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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

BARRY MINKOW, FRAUD DISCOVERY INSTITUTE, INC.; ROBERT L. FITZPATRICK; TRACY COENEN; SEQUENCE, INC,; WILLIAM LOBDELL; IBUSINESS REPORTING; THOMAS ZIEMANN,

Defendants.

CASE NO. 10-CV-0382-JLS BGS

PLAINTIFFS' OPPOSITION TO DEFENDANTS' ANTI-SLAPP MOTIONS TO STRIKE

Date: February 17, 2011
Time: 1:30 p.m.
Honorable Janice L. Sammartino
Courtroom: 6 – 3rd Floor

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I. INTRODUCTION

The First Amendment has nothing to do with this lawsuit. Plaintiffs filed it because they were damaged by the lies published about them on the Internet and in the media by the defendants. For years, these defendants have been working in concert, attacking publicly-traded company after publicly-traded company – not because they feel the need to exercise their First Amendment rights for the good of the consumer – but for profit and public attention. Since this lawsuit was filed, Defendants have attempted to distance themselves from one another – to parse out the attacks made on Medifast as isolated incidents, with no connection, no collusion, and no collective malicious intent. The facts, however, which Defendants hoped and/or never expected would to come to light, tell a different story.

Barry Minkow likes to wear his "fraud-buster" badge and boast about the frauds he has helped uncover. Recently, however, Minkow has been forced to make public – by virtue of this lawsuit; an earlier lawsuit, filed against Minkow and FDI in 2009 by Lennar Corporation, currently pending in a Florida state court; and a 2010 subpoena targeting FDI from the Securities & Exchange Commission – the intricate link between him, FDI, Robert FitzPatrick Tracy Coenen and William Lobdell and how each of these co-conspirators have worked together – and profited – in a scheme to manipulate the stock of publicly traded companies. Make no mistake; whatever good intentions Minkow may have had when he was paroled for his original crimes, in 2006, his "business model" took a turn back to the fraud that had put him in prison in the first place.

In addition to their attacks on Lennar and Medifast, Minkow, Coenen and FitzPatrick have worked together to publish incendiary "reports" on Herbalife, InterOil, PrePaid Legal and USANA. The attacks are not for the public good. They are a hugely profitable enterprise – Minkow boasted to Lobdell during the Medifast attacks, that the brokerage account they used to short the stock of public companies had a value of $1 million. FitzPatrick and Coenen have also profited handsomely from lending their "expertise" to the published lies. Just as parties engaged in illegal schemes rarely keep detailed records, Coenen and FitzPatrick produced no records of how and when they were paid by Minkow. FDI and Minkow's *modus operandi* is to send "Paypals" to his co-conspirators at odd times – with no invoice, no paper trail and no appropriate tax forms (1099s).

But one piece of incriminating evidence Minkow *did* produce is a one page summary of his "investigations." This document, which Minkow testified he prepared for and produced to the SEC in response to its subpoena, shows that Coenen was paid a total of $56,350 for aiding in Minkow's attacks on Herbalife, Lennar, PrePaid Legal, USANA and Medifast. FitzPatrick was paid a total of $49,537.00 for his work on Herbalife, PrePaid Legal, USANA and Medifast. Even FitzPatrick's attorney and Minkow's food safety "expert", Christopher Grell, was paid a total of $43,690 for his work on Herbalife and Medifast.

To protect this valuable franchise, Defendants (and third parties) have gone to great lengths to avoid producing e-mails and other evidence. As this Court knows, all of the defendants opposed *any* discovery; after the Court granted limited discovery, the discovery period had to be extended – twice – because various parties and one non-party refused to timely turn over relevant e-mails. Indeed, Coenen produced not a single document from 2008 or 2009, even though she hired a company to search for all deleted emails on her hard drives. Fortunately, those emails were retrieved from the hard drives of Minkow's computers, and that key evidence was not lost to Plaintiffs, much to Coenen's chagrin.

Minkow has resorted to even more extreme measures. In the case of Lennar, which is a publicly traded home builder, Minkow had an agreement with and was paid by one of Lennar's former business partners to try and extort the company. In that case, to keep the truth from coming out, Minkow destroyed bad evidence, perjured himself repeatedly, and "manufactured" good evidence. In August 2010, following a full-day evidentiary hearing in Lennar, the Judge made specific findings of Minkow's "fraud on the Court"; all that remains is for the Court to decide on the appropriate sanctions.

In sum, and as we detail below, there already exists ample evidence of a conspiracy to spread incendiary lies by the Defendants, who each conspired with one another for fame, profit and greed, and defamed Plaintiffs, and in the process severely injured the reputation of a public company (putting the jobs of its employees at great risk and financially ruining many of its shareholders), and a Colonel who served his country honorably for 28 years in the United States Marine Corps. The motions to strike must be denied.

II. STATEMENT OF FACTS

1. The Players:

There is a fairly small cast of characters in this drama, but they each had very important roles to play, and each were hand-picked by Minkow and the Fraud Discovery Institute, Inc. ("FDI"; collectively "Minkow")[1] for their particular "expertise" and eagerness to participate in the downfall of any publicly-traded company that Minkow chose to attack. And he chose several targets over the three-plus years this team worked together – Herbalife, InterOil, Lennar Corporation, PrePaid Legal, USANA, and of course, Medifast. Minkow's team included FitzPatrick, Coenen and her business Sequence, Inc. (collectively "Coenen"), Sam Antar, attorney Christopher Grell, William Lobdell, and his website iBusinessreporting.com (collectively "Lobdell").[2]

Minkow himself is an infamous character, founder of ZZZZ Best Carpets in the '80's and self-described ex-con turned fraud buster, after he served 7 years for committing 57 counts of securities fraud.[3] He claims that he started FDI initially to unearth fraud in private companies, but in approximately 2006, a hedge fund manager named Whitney Tilson, of T2 Partners, gave him the idea that there was money to be made in turning his attention to publicly-traded companies. Minkow then got the idea of preparing reports on publicly-traded companies, shorting the stock of these companies and then publicly releasing the information in the hope of turning a profit when the stock drops in price. Early on, Minkow tried pre-releasing negative reports to paying customers through an email blast or "listserv," but because this model never gained any traction, Minkow was forced to tap into his own private network to get the word out and generate the selling interest he needed to profit from his short sales.[4] Minkow did this through several means – by attempting to get the press to pick up his stories either on his own, or through a day-trader named Hal Schoenfeld (email name

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[1] As the testimony established that Minkow and FDI were considered as the same, we refer to both as "Minkow" unless a distinction is required (**Ex. 1** 12:5-12; 110:4-111:7; **Ex. 3,** 29:6-12; 31:20-22; **Ex. 5**, 37:7-8; **Ex. 6**, 34:21 – 32:8. All exhibits are attached to the Declaration of Lainie E. Cohen filed herewith and incorporated by reference as if fully set forth herein. All further references to Exhibits shall be to those attached to Ms. Cohen's Declaration, unless otherwise noted).

