *Cal. Amplifier, Inc. v. RLI Ins. Co.*, 94
 28 Cal.App.4th 102, 110 (Cal. Ct. App. 2001). Coenen's posts were made to provide consumer

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1 protection information to the general public, not to induce the sale of Medifast stock. (Dec.
2 Coenen, ¶¶ 6, 10 & 19.) Medifast’s claim for violation of Business and Professions Code § 17200
3 is dependent on the claim for market manipulation, and therefore must fail as well.

4 **C. Defendants Are Entitled To Recover Their Costs And Attorney’s Fees**

5 If Medifast fails to carry its burden, Defendants will request recovery of attorney’s fees
6 through a noticed motion. Code Civ. Proc. § 425.16(c).

7 V.

8 **CONCLUSION**

9 By shining a light on corporate abuses, scams and schemes, Tracy Coenen arms consumers
10 with the tools they need to make informed decisions. Her advocacy work is a necessary check to
11 the power that businesses like Medifast hold over consumers. The awful force of this power is
12 demonstrated by this lawsuit, filed solely to silence Coenen and the chorus of other critics
13 questioning Medifast’s operations.

14 When a lawsuit serves to chill the proper exercise of free speech through intimidation,
15 misdirection and miscalculation, California's anti-SLAPP statute must be applied to thwart that
16 attack. Medifast cannot meet its burden to show it can prevail on its claims against Tracy
17 Coenen, so her voice must be returned.

18 For the reasons stated above, Defendants’ special motion to strike Plaintiffs’ complaint
19 should be granted.

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22 DATED: April 12, 2010

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