CHRISTOPHER E. GRELL (NO. 88498)
RICHARD F. RESCHO (NO. 108086)
LAW OFFICES OF CHRISTOPHER E. GRELL
The Leamington
1814 Franklin Street, Suite 501
Oakland, California 94612
Telephone: (510) 832-2980
Facsimile: (510) 832-2986
grell140@yahoo.com
rrescho2001@yahoo.com

Attorneys for Defendant
Robert L. FitzPatrick

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

vs.

BARRY MINKOW, an individual; FRAUD DISCOVERY INSTITUTE, INC., a California corporation; ROBERT L. FITZPATRICK, an individual; TRACY COENEN, an individual; SEQUENCE, INC., a Wisconsin service corporation; WILLIAM LOBDELL, an individual; iBUSINESS REPORTING, a California business organization of unknown form; and 'ZEEYOURSELF', an individual,

Defendants.

Case No.: 10 CV 0382 JLS WMc

DEFENDANT ROBERT L. FITZPATRICK'S SPECIAL MOTION TO STRIKE PLAINTIFF'S COMPLAINT AS A SLAPP PURSUANT TO CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 425.16

Date: July 1, 2010
Time: 1:30 P.M.
Courtroom: 6
Judge: The Hon. Janis L. Sanmartino
Magistrate Judge: William McCurine, Jr.
Complaint Filed: February 17, 2010
Trial Date: None Set

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I. PRELIMINARY STATEMENT

This is a paradigm SLAPP[1] suit for defamation brought by Plaintiff Medifast, Inc., a publicly traded corporation, and its Executive Chairman of the Board, Bradley MacDonald for one reason, to chill Defendant Robert L. FitzPatrick's constitutional right of free speech on an important public issue[2], i.e., multilevel marketing, pyramid schemes and Ponzi schemes, a type of business model, which adversely affects the lives of thousands of individuals, their families and their friends, in a place open to the public: The Internet) (See Affidavit of Robert L. FitzPatrick, attached as **Exhibit A** and incorporated as if set forth herein.)

II. BRIEF STATEMENT OF THE CASE AGAINST FITZPATRICK

Defendant Robert L. FitzPatrick ("FitzPatrick"), an expert in multilevel marketing analysis, was retained by Defendants the FRAUD DISCOVERY INSTITUTE, INC. and its co-founder Barry Minkow ("FDI") to investigate and provide FDI with FitzPatrick's analysis and his expert opinions relating to the business practices of Medifast and its multi-level marketing division, Take Shape for Life ("TSFL"). (See **Exhibit A**, Affidavit of Robert L. FitzPatrick ("FitzPatrick Aff."), ¶48-55.)

As set forth in Exhibit 8 to Plaintiffs' Complaint, the findings in FitzPatrick's Reports were also submitted to both the Federal Trade Commission ("FTC") and the Attorney General of California with a request that further action be taken.

The essence of Medifast's and Bradley MacDonald's ("Plaintiffs") $270 million dollar defamation action against FitzPatrick is that he allegedly libeled Medifast in his expert reports sent to FDI, who publicized these reports by posting them on the Internet and sending them to the FTC and the Attorney General of California. Copies of FitzPatrick's reports are attached to Plaintiffs' Complaint as **Exhibits 1, 9, 11 and 19** and to FitzPatrick's Affidavit.

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[1] SLAPP is an acronym for "Strategic Lawsuits Against Public Participation." (See California Code of Civil Procedure Section 425.16.)

[2] In 2002, the California Supreme Court held that Code of Civil Procedure §425.16 applies to speech protected under section (e) regardless of whether a plaintiff actually intends by his lawsuit to chill protected speech. "Defendant, in order to obtain a dismissal of plaintiff's SLAPP suit (strategic lawsuit against public participation), did not have to demonstrate that plaintiff's action was brought with the intent to c hill defendant's exercise of constitutional speech or petition rights." Equilon Enterprises v. Consumer Cause, Inc. (2002) 29 Cal.4th 53. The only consideration is whether the defendant's speech would actually be chilled as a result of the lawsuit.

In Plaintiffs' Amended Complaint, they added a "Conspiracy to Defame" cause of action to try and impose liability on FitzPatrick based on statements made by other Defendants named in the case. This cause of action is also subject to California Code of Civil Procedure[3] Section 425.16.

Plaintiffs' also claim that Fitzpatrick and the other Defendants engaged in a scheme of illegal market manipulations to lower the price of Medifast's stock in violation of California Business & Professions Code ("Cal. Bus. & Prof.") Section 17200 et seq. and California Corporation Code ("Cal. Corp. Code") Section 25400 et seq.

Since FitzPatrick never traded any Medifast stocks and never was a part of any common plan to benefit from a sale of Medifast stocks, a condition precedent to establishing a conspiracy, Plaintiffs' First, Second, Third and Fourth Causes of Action against FitzPatrick are frivolous and without any justification and should be dismissed under CCP §425.16, California's SLAPP statute for the reasons discussed.

Bradley MacDonald's claim against FitzPatrick is also a frivolous SLAPP since FitzPatrick made no statements against Bradley MacDonald ("MacDonald"), individually or as part of any conspiracy. As a result, MacDonald's Complaint against FitzPatrick should also be dismissed pursuant to CCP §425.16.

III. PLAINTIFFS' LAWSUIT IS A SLAPP SUIT AND SHOULD BE DISMISSED

FitzPatrick, who never bought or sold any Medifast stock nor benefitted from the sale of any stocks and who never published any statement about MacDonald or publicized any statements against Medifast, brings this Special Motion to Dismiss under CCP §425.16 against Medifast and MacDonald ("Plaintiffs"). See United States ex rel. Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 970-973 (9th Cir. 1999), *cert. denied*, 530 U.S. 1203 (2000). See also Thomas v. Frye's Electronics, Inc. 400 F.3d 1206 (9th Cir. 2005) ("In Lockheed, we determined that California anti-SLAPP motions to strike and entitlement to fees and costs are available to litigants proceeding in federal court, and that these provisions do not conflict with the Federal Rules of Civil Procedure.")

The basis for FitzPatrick's Special Motion to Strike is that Fitzpatrick's speech is protected under CCP §425.16 based on several provisions of California's SLAPP statute, including, but not limited to CCP §425.16(b)(3) and (4), i.e., FitzPatrick's speech involved a matter of public interest

[3] All further reference is to California Code of Civil Procedure ("CCP") unless otherwise noted.

made in a place open to the public and involved speech made in furtherance of his constitutional right of free speech in connection with a public issue and/or an issue of public interest.

FitzPatrick's speech is also protected by CCP §§425.16(e)(1) and (2) since his findings were sent to both the FTC and California's Attorney General Office. (See **Exhibit 8** to Plaintiffs' Complaint.)

As set forth in CCP §425.16, in pertinent part:

> (b) (1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.
>
> * * * *
>
> (e) As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

In short, the speech involved in FitzPatrick's reports, which Plaintiffs base their claims on, was made in furtherance of FitzPatrick's exercise of his constitutional right of free speech made in connection with both a public issue and an issue of public interest (See CCP §425.16(e)(4)), and in connection with a public issue made in a public forum, (CCP §425.16(e)(2).) (The Internet is a public forum. See Reno v. American Civil Liberties Union (1997) 51 U.S. 44, 853.)

Since FitzPatrick's reports were also sent to the California State Attorney General and the FTC (Complaint, Exhibit 8), FitzPatrick's speech would also be protected under CCP §§425.16(1) and (2).

IV. CALIFORNIA'S ANTI-SLAPP STATUTE IS APPLICABLE TO THIS CASE

Under U.S. ex rel. Newsham v. Lockheed Missiles & Space Co., supra, and under Thomas v. Frye's Electronics, supra, FitzPatrick is entitled to bring a California Anti-SLAPP motion in federal court.

In anticipation of Plaintiffs' claim that under the doctrine of Erie Railroad Co. v. Thompkin 304 U.S. 64 (1938), this Court should not apply the California Anti-SLAPP statute because it "is a state procedural rule, in conflict with the Federal Rules of Civil Procedure", Defendant FitzPatrick responds as follows:

First, the doctrine of Erie states that state's substantive law should apply in a federal court setting in diversity but that federal procedure rules should control the analysis if use of "procedural state laws" would result in a "direct collision" with a Federal Rule of Civil Procedure ("Fed.R.Civ.P."). If there is no collision, "the court must make the typical, relatively unguided Erie choice." (See Metabolife Intl. Inc. v. Warnick 264 F.3d 832, 845 (9th Cir. 2001), an anti-SLAPP case filed in federal court which applied California's Anti-SLAPP statute.)

Here, there is no "direct collision" between the Fed.R.Civ.P. and the California anti-SLAPP statute. See New Net, Inc. v. Lavasoft 356 F.Supp. 2d 1090, 1101 (C.D. Cal. 2004).

The next step the Court must look to in determining whether the California anti-SLAPP statute should apply is to look to the "twin arms of the Erie Rule: discouragement of forum – shopping and avoidance of inequitable administration of the laws." See Hanna v. Plummer 380 U.S. 460, 468.

Here, the application of the California anti-SLAPP statutes does not violate the Erie doctrine. To the contrary, in U.S. ex rel. Newsham, supra, 190 F.3d at 973, the court held that:

> Plainly, if the anti-SLAPP provisions are held not to apply in federal court, a litigant interested in bringing meritless SLAPP claims would have a significant incentive to shop for a federal forum. Conversely, a litigant otherwise entitled to the protections of the Anti-SLAPP statute would find considerable disadvantage in a federal proceeding. This outcome appears to run squarely against the "twin arms" of the Erie doctrine.

Accordingly, Defendant FitzPatrick's Special Motion to Strike under California's anti-SLAPP statute is properly before this Court.

V. BACKGROUND RELEVANT TO PLAINTIFFS' CLAIMS AGAINST DEFENDANT ROBERT L. FITZPATRICK

On February 17, 2009, more than a year after FitzPatrick published his September 15, 2008 report, the first of several of his expert reports critical of Plaintiffs' business model, and more than a

year after FitzPatrick published his second February 16, 2009 report[4] (See Exhibit 1 to Plaintiffs' Complaint), Plaintiffs commenced this action claiming that FitzPatrick's September 15, 2008 report and his February 16, 2009 report contained false and defamatory statements about the integrity of Medifast's multi-level marking business model and the viability of Medifast in general. (See Plaintiffs' Complaint, ¶¶1-2.)

Plaintiffs make the same claims against FitzPatrick as a result of two additional reports that he published and that were publicized on the Internet by FDI and Barry Minkow ("FDI"). (See **Exhibit 9 and 11** to Plaintiffs' Complaint.)

As set forth in the Fitzpatrick Aff., ¶4, FitzPatrick did not publicize any of his reports after they were published and sent to FDI.

As set forth in Plaintiffs' Complaint, Plaintiffs' claim for defamation against FitzPatrick are based on the "opinions" expressed by FitzPatrick in his reports. (Plaintiffs' Complaint, ¶¶49, 50 and 69.)

Among the opinions FitzPatrick expressed, the following are "examples" of what Plaintiffs claim were libelous per se:

1. That TSFL operates as an endless chain or pyramid scheme. (Comment: not libelous per see, true.)
2. That TSFL's business model violates California Penal Code Chapter 9, §327. (Comment: not libelous per se, true.)
3. That like Bernie Madoff's Ponzi scheme, TSFL's unprecedented and inexplicable growth should be looked upon with suspicion. (Comment: not libelous per see, true.)
4. That TSFL's grown is unsustainable and therefore Medifast's reporting to its shareholders is false and misleading. (Comment: not libelous per se, true.)
5. That TSFL's income promise is based on success at endless chain recruiting, not retail selling. (Comment: not libelous per se, true.)
6. That Medifast's doesn't offer a viable income opportunity, but the illusion of one. (Comment: not libelous per se, true.)
7. That it is the bogus income opportunity of Medifast, not its weight loss products that account for its singular revenue growth and stock rise. (Comment: not libelous per se, true.)
8. TSFL's marketing lure is not legitimate. (Comment: not libelous per se, true.)
9. That Medifast's true competitors are Amway and Pre-Paid Legal Services, among other such pyramid schemes. (Comment: not libelous per se, true.)

[4] Under CCP §340, Plaintiffs had one year in which to file any claim for libel stemming from FitzPatrick's September 2008 and February 16, 2009 reports. Plaintiffs failed to do so. As a result, any claim for libel based on these two reports are time-barred.

10. That the evolution of a Medifast consumer pyramid scheme on Main Street to an inflated stock scheme on Wall Street has an obvious and unavoidable analogy – the sub-prime mortgage crisis. (Comment: not libelous per se, true.)
11. That getting a position on the TSFL pyramid pay plan requires a payment of between $100 and $300 and each coach would also be required to purchase inventory and marketing materials. (Comment: not libelous per se, true.)
12. That Medifast is merely a pump-and-dump scheme, creating a deception on Wall Street and misleading shareholders. (Comment: not libelous per see, true.)
13. That more than $6 million worth of shares were dumped by insiders in the two months prior to the report. (Comment: not libelous per se, true.)
14. That the stock price is inflated out of all proportion to revenue because the future expansion is presented as "unlimited", just like the coaches' mythical prospects for earnings. (Comment: not libelous per se, true.)

As set forth herein, in the Fitzpatrick Aff. (**Exhibit A**) and in the Affidavit of Christopher E. Grell (**Exhibit 1**) ("Grell Aff."), not only are these statements protected under CCP §425.16, they are not libelous per se since most, if not all, of FitzPatrick's statements, are non-actionable statements of opinion.

Furthermore, these statements are also true.

In addition, these statements are privileged under Civil Code §47(b)(2). (See Complaint, Exhibit 8.)

In fact, Plaintiffs' lawsuit against FitzPatrick, as well as against FDI, Barry Minkow, Tracy Coenen, and William Lobdell reads more like an infomercial extolling the purported "health" benefits of Medifast products and its weight loss plan based on nothing more specific than Plaintiffs' self-serving and conclusory allegations. (See Complaint, ¶¶18-39.)

As set forth herein in the FitzPatrick Aff. (**Exhibit A**) and in the Grell Aff. (**Exhibit One**), Plaintiffs' self-serving and conclusory allegations are replete with numerous misrepresentations and omissions of material fact about Medifast, its history, Medifast products and Medifast's Take Shape for Life ("TSFL") business model.

In short, Plaintiffs' Complaint is a frivolous and suspect lawsuit brought to chill FitzPatrick's constitutional right of free speech protected under CCP §425.16, the California SLAPP statute.

VI. BRIEF STATEMENT OF THE LAW

A. California's Anti-SLAPP Law

California CCP §425.16, California's anti-SLAPP law, was enacted by the Legislature in 1992 to address a stated concern over the "disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for redress of grievances." (§425.16, subd. (a).) (Wilcox v. Superior Court (1994) 27 Cal.App.4th 809, 816-817, 823.)

In 1997, the Legislature amended §425.16 to expressly mandate that it "shall be construed broadly." (Stats. 1997, ch. 217, §1; amending section 425.16, subd. (a).) Shortly thereafter, the Supreme Court issued its first opinion construing the anti-SLAPP law and directed that the courts, "whenever possible, should interpret the First Amendment and Section 425.16 in a manner 'favorable to the exercise of freedom of speech, not to its curtailment'." (Briggs v. Eden Council for Hope and Opportunity (1999) 19 Cal.4th 1106, 1119 ("Briggs"), quoting Bradbury v. Superior Court (1996) 49 Cal.App.4th 1170, 1176.)

Such mandate for broad construction was discussed in M.G. v. Time Warner, Inc. (2001) 89 Cal.App.4th 623, 628-629. In first holding that the anti-SLAPP law could be used by powerful media defendants, the Court of Appeal explained how broadly the law has been applied, noting as follows:

> Both legislative mandate and judicial interpretation have expanded the application of the anti-SLAPP statute beyond its paradigmatic origins. At first, it was envisioned that the anti-SLAPP statute would be limited to situations involving "powerful and wealthy plaintiffs, such as developers, against impecunious protestors...." [cite] The state Legislature, however, has directed that Section 425.16 to be interpreted broadly. [cite] Furthermore, a number of courts have approved the use of the anti-SLAPP statute by media defendants like those here. [cite] Therefore, although in this situation, powerful corporate defendants are employing the anti-SLAPP statute against individuals of lesser strength and means, we are constrained by the authorities to permit its use against plaintiffs of this ilk.

To effectuate its broad public purpose, §425.16 creates an accelerated two-step procedure for disposing of SLAPP lawsuits. In the first step, the defendant bringing a Special Motion to Strike must establish that the lawsuit arises from "any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitutions in connection with a public issue." (§425.16, subd. (b); Wilcox v. Superior Court, supra, 27 Cal.App.4th at 820.) The defendant may meet this burden by showing the act which forms the basis for the plaintiff's cause of action is "an act in furtherance of [the] person's right of petition or free speech", which phrase is defined in §425.16(e) as:

> (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law;
>
> (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law;
>
> (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; [or]
>
> (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

If the defendant meets this burden, in the second step, the burden shifts to the plaintiff to demonstrate a probability that the plaintiff will prevail on the claim. (§425.16(b).) To meet this burden, the plaintiff must demonstrate that his or her complaint is legally sufficient and is supported by a sufficient prima facie showing of admissible facts to sustain a favorable judgment. (Wilcox v. Superior Court, supra, 27 Cal.App.4th at 823.) Once the appropriate evidence is submitted, the Special Motion to Strike must be granted "unless the court determines that the plaintiff has established that there is a probability that [he or she] will prevail on the claim." (Ibid.)

i. **The Publications of Robert L. FitzPatrick Are Protected Under CCP §425.16**

As noted, §425.16(e) defines the type of acts covered by the SLAPP law, and includes four illustrative sub-parts. Specifically, §425.16(e)(3) and (e)(4) provide that acts falling within the statute's protection include: "(3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest."

As also noted, the statute expressly mandates that it is to be construed broadly. See Church of Scientology v. Wollersheim (1996) 42 Cal.App.4th 628, 650-651:

Similarly, Damon v. Ocean Hills Journalism Club (1999) 85 Cal.App.4th 468, 479, held that "The definition of 'public interest' within the meaning of the anti-SLAPP statute has been broadly construed to include not only governmental matters, but also private conduct that impacts a broad segment of society and/or that affects a community in a manner similar to that of a governmental

entity." (Also see Nicosia v. De Rooy (N.D. Cal. 1999) 72 F.Supp.2d 1093, 1110 [critical statements about biographer Jack Kerouac deemed to involve a matter of public interest].)

Applying the language and rationale of the foregoing authorities to the publications upon which Plaintiffs' claims rest, the statements set forth in the reports of Robert L. FitzPatrick attached to Plaintiffs' Complaint, are protected under CCP §425.16 since his speech was made in connection with a public issue in a public forum, i.e., the Internet, as well as in furtherance of his constitutional right of free speech in connection with a public issue or issue of public interest.

Since FitzPatrick's findings were also sent to the FTC and Attorney General of California, FitzPatrick's statements are also protected under CCP §425.16(e)(1) and (2).

ii. **FitzPatrick's Speech Involves a Matter of Public Interest**

As set forth in FitzPatrick's affidavit (**Exhibit A**), this suit seeks to prevent a valid analysis and critique of the type of business – multi-level marketing – that is at the center of important public discussions and controversies that affect the public interest. Millions of people are solicited annually to invest in and pursue the "income opportunity" of companies of like Medifast. Evaluating multi-level marketing plans is an important public aspect of consumer protection against pyramid and Ponzi schemes that harm millions of people. (FitzPatrick Aff., ¶19.)

At the heart of these public discussions is the question whether multi-level marketing companies, such as Medifast's TSFL division, are disguised pyramid, endless chain and money transfer schemes that make claims for substantial income but, in fact, result in nearly all failing. This failure rate occurs not by market forces or "odds" or levels of talent or ambition, but due to the inherently flawed structure and deceptive lures. (FitzPatrick Aff., ¶20.)

Questions about multi-level marketing's legitimacy and income opportunity, as well as how to distinguish a legitimate direct selling company from a disguised pyramid scheme are the subject of constant and pervasive internet debates, official warnings posted on Better Business Bureau sites, official advisories from the FTC, and news media feature stories. (FitzPatrick Aff., ¶26.)

The U.S. FTC has prosecuted or shut down more than 20 multi-level marketing companies since 1994 that it determined were disguised pyramid schemes. Many others have been prosecuted by state regulators. (FitzPatrick Aff., ¶27.)

The question of multi-level marketing pay plans is of special importance during an economic recession. In this distressed financial climate, the "product" in most demand–and in least supply–is an *income opportunity*. This is precisely what multi-level marketing companies sell. The "opportunity" that is offered is, in fact, to sell the opportunity to someone else. The cruelty of the endless chain extends beyond a financial loss. The scheme induces the people to recruit among their very own friends and relatives. (FitzPatrick Aff., ¶142.) Social and personal harm may exceed the financial losses. (FitzPatrick Aff., ¶29.)

As news media reports have verified repeatedly, pyramid and Ponzi schemes are pervasive now and have grown markedly in proportion to rises in unemployment and home foreclosures. They proliferate not only on Wall Street, but on Main Street. All of these schemes have in common the trickery of the endless chain. (FitzPatrick Aff., ¶30.)

Due to new disguises, the weakness of law enforcement and the desperate needs of many more people during a Recession that incline them to pursue misleading income schemes, open inquiry, debates and consumer protection efforts regarding pyramid selling schemes are all the more important. (FitzPatrick Aff., ¶¶31-38.)

Multi-level marketing is largely unregulated and little understood by regulators or the media. It is not taught in schools or universities. No data is collected on it at the federal or state level. It is not defined as an industry sector by Wall Street analysts. It developed only over the last 30 years into a significant economic force. (FitzPatrick Aff., ¶138.)

Faced with receding job opportunities, rising home foreclosures and ballooning credit card debt, millions of Americans are being solicited each year to place their hopes in multi-level marketing "business opportunities" of the Medifast variety. For consumers, the importance of this field has grown immensely in recent years such that virtually every family in America is affected directly or indirectly by the flood of multi-level marketing solicitations. Lured by the schemes' defining promise of potentially "unlimited" income for an infinite chain of later participants, consumers commonly skip due diligence, take on more debt, and eschew conventional job opportunities in a hope-filled, but futile, pursuit of the "endless chain" mirage. The recruiting program is sometimes euphemistically referred to as "leveraging", "duplication" or as Medifast's recruiters term, "building structure." (FitzPatrick Aff., ¶140.)

Few who sign up and invest time and money realize they have sacrificed conventional consumer protections and assumed an entirely new legal status as "independent contractors", the proverbial unprotected "middle men." In this vulnerable state, they sign contracts, pay fees, buy products, acquire marketing materials and take on many other business costs. (FitzPatrick Aff., ¶141.)

Multi-level marketing's primary jeopardy to consumers-operating as pyramid schemes rather than genuine direct selling-has the capacity to harm millions of people and often those most vulnerable and least able to recover from economic harm. (FitzPatrick Aff., ¶143.)

The importance of public vigilance and expert analysis and critique of multi-level marketing is confirmed and best exemplified by the U.S. FTC's 2006 Business Opportunity Rule: Notice of Proposed Rule Making. (See Federal Register/Vol. 71, No. 70/Wednesday, April 12, 2006/Proposed Rules, 19059.) (FitzPatrick Aff., ¶144.)

The FTC's description and statement of the vulnerability of consumers to promises and claims made by pyramid marketing schemes closely match Medifast's marketing claims and promises which FitzPatrick analyzed in his reports. (FitzPatrick Aff., ¶144.)

The FTC wrote:

> "Like business opportunities covered by the existing Franchise Rule, pyramid schemes often deceive consumers with the promise of large potential incomes. It is not uncommon for promoters of these schemes to claim potential incomes of thousands of dollars a week or month....Many induce new recruits with the promise of ongoing commercial relationships that will enable recruits to operate their own business selling various products or services. Typically, they promise to provide recruits with promotional assistance. Some also offer training. Few, however, reveal their high drop-out rates, much less the fact that the vast majority of those who have joined the program-often 90% or more-will not recoup their investment." (FitzPatrick Aff., ¶145.)

In sum, there can be little, if any, doubt that the public debate and discussion surrounding multi-level marketing, pyramid and Ponzi schemes, involves an important matter of public interest entitled to protection under CCP §425.16.

VII. PLAINTIFFS CANNOT ESTABLISH A PROBABILITY OF PREVAILING

A. Plaintiff's Complaint Contains False and Misleading Allegations and Should Be Viewed As Suspect

One reason why Plaintiffs cannot establish a probability of prevailing on any of their claims is because Plaintiffs' Complaint is replete with misrepresentations and material omissions of material fact that render the entire Complaint as suspect.

For example, contrary to Plaintiffs' claim, Medifast, Inc. did not start doing business in 1980. (See Complaint, ¶18.) In fact, Medifast was not incorporated until 2001 when it changed its name from Healthrite to Medifast. (**Exhibit C**.)

Rather, in 1980, a company called Jason Pharmaceutical, Inc. began manufacturing and marketing to doctors and hospitals, products with the brand name Medifast. (See **Exhibit D**.)

Contrary to Plaintiffs' claim (Plaintiffs' Complaint, ¶21), the Medifast products and weight loss plan was developed by Dr. William Vitale, not Dr. Wayne Anderson. (**Exhibits E and EE.**)

Contrary to Plaintiffs' claim (Complaint, ¶20), Medifast products were not at all times readily available to the public. Instead, Medifast products were only available from a doctor and with a doctor's supervision because the Medifast program was an extremely low calorie diet and dangerous. (**Exhibit F**).

As set forth in **Exhibit G** at p. 901, in a 1992 FTC Consent Decree issued against Jason Pharmaceuticals, there were substantial health risks associated with Medifast products. As set forth in **Exhibit II**, there are still significant health risks. (See Grell Aff., ¶¶78-80.)

As also set forth in FTC Consent Decree, the FTC found that Jason Pharmaceuticals was guilty of false and misleading statements about the safety and efficacy of the Medifast products and program, facts that were concealed by Jason Pharmaceuticals and its successor companies, Vitamin Specialties, Healthrite and Medifast.

Jason Pharmaceuticals was also involved in a number of personal injury lawsuits stemming from the use of their Medifast program, which were also concealed. (See **Exhibit H**.)

As set forth in **Exhibit H**, up until the time that the FTC issued its Consent Decree, Jason Pharmaceuticals ("Jason") succ essfully marketed the Medifast plan through the use of false and misleading advertising.

Facing an increasing number of personal injury lawsuits, coupled with the fraud claims brought by the FTC, Jason filed for bankruptcy in 1994. (See **Exhibit I**.)

In 1995, a publically traded corporation named Vitamin Specialties purchased Jason. (See **Exhibit J**.) Jason became a subsidiary of Vitamin Specialties.

Despite the fact that Jason had been ordered by the FTC to provide copies of the 1992 FTC order to any company that subsequently purchased or acquired Jason (See **Exhibit G**, p. 915), the annual reports of Vitamin Specialties for the year 1995 made no mention of the FTC's Consent Decree to the public or its stockholders. No mention was made of any of the lawsuits that were filed against Jason either.

In 1995, Vitamin Specialties changed its name to Healthrite. (**Exhibit K**.) Jason remained a subsidiary. Bradley MacDonald was CEO of Healthrite.

At no time did Healthrite, which was also publically traded, ever mention the 1992 FTC Consent Decree or any of the lawsuits to the public or its stockholders during the years 1995, 1996, 1997, 1998, 1999, 2000 and 2001.

In 1997, the Board of Directors of Healthrite fired MacDonald, claiming he was incompetent. (See **Exhibit L**.)

After being fired, MacDonald used the Healthrite stock he had acquired as CEO and started a proxy fight with Healthrite's then Board of Directors. (See **Exhibit M.)**

As a result of the proxy fight, MacDonald regained his position as CEO of Healthrite in 1998. (**Exhibit N**)

In 2001, Healthrite decided to change the company's name to Medifast. (**Exhibit O**.)

At no time did Medifast disclose to the public that a consent decree had been issued against Jason Pharmaceutical, a subsidiary of Medifast.

At the time, Medifast sent a proxy statement to all shareholders. (**Exhibit P**.) One of the more interesting disclosures that Medifast was, that instead of there being the 20,000 physicians who had recommended the Medifast products and weight plan as set forth in Plaintiffs' Complaint (See Complaint, ¶19), there were only "several thousand doctors" who did so.)

Proof that Medifast falsely advertised that 20,000 physicians recommended the Medifast program is set forth in Medifast's 2008 Annual Report (**Exhibit Q**), wherein Medifast claims that only 15,000 physicians had recommended the Medifast program. Proof that this number had not changed in

decades is set forth in **Exhibit G**, p. 910, wherein it was reported that in 1989, two to three years before the FTC issued its order, 12,000 physicians recommended Medifast.

In other words, assuming that during the years 1990 and 1991, another 1,333 new physicians joined Medifast, by September 1992, there were approximately 15,000 physicians getting paid to falsely advertise and recommend the Medifast program.

Under the FTC Consent Decree, Jason Pharmaceuticals was ordered to serve a copy of the FTC order on every physician involved. (See **Exhibit G**, p. 915.) As a result, many physicians ceased being involved, especially when Medicare stopped reimbursing physicians for patients on the Medifast plan. (**Exhibit R**.)

Medifast's advertisements claiming that 15,000 or 20,000 physicians recommended the Medifast program is also misleading because the Medifast program previously recommended was not the same Medifast program sold today. (See **Exhibit S**.)

In fact, in late 2002, the last year that the FTC order was in effect (See **Exhibit G**, p 915), Medifast started the company "Take Shape for Life". As set forth in **Exhibits T and DD**, the TSFL Medifast business model bore no resemblance to the original doctor-supervised Medifast liquid protein diet plan.

As set forth in **Exhibits T and V**, at the time Medifast changed to its multi-level marketing program, the company was on the verge of bankruptcy.

After regaining his position as CEO of Healthrite/Medifast, in 2007, MacDonald was again removed as CEO of Medifast for suspected improprieties. (**Exhibit U**.)

As set forth in **Exhibit V**, Medifast's stock also had a history of substantial declines.

Given the prior history of Medifast and MacDonald and their failure to disclose information to the public and its stockholders, it was only a matter of time before the questionable practices and problems with Medifast were exposed. Exposing the truth, however, does not give rise to a libel claim.

Other material and misleading claim by Plaintiffs is their claim that the Medifast program has been clinically approved. As set forth in **Exhibit W**, Medifast never publicized the fact that the clinical study done by John Hopkins by Lawrence Cheskin, M.D., the principal author, was paid for by Medifast and run by Lawrence Cheskin, M.D., a member of Medifast's Board of Medical Advisors.

Medifast also failed to disclose that the John Hopkins study, which Medifast uses as a strong advertising claim, was originally rejected by Diabetes Care, a leading peer-reviewed journal. (See **Exhibit W**.) It was later published in a less prestigious journal.

As set forth in the Grell Aff. (**Exhibit 1,** ¶¶78-81), Medifast also failed to disclose the risks of the Medifast diet, risks which Medifast's own Dr. Cheskin writes about in his books and reports.

Another false and misleading claim is Medifast's claim that health coaches can obtain "healthy finances." (Complaint, ¶22.) As set forth in **Exhibit X**, recently posted compensation documents, buried in the Medifast TSFL's website, show that the average monthly income of a health coach is $76.00, significantly less than what it would cost a health coach to set up its Medifast business opportunity. Indeed, while Medifast claims that its health coaches have low start-up costs (Complaint, ¶27), Medifast fails to disclose the true cost for a health coach to get their business up and running and to stay up and running. (**Exhibit Y**, see also Grell Aff., ¶¶80-81.)

In short, Medifast past and present history, as set forth in Plaintiffs' Complaint, is replete with false and misleading statements and omissions of material fact made to promote the integrity of the case, the company, the company's products and the integrity of Medifast and of MacDonald as upstanding public figures. They are not and, as a result, Plaintiffs' claims should be viewed with suspicion in evaluating the merits of Plaintiffs' claim.

B. Plaintiffs Cannot Establish a Probability of Prevailing on Any Claim for Defamation

As noted, once a defendant makes a prima facie showing that the lawsuit arises from speech covered by CCP §425.16, the burden shifts to Plaintiffs to establish a probability of prevailing on their claims. Plaintiffs' showing must be made by competent and admissible evidence. (Wilcox v. Superior Court, supra, 27 Cal.App.4th at 820, 830; Evans v. Unkow (1995) 38 Cal.App.4th 1490, 1497-1498; Ludwig v. Superior Court (1995) 37 Cal.App.4th 8, 15-16, fn. 16, 25.) "The test is similar to the standard applied to evidentiary showings in summary judgment motions pursuant to CCP §437c and requires that the showing be made by competent admissible evidence within the personal knowledge of the declarant." (Church of Scientology v. Wollersheim, supra, 42 Cal.App.4th at 654.)

If Plaintiff is a public figure, Plaintiff must establish malice by clear and convincing evidence.

To establish defamation, Plaintiffs must also come forward with admissible evidence on at least four scores.

First, Plaintiffs must show that the matters complained of were "published", i.e., that the statements were communicated to some third person who understood their defamatory meaning and their application to the Plaintiffs. (See Witkin, Summary of California Law (9th Ed. 1988), Vol. 5, §476, pp. 560-561.)

Second, Plaintiffs must affirmatively show that the statements at issue are false. (Hejmadi v. AMFAC, Inc. (1988) 202 Cal.App.3d 525, 552-553 [truth is an absolute defense against civil liability for defamation].) Moreover, because the statements at issue pertain to a matter of public concern, the burden rests squarely on Plaintiffs to prove falsity. (Philadelphia News, Inc. v. Hepps (1986) 475 U.S. 767, 787-788; see Brown v. Kelly Broadcasting Co. (1989) 48 Cal.App.3d 711, 747.

Third, Plaintiffs must show that the statements at issue are defamatory. In defamation actions, it is entirely appropriate for the Court to determine in the first instance "whether the publication could reasonably have been understood to have a libelous meaning." (Kapellas v. Kofman (1969) 1 Cal.3d 20, 34, fn. 14.) Thus, Plaintiffs must show the statements involve "a false and unprivileged publication…which exposes [them] to hatred, contempt, ridicule, or obloquy, or which causes [them] to be shunned or avoided, or which has a tendency to injure [them] in [their] occupation." (Civil Code §45.) [Emphasis added.]

For the reasons discussed, Plaintiffs cannot meet the evidentiary burdens with which they are faced:

1. Plaintiffs Cannot Establish that the Statements at Issue Are Demonstrably False Statements of Fact

Plaintiffs' conclusory claim that the opinions and statements published in FitzPatrick's reports constitute actionable libel does not establish a probability of prevailing on a claim for defamation since FitzPatrick's statements do not contain provably false assertions of fact. Instead, they are true and/or protected expressions of FitzPatrick's subjective judgment based on non-libelous statements that supports his opinions. As Justice Swager observed in Copp v. Paxton (1996) 45 Cal.App.4th 829: "The issue whether a communication was a statement of fact or opinion is a question of law to be decided by the Court.

Moreover, the boundaries of permissible public discourse have evolved significantly in the last half century. As noted, in Rosenaur v. Scherer (2001) 88 Cal.App.4th 260, 280, "Although it may have been actionable to call someone a "hypocrite" in 1916, or an "old witch" in 1955, today calling someone a "thief" and a "liar" in a public debate has been held to be constitutionally-protected rhetorical hyperbole."

That Defendant FitzPatrick's statements are protected opinion is also supported by the forum and context in which the statements were republished, the Internet, a public forum, as part of an on-going exchange about multi-level marketing and pyramid schemes. As noted in Gregory v. McDonnell Douglas Corp. (1976) 17 Cal.3d 596, 601: "[W]here potentially defamatory statements are published in a public debate, … or in another setting in which the audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole, language which generally might be considered as statements of fact may well assume the character of statements of opinion."

Here, FitzPatrick was specifically retained as an expert to evaluate and assess Medifast and its TSFL business model and express his opinions. FitzPatrick's findings, which he relied in forming his opinions, involved issues of public interest, that were published as part of a public debate to persuade others, including the California Attorney General and FTC, to his position by use of rhetoric and analogy to support FitzPatrick's opinions. As such, FitzPatrick's findings and his interpretation of these findings, are expression of non-actionable opinion.

i. Plaintiffs Medifast and Bradley MacDonald Are Public Figures Who Must Prove Malice

As public figures, even if FitzPatrick's statements were actionable, Plaintiffs must prove malice to establish a probability of prevailing under the New York Times Co. v. Sullivan (1964) 376 U.S. 254 rule, requiring malice as a condition to recovery for defamation by a public figure. See Curtis Publishing Co. v. Butts (1967) 388 U.S. 130.

For example, in Reader's Digest Assn. v. Superior Court, (1984) 37 Cal.3d 244, 256, the court held that Synanon, a foundation established as a rehabilitation program for drug addicts, and its founder were public figures, noting that:

> "While any person or organization has the right to engage in publicity efforts and to attempt to influence public and media opinion regarding their cause, such significant,

> voluntary efforts to inject oneself into the public arena require that such person or organization be classified as a public figure in any related defamation actions. In the instant case, Synanon and its founder have sponsored massive publicity and self-promotion efforts over a period of many years and apparently *increased* these efforts with regard to the present controversy. As such, they enjoyed remarkable access to the media through which to counter any criticisms they deemed to be unwarranted and voluntarily exposed themselves to increased risk of injury from unfavorable commentary about them. Thus, they have clearly met the standards for 'public figure' status for purposes of this defamation action."

Here, both Medifast and MacDonald voluntarily injected themselves into the public arena through their promotions, advertisements and press releases about Medifast and Medifast's "Trilogy of Optimal Health", i.e., Healthy Body, Healthy Mind and Healthy Finances.

A Google search using the words "Medifast" comes back with 756,000 hits. (**Exhibit Z.**)

A Google search for "Bradley MacDonald and Medifast" comes back with 4,710 hits, which includes YOUTUBE's videos of Brad MacDonald promoting Medifast. (**Exhibit AA.**)

As with Synanon, both Medifast and Bradley MacDonald have sponsored massive publicity and self-promotional campaigns over a period of years and have increased these efforts with regard to the present controversy. (See **Exhibit BB.**) As such, Medifast and MacDonald have enjoyed remarkable access to the media through which to counter any criticisms they deem to be unwarranted.

By maintaining numerous websites promoting Medifast and TSFL (See Plaintiffs' Complaint, ¶22), and publishing and speaking widely about Medifast and TSFL's healthy body, healthy mind and healthy finances philosophy, Plaintiffs must also believe that the public is interested in the benefits Plaintiffs' claim to others.

In short, Medifast and MacDonald meet the standards for "public figure" status for purposes of the defamation action and conspiracy to commit defamation. As public figures, Plaintiffs' burden of proof requires that they establish, with clear and convincing evidence that FitzPatrick acted with malice when he wrote his reports.

ii. Plaintiffs Cannot Show Malice and a Probability of Prevailing

It is well settled that where, as here, the publications at issue concern a public figure, actual malice must be showed and may not be presumed. As a result, Plaintiffs bear the burden of proving actual malice, and it must be proved by clear and convincing evidence. (See Copp v. Paxton, supra, 45 Cal.App.4th at 846.) This means that Plaintiffs must show not only that the statements they attributed

to FitzPatrick were false and defamatory, but also that they were published with actual knowledge of their falsity or otherwise circulated with reckless disregard of whether they were false or not. (Id.) Moreover, "[t]he burden of proof by clear and convincing evidence requires a finding of high probability. The evidence must be so clear as to leave no substantial doubt. It must be sufficiently strong so as to command the unhesitating assent of every reasonable mind." (Ibid.)

As set forth in the FitzPatrick affidavit, Plaintiffs cannot meet the burden with which they are faced since the reports of FitzPatrick were not made with reckless disregard for the truth. To the contrary, as set forth in the FitzPatrick Affidavit, the statements made in his reports are true and well researched.

Since Plaintiffs have not and cannot come forward with sufficient prima facie evidence of falsity or actual malice to establish a probability of prevailing on their defamation claims as against Defendant FitzPatrick, Plaintiffs' claims against FitzPatrick should be dismissed on the grounds that FitzPatrick's statements are protected under CCP §425.16 and on the grounds that Plaintiffs cannot establish a probability of prevailing on any of their causes of action which all flow from FitzPatrick's protected speech.

Plaintiffs' claim for conspiracy to defame is similarly flawed and should be dismissed, i.e., the statements are true, not made with malice and privileged and that Plaintiffs cannot show a probability of prevailing.

iii. FitzPatrick's Statements Are Also Protected under Civ. Code §47(b)(2) and CCP §425.16(e)(1) and (2) and the Litigation Privilege Under Civ. Code §47(b)

As set forth in **Exhibit 8** to Plaintiffs' Complaint, the opinions and findings set forth in FitzPatrick's reports were submitted to the California Attorney General and the FTC with the request that these agencies take legal action against Plaintiffs. As a result, the statements are privileged under Civil Code §47(b).

In Ramalingam v. Thompson (2007) 151 Cal.App.4th 491, the court noted that Civil Code §47(b)(2) provides, in pertinent part:

> "The California Supreme Court has established the parameters of the litigation privilege: [T]he section 47(b) privilege operates as a *limitation on liability*, precluding use of the protected communications and statements as the basis for a tort action other than for malicious prosecution. Thus, section 47(b) creates what in many other contexts

is termed an 'immunity' from suit." (Moore v. Conliffe (1994) 7 Cal.4th 634, 638, fn.1 [discussing former section 47(b), now section 47(b)(2).])

"To effectuate its vital purposes, the litigation privilege is held to be absolute in nature." (Silberg v. Anderson (1990) 50 Cal.3d 205, 215 [discussing former section 47(2), now section 47(b)(2).]

The litigation privilege also to be broadly applied (Silberg, supra at 211) and doubts are resolved in favor of the privilege. (Kashian v. Harriman (2002) 98 Cal.App.4th 892, 913.)

Moreover, the litigation privilege has been affixed to matters beyond the courtroom. See Silberg v. Anderson (1990) 50 Cal.3d 205, 214.

Here, Defendant FitzPatrick was, as he had been in the past, retained to evaluate and express his opinions concerning Medifast's business model and whether, in his opinion, it violated the law against illegal "pyramid" or "Ponzi schemes." (See FitzPatrick Aff., ¶¶1-16.) As set forth in FitzPatrick's Affidavit, his mission like that of FDI is to expose companies engaged in illegal business operations so that legal action by either the FTC, SEC or Attorney General's Office can stop these practices.

In short and as set forth in Edwards v. Centex Real Estate Corp. (1997) 53 Cal.App.4th 13, 34-37, FitzPatrick's reports were made preliminary to a proposed judicial or quasi judicial proceeding, in good faith, with the request that legal action be taken in order to resolve FitzPatrick and FDI's concerns relating to Medifast's illegal business operations.

For these reasons, FitzPatrick respectfully submits that the statements in his reports are also privileged under Civil Code §47(b)(2) and protected under CCP §425.16(e)(1) and (2).

iv. Plaintiffs' Second Cause of Action for Conspiracy to Defame Is Also A SLAPP Claim That Should Be Dismissed

On April 12, 2010, Plaintiffs unilaterally filed an Amended Complaint, adding a cause of action for "Civil Conspiracy to Defame." (See Amended Complaint, ¶¶106-112.)

Aside from the fact that Plaintiffs' claim is devoid of any specific facts to support a conspiracy claim and that "conspiracy" is not a cause of action, (See Applied Equipment Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal.4th 503, 510-511), Plaintiffs' conspiracy claim, like Plaintiffs' first, third and fourth causes of action arise out of the same speech and conduct that is protected under CCP §425.16.

Since CCP §425.16 is applicable to Plaintiffs' conspiracy claim, Plaintiffs, must, as they acknowledge in ¶112 of the Amended Complaint, establish malice by clear and convincing evidence that there is a probability of prevailing on a conspiracy to defame cause of action against FitzPatrick. (See Amended Complaint, ¶112.)

As noted, Plaintiffs cannot establish that FitzPatrick's statements and/or conduct was made with malice. To the contrary, the FitzPatrick statements that give rise to Plaintiffs' claim were well researched and support FitzPatrick's non-actionable and/or privileged opinions set forth in his reports.

For this reason alone, Plaintiffs cannot establish a probability of prevailing. However, there is more.

As set forth herein, FitzPatrick never traded any Medifast stock, never publicized his reports and never benefited financially from the fluctuation of Medifast stock. (FitzPatrick Aff., ¶¶1-16.)

As a result, Plaintiffs cannot establish that FitzPatrick was ever part of the "common goal" of the alleged conspiracy, i.e.,"to glean huge profits and to bolster their own reputations in the public eye. (See Amended Complaint, ¶109.)

Further, since a "conspiracy is not an independent tort, it cannot create a duty or abrogate an immunity. Applied Equipment, Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal.4th 503, 514.

As long as the underlying wrongs are subject to privilege, defendants cannot be held liable for a conspiracy to commit those wrongs. In other words, acting in concert with others does not destroy the immunity of defendants. McMartin v. Children's Institute International (1989) 212 Cal.App.3d 1393, 1406.

In short, any privilege or immunity applicable to FitzPatrick or any other defendant such as the litigation privilege, the statute of limitations, or the immunity privilege under Section 230 of the Communication Decency Act, is not destroyed by acting in concert.

Indeed, because civil conspiracy is so easy to allege, Plaintiffs have a weighty burden to establish a probability of prevailing, i.e., Plaintiffs must prove that each member of the conspiracy acted in concert and came to a mutual understanding to accomplish a common and unlawful plan, and that one or more of them committed an overt act to further it. It is not enough that the conspiring officers knew of an intended wrong act, they had to agree, expressly or tacitly, to achieve it. Unless

there is such a meeting of the minds, the independent acts of two or more wrongdoers do not amount to a conspiracy. See Choate v. Orange County (2006) 86 Cal.App.4th 312, 333.

Here, there is no such evidence of any unlawful plan, meeting of the minds or common goal.

In short, Plaintiffs' Second Cause of Action for Conspiracy to Defame is a thin-veiled and frivolous attempt to hold FitzPatrick liable for the statements of every other Defendant because Plaintiffs know that the specific statements made by FitzPatrick were made without malice, are time barred, are true, are non-actionable opinion and/or are privileged.

For this reason and the reasons already discussed, Plaintiffs' conspiracy cause of action should be dismissed pursuant to CCP §425.16.

v. Plaintiffs Cannot Establish a Probability on Prevailing on Their Second, Third and Fourth Causes of Action Against FitzPatrick

As set forth in FitzPatrick's Aff. at ¶3, Robert FitzPatrick never traded, bought or sold any Medifast stock. Since Plaintiffs' second, third and fourth causes of action are based on unspecified Defendant stock trading practices, these causes of action simply do not apply to FitzPatrick. As set forth in Cal. Bus. & Prof. Code §17200:

> "As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 or Division 7 of the Business and Professions Code."

Cal. Corp. Code §25400 states that:

> "It is unlawful for any person, directly or indirectly, in this state:
>
> (a) For the purpose of creating a false or misleading appearance of active trading in any security or a false or misleading appearance with respect to the market for any security, (1) to effect any transaction in a security which involves no change in the beneficial ownership thereof, or (2) to enter an order or orders for the purchase of any security with the knowledge that an order or orders of substantially the same size, at substantially the same time and at substantially the same price, for the sale of any such security, has been or will be entered by or for the same or different parties, or (3) to enter an order or orders for the sale of any security with the knowledge that an order or orders of substantially the same size, at substantially the same time and at substantially the same price, for the purchase of any such security, has been or will be entered by or for the same or different parties.

Moreover, even *assuming arguendo* that FitzPatrick was involved in any trading, which is denied, Plaintiffs' claims should be dismissed since the speech giving rise to Plaintiffs' claims against FitzPatrick still falls under the protection of the California Anti-SLAPP law.

In other words, Plaintiff's Second, Third and Fourth Cause of Action focus on FitzPatrick's alleged trading practices. Upon closer inspection and in light of all other circumstances surrounding this dispute, it is very clear that Plaintiffs have merely tinkered with their pleading in an attempt to shift public scrutiny away from itself and onto FitzPatrick as a result of other Defendants' alleged trading practices. Notwithstanding the motivation behind this, the gist of Plaintiffs' claims has not changed: Plaintiffs' claims against FitzPatrick and all Defendants arise out of the publication of the reports and Defendants' criticism of Plaintiffs and the trading practices of other defendants.

In fact, in order to discern whether Plaintiffs' claims are *really* about FitzPatrick or any Defendant's alleged securities transactions or rather a response to the fallout created by Defendants' statements, one need simply ask whether Plaintiffs would have commenced this action if they believed that FitzPatrick or any other Defendant merely short sold or even naked short sold shares of Medifast's stock *without publishing and publicizing any negative criticism*. The answer is obvious: the publication and publicizing of the negative criticism is the *sine qua non* of this case.

Moreover, Medifast has signaled throughout its Complaint that the republication of FitzPatrick's reports by FDI remains central to Plaintiffs' allegations and claims.

For examples, in ¶¶ 97, 106, 113 and 119 of the Complaint, Plaintiffs incorporate by reference all the facts about Defendants' publication of the FitzPatrick reports, as well as the postings of the other reports and publications by other Defendants. (See Complaint, Exhibits 1-31.)

In other words, Plaintiffs' restates and repeats their principal allegation that Defendants, especially FitzPatrick, made false, deceptive and misleading statements against Plaintiffs. That remains the core allegation underlying Plaintiffs' entire case against FitzPatrick and others and is a critical element of Plaintiffs 'claims for relief against him claims for violation of Bus. & Prof. Code §17200 et seq. for violation of Cal. Corp. Code §25400 et seq. and for conspiracy to defame.

In short, Plaintiffs have cast its defamation claim as one for conspiracy to defame, violation of California's unfair competition law under Bus. & Prof. Code §17200, and security violation under Cal. Corp. Code §25400 et seq. However this pleading maneuver is irrelevant for purposes of this motion

because such claims are still subject to the anti-SLAPP law. See Bernardo v. Planned Parenthood Federation of America (2004) 115 Cal.App.4th 322, where the plaintiffs likewise sued Planned Parenthood under §§17200 and 17500, though their aim was to limit and control Planned Parenthood's speech. Id. at 328. The court of appeal affirmed the trial court's order dismissing those and other claims and granting defendant's special motion to strike under California's anti-SLAPP statute, CCP §425.16.

Here, there is no evidence that would enable Plaintiffs to prove FitzPatrick's statements: (1) constituted an unlawful, unfair or fraudulent business practice or act; and (2) are false and misleading; and (3) caused members of the public to be deceived. Bernardo, supra, 115 Cal.App.4th at 351-356. As a result, any request for discovery should be denied.

Since Plaintiffs cannot establish the probability that it will prevail as against FitzPatrick, Plaintiffs' Second, Third and Fourth Causes of Action should be dismissed pursuant to CCP §425.16.

vi. Plaintiffs Cannot Establish a Probability of Prevailing on Their Conspiracy, Bus. & Prof. Code or Their Cal. Corp. Code Claims Under CCP §425.16 Because There Was No Illegal Conduct

Under CCP §425.16, Plaintiffs' burden is to show a reasonable probability of prevailing on the merits. It is not Defendant's burden to show that Plaintiffs cannot prevail. Notwithstanding, FitzPatrick has demonstrated that Plaintiffs cannot prevail as a matter of law on any of their claims for the reasons discussed.

Moreover, the legal standard governing a Motion to Strike under the anti-SLAPP statute is not the same as that for Motion to Dismiss under Fed.R.Civ.P. 12(b)(6). Therefore, even if Plaintiffs' claims were able to withstand Defendant's Motion to Strike under 12(b)(6), they would not survive the instant Motion to Strike under CCP §425.16. That is because under the "reverse summary judgment" standard set forth in CCP §425.16, it is not enough for the plaintiff merely to show that its claim is legally viable; rather, the plaintiff must show through competent, admissible evidence that it will probably prevail on its claims. As public figures, Plaintiffs must show this by clear and convincing competent evidence.

Here, because FDI and FitzPatrick had begun to closely analyze Medifast's business and was discovering the troubling facts set forth in Defendant FitzPatrick's reports before any statements were

published, FDI, who appreciated that Medifast's stock was poised for a significant downturn, took a short position on shares of Medifast's stock. Those transactions, however, were perfectly legal.

For all the foregoing reasons, Defendant FitzPatrick respectfully requests that the Court grant his Special Motion to Strike Plaintiffs' Second, Third and Fourth Causes of Action and award him attorneys' fees and costs according to proof pursuant to CCP §425.16(d) since FitzPatrick and the other defendants engaged in no illegal activity.

VIII. CONCLUSION

Defendant FitzPatrick respectfully requests that this Court issue an Order granting this Special Motion to Strike in favor of Defendant Robert L. FitzPatrick and against Plaintiffs Medifast and Bradley MacDonald and/or Medifast and/or MacDonald with respect to all four causes of action asserted in Plaintiffs' Complaint.

FitzPatrick also requests that under CCP §425.16(d), this Court order that Fitzpatrick be entitled to recover all attorneys' fees and costs according to proof as the prevailing party in this Special Motion to Strike.

Date: April 27, 2010

Respectfully submitted,

LAW OFFICES OF CHRISTOPHER E. GRELL

By: _____

CHRISTOPHER E. GRELL
Attorneys for Defendant
ROBERT L. FITZPATRICK