[2] **Ex. 7**; **Ex. 1**, 135:18-137:17; 139:21-140:7; 141:14-23; 142:23-143:6; 143:22-144:7; 227:17-19; 18:22; **Ex. 2**, 84:21-85:14; **Ex. 3**, 41:8-24.

[3] **Ex. 1**, 32:13-33:25; Memorandum of Points and Authorities ("MPA") of Minkow, FDI, Lobdell and iBusiness Reporting (hereinafter collectively referred to as the "Minkow defendants"), 3:7-9.

[4] **Ex. 1**, 51:10-25; 96:1-98:23; 103:12-104:24; **Ex. 8**.

'fresco1'). He spoke with hedge fund contacts and he passed on the information to his friends, family, parishioners, and anyone else who would listen. He even went so far as to direct trades on behalf of other individuals.[5]

Minkow has funded his attacks in various ways. For example, his attack on Lennar was funded by Nicolas Marsh, a former business partner in Lennar that tried to extort money from the company (Minkow has been sued for defamation by Lennar in a Florida State Court and is facing a Court ruling on Lennar's motion for sanctions owing to his serious discovery abuses). Sam Antar helped fund the attack on USANA through trading in his (now ex) wife's brokerage account to the tune of $200,000, as well as an individual named Tony Braun. [6]

Though Minkow denies it, the evidence reveals that he had a client who retained him to attack Medifast. When questioned at his deposition, and shown an email indicating there was such a client, Minkow admitted that a man named Reid Bloom, who worked for a hedge fund, was the "client" that asked Minkow to look into Medifast. Even when confronted with this e-mail, Minkow adamantly asserted that he simply was never paid by anyone for his work on Medifast.[7]

In any event, Minkow testified that he was the one to orchestrate everything. He retained the experts, coordinated the reports, other posts and press releases, and oversaw that it was all posted on his website – in his words, he "authored the report." As Coenen testified, "Barry has final say-so over what gets published by FDI." Everything that was posted on the Internet about Medifast was up there because of Minkow. And at all times throughout the attacks on Medifast, each defendant was aware that Minkow was shorting Medifast stock prior to releasing his negative posts. [8]

FitzPatrick, the "expert" in pyramid schemes and the Multi-Level Marketing business model ("MLM") – a self-taught expertise he obtained from researching a book he published on the subject – was retained to write the "expert" reports that became the centerpiece of Minkow's attacks on

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[5] **Ex. 1**, 42:6-18; 94:14-96; **Ex. 9**, 149:4-151:13; 156:12-24; 158:9-159:25; 161:10-162:3; 166:5-170:15; 175:13-176:12; **Ex. 10-29**.

[6] See fn. 1; **Ex. 1**, 42:6-18; **Ex. 36**, 61:17-63:10.

[7] **Ex. 1**, 80:9-80:22; 83:8-84:22; 86:4-87:8; 99:3-24; 100:12-101:6; 119:2-120:9; 121:7-22; 122:7-20; 127:1-3; **Ex. 30-32**.

[8] **Ex. 1**, 145:19-146:8; **Ex. 2**, 50:9-20; 51:24-9; 104:4-105:25; 107:13-108:25; 151:20- ; 201:21-202:24; **Ex. 4**, 89:3-12; 93: 17-94:15; 158:6-8; 160:17-20; 189:13-20;122:1-6; **Ex. 33-35; Ex. 3,** 30:8-23; 33:4-16; 34:4-17; 45:14-46:9; 48:12-16; 54:13:16; **Ex. 4,** 64:12-65:21; 75:1-11; 76:25:77:10.

Medifast. FitzPatrick was chosen because of his bias – he disagrees with the Federal Trade Commission's ("FTC") definition of a pyramid scheme. Nor does he agree with the FTC's landmark decision in the Amway case in 1979, establishing the test for what constitutes a pyramid scheme (a test still in use today), and holding that Amway was not a pyramid scheme – he believes the FTC's test for what constitutes a pyramid scheme is "inadequate." FitzPatrick testified that he has never provided Minkow with a report that concluded that the subject company was not an endless chain or a Ponzi Scheme.[9]

Exhibit 7 is a document Minkow personally prepared, and submitted to the SEC in response to a subpoena issued to him and FDI in relation to the SEC's current securities fraud investigation of Minkow and FDI. According to that document, FitzPatrick was paid a total of $49,537.00 for his work on Herbalife, PrePaid Legal, USANA and Medifast. The document is inaccurate, however, since FitzPatrick testified that he was paid approximately $24,250 in total for his work on the Medifast attacks, meaning that his total compensation he received from Minkow was approximately $60,787.00. FitzPatrick was paid this amount of money for only one reason – he delivered the negative reports that Minkow requested. And while FitzPatrick and Minkow assiduously denied that they had an understanding to prepare "negative" reports, Lobdell admitted in his deposition that he (and Minkow) knew and understood that FitzPatrick's report on Medifast, when delivered, was going to be negative. Minkow indirectly confirmed Lobdell's admission, when he testified that if FitzPatrick's reports didn't turn out to be negative against the company at issue, he (Minkow) would have paid FitzPatrick for the work, but he would probably never use him again.[10]

By her own testimony, Tracy Coenen had little, if any formal education in the area of her "expertise" – forensic accounting. Instead, she acquired this highly technical knowledge "on-the-job." Coenen has no experience in MLM's or pyramid schemes other than she took an interest in them and has studied them on her own. Like FitzPatrick Coenen is admittedly biased – she has never met an MLM she liked. As the accounting expert member of the team, Coenen was responsible for

[9] **Ex. 3**, 16:18-17:14; 20:14-23:13; 52:15-53:2; 120:7-24; 130:4-18; 132:4-17; Compare, In Re Amway Corp., 93 F.T.C. 618 (1979).

[10] **Ex. 3**, 8:1-14:12; 101:2-13; 101:23-102:1; **Ex. 1**, 149:3-151:13;

checking FitzPatrick's numbers, fact checking, and making other suggestions and observations. But Minkow also sought her opinion on other areas, such as MLM compensation plans, because Coenen "knows these compensation plans inside and out." However, according to Coenen, she had never actually *analyzed* an MLM compensation plan – she only "looked very carefully at some and not very carefully at others." By "very carefully" she meant that she "spent more than a few minutes looking at them." Coenen admitted that she had never seen the relevant Take Shape For Life ("TSFL") compensation plan before her deposition on September 15, 2010. [11]

Coenen has several websites, most of which are devoted to promoting her books and her work as a retained "expert" in forensic accounting. He Fraud Files blog, on which she posted her attacks on Medifast, is accessible through each of these self-promotional websites. Self-promotion is important to her - Coenen has strong beliefs that she should be allowed to promote herself and profit from her work in any way she sees fit, without someone imposing restrictive rules on her. She discontinued her membership in the Association of Certified Fraud Examiners over a difference of opinion in these areas.[12]

Coenen's blog, although not usually a source of income for her (other than a small amount earned from advertising), was used by Minkow as a platform on *one* occasion, in which he "directly" paid Coenen about $500 to "compile a list of cases that Barry Minkow had investigated" and post it on her blog. Coenen testified that she "posted things" on companies Minkow has investigated, and although he did not pay her "directly" for those posts, he did pay her "for work related to those investigations." In fact, however, Coenen blogged regularly on every investigation she worked on for Minkow, whether she was paid "directly" or "indirectly." She also frequently blogs on whatever FitzPatrick is working on, and is a member of FitzPatrick's Pyramid Scheme Alert ("PSA") board of directors. [13] According to Exhibit 7, Coenen was paid a total of $56,350 for aiding in Minkow's attacks on Herbalife, Lennar, PrePaid Legal, USANA and Medifast.

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[11] **Ex. 2**, 10:2-19:25; 48:8-18; 48:23-15; 92:18-93:18; 96:24-98:5; 141:9-18; 147:3-148:23; 184:2-20; 198:4-5; **Ex. 1**, 214:7-16; **Ex. 9**, 110:1-111:25.
[12] **Ex. 2**, 39:25-43:4; 45:22-47:16.
[13] **Ex. 2**, 50:9-52:5; See www.sequenceinc.com/fraudfiles/

Sam Antar, of "Crazy Eddie" fame (and also an ex-con), although not a defendant in this case, was also part of the team, and regularly consults with Minkow. Most recently, Antar began blogging about Rep. Eric Weiner and goldline.com at the behest of Minkow, who reminded Antar that they wanted to "vindicate these guys." Antar has regularly blogged on Minkow's other targets – Lennar and InterOil – and on Medifast, he has blogged twelve times in less than a year. Sam Antar was subpoenaed for documents and testimony in this case. At his deposition, he testified that all he did in regards to the Medifast investigation was to obtain a public report off the Internet on Medifast's outside auditor, and meet briefly with the "FDI operative" referred to in Minkow's June 9, 2009, attack (and Coenen's June 21, 2009 attack). For this minimal effort, he admitted being paid approximately $30,000 by Minkow. Antar added, however, that he intends to pay every penny of that back. [14]

Christopher Grell, counsel for FitzPatrick, Minkow, *and* Coenen in this action,[15] has worked with Minkow on both Herbalife and Medifast. Grell is "anti-products" and Minkow's expert "for lead." According to the "expert opinion letter" that Grell wrote for Minkow, he is the co-founder of the "informal" Dietary Supplement Safety Committee, a "kind of an ad hoc group of various scientists that would gather…once every couple months…and discuss things that had developed within the whole dietary supplement industry." Grell's "expertise" in Proposition 65 – the California statute concerning acceptable levels of certain chemicals in drinking water and other products – comes from attending a conference that was actually "a love-fest" for those in the industry, and a few continuing education courses on how to go about filing a complaint for damages under Proposition 65's private attorney general provision.[16]

Grell has acted as an expert on Proposition 65 twice in his career – in the Herbalife case and in this case, both for Minkow. His "expertise" in MLMs and pyramid schemes is non-existent. His understanding of the business model of TSFL came from briefly looking at FitzPatrick's report, and

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[14] **Ex. 36**, 50:10-51:4; 100:5-104:14; 93:19-94:3; 231:13-237:9; **Ex. 3**7; See http://whitecollarfraud.blogspot.com/search/label/Medifast;

[15] **Ex. 2**, 63:2-19; **Ex. 6**, 44:9-21; 49:4-13.

[16] **Ex. 1**, 227:18; 145:1-7; **Ex. 6**, 24:19-25:10; 27:4-23; 30:2-23; 33:14-25; 99:11-103:12; 151:22-153:5; 51:3-11; 67:8-68:3; 69:16-18; 69:21-70:2; 73:6-12; 79:19-81:5; 82:17-84:5; 108:1-112:23; 118:15-23; 120:1-12; 122:13-123:4; 146:1-15; **Ex. 1**, 235:14-20;236:7-237:9239:2-14; 242:5-243:24; 245:5-246:18246:23-251:18; 254:5-255:20. **Ex. 38-42**.

the conclusions he stated in his "expert opinion letter" regarding Medifast's "closed system were actually Minkow's additions to the letter – not his own words.[17] According to Exhibit 7, Grell was paid a total of $43,690 for his work on Herbalife and Medifast.

William Lobdell, the last to join the team, was previously a reporter on the general interest desk for an affiliate paper of the LA Times. His previous area of journalistic expertise was religion. Lobdell left journalism, joined FDI, and created iBusinessreporting.com ("an arm of FDI") in order to "impute credibility to [FDI's] findings." He was, according to Minkow, "the Cavalry," coming "to his rescue," riding in like a "knight in shining armor" to legitimize his attacks on Medifast, Interoil and Lennar – or so that would be "the PR play angle." As an FDI employee, Lobdell was to earn $7,500 a month, plus benefits. He was also expecting to short the stock of the companies he reported on, and make profits from causing those stock prices to fall. Lobdell's research on Medifast and TSFL came from reviewing FitzPatrick's reports (which he testified were commissioned to be negative), reading Coenen's blogs and talking to Minkow. [18]

2. The Attacks:

February 2009 Attacks:

On August 22, 2008, Minkow first approached Coenen for help with an assignment for an undisclosed client – he had "been asked to do a complete report on [Medifast]." Coenen responded that she had "never heard of the company until now. Do they have any shares available to short?" According to Minkow's testimony, the reason *he* chose to investigate Medifast was because it was "low-hanging fruit." They had experience in this area – Medifast was just another MLM, like all the others, and an easy mark. Minkow then approached FitzPatrick to write a report on Medifast corroborating his suspicion that it was "a pyramid/Ponzi scheme," that it "functioned using an endless chain or a Ponzi or deceptive marketing in some fashion," and the three collaborated over the next few months to complete the first report.[19]

[17] See. fn.18.
[18] **Ex. 4**, 15:5-18:25. **Ex. 1**, 68:15-22; **Ex. 43; Ex. 4**, 70:24-73:2; 75:1-11; 76:25-77:10; **Ex. 30**; **Ex. 4**, 84:1-18; 85:8-87:9; **Ex. 44**; **Ex. 4**, 145:6-147; 34:8-17; 62:16-25; 123:9-124:3.
[19] **Ex. 9**; **Ex. 1**, 112:1-113:11; 115:15-24; **Ex. 3**, 108:12-109:14; 266:20-267:22; **Ex. 30, 45-47**.

FitzPatrick's research on Medifast consisted of looking at the Medifast website, the TSFL website, Medifast's compensation plan, the YourTravelBiz.com ("YTB") compensation plan (he also relied upon a previous investigation he had done into YTB including interviews of numerous 'participants' and travel service owners), the California Attorney General's ("AG") press release regarding its prosecution of YTB, Medifast's 10-Q filings with the SEC for the second and third quarters of 2008, stock trends of several "diet companies" including Medifast, and a single article regarding how Americans "put on Recession pounds." He reviewed one health coach website – www.getyouhealth.com/Medifast-healthCoach.asp and one of the two comprehensive training manuals available through that website. He also claimed to have spoken with one health coach very briefly to ask how much it cost her to recruit health coaches. He did not speak with anyone else involved with Medifast or TSFL. In regards to his comparison of TSFL to YTB, FitzPatrick testified that he could have picked any MLM – there are hundreds of them – but YTB was in the news.[20]

FitzPatrick asserted that he based most of his "opinion" regarding TSFL's illegality on TSFL's compensation plan, however, his testimony reflects that he had very little understanding of how the plan actually worked when he wrote his report. At deposition, he could not answer simple questions based on hypothetical examples proffered by counsel as to how bonuses and commissions under the plan were earned and had to admit several times where he had interpreted the plan incorrectly.[21]

To bolster FitzPatrick's "expert" opinion, Minkow and FitzPatrick attempted to get an "expert opinion letter" from an attorney named Douglas Brooks, who had been counsel on the Hebalife class action lawsuit. According to FitzPatrick and Minkow, Brooks is an expert in pyramid schemes, and particularly Cal. Penal Code § 327, the endless chain recruitment statute upon which FitzPatrick initially based his Medifast report. After numerous correspondence back and forth, in which FitzPatrick tried to sway Brooks to his point of view, Brooks had a "less than enthusiastic response" to FitzPatrick's report on Medifast, and declined to provide a letter supporting the report.

[20] **Ex. 48-50**, **Ex. 3**, 69:6-70:25; 74:20-79:25; 84:18-24; 89:7-94:25; 139:5-149:5.
[21] **Ex. 3**, 154:21-155-1; 158:19-159:25; 161:24-162:10; 165:1-167:1; 168:14-169:21; 171:1-172:19; 175:13-20; 177:4-178:25; 180:14-19; 186:9-1195:3; 196:14-198:23; 200:14-23; 201:6-203:15; 208:15-210:25; 216:2-17; 217:3-223:3; 227:8-234:5; 234:19-235:7;

He did not see the §327 violation beyond "an academic issue." Undaunted, Minkow and FitzPatrick decided to go ahead and publish the report without Brooks' opinion.[22]

Days prior to publishing the first report, FitzPatrick came up with the idea of the Madoff hook. He and Minkow had had a "discussion about – because Madoff had hit the scene in December of '08. It was in the newspapers." And FitzPatrick had recently published an article on his PSA website "where he said that Madoff was just like multi-level marketing companies." FitzPatrick and Minkow then "just extrapolated it and made it specific to Medifast." The published piece was a direct comparison between Madoff and Medifast, reciting five points of similarity between Medifast and a criminal enterprise. But at his deposition, FitzPatrick admitted that he knew that what Madoff was doing was "taking people's money and not investing it in the stock market" when TSFL was taking people's money and delivering a product in return. FitzPatrick also stated that he believes that TSFL is "certainly not" a criminal enterprise.[23]

On February 17, 2009, at approximately 9:59 a.m., New York time, Minkow went live with the medifraud.net website – a site devoted to attacking the integrity of Medifast, a small, relatively unheard-of company (at that time), devoted to improving the health of the American population. The purpose for the timing of the launch was for one reason only – so that Minkow and his friends could maximize their financial gain by having "about 25 minutes to put something [options trades] on" after the market opened that day, and before the published attack drove the stock price down.[24]

The medifraud.net website included links to the following posts prepared by Minkow and FitzPatrick: 1) an FDI press release announcing the completion of a six-month investigation into Medifast and it's "MLM" arm, TSFL; 2) the FitzPatrick Report which concluded that TSFL was "nothing more than an endless chain pyramid scheme" and a Madoff-like Ponzi scheme; 3) the heading MEDIFAST = MADOFF??, linking to a document entitled Points of Similarity Between Madoff and Medifast (the "Madoff comparison") drafted by FitzPatrick, without reference to its source; 4) a link to a YouTube video by Minkow discussing FitzPatrick's report and Minkow's

[22] **Ex. 51-55**; Ex. 3, 242:14-244:25; 247:16-248:13251:2-10; 252:18-253:13; 261:3-20; 262:11-21;263:24-264:5
[23] **Ex. 9**, 85:24-87:22; **Ex. 56, 57**; Ex. 3, 278:6-280:8.
[24] **Ex. 58**, **59**; **Ex. 1**, 131:9-135:13; 145:9-15; **Ex. 3**, 57:4-18; **Ex. 4**, 34:8-17; 62:16-25; 123:9-124:3; **Ex. 8**; FAC ¶20.

theories regarding TSFL and Medifast's illegality; and 5) lab results and an "expert opinion" letter written by Grell determining that because two of Medifast's approximately seventy products allegedly contained high doses of lead in violation of California's Proposition 65 (which it was unclear by the letter actually applied to Medifast's products), Medifast was poisoning its health coaches for profit. Although FitzPatrick compares TSFL to YTB in his first report, nowhere does he provide readers a source for the YTB compensation plan, nor does he reveal his claimed independent knowledge of YTB. [25]

The basis for Minkow's knowledge of the contents of these several posts was his review of the TSFL comp plan, the Medifast and TSFL websites, FitzPatrick's report, and his purported extensive knowledge of MLMs, pyramid schemes and Ponzi schemes. Much like FitzPatrick, Minkow's testimony reflects a flawed understanding of the TSFL compensation plan. Minkow believes, just as FitzPatrick did, that on paper, maybe the TSFL compensation plan awarded sales, but in reality, it was impossible to make any money without recruiting.[26]

Following the launch of the medifraud website, Medifast's stock price fell almost thirty percent.[27]

On February 18, 2009, in response to a Press Release issued by Medifast in order to attempt to defend itself, and fend off any further damage to its shareholders, Minkow attacked again, issuing a second press release. In this second release Minkow again expanded upon their claim that "Medifast" and "Madoff" are interchangeable, by announcing that Medifast's use of a one-office accounting firm is just like Madoff – "they're one office, they're one office. If Madoff is one office, you know, you can infer what you want. But that point of similarity was accurate." The inference to be drawn was obvious – "a small accounting firm would not necessarily hold a New York Stock Exchange multi-level marketing company to the highest disclosure standards of failure, attrition rates, collapse rates, average incomes, and things like that." Minkow wanted these inferences made,

[25] **Ex. 60 – 64**; Ex. 12, 60:2-61:3; **Ex. 3**, 138:20-143:19.
[26] **Ex. 1**, 177:25-178:20; 180:22-181:6; 185:3-186:16; 191:6-193:11; 196:1-16; 197:9-12; 198:23-200:5; **Ex. 9**, 121:6-10;
[27] **Ex. 65**.

even though his forensic accounting expert Coenen testified that these disclosures are not required to be made by either the SEC or any other government agency.[28]

May 2009 Attacks:

On April 10, 2009, Minkow wrote to an individual named 'David' at the D'Arcangelo Companies informing him that he was "considering a round two on [Medifast] based on an upcoming media segment on the CBS Morning Show." But before he launched that second attack, he asked 'David' if he could reach out to someone at Medifast and see "if they are interested in not having us around[.]" This was to be done very confidentially because "it would be very bad for [FDI]" if it got out that "FDI wants to settle with Medifast."[29]

No one contacted Medifast, and the promised next round of attacks did occur, beginning with Minkow's posting of a press release and an updated report by FitzPatrick completed on or about May 11, 2009, and posted on the FDI website on May 21, 2009. Along with FitzPatrick's updated report, Minkow and FitzPatrick published a document that FitzPatrick wrote (with much reservation), called Eleven Key Distinctions Between Medifast and Avon (the "Avon post").[30]

In the same attack, Minkow posted a document entitled 'Five Points of Similarity between Medifast and YTB (YourTravelBiz.com)' (the "YTB post"). Coenen created the YTB post at Minkow's behest, even though she told Minkow that the disclosures that the AG forced YTB to make were not required under the law. Though she disagreed with the claimed "similarities", Coenen also published her YTB post on her own blog, the fraud files. She also posted Minkow's Avon comparison, even though again, she did not agree with the post. Nowhere does either YTB post provide a link to its source material, or reference to the post's author. [31]

The following day (May 22), Minkow attacked again. His (day earlier) attack had caused Medifast stock to drop "almost 2 at 7.70 but then the company repurchased shares and it is up about 80 cents." He and FitzPatrick decided to try again. They then quickly drafted and published a letter loosely addressed to the AG and the FTC, again comparing TSFL to YTB, along with another press

[28] **Ex. 66**; **Ex. 9**, 192:1-193:16; 197:15-198:8; **Ex. 2**, 145:6-146:6; 166:8-13; 176:5:177:18.
[29] **Ex. 67**.
[30] **Ex. 68-73**; **Ex. 9**, 95:21-96:11; 97:17-99:3; 102:1-105:18; 107:9-17; 111:10-25; 117:1-118:6; 119:1-17; 122:21-125:16.
[31] **Ex. 74-78**; **Ex. 2**, 46:24-47:15; 102:2-13; 146:14-148:23; 150:5-15154:10; **Ex. 9**, 110:1-23; 113:11-15.

release on May 22, 2009. Minkow also posted on the FDI website "Coming Soon- FDI to roll out YouTube video interviews of past Medifast, Inc. (NYSE:MED) 'coaches' who enrolled in the business opportunity only to conclude it was an endless chain." Again, no source materials were provided to the reader regarding YTB's compensation plan, nor any disclosure of FitzPatrick's claimed independent knowledge of the company. [32]

As to the disgruntled health coaches, Minkow testified that he spoke to two or three, but could not recall a single name. Minkow also informed Hal Schoenfeld, a day trader confidant in Florida, that he was about to make a video involving disgruntled health coaches. Although Schoenfeld continually told Minkow that the videos were key in proving his claims against the company, no videos by disgruntled health coaches would ever appear on the FDI website. Minkow's excuse was that Medifast had sent an email to all health coaches threatening to sue if anyone spoke to Minkow, but Minkow had never seen this email, nor could he recall where he learned of its existence. FitzPatrick also testified he had never spoken to any disgruntled health coaches – he had interviewed one or two coaches "[b]ut not about whether they were happy or not."[33]

June 2009 Attacks:

In late May, 2009, Minkow was contacted by Mike Lair, an individual who had just been released from federal prison after serving 27 months for committing four counts of wire fraud, and was living in New York while on probation. In particular, Lair pled guilty, and was convicted based on an Information that contained the following facts:

> 2. From in or about February 2003 up to in or about October 2006, MICHAEL LAIR, the defendant was engaged in a scheme to defraud various attorneys in high-profile litigation by promising to provide them with evidence to support their existing or contemplated litigations, in exchange for large, up-front payments. Throughout this scheme, LAIR never provided the promised evidence and continued to demand additional funds from the various victims.[34]

[32] **Ex. 79-82.**

[33] **Ex. 83-90**; **Ex. 1**, 75-76:7; 77:3-12; **Ex. 9**, 4-19:11; 20:18-23; 21:18-22:22; 23:4-8; 24:15-20; 26:1-28:21; 34:12-35:5; 38:17-25; 48:16-50:14; 52:22-54:18; **Ex. 3**, 95:3-6; 96:19-97:12. Notably, Minkow and Coenen both received several emails and messages from *happy* health coaches. **Ex. 91**

[34] **Ex. 92**.

Although Minkow testified that he did not know what Lair had been convicted of (nor was he surprised to find out), various emails between Minkow and his assistant Shannon Boelter reflect otherwise. In one, dated June 11, 2009, Ms. Boelter comments "he's been playing this game for years, and it would appear that he is still playing by his old rules. You said earlier, he is full of really icky stuff (smile) and it is becoming ickier by the minute." In another a month later, regarding another of Lair's ideas for a hit against Medifast, Ms. Boelter commented:

> He's asking for $1,250 for the work he supposedly had in it as of the other day, which was only the first (and useless) recording he'd made and has since delivered two additional unusable pieces. He reached out to us with this allegedly powerful information and didn't produce. I suspect he will happily keep at it as long as we are willing to pay him…[35]

Nonetheless, Minkow gave Lair a job. Indeed, in hiring Lair, Minkow testified at deposition that he took "risks" with people. Lair's first assignment was to photograph Medifast's one-office auditing firm Bagell Josephs & Levine & Co. ("Bagell"), for a comparison with Madoff's auditing firm. Minkow and Lair worked together to put this document together – entitled "Relied Upon" – in order to once again associate Medifast with Madoff's criminal enterprise. [36]

Lair then came to Minkow with a second angle on Bagell, indicating, in an email to Minkow: "WOW..Did you know Mr. Bagell will also sell you stock in Medifast?" In this email, dated June 1, 2009 at 3:27 p.m. (California time), Lair stated that Bagell owns a "wealth management" company too, and he "sent in a quote to by[sic] some shares in a good MLM, and I got back --- MED --- a great buy…" Lair wrote to Minkow again at 8:08 a.m., on June 2, 2009 (California time) stating "It would not be too hard to write to them and ask them to recommend a great stock in the 'food delivery' cycle or??" Following these emails, Minkow summoned the team – Antar and Coenen for help in confirming that Bagell's wealth management firm, BJL Wealth Management ("BJL") was recommending Medifast stock as Lair claimed. Minkow suggested they get "one taped call to the investment firm whereby we ask them to recommend a diet product home delivery company

[35] **Ex. 9**, 198:10-200:3; 200:20-202:16; 206:2-207:16; **Ex. 93 – 95**.
[36] **Ex. 9**, 217:11-218:14.223:16-225:12; **Ex. 96, 97**.

(Medifast like) as our investigator indicated that this is exactly what they said to him when he called…"[37]

This initial email to Antar and Coenen led to a lengthy colloquy regarding whether it would in fact be a conflict of interest if BJL had recommended Medifast stock to Lair. After much back and forth, Coenen held to her belief that this was not a conflict – "even if they are brothers, I don't believe there is any disclosures that would be required." At her deposition Coenen confirmed her belief that no conflict existed. Disregarding the advice of his forensic accounting expert, Minkow forwarded his allegations of the "conflict" to a reporter at Bloomberg seven days before he published anything on his website.[38]

An email between Minkow and Lair produced in discovery confirms that Minkow had no verifiable proof that BJL had recommended Medifast stock to Lair. But because Lair's "word [was] good enough" for Minkow, on June 9, 2009, Minkow published a series of documents, along with a press release attacking the credibility of Bagell. Posted with the press release was the document entitled "Relied Upon," and a letter prepared by Michael Brown, a former securities broker-dealer compliance attorney, who was retained by Minkow to provide an opinion on the potential conflict of interest Medifast had with Bagell based on Lair's claims. Undisclosed to anyone that read Brown's opinion was that he had a "pastoral relationship" with Minkow, who is also a Church minister.[39]

According to Brown's testimony, the opinion letter he wrote, which was based on information that only Minkow had provided, was very preliminary in nature. Brown knew nothing about TSFL or Medifast beyond what Minkow had told him, and only briefly looking at the SEC filings on Medifast. Brown never intended his opinion letter to be published by Minkow or sent to the SEC. For this reason, Brown wrote "Attorney-Client Privileged" on the letter. Minkow, however, insisted on publishing the letter on the FDI website, and copying it to the SEC. According

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[37] **Ex. 98 – 100**. Minkow testified Lair taped his initial conversation with BJL, and was told Medifast was a good buy, but the tape was unusable, because it was recorded in New York – a two-party state, i.e., the tape was inadmissible without permission of all participants. Minkow was adamant on this point. (New York is a one-party state. N.Y. Penal Law §250.00(1)). Antar, who was brought in to help on this pretext call on June 2, 2009, after this email exchange, testified that *he* purchased the recording equipment for Lair. No tape was ever produced. **Ex. 9**, 234:23-6; 242:3-244:21; **Ex. 36**, 100:5-104:14; 209:5-22; **Ex. 101**.

[38] **Ex. 100, 102, 103; Ex. 2,** 208:3-11; **Ex. 104.**

[39] **Ex. 105-108**; **Ex. 5**, 12:19-14:24; 16:3-12; 17:2-9; 17:16-23; 19:2-17; 20:12-21:14;25:11-27:10; 33:8-20; 38:3-41:16.

to Brown, Minkow said "it's my property now. I paid for it…he clearly indicated he was going to go ahead and proceed with that idea [of publishing it]."[40]

Brown's preliminary opinion, which was based upon information obtained from Minkow and Lair, was that *if* a stock recommendation was made by an auditor, it would be a conflict of interest for the auditing firm. At deposition, Brown testified that he had no knowledge of Mike Lair's criminal background when he wrote his opinion and that if he had known, he would not have written his opinion letter. Coenen too, testified that she did not know about Lair's criminal history. In fact, she did nothing to independently confirm the statement she made about Lair in her June 24, 2009 post. She never even inquired about the identity of the "FDI operative." She didn't care; she trusted Minkow's word.[41]

On or about June 16, 2009, Minkow was informed by FitzPatrick that the Department of Justice had contacted him and was allegedly considering looking into Medifast. Following this email, Minkow commented to several people that he could no longer trade in Medifast, nor could he post anything on the company at all, as it would appear as a conflict of interest if he were involved in any future investigation that may occur. Minkow denied this in his deposition. He stated that this was an issue FitzPatrick was involved in – not him.[42]

On June 24, 2009, 8 days later, and in spite of her belief that there *was no* conflict of interest, Coenen wrote a post on her fraud files blog bringing further attention to this Bagell conflict of interest claim made by Minkow. She entitled it "Conflict of Interest for Medifast Auditors?" and then made this definitive statement: "This gets interesting when you consider that BJL Wealth Management recommended the purchase of Medifast stock to an operative of FDI," and qualified her position by stating that this *may* well be a conflict of interest.[43]

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[40] **Ex. 5**, 79:1-21; 86:6-87:3; 99:10-25; 101:14-23; 102:9-103:16; 133:13-134:20; 145:14-148:1; **Ex. 109**.
[41] **Ex. 5**, 58:4-3; 59:12-22; 61:1-9; 78:4-79:16; 94:2-95:24; 96:15-99:4; 121:12-122:5; 127:6-21; **Ex. 2**, 160:18-161:11; 178:11-182:21.
[42] **Ex. 110, Ex. 89, Ex. 9**, 41:5-44:10.
[43] **Ex. 111.**

September 2009 Attack:

On September 14, 2009, Coenen posted again, this time commenting on the question of whether Medifast is a weight loss pyramid scheme. Her conclusion was that yes, "like all other MLM's [she's] looked at," it is. In Coenen's opinion, Medifast's SEC filings reflected that there was "no evidence that the products themselves were actually selling well." She believed that "the actual sale of a product took a back seat [at Medifast] to the activity of recruiting people."[44] Minkow had not posted on Medifast in fourteen weeks.

January 2010 Attacks:

In spite of their efforts, Medifast stock had been steadily rising since the June attacks, with only a dip resulting from Coenen's September 14, 2009 attack. By December 2009, the stock was trading in the $30 range, an all-time high for Medifast. On December 2, 2009, in an email to his broker Joseph MacDougall, Minkow stated "Thanks Joe and you are right—in a world where MED is at 30.00 and IOC is at 61.00, I am suicidal (smile)." On December 14, 2009, Minkow received an email from Schoenfeld informing him that "the short community keeps saying you were wrong on MED. the coaches never came on UTube as promised.. the Audit issue was disproved. You may be right on the MLM issue when recession ends.. and I tend to agree.. but the fraud issue is not there and stock is at 32…" On December 20, 2009, Minkow emails FitzPatrick and tells him Medifast's stock had gone from 2.50 in December 2008 to 32.50 in December 2009 and "one of [his] clients wants an update." FitzPatrick then gets to work. [45]

Minkow then recruits Coenen to join in and give FitzPatrick's report a "Tracy" going-over, and Coenen writes back with a piece for inclusion in the upcoming attack. In response, Minkow writes: "This is great stuff Tracy as I just had a chance to read it. Now, do you know what would make it absolutely perfect? If we can find (I have not even tried to look yet) a nice 'income opportunity' ad from one of these coaches." Between FitzPatrick, Coenen and Minkow, no one found any such ads "promising some kind of outrageous income opportunity." [46]

[44] **Ex. 112**; **Ex. 2**, 163:7-164:8; 168:6-22; 198:4-5.
[45] **Ex. 113, 114**; **Ex. 31**;
[46] **Ex. 115, 116**; **Ex. 9**, 14:22-16:4; **Ex. 2**, 211:1-19;213:1-13.

There were six separate attacks on Medifast in the first two weeks of January, two occurring on January 8, with the posting of two separate FDI press releases and FitzPatrick's updated report; one post by Coenen on January 12, quoting portions of FitzPatrick's updated report; and three on January 13 – one more by Minkow, posting an "open letter to Brad MacDonald" and two separate posts by Coenen, one providing more of FitzPatrick's updated report and the other claiming "Medifast Continues to Mislead its Shareholders." On the same day, a plaintiffs' class action law firm announced it was opening an investigation into Medifast because of Defendants' attacks, and seeking any shareholders interested in suing. After a very busy news cycle, orchestrated by Defendants, Medifast stock plunged to a low of $16.65.[47]

On January 8, 2010, Minkow was congratulated by his friend Tony Nevarez on his "Nice action/results," and did he "get out?" On January 12, 2010, Minkow instructed his web designer to release the day's attack – his "Open Letter to Mr. Bradley MacDonald" fifteen minutes after the market opened. That same day, Minkow wrote to Coenen, asking her to review an attack Antar intended to post in response to Medifast's press release defending itself against the January 8 barrage. He told Coenen "Medifast dropped big on Robert's report and they took the bait and responded…We got our check yesterday so getting you current is no problem." When asked what Minkow meant by "Medifast dropped big" Coenen testified that she assumed "he means the stock price went down following the release of Robert's report." On January 13, 2010, at 7:32 a.m. California time, Minkow emailed Ms. Boelter informing her that "IOC down and MED opened up 86 cents, John released now it is down. God has been so good to us this week…" [48]

In FitzPatrick's January 8, 2010 updated report, he continues to refer to "the paltry 15-20% commission offered on retail sales" even though the compensation plan had been revised, and the cheaper $99 starter pack (which *initially* paid 15% commission) had been discontinued several months previously. Minkow was completely unaware the compensation plan had changed. Although FitzPatrick referenced TSFL's new 'Income Disclosure Statement' ("IDS") in his update, he neglected to provide the reader with the actual disclosures made in that document, or inform the

[47] **Ex. 117 – 124; Ex. 65**.
[48] **Ex. 125 – 128; Ex. 2,** 214:17.

reader that they existed. Instead, he created his own chart from the data included in the IDS document, which looked similar to TSFL's original, a fact he failed to disclose. [49]

February 2010 Attacks:

On February 3, 2010, FDI launched its new website, iBusinessreporting.com, and announced its new relationship with "knight in shining armor" William Lobdell. Lobdell published his seven red flags regarding Medifast, which upon further reflection at his deposition, he admitted were false, or in his words, "it could be better written." On February 19, 2010, two days after Medifast filed this lawsuit in an attempt to protect its 369 employees from losing their jobs, its shareholders, and its reputation, Minkow posted another press release, promising a full-blown attack on the company. In an email to an individual named "glennymarshall@yahoo.com," Minkow stated: MED stock down almost 10% on news that they sued us and wokethesleeping [sic] giant. They are dead now…" A week later, on February 25, 2010, Lobdell attempted to correct one of the seven red flags in his original post, but did not remove it from the ibusinessreporting.com website.[50]

After Lobdell's last attack on February 25, 2010, Medifast stock began another steady rise in price, until it broke $35.00 a share in May 2010, just before Defendants attacked again. During this period (February to May 2010), Minkow and his friends began taking long positions in Medifast stock, profiting on its rise back up, before they attempted to drive it back down.[51]

Since that last attack in May 2010, Minkow and Lobdell have reconsidered their business model – they are "exploring [their] options." Minkow determined that shorting stock was something he no longer wanted to do. He testified: "I- as a pastor, I – if somebody is doing something wrong, I should probably want to help them rather than go after them. So it was conflicting, you know. Do I want to be a guy that goes after people or as a pastor who helps them?"[52]

As of October 1, 2010, the FDI website was still up and all of the posts regarding Medifast were visible and accessible. So too, was the iBusiness Reporting website. On November 11, 2010,

[49] **Ex. 82**, p.4 **Ex. 118**, pp. 2, 13; **Ex. 128**; **Ex. 1**, 189:24-190:14; **Ex. 3**, 155:8-25.
[50] **Ex. 43**; **Ex. 130 – 134**; **Ex. 4**, 99:4-19; 121:-129:1; 130:22-132:5; 149:4-153:9; 153:12-156:20; 162:10-164:23; 165:18-25; 168:11-171:6; 177:17-178:17; 178:25-180:4; 183:18-185:19.
[51] **Ex. 64**; **Ex. 135 – 138**.
[52] **Ex. 1**, 71:20-72:21

however, iBusinessreporting.com had been dismantled, along with the medifraud.net website. The links to the attacks on Medifast were no longer active on FDI's website, except for the few attacks made after this lawsuit was filed. Those post-filing attacks remain live to this day.[53]

3. The Truth:

Medifast is Neither a Pyramid Scheme, Ponzi Scheme or Any Other Criminal Enterprise:

The Court is respectfully referred to the December 23, 2010 Declaration of Daniel Bell for a full recitation of the following facts:

Medifast is a publicly owned company (NYSE symbol MED) engaged in the production, distribution and sale of weight management and health management consumable products. The Medifast program has been clinically tested and prescribed or recommended by over 20,000 physicians nationwide. MacDonald, a retired Colonel from the United States Marine Corps, is the Executive Chairman of the Board of Medifast, a Medifast shareholder and was the co-founder of TSFL, a professional health services company and a wholly-owned subsidiary of Medifast. Medifast sells its products through multiple business lines, including direct sales by trained health coaches in TSFL. The business of TSFL is to train both healthcare professionals and certified health coaches to provide comprehensive support in the specific protocols of Medifast's portion-controlled meal replacements.

TSFL is not a multi-level marketing company or "MLM" where the focus is on recruiting other salespeople who buy inventory and people make money from recruiting other salespeople. At TSFL, no compensation of any kind is paid merely for "recruiting" or sponsoring another health coach. No commissions are ever paid on "fees" or anything other than the sale of Medifast products. Health coaches are not wholesale "distributors" – they do not hold inventory or distribute *any* products. All clients/patients order meal replacements directly from Medifast/TSFL, which ships directly to the client/patient and only then pays the health coach.

At TSFL, a health coach can become a "business coach" by acquiring and supporting clients and enrolling, training and mentoring other health coaches. A "business leader" is someone who

[53] **Ex. 4**, 17-205:14; **Ex. 1**, 71:20-72:21; Cohen Decl. ¶ 148.

acquires and supports clients, enrolls, trains, and mentors health coaches and builds teams of health coaches and business coaches. However, building a network of other health coaches is totally optional and, as the company's statistics show, the focus of TSFL health coaches is on client acquisition, not recruiting other health coaches.

Thus, from May 2009 through April 2010, TSFL enrolled 6,356 new health coaches and as of May/June 2010, had approximately 8,000 *independent* health coaches across the country. About 22% of these coaches are physicians and other health care professionals, with the remaining 78% consisting of lay people who have been trained to be coaches. During the same period of time (May 2009 to April 2010), TSFL gained 102,505 new *ordering clients/patients*.

With this ratio of coaches to clients/patients, the vast majority of product orders are placed by clients, not health coaches. In February 2009, from a total of 28,385 orders placed, 3,492 (12.3 %) were from health coaches and 24,893 (87.7%) were from clients/patients. In May of 2009, from a total of 37,410 orders, 4,705 (12.58 %) were from health coaches and 32,705 (87.42%) were from clients/patients. And, for all of 2009, approximately 87% of all sales of Medifast products went to end user clients/patients who were not health coaches. In April 2010, 93.38% of all sales of Medifast products went to end user clients/patients who *were not* health coaches.

Despite these facts, the Defendants have all concluded that TSFL's growth must be viewed with suspicion and that the company must be doing something wrong to be succeeding during a recession. The facts, however, reveal simply that the company is filling a fundamental need in the marketplace. End-user consumers are benefiting, as are the health coaches that support them.

There are no heath coaches complaining that they have been manipulated, coerced or harmed in any way. Nor has there been a single lawsuit of any kind – from a health coach, the public or any state or federal agency – that questioned the efficacy of TSFL's business model. Simply put, and as further fleshed out in Bell's accompanying declaration, Medifast is not a criminal enterprise of *any* kind.

BJL Wealth Management Never Recommended Medifast Stock to Lair:

According to the sworn Affidavits of Faith Hollander, Matthew Bagell (and exhibits thereto) and Charles Holmes, all filed herewith, BJL was contacted on or about June 1, 2009, by an

individual named 'Mike' or 'Michael Air' who was looking to invest. Specifically in a June 2, 2009, email, 'Mike' requested Matthew Bagell's "plan to spread $600,000 across the bottom areas" which he listed as "Minerals" "Dynamic Consumer Staples" and "Alternative Energy." He also stated that he "like[s] HLF" (the ticker symbol for Herbalife). He continued, "please give me 4 more recommendations. I like the home delivery of healthy diet foods for a dieting fat America. This market is poised for consolidation." After some phone tag, and another desperate-seeming email from 'Mike,' Mr. Bagell decided not to respond, and never spoke with 'Mike' again. Nor did anyone else at Bagell or BJL. Medifast was never mentioned, let alone recommended by anyone at Bagell or BJL.

Based on these facts uncovered during limited discovery – all of the above-cited documents and testimony – Plaintiffs can easily meet their burden to overcome Defendants' Anti-SLAPP motions to strike, and they should be denied.

III. LEGAL STANDARD

Resolving the merits of a section 425.16 motion involves a two-part analysis, concentrating initially on whether the challenged cause of action arises from protected activity within the meaning of the statute and, if it does, proceeding secondly to whether the plaintiff can establish a probability of prevailing on the merits. Overstock.Com, Inc. v. Gradient Analytics, Inc