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iBUSINESS REPORTING

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

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)

**SPECIAL ANTI-SLAPP MOTION
TO STRIKE PLAINTIFFS'
AMENDED COMPLAINT [Cal.
Code. Civ. Pro. § 425.16]**

Date: June 3, 2010

Time: 1:30 p.m.

Courtroom: 6

Judge: Hon. Janis L. Sammartino

Complaint Filed: February 17, 2010

Trial Date: None Set

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on June 3, 2010, at 1:30 p.m., or as soon
thereafter as the matter may be heard, in the courtroom of the Honorable Janis L.

1 Sammartino, located at 880 Front Street, San Diego, CA, 312 N. Spring Street,
 2 Los Angeles, California 90012-4793, Defendants Fraud Discovery Institute
 3 ("FDI"), Barry Minkow, William Lobdell and iBusiness Reporting will and
 4 hereby do move this Court for an order striking the Amended Complaint in this
 5 matter in its entirety, without prejudice and without leave to amend pursuant to
 6 California Code of Civil Procedure section 425.16.

7 This special motion to strike is made upon the grounds that plaintiffs have
 8 filed a "Strategic Lawsuit Against Public Participation" ("SLAPP"). The conduct
 9 complained of implicates Defendants' rights of petition and free speech and thus
 10 is subject to California's Anti-SLAPP Statute, California Code of Civil Procedure
 11 section 425.16. Because the complaint is a SLAPP lawsuit, section 425.16(b)(1)
 12 requires that the complaint be stricken unless Plaintiffs demonstrate a probability
 13 of prevailing on their claims against Defendants. Plaintiffs cannot do so for
 14 multiple reasons including: the statements made by Defendants are not actionable
 15 statements of fact, Plaintiffs cannot demonstrate that defendants made any false
 16 statements with actual malice, and Plaintiffs fail to state claims for violations of
 17 California Business & Professions Code section 17200 and California
 18 Corporations Code sections 25400, *et seq.*

19 This Motion is based upon this Notice of Motion and Motion, the
 20 Memorandum of Points and Authorities in support thereof, the supporting
 21 Declaration of Barry Minkow, all pleadings and papers on file in this action, oral
 22 argument as permitted by the Court, and any such other matters that the Court
 23 deems appropriate. The moving parties respectfully request oral argument.

24 Dated: May 4, 2010

DLA PIPER US LLP

25 By: 
 26

ROBERT D. WEBER

27 Attorneys for Defendants Barry Minkow and
 28 Fraud Discovery Institute, Inc., William Lobdell
 and iBusiness Reporting

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 1999 Avenue of the Stars, Fourth Floor, Los Angeles, California 90067.

On May 4, 2010, I served the foregoing document(s) described as:

SPECIAL ANTI-SLAPP MOTION TO STRIKE PLAINTIFFS' AMENDED COMPLAINT [Cal. Code. Civ. Pro. § 425.16]

on interested parties in this action by placing ☐ the original ☒ true copy(ies) thereof enclosed in sealed envelopes as stated below.

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7 ☒ **(BY MAIL)** The envelope was mailed with postage thereon fully prepaid.
As follows: I am "readily familiar" with the firm's practice of collection and
8 processing correspondence for mailing. Under that practice it would be
deposited with U.S. postal service on that same day with postage thereon
9 fully prepaid at Los Angeles, California in the ordinary course of business. I
am aware that on motion of the party served, service is presumed invalid if
10 postal cancellation date or postage meter date is more than one day after date
of deposit for mailing in affidavit.

11 ☒ **(BY ELECTRONIC FILING SERVICE)** By electronically filing the
12 foregoing document(s) using the CM/ECF system. Service of the designated
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13 service, is deemed complete upon the transmission of the Notice of
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14 ☐ **(BY FACSIMILE)** I delivered such document by facsimile to the following
15 persons at the facsimile telephone numbers listed above.

16 ☐ **(BY HAND DELIVERY)** I delivered the within documents to Corporate
Legal Services for delivery to the above address(es) with instructions that
17 such envelope be delivered personally on May 4, 2010 to the above named
individuals.

18 ☐ **(BY OVERNIGHT MAIL)** I am readily familiar with the firm's practice of
19 collection and processing correspondence for mailing with an overnight
courier service. Under that practice it would be deposited with said
20 overnight courier service on that same day with delivery charges thereon
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21 of business. The envelope was sealed and placed for collection and mailing
on that date following ordinary business practices.

22 ☐ **(STATE)** I declare under penalty of perjury under the laws of the State of
23 California that the above is true and correct.

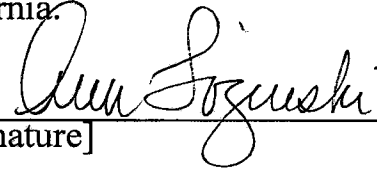
24 ☒ **(FEDERAL)** I declare that I am employed in the office of a member of the
25 bar of this court at whose direction the service was made.

26 Executed on May 4, 2010, at Los Angeles, California.

27 Ann Lozinski

28 [Print Name Of Person Executing Proof]

[Signature]



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**MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF BARRY MINKOW,
FRAUD DISCOVERY
INSTITUTE, WILLIAM
LOBDELL AND iBUSINESS
REPORTING'S SPECIAL ANTI-
SLAPP MOTION TO STRIKE
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I. INTRODUCTION

The Fraud Discovery Institute (“FDI”) and its founder Barry Minkow are in the business of investigating and exposing fraudulent schemes by individuals and entities. And they are very good at it. Since its founding in 2002, FDI has uncovered and stopped nearly \$1.8 billion in financial fraud. Its successes have been acknowledged and lauded by law enforcement authorities and media throughout the nation. FDI and Mr. Minkow expose frauds by conducting in depth research and then publishing their findings to their website, the media and law enforcement.

Plaintiff Medifast, Inc. is one of the more recent subjects of an FDI investigation. FDI and Mr. Minkow decided to research the company due to the similarity of its multi-level marketing business model to those of other companies that previously had been revealed to be fraudulent, and its suspicious revenue spikes during the worst economy since the 1930s. FDI and Mr. Minkow retained numerous experts who conducted investigations and developed extensive reports over a period of more than six months. In February 2009 and periodically thereafter, FDI and Mr. Minkow published their findings and opinions regarding Medifast’s business model.

What FDI and Mr. Minkow did was no different than what happens thousands of times a day in forums ranging from small websites and internet chat rooms to national publications like *The Wall Street Journal* and *Forbes*—professional and amateur reporters evaluate a public company’s business model, form an opinion, and publish that opinion. The right to publish one’s opinions about a publicly traded company, whether those opinions are favorable or critical, is a fundamental right afforded by the First Amendment. And transacting in the stock of a company that one criticizes—something that Mr. Minkow clearly disclosed to the public he was doing—also is not actionable activity. Rather, it is commonly known as “putting one’s money where one’s mouth is.”

1 Lawsuits such as the present one, which chill a well-known whistle
2 blower's freedom of speech, are barred by California's Anti-SLAPP law. FDI
3 and Mr. Minkow's reports and statements, and those of FDI's employee Lobdell,
4 clearly concern a matter of public interest covered by the Anti-SLAPP statute.
5 Thus, under the law, in order to survive the defendants' motions to strike,
6 Plaintiffs have the burden of establishing a probability of success on their claims.
7 As explained below, Plaintiffs cannot do so.

8 Other firms previously exposed by FDI and Mr. Minkow have attempted to
9 silence them using exactly the same tactics that Medifast is trying here, and have
10 failed. For instance, about two years ago FDI publicized (just as it did with
11 Medifast) the fraudulent practices of a multi-level marketing company named
12 USANA Health Sciences, Inc. Like Medifast, USANA also filed a SLAPP suit
13 alleging defamation and stock manipulation in an attempt to scare off FDI and
14 Minkow. U.S. District Judge Tena Campbell of the District of Utah granted FDI
15 and Mr. Minkow's Anti-SLAPP motion,¹ and they subsequently were awarded
16 over \$140,000 in attorneys fees by U.S. Magistrate Judge Samuel Alba.

17 The present suit is no different than the USANA action, and the moving
18 parties respectfully ask the Court to dismiss it for the same reasons: the reporting
19 by Mr. Minkow, FDI, Lobdell and iBusiness Reporting is a protected activity, and
20 Medifast will be unable to prove defamation or stock manipulation because the
21 statements made in the reports were truthful.

22
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27 ¹ *USANA Health Sciences, Inc. v. Minkow*, 2008 WL 619287 (D.Utah March 04,
28 2008).

II. BACKGROUND FACTS

A. FDI and Barry Minkow Are Renowned Corporate Fraud Investigators.

Barry Minkow founded the Fraud Discovery Institute (“FDI”) in 2001 in order to uncover and focus attention on fraudulent activity. *See* Declaration of Barry Minkow (“Minkow Decl.”) at ¶2. Mr. Minkow’s personal history gave him a unique interest in, and aptitude for, uncovering fraudulent schemes. During the 1980s and 1990s, he served seven years in federal prison for securities fraud relating to ZZZZ Best Company. *Id.* at ¶3. Upon his rehabilitation and release from prison, he decided to use his knowledge of how fraudulent schemes are perpetrated to expose other fraudsters.

Since 2002, FDI has uncovered and stopped over 20 major frauds totaling over \$1.8 billion. *Id.* at ¶4. FDI and Mr. Minkow often work closely with agents from the Securities Exchange Commission, the Federal Bureau of Investigation and the Internal Revenue Service. *Id.* FDI and Mr. Minkow have received a letter of commendation from the FBI’s white collar crimes unit, acknowledging their work in assisting the FBI “and other law enforcement agencies to identify and help disrupt and dismantle financial frauds totaling millions of dollars.” *Id.* at ¶5. Numerous national media outlets have hailed their work, and Mr. Minkow is a frequent guest on national television networks including Fox News, CNN and CNBC. *Id.* at ¶6.

William Lobdell is the editor of iBusiness Reporting, a division of FDI that was established in February 2010. iBusiness Reporting is an online journalism enterprise that publishes investigative stories on public companies. Mr. Lobdell was an award-winning investigative reporter for the *Los Angeles Times* and its sister newspapers for 17 years, and is on the visiting faculty at the University of California, Irvine.

1 B. Multilevel Marketing Programs and Pyramid Schemes.

2 A frequent target of FDI's investigations are companies that employ
3 "multi-level marketing" programs, which are a method to sell a product to
4 consumers through a network of salespersons. While these programs purport to
5 be focused on consumer sales, revenue often is mainly generated by recruitment
6 of additional salespeople.² Participants in these programs are compensated both
7 for the amount of retail sales they make and for a portion of the sales or purchases
8 made by salespeople they have recruited to join the program. These schemes
9 generate "revenues" principally as a result of the transfer of money between
10 investors within the scheme as opposed to money from retail sales generated
11 outside the scheme. The compensation of the earlier participants in the scheme
12 grows as they attract later participants, and so on, as more and more participants
13 join.

14 These programs often are called "pyramid schemes" or "endless chain"
15 schemes because of the tiered structure developed by the chain of additional
16 recruits. Because the revenues that support the commissions paid to participants
17 are funded primarily by payments made for the right to participate, an endless
18 chain scheme depends on the continual recruitment of more and more
19 participants. *See* Dec. T. Coenen, Ex. D. The chain continues until recruitment
20 reaches an unsustainable level at which point the scheme collapses and the
21 majority of participants lose money.

22 Multilevel marketing programs that generate revenue primarily through
23 recruitment of additional participants rather than actual sales are considered a
24
25
26

27 ² *See* Declaration of Tracy Conen in Support of Coenen's and Sequence Inc.'s
28 Special Motion to Strike ("Dec. T. Coenen"), Exhibits B & C.

1 form of fraud and are outlawed in many states including California.³ The Federal
 2 Trade Commission publishes a variety of information to warn consumers about
 3 these types of schemes and frequently takes legal action to halt them. *See* Dec. T.
 4 Coenen, Exs. B, C, H-K.

5 C. FDI Investigates The Curious Performance of Medifast's Multilevel
 6 Marketing Division, *Take Shape for Life*.

7 FDI has a long history of investigating and exposing fraudulent multi-level
 8 marketing businesses. FDI has exposed fraudulent schemes at other multi-level
 9 marketers including PrePaid Legal and USANA Health Sciences. Minkow Decl.
 10 at ¶7. Through this research on the multi-level marketing industry and other
 11 information, Medifast came to Mr. Minkow's attention as a potential perpetrator
 12 of financial fraud. Medifast recently had reported a surprisingly sharp spike in its
 13 revenues in the midst of a bruising recession, which stood in sharp contrast to the
 14 revenue declines of most of its competitors. FDI therefore began to investigate
 15 Medifast in 2008. Minkow Decl. at ¶8.

16 FDI retained Robert L. FitzPatrick ("FitzPatrick"), an expert in multilevel
 17 marketing analysis, to investigate and provide expert opinion relating to the
 18 business practices of Medifast and its multi-level marketing division, *Take Shape*
 19 *for Life*. Minkow Decl. at ¶9. FDI retained additional experts to perform
 20 laboratory tests on certain Medifast products and to perform forensic accounting
 21 analyses. *Id.*

22 In September 2008, Mr. FitzPatrick completed his report analyzing
 23 Medifast's growth and the *Take Shape for Life* business model. *Id.* at ¶10. Based

24
 25 ³ As defined by California Penal Code § 327, an "endless chain" means "any
 26 scheme for the disposal or distribution of property whereby a participant pays a
 27 valuable consideration for the chance to receive compensation for introducing one
 28 or more additional persons into participation in the scheme or for the chance to
 receive compensation when a person introduced by the participant introduces a
 new participant."

1 upon his evaluation of financial data and marketing materials published by
 2 Medifast, Mr. FitzPatrick concluded that Medifast, and specifically its *Take*
 3 *Shape for Life* program, operates as an unlawful “endless chain” as defined by
 4 California law. *Id.* FitzPatrick updated his report several months later to include
 5 additional current financial information about Medifast. *Id.*

6 On February 17, 2009, FDI published Mr. FitzPatrick’s report on its
 7 website. *Id.* at ¶12; Am. Compl. ¶¶ 46, 47 and exhibits 1-5. In conjunction with
 8 the publication of the report, FDI launched the website www.medifraud.net. *Id.*
 9 The website contained a series of documents related to Mr. FitzPatrick’s
 10 investigation and findings. *Id.* Subsequent to February 17, 2009, FDI and
 11 Mr. Minkow periodically published additional statements regarding Medifast.

12 Medifast filed this lawsuit on or about February 16, 2010. Neither plaintiff
 13 served a demand for retraction upon any of the defendants under Civil Code
 14 section 48a prior to filing their complaint. iBusiness reporting had not published
 15 any articles about Medifast prior to the suit being filed. Further, while the
 16 Amended Complaint broadly concludes that every statement about Medifast made
 17 by FDI and Mr. Minkow is defamatory, the Amended Complaint notably does not
 18 identify any particular statement in any of the press releases identified above and
 19 identify the specific facts that renders any particular statement untrue.

20 **III. LEGAL STANDARDS REGARDING MOTION TO STRIKE**

21 A. California’s Anti-SLAPP Statute Protects First Amendment Rights 22 By Providing a Procedure for Quickly Dismissing Lawsuits Which 23 Chill Those Rights.

24 Nearly 20 years ago, the California Legislature enacted Section 425.16 of
 25 the Code of Civil Procedure to provide for the early dismissal of meritless suits
 26 aimed at chilling the valid exercise of the constitutional rights of freedom of
 27 speech and petition for the redress of grievances. *See* Cal. Code Civ. Proc.
 28 § 425.16(a); *Braun v. Chronicle Publishing Co.*, 52 Cal. App. 4th 1036, 1042, 61

Cal. Rptr. 2d 58 (1997); *Globetrotter Software, Inc. v. Elan Computer Group, Inc.*, 63 F. Supp. 2d 1127, 1128 (N.D. Cal. 1999). These meritless suits often are referred to as “Strategic Lawsuits Against Public Participation” or “SLAPP” suits, with the result that Section 425.16 has come to be called the “Anti-SLAPP statute.” *See Braun* at 1040 & n. 1; *see also Batzel v. Smith*, 333 F.3d 1018, 1023-24 (9th Cir. 2003) (“California law provides for pre-trial dismissal of ‘SLAPPs’ ... [which are] lawsuits that ‘masquerade as ordinary lawsuits’ but are brought to deter common citizens from exercising their political or legal rights or to punish them from doing so.”).

The statute provides that:

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.

Cal. Code Civ. Proc. § 425.16(b)(1). The California Legislature explicitly directed that this statute “shall be construed broadly.” Cal. Code Civ. Proc. § 425.16(a).

Courts evaluate Anti-SLAPP motions using a two-step process. *Commonwealth Energy Corp. v. Investor Data Exchange, Inc.*, 110 Cal. App. 4th 26, 31, 1 Cal. Rptr. 3d 390 (2003). In the first step, the court determines whether “the defendant has made a threshold showing that the challenged cause of action is one arising from a protected activity.” *Navellier v. Sletten*, 29 Cal. 4th 82, 88, 124 Cal. Rptr. 2d 530 (2002). Protected activities include “any 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.” Cal. Code Civ. Proc. § 425.16(e). Specifically included in these activities are:

(1) any written or oral statement or writing made

1 before a legislative, executive, or judicial proceeding, or
2 any other official proceeding authorized by law;

3 (2) any written or oral statement or writing made in
4 connection with an issue under consideration or review
5 by a legislative, executive, or judicial body, or any other
6 official proceeding authorized by law;

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

10 (4) or any other conduct in furtherance of the
11 exercise of the constitutional right of petition or the
12 constitutional right of free speech in connection with a
13 public issue or an issue of public interest.

14 Cal. Code Civ. Proc. § 425.16(e). The latter two categories require a specific
15 showing that the action concerns a matter of public interest; the first two
16 categories do not. *Briggs v. Eden Council for Hope & Opportunity*, 19 Cal. 4th
17 1106, 1117-18, 81 Cal. Rptr.2d 471 (1999). Any speech by a public or private
18 party falling within these categories is protected under the statute, and a lawsuit
19 arising out of that speech is subject to a special motion to strike.

20 In showing that a cause of action “arises from” protected activity, the
21 moving party need not prove that a plaintiff’s *intent* in bringing a non-meritorious
22 claim was to chill the exercise of protected rights — in fact, the specific intent of
23 a plaintiff is irrelevant. *Fox Searchlight Pictures v. Paladino*, 89 Cal. App. 4th
24 294, 305 (2001); *Tuchscher Dev. Enters., Inc. v San Diego Unified Port Dist.*,
25 106 Cal. App. 4th 1219, 1232 (2003). The only consideration is whether the
26 defendant’s speech would actually be chilled as a result of the lawsuit.

27 B. Once a Defendant Shows That It Engaged In A Protected Activity,
28 The Burden Shifts to Plaintiff to Establish a Probability That It Will
Prevail on its Causes of Action.

Once the defendant makes a threshold showing that a plaintiff’s action is
one arising from statutorily protected activity, the burden then shifts to the
plaintiff to establish the probability that it will prevail on the merits of each of its
causes of action. Cal. Code Civ. Proc. § 425.16(b). In this step, a motion to

1 strike “operates like a demurrer or motion for summary judgment in ‘reverse.’ ...
2 [T]he motion requires the plaintiff to demonstrate that he possesses a legally
3 sufficient claim which is ‘substantiated,’ that is, supported by competent,
4 admissible evidence.” *USANA Health Sciences, Inc. v. Minkow*, 2008 WL
5 619287 at *5 (D. Utah March 4, 2008) (citing *Coll. Hosp. Inc. v. Superior Court*,
6 8 Cal. 4th 704, 34 Cal. Rptr. 2d 898 (1994)).

7 Plaintiff must show “there is a reasonable probability [it] will prevail on the
8 merits at trial” by “show[ing] both that the claim is legally sufficient and there is
9 admissible evidence that, if credited, would be sufficient to sustain a favorable
10 judgment.” *McGarry v. Univ. of San Diego*, 154 Cal. App. 4th 97, 64 Cal. Rptr.
11 3d 467, 475 (2007); *USANA*, 2008 WL 619287 at *5 (“[A] plaintiff opposing an
12 Anti-SLAPP motion cannot rely on allegations in the complaint, but must set
13 forth evidence that would be admissible at trial”). The court “should grant the
14 motion if, as a matter of law, the defendant’s evidence supporting the motion
15 defeats the plaintiff’s attempt to establish evidentiary support for the claim.”
16 *Wilson v. Parker, Covert & Chidester*, 28 Cal. 4th 811, 123 Cal. Rptr. 2d 19
17 (2002).

18 Federal courts repeatedly have confirmed that defendants sued in federal
19 courts can bring Anti-SLAPP motions to strike state law claims and that
20 defendants are entitled to attorneys’ fees and costs when they prevail. *Vess v.*
21 *Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1109 (9th Cir. 2003); *Verizon Delaware,*
22 *Inc. v. Covad Communications Co.*, 377 F.3d 1081, 1091 (9th Cir. 2004). FDI
23 and Minkow are entitled to bring this motion because all of plaintiffs’ causes of
24 action are based on state law.

IV. PLAINTIFFS' CAUSES OF ACTION AGAINST FDI AND MINKOW ARISE FROM ACTIVITIES THAT ARE PROTECTED UNDER THE ANTI-SLAPP STATUTE

The various statements made by FDI and Mr. Minkow which are the subject of the Amended Complaint constitute protected activity under three of the four expressly enumerated categories set forth in subdivision (3) of Section 425.16.

A. FDI and Minkow's Statements Were Made In Connection With An Issue Under Consideration or Review By Governmental Authorities, Namely The FTC and the California Attorney General.

Statements made in connection with an issue under consideration by a "legislative, executive, or judicial body, or any other official proceeding authorized by law," are protected under the Anti-SLAPP statute. Cal. Code Civ. Proc. § 425.16(e)(2). As noted in paragraph 54 of the Amended Complaint, FDI and Mr. Minkow formally asked the U.S. Federal Trade Commission and the California Attorney General to initiate investigations of Medifast and its multi-level marketing division, *Take Shape for Life*. See also Exhibit 8 to Amended Complaint (copy of aforementioned letter to FTC and California Attorney General). Accordingly, FDI and Minkow's reports and website postings constitute "written or oral statements or writings made in connection with an issue under consideration by a legislative, executive or judicial body, or any other official proceeding authorized by law." Cal. Code Civ. Proc. § 425.16(e)(2).

Numerous courts have stricken pursuant to the Anti-SLAPP statute lawsuits based on statements made to administrative agencies and governmental bodies. For example, in *Dickens v. Provident Life and Accident Ins. Co.*, the court found that communications with federal authorities that ultimately led to an individual's criminal indictment constituted protected activity under the Anti-SLAPP statute. 117 Cal. App. 4th 705, 714, 11 Cal.Rptr.3d 877, 883 (2004) ("whatever contact [defendants] allegedly had with the federal authorities

1 was likewise within the ambit of the statute. It was contact with the executive
 2 branch of government and its investigators about a potential violation of law.”).
 3 Similarly, in *ComputerXpress, Inc. v. Jackson*, 93 Cal App. 4th 993, 1008-09 113
 4 Cal. Rptr. 2d 625, 640 (2001), the court held that claims based upon a defendant’s
 5 filing of a complaint with the SEC fell within the scope of the Anti-SLAPP
 6 statute, because the purpose of the complaint was to solicit an SEC investigation.

7 Evidence that a matter is actually under consideration or review by the
 8 authorities is not necessary; “communications to or from governmental officials
 9 which may precede the initiation of formal proceedings” themselves constitute
 10 protected communications under subdivision (e)(2) of Section 425.16. *Id.* at
 11 1009. At least one court has taken this even one step further, holding that a letter
 12 sent to a number of individuals seeking support for a potential petition to the
 13 California Attorney General asking for an investigation constituted protected
 14 activity within the ambit of the Anti-SLAPP statute. *Dove Audio, Inc. v.*
 15 *Rosenfeld, Meyer & Susman*, 47 Cal. App. 4th 777, 54 Cal. Rptr. 2d 830 (1996).

16 B. FDI’s and Mr. Minkow’s Statements Were Made In A Public Forum
 17 In Connection With An Issue of Public Interest.

18 Opinions posted on a widely-read website, regarding whether a publicly
 19 traded company is employing an unsustainable and possibly fraudulent business
 20 model, constitute communications made in connection with an issue of public
 21 interest. Consequently, the statements of FDI and Mr. Minkow regarding
 22 Medifast fall within the ambit of the third and fourth categories of the Anti-
 23 SLAPP Statute.

24 Several courts have held that internet postings regarding corporate activity
 25 constitute issues of public interest in a public forum as defined by the Anti-
 26 SLAPP statute. *See Ampex Corporation v. Cargle*, 128 Cal. App. 4th 1569, 1576,
 27 27 Cal. Rptr. 3d 863 (2005); *ComputerXpress*, 93 Cal. App. 4th at 1007. In
 28 determining whether particular communications constitute protected activity

under these prongs of the Anti-SLAPP statute, courts consider three factors: (1) whether the criticized company is publicly traded; (2) the number of investors; and, (3) whether the company has promoted itself by means of numerous press releases. *Ampex*, 128 Cal. App. 4th at 1576. In *Ampex*, for instance, a California Court of Appeal agreed with a trial court finding that internet postings critical of a company and its management constituted protected activity under the Anti-SLAPP statute because the company was publicly traded, had over 56 million outstanding shares of stock and issued numerous press releases. The same is the case with the present plaintiff, Medifast; it has over 13 million outstanding shares, trades on the New York Stock Exchange (*see* Dec. T. Coenen, Exs. L & M), and as the Amended Complaint reveals, the company issued numerous press releases in which it debated the opinions that FDI and Minkow published about Medifast. Am. Compl. ¶¶ 51, 70.

V. PLAINTIFFS CANNOT ESTABLISH A PROBABILITY OF PREVAILING ON THEIR CLAIMS AGAINST FDI AND MINKOW

Because FDI and Mr. Minkow have established that they were sued after exercising their First Amendment right to free speech in connection with activities protected under the Anti-SLAPP statute, the burden shifts to Plaintiffs to establish that there is a probability it will prevail on its claims. Cal. Code Civ. Proc. 425.16(b)(1). To do so, Plaintiffs must “demonstrate the complaint is legally sufficient and supported by a *prima facie* showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.” Plaintiffs cannot come anywhere close to meeting their burden.

A. Plaintiffs Cannot Prevail on Their Defamation Claim.

Libel, a form of defamation “is a false and unprivileged publication by writing ... which exposes any person to hatred, contempt, ridicule, or obloquy, or which ... has a tendency to injure him in his occupation.” Cal. Civ. Code, §§ 44(a), 45. A statement that is defamatory without the need for explanatory

1 matter such as an inducement, innuendo or other extrinsic fact, constitutes “a libel
2 on its face.” *Id.*, § 45a. Defamatory language that is not libelous on its face is not
3 actionable unless the plaintiff proves special damages as a proximate result of the
4 libel.

5 Additionally, where, as here, the plaintiff is a limited public figure, it must
6 prove by ***clear and convincing evidence*** that the allegedly defamatory statements
7 were made with knowledge of their falsity or with reckless disregard of their truth
8 or falsity.⁴ *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710 (1964);
9 *Ampex*, 128 Cal. App.4th at 1577-1578, 27 Cal. Rptr. 3d 863. In the context of an
10 Anti-SLAPP suit motion, the limited public figure who sues for defamation must
11 establish a probability that he or she can produce such clear and convincing
12 evidence. *Id.* at 1578. “Reckless disregard” is a purely subjective test, “focused
13 on the defendant’s attitude toward the veracity of the published material, as
14 opposed to his or her attitude toward the plaintiff.” *Reader’s Digest Ass’n v.*
15 *Superior Court*, 37 Cal. 3d 244, 257 (1984). A plaintiff must present evidence
16 that the defendant “in fact entertained serious doubts as to the truth of his
17 publication.” *Id.* at 256. Gross negligence is not enough to establish actual
18 malice; rather, plaintiff must prove that the defendant made the statement with
19

20
21 ⁴ “The limited purpose public figure is an individual who voluntarily injects him
22 or herself or is drawn into a specific public controversy, thereby becoming a
23 public figure on a limited range of issues.” *Ampex*, 128 Cal.App.4th at 1577. In
24 order to characterize a plaintiff as a limited purpose public figure, (1) there must
25 be a public controversy, (2) the plaintiff must have undertaken some voluntary act
26 through which he or she sought to influence resolution of the public issue, and (3)
27 the alleged defamation must be germane to the plaintiff’s participation in the
28 controversy. *Id.* Those factors are present here, as each of the defendants stated
public opinions criticizing Medifast’s business model, Medifast injected itself
into the controversy by publicly rebutting those criticisms with multiple press
releases of its own, establishing a special committee for the purpose of
considering FitzPatrick’s findings and then suing defendants over their
comments.

1 actual knowledge of its falsity or “actual doubt concerning the truth of the
2 publication.” *Reader’s Digest*, 37 Cal.3d at p. 259, fn. 11, 208 Cal.Rptr. 137.

3 Plaintiffs cannot meet this high standard. Plaintiff MacDonald will not be
4 able to prevail on his defamation claims against the FDI defendants for the simple
5 reason that they ***did not make any statements about MacDonald***. The Amended
6 Complaint does not identify a single statement that either FDI, Minkow, Lobdell
7 or iBusiness Reporting made about MacDonald. The only statements in the entire
8 complaint that appear to be directed specifically at MacDonald are several
9 postings on a Yahoo! Message board written by anonymous posters. *See* Exs. 28,
10 29 to Amended Complaint. Neither FDI nor Mr. Minkow made those statements.
11 Minkow Decl. at ¶18. A complaint for libel or slander must plead the exact
12 words constituting the alleged defamation. *Christakis v. Mark Burnett*
13 *Productions*, 2009 WL 1248947 at *4 (C.D. Cal. April 27, 2009)(not
14 reported)(citing *Des Grages v. Crall*, 27 Cal. App. 313, 314-15, 149 P. 777
15 (1915)). This is especially true when a plaintiff alleges defamation *per se*,” as
16 Plaintiffs do here (Am. Compl. ¶103). *See Levitt v. S.C. Food Service, Inc.*, 820
17 F. Supp. 366, 367 (N.D. Ill. 1993). If MacDonald cannot even meet the basic
18 obligation of identifying a statement made about him by the FDI or Mr. Minkow,
19 then MacDonald surely will never be able to prove that FDI or Mr. Minkow
20 defamed him.

21 Plaintiff Medifast also cannot prevail on its defamation claim against the
22 FDI defendants, because it will be unable to identify any false statement made by
23 those defendants. When one takes a close look at the statements attributed to FDI
24 and Mr. Minkow, it is readily apparent that the statements are nothing more than
25 non-actionable statements of opinion, or are based upon excerpts from Medifast’s
26 own SEC filings.

27 FDI and Mr. Minkow’s statements were based upon the research and
28 reports of several experts and Medifast’s own public documents, and FDI and

1 Mr. Minkow believed each of their statements were true at the time they were
 2 made. Minkow Decl. at ¶13. Furthermore, Medifast has never provided a single
 3 fact tending to show that anything FDI or Mr. Minkow said about the company
 4 was the least bit false, even though Mr. Minkow expressly challenged Medifast to
 5 do so. As noted by the Amended Complaint, on January 12, 2010, Mr. Minkow
 6 published an open letter to Plaintiffs, in which he wrote:

7 I will immediately retract and formally apologize to
 8 you, your stockholders and your board of directors . . .
 9 if you can simply show me where we are factually
 10 incorrect.

11 See Am. Compl. at ¶71 and Ex. 22. It is notable that even though directly
 12 challenged to back up its claim that Mr. Minkow is wrong, Medifast has not set
 13 forth any facts.

14 B. Plaintiffs Cannot Prevail on Their Claim for Civil Conspiracy to
 15 Defame.

16 Under California law, civil conspiracy “is not an independent tort.”
 17 *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 510-511, 28
 18 Cal. Rptr. 2d 475 (2004). For a cause of action for civil conspiracy to lie,
 19 plaintiffs much prove the commission of an underlying tort. *Okun v. Superior*
 20 *Court*, 29 Cal. 3d 442, 454, 175 Cal. Rptr. 157, 164 (1981). For the reasons
 21 explained above, Plaintiffs cannot prevail on their defamation claim; because they
 22 cannot prove the underlying tort of defamation, they likewise will be unable to
 23 prove conspiracy to defame.

24 C. Medifast Cannot Prevail on its Claim for Violation of California
 25 Corporations Code “Sections 25400 et seq.”

26 Plaintiffs’ Third Cause of Action for violations of “California Corporations
 27 Code §§ 25400 et seq.” notably does not specify which particular code sections
 28 were violated, and by which defendants. These specifics are important, because
 private rights of action exist for only some provisions of the California Corporate

1 Securities Law. As to the few sections of the Code that do provide a private right
2 of action, Plaintiffs will be unable to prove a violation by FDI and Mr. Minkow.

3 California Corporations Code Sections 25400 through 25502 are the
4 portions of the California Corporate Securities Law of 1968 that set forth
5 fraudulent and prohibited practices in the purchase and sale of securities. Section
6 25400 prohibits “market manipulation”—essentially a term of art that covers
7 fraudulent practices such as wash sales, matched orders, and rigged prices, that
8 are intended to mislead investors by artificially creating market activity in a
9 security. *Diamond Multimedia Systems, Inc. v. Superior Court* (1999) 19 Cal. 4th
10 1036, 1040, 80 Cal. Rptr. 2d 830 (1999). Section 25401 is a broader statute that
11 prohibits misrepresentations in connection with the purchase or sale of securities
12 in general. *California Amplifier, Inc. v. RLI Ins. Co.*, 94 Cal. App. 4th 102, 108,
13 113 Cal. Rptr. 2d 915, 920 (2001). Section 25402 prohibits insider trading. *Id.*

14 Only state regulatory authorities have standing to bring an action under
15 Sections 25400, 25401 and 25402. But each of these three fraudulent practices
16 sections has a corresponding section which establishes a private remedy for
17 damages, those being Sections 25500, 25501, 25502.

18 Presuming that Plaintiffs mean to assert claims under one of the three Code
19 sections that provide for a private right of action, Plaintiffs cannot prevail on any
20 of them. To begin with, to find liability under any of these three anti-fraud
21 provisions, Plaintiffs must be able to establish that FDI or Minkow made
22 knowingly false statements. As explained above, none of their statements was
23 false.

24 Additionally, Plaintiffs cannot prevail on a Section 25500 claim because
25 they do not allege that they were sellers or purchasers of Medifast stock. By its
26 express language, Section 25500 is available only to any person “who purchases
27 or sells any security at a price which was affected by” the defendant’s conduct.
28 Cal. Corp. Code § 25500.

1 Plaintiffs cannot prevail on a Section 25501 claim, because that claim may
 2 only be established where privity exists between the plaintiff and defendant. Cal.
 3 Corp. Code § 25500 (providing that a defendant may be held liable only to “the
 4 person who purchases a security from him or sells a security to him”); *Apollo*
 5 *Capital Fund, LLC v. Roth Capital Partners, LLC*, 158 Cal. App. 4th 226, 252, 70
 6 Cal. Rptr. 3d 199, 221 (2007)(“Section 25501 on its face requires privity between
 7 the plaintiff and the defendant.”); *see also, In re Diasonics Securities Litigation*,
 8 599 F. Supp. 447, 449 (S.D. Cal. 1984). In this case, there is no allegation that
 9 Plaintiffs purchased or sold securities to FDI or Minkow, and indeed,
 10 Mr. Minkow expressly states in his declaration that this did not occur. *See*
 11 *Minkow Decl.* at ¶¶16, 17.

12 Plaintiffs cannot prevail on a Section 25502 claim, because that code
 13 section only applies to corporate insiders who engaged in securities transactions
 14 while in possession of material, non-public information, facts which are not and
 15 never can be alleged as to defendants FDI and Minkow.

16 D. Plaintiffs Cannot Prevail on their Claim for Violation of California
 17 Business & Professions Code 17200.

18 At least one reported case holds that California’s unfair competition law,
 19 Business & Professions Code § 17200 *et seq.*, (the “UCL”) is inapplicable to
 20 “securities transactions” as a matter of law. *See Bowen v. Ziasun Technologies,*
 21 *Inc.*, 116 Cal. App. 4th 777, 786-88, 11 Cal. Rptr. 3d 522 (2004). In that case, the
 22 Court of Appeal concluded that the UCL does not apply to securities transactions
 23 because the UCL was modeled on the Federal Trade Commission (“FTC”) Act
 24 and the FTC Act does not cover securities transactions. *Id.* at 789. The Court of
 25 Appeal also reasoned that application of the UCL to securities transactions would
 26 go beyond the legislative intent of the UCL, which was ““to protect consumers
 27 from unethical business practices resulting in relatively small commercial
 28 injuries.”” *Id.* at 788 (quoting *Spinner Corp. v. Princeville Development Corp.*,

1 849 F.2d 388, 391 (9th Cir. 1988)). The instant action certainly concerns
2 securities transactions, as the Amended Complaint specifically alleges that the
3 17200 claim is based upon defendants' "market manipulation" and "short-selling
4 [of] Medifast's stock." Am. Compl. ¶¶ 121, 122.

5 While the breadth of the holding in *Bowen* has been called into question by
6 some courts, there is an additional reason for why Plaintiffs will be unable to
7 prevail on their UCL claim: Plaintiffs clearly are seeking monetary damages,
8 which are not recoverable pursuant to a UCL action. The only monetary relief
9 available under the UCL is restitution. *Korea Supply Co. v. Lockheed Martin*
10 *Corp.*, 29 Cal. 4th 1134, 1144 (2003); Cal. Bus. & Prof. Code § 17203 ("The
11 court may make such orders or judgments . . . as may be necessary to restore to
12 any person in interest any money or property, real or personal, which may have
13 been acquired by means of such unfair competition."). Restitution may be
14 ordered only where "a defendant has wrongfully acquired funds or property in
15 which a plaintiff has an ownership or vested interest." *Alch v. Superior Court*,
16 122 Cal. App. 4th 339, 404 (2004); *see also Korea Supply*, 29 Cal. 4th at 1148-
17 49.

18 The relief that Plaintiffs seek under their UCL claim, however, is not the
19 restitution of money or property belonging to Plaintiff. The relief sought by
20 Plaintiffs here clearly are money damages, to the tune of \$270,000,000, due to
21 purported loss of market capitalization and loss of potential revenues. Am.
22 Compl. ¶¶ 104, 123. The touchstone of a potentially valid claim for restitution
23 under the UCL is that plaintiff own, or have a legally cognizable, vested interest
24 in, the property at issue. *See Korea Supply*, 29 Cal. 4th at 1149 (restitution can
25 apply only to property in which plaintiff has a vested ownership interest). That is
26 not at all what Plaintiffs alleged here.

1 E. Defendants Are Entitled to Recover Their Costs and Attorneys Fees.

2 If Plaintiffs fail to carry their burden, defendants will request recovery of
3 attorney's fees through a noticed motion. Cal. Code Civ. Proc. § 425.16(c).

4 **VI. CONCLUSION**

5 For the foregoing reasons, FDI, Minkow, Lobdell and iBusiness Reporting
6 respectfully request that the Court grant their Special Motion to Strike Plaintiffs'
7 First Amended Complaint, and conditionally award them the fees and costs
8 incurred in bringing this motion subject to submission of proof of those fees and
9 costs.

10 Dated: May 4, 2010

DLA PIPER US LLP

11 By: 

12 ROBERT D. WEBER

13 Attorneys for Defendants Barry Minkow and
14 Fraud Discovery Institute, Inc., William Lobdell
15 and iBusiness Reporting
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 1999 Avenue of the Stars, Fourth Floor, Los Angeles, California 90067.

On May 4, 2010, I served the foregoing document(s) described as:

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
BARRY MINKOW, FRAUD DISCOVERY INSTITUTE, WILLIAM
LOBDELL AND iBUSINESS REPORTING'S SPECIAL MOTION TO
STRIKE PLAINTIFF'S FIRST AMENDED COMPLAINT**

on interested parties in this action by placing ☐ the original ☒ true copy(ies) thereof enclosed in sealed envelopes as stated below.

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Counsel for Defendants
TRACY COENEN and
SEQUENCE, INC.

7 ☒ **(BY MAIL)** The envelope was mailed with postage thereon fully prepaid.
As follows: I am "readily familiar" with the firm's practice of collection and
8 processing correspondence for mailing. Under that practice it would be
deposited with U.S. postal service on that same day with postage thereon
9 fully prepaid at Los Angeles, California in the ordinary course of business. I
am aware that on motion of the party served, service is presumed invalid if
10 postal cancellation date or postage meter date is more than one day after date
of deposit for mailing in affidavit.

11 ☒ **(BY ELECTRONIC FILING SERVICE)** By electronically filing the
12 foregoing document(s) using the CM/ECF system. Service of the designated
filed document(s) upon a CM/ECF User, who has consented to electronic
13 service, is deemed complete upon the transmission of the Notice of
Electronic Filing.

14 ☐ **(BY FACSIMILE)** I delivered such document by facsimile to the following
15 persons at the facsimile telephone numbers listed above.

16 ☐ **(BY HAND DELIVERY)** I delivered the within documents to Corporate
Legal Services for delivery to the above address(es) with instructions that
17 such envelope be delivered personally on May 4, 2010 to the above named
individuals.

18 ☐ **(BY OVERNIGHT MAIL)** I am readily familiar with the firm's practice of
19 collection and processing correspondence for mailing with an overnight
courier service. Under that practice it would be deposited with said
20 overnight courier service on that same day with delivery charges thereon
billed to sender's account, at Los Angeles, California in the ordinary course
21 of business. The envelope was sealed and placed for collection and mailing
on that date following ordinary business practices.

22 ☐ **(STATE)** I declare under penalty of perjury under the laws of the State of
23 California that the above is true and correct.

24 ☒ **(FEDERAL)** I declare that I am employed in the office of a member of the
25 bar of this court at whose direction the service was made.

26 Executed on May 4, 2010, at Los Angeles, California.

27 Ann Lozinski

28 [Print Name Of Person Executing Proof]

[Signature]

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WILLIAM LOBDELL and
iBUSINESS REPORTING

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

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)

**DECLARATION OF BARRY
MINKOW SUPPORTING HIS
AND FRAUD DISCOVERY
INSTITUTE'S SPECIAL MOTION
TO STRIKE PLAINTIFF'S FIRST
AMENDED COMPLAINT**

Date: June 3, 2010

Time: 1:30 p.m.

Courtroom: 6

Judge: Hon. Janis L. Sammartino

Complaint Filed: February 17, 2010

Trial Date: None Set

DECLARATION OF BARRY MINKOW

1
2 1. I make this declaration based upon my personal knowledge,
3 information and belief.

4 2. I co-founded the Fraud Discovery Institute ("FDI") in 2001 in order
5 to uncover, and focus attention on, fraudulent activity.

6 3. My interest in uncovering and educating the public about corporate
7 and consumer fraud stems from my own background. During the 1980s and
8 1990s, I served seven years in federal prison for securities fraud relating to ZZZZ
9 Best Company. In 2002, I was released from federal probation early, with the
10 support of Assistant United States Attorney James Asperger, the former chief of
11 the major fraud section in the Office of the United States Attorney in the United
12 States District Court for the Central District of California, and the lead prosecutor
13 in the ZZZZ Best case. Mr. Asperger supported my early release from probation
14 based upon, among other things, my work with FDI.

15 4. Since 2002, FDI has uncovered and stopped over 20 major frauds
16 totaling over \$1.8 billion. FDI and myself often work closely with agents from
17 the Securities Exchange Commission, the Federal Bureau of Investigation and the
18 Internal Revenue Service.

19 5. In October 2005, FDI and I received a letter of commendation from
20 J. Stephen Tidwell and Peter H. Norell of the FBI's white collar crimes unit,
21 acknowledging our work in assisting the FBI "and other law enforcement
22 agencies identify and help disrupt and dismantle financial frauds totaling millions
23 of dollars." Messrs. Tidwell and Norell specifically explained that our
24 "submission of detailed reports" on various companies and individuals engaged in
25 fraud "was used to launch various investigations and enhance pending
26 investigations that either resulted in indictments and convictions or are pending
27 criminal filings." A copy of the October 24, 2005 letter from Messrs. Tidwell and
28 Norell is attached hereto as Exhibit A.

1 6. I have appeared numerous times on national television networks
2 including Fox News, CNN and CNBC, speaking about the dangers of corporate
3 fraud and the techniques criminals use to deceive victims.

4 7. Medifast is not the first multi-level marketing business that has been
5 investigated by FDI. Indeed, FDI has a long history of answering consumer
6 questions about multi-level marketing businesses. FDI has exposed fraudulent
7 schemes at other multi level marketers including PrePaid Legal and Usana.

8 8. Through this research on the multi-level marketing industry and
9 other information, Medifast came to my attention as a potential perpetrator of
10 financial fraud. FDI and I therefore began to investigate Medifast in 2008.

11 9. FDI retained Robert L. FitzPatrick, an expert in multi-level
12 marketing analysis, to investigate and provide expert opinion relating to the
13 business practices of Medifast and its multi-level marketing division, *Take Shape*
14 *for Life*. FDI retained additional experts to perform laboratory tests on certain
15 Medifast products and to perform forensic accounting analyses.

16 10. In September 2008, Mr. FitzPatrick completed and delivered to FDI
17 his initial report analyzing Medifast's growth and the *Take Shape for Life*
18 business model. Based upon his evaluation of financial data and marketing
19 materials published by Medifast, Mr. FitzPatrick concluded that Medifast, and
20 specifically its *Take Shape for Life* program, operates as an unlawful "endless
21 chain" as defined by California law. Mr. FitzPatrick updated his report several
22 months later to include additional current financial information about Medifast.

23 11. FDI's investigation continued until February 2009. As a result of
24 our investigation, FDI and I came to the opinion that Medifast's business
25 practices and business model were fraudulent.

26 12. On February 17, 2009, FDI published FitzPatrick's report on its
27 website. In conjunction with the publication of the report, FDI launched the
28

1 website www.medifraud.net. The website contains a series of documents related
2 to FitzPatrick's investigation and findings.

3 13. Subsequent to February 17, 2009, FDI and I periodically have
4 published additional statements regarding Medifast. Every statement that I and
5 FDI published regarding Medifast I believed to be truthful and accurate at the
6 time it was published, and I continue to believe that each of mine and FDI's
7 statements regarding Medifast is truthful.

8 14. Indeed on January 12, 2010, I published an open letter to Medifast
9 and its board of directors in which I wrote, "I will immediately retract and
10 formally apologize to you, your stockholders and your board of directors . . . if
11 you can simply show me where we are factually incorrect." I have yet to receive
12 a response to this offer.

13 15. In May 2009, I delivered a letter to the Federal Trade Commission
14 and the California Attorney General advising them of our findings regarding
15 Medifast. As FDI and I have done in the past, we delivered our report to these
16 governmental agencies in order to induce them to open their own investigations
17 regarding Medifast.

18 16. I have never purchased any securities from Medifast or Bradley
19 MacDonald directly, nor sold any securities directly to Medifast or Bradley
20 MacDonald.

21 17. FDI has never purchased any securities from Medifast or Bradley
22 MacDonald directly, nor sold any securities directly to Medifast or Bradley
23 MacDonald.

24 18. Neither I nor FDI made any of the Yahoo! Message board postings
25 made by "medisdead" or "zeeyourself" shown in Exhibits 28 and 29 of the
26 Amended Complaint. Neither I nor anyone I am aware of at FDI has ever used
27 the screen names "medisdead" or "zeeyourself".
28

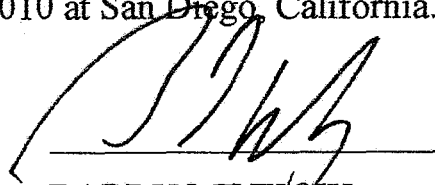
1 19. I had no financial connection or connection of any kind with
2 Barrack, Rodos & Bacine, the law firm that announced it was investigating
3 Medifast for securities violations, (as described in paragraph 74 of the Amended
4 Complaint).

5 20. Because of our public statements and the public's interest in this
6 publicly traded company, FDI, myself and others were sued by Medifast.

7 21. The clear message that Medifast is sending through this lawsuit is
8 that critics who dig too deeply will be punished and silenced. By its action,
9 Medifast is chilling my, FDI's and others' negative speech about the company.

10
11 I declare under penalty of perjury that the foregoing is true and correct.
12 Executed on this 4th day of May, 2010 at San Diego, California.

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BARRY MINKOW

INDEX OF EXHIBITS

<u>Exhibit</u>	<u>Description</u>
Exhibit A	October 24 2005, Commendation Letter from J. Stephen Tidwell and Peter H. Norell, of the FBI's White Collar Crimes Unit

OCT-26-2005 12:14

310 996 3836

310 996 3836

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U.S. Department of Justice

Federal Bureau of Investigation

In Reply, Please Refer to
File No.

11000 Wilshire Blvd.
91344
310 996-3832
October 24, 2005

Mr. Barry Minkow
Fraud Discovery Institute
9770 Carroll Center Road
Suite F
San Diego, CA 92126

RE: Commendation Letter

Dear Mr. Minkow:

The letter is to confirm and acknowledge your work in assisting the Federal Bureau of Investigation (FBI) and other law enforcement agencies identify and help disrupt and dismantle various financial frauds totaling millions of dollars. These frauds involved both ongoing operations and historic cases with many potential and actual victims. In most cases, law enforcement knew little or nothing about these matters before your involvement. Your subsequent submission of detailed reports on the below referenced companies was used to launch various investigations and enhance pending investigations that either resulted in indictments and convictions or are pending criminal filings.

Our records indicate you have submitted detailed written reports on seven (7) companies that were used in our investigations to obtain criminal filings. These include Turning International/Derek Turner (New York Field Office), Financial Advisory Consultants/James Lewis (Los Angeles Field Office), MX Factors/Randy Harding (Los Angeles Field Office), Ware Enterprises/Warren Ware (Miami Field Office), Par Three Financial (Los Angeles Field Office), Chicago Development and Planning/Pat Morgen (San Francisco Field Office), and Rainmaker/Alrezha Dimaghani (New York Field Office).

Moreover, our records indicate that there are also six (6) additional current investigations that we have opened based upon information received from you.

These 13 matters have all been referred to us within the last two (2) years. This accomplishment is worthy of commendation in that you identified millions of dollars of fraud and prevented further potential economic loss to hundreds of

OCT-26-2005 12:15

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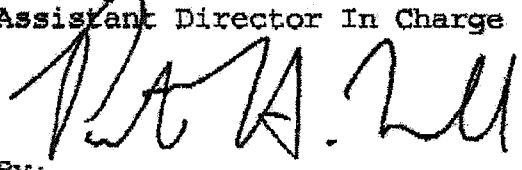
310 996 3836

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victims. The FBI appreciates your cooperation in these matters and encourages you to continue making us aware of crimes that materially affect the integrity of the financial markets of the United States and the confidence of the investing public.

Sincerely yours,

J. Stephen Tidwell
Assistant Director In Charge


By:
Peter H. Norell
Acting Assistant Special Agent In
Charge

cc: Steve Georgi, California Bureau of Security
401 S Street, Suite 101, Sacramento, CA 95814

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 1999 Avenue of the Stars, Fourth Floor, Los Angeles, California 90067.

On May 4, 2010, I served the foregoing document(s) described as:

**DECLARATION OF BARRY MINKOW SUPPORTING HIS AND FRAUD
DISCOVERY INSTITUTE'S SPECIAL MOTION TO STRIKE
PLAINTIFF'S FIRST AMENDED COMPLAINT**

on interested parties in this action by placing ☐ the original ☒ true copy(ies) thereof enclosed in sealed envelopes as stated below.

Michael I. Neil, Esq.
mneil@neildymott.com
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hmccabe@neildymott.com
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dhall@neildymott.com
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MacDONALD*

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MacDONALD*

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5 Stephen M. Duvernay, Esq.
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8 San Diego, California 92101
9 Tel: (619) 239-8131
10 Fax: (619) 238-8707

Counsel for Defendants
TRACY COENEN and
SEQUENCE, INC.

11 ☒ **(BY MAIL)** The envelope was mailed with postage thereon fully prepaid.
12 As follows: I am "readily familiar" with the firm's practice of collection and
13 processing correspondence for mailing. Under that practice it would be
14 deposited with U.S. postal service on that same day with postage thereon
15 fully prepaid at Los Angeles, California in the ordinary course of business. I
16 am aware that on motion of the party served, service is presumed invalid if
17 postal cancellation date or postage meter date is more than one day after date
18 of deposit for mailing in affidavit.

19 ☒ **(BY ELECTRONIC FILING SERVICE)** By electronically filing the
20 foregoing document(s) using the CM/ECF system. Service of the designated
21 filed document(s) upon a CM/ECF User, who has consented to electronic
22 service, is deemed complete upon the transmission of the Notice of
23 Electronic Filing.

24 ☐ **(BY FACSIMILE)** I delivered such document by facsimile to the following
25 persons at the facsimile telephone numbers listed above.

26 ☐ **(BY HAND DELIVERY)** I delivered the within documents to Corporate
27 Legal Services for delivery to the above address(es) with instructions that
28 such envelope be delivered personally on May 4, 2010 to the above named
individuals.

☐ **(BY OVERNIGHT MAIL)** I am readily familiar with the firm's practice of
collection and processing correspondence for mailing with an overnight
courier service. Under that practice it would be deposited with said
overnight courier service on that same day with delivery charges thereon
billed to sender's account, at Los Angeles, California in the ordinary course
of business. The envelope was sealed and placed for collection and mailing
on that date following ordinary business practices.

☐ **(STATE)** I declare under penalty of perjury under the laws of the State of
California that the above is true and correct.

☒ **(FEDERAL)** I declare that I am employed in the office of a member of the
bar of this court at whose direction the service was made.

Executed on May 4, 2010, at Los Angeles, California.

Ann Lozinski

[Print Name Of Person Executing Proof]

[Signature]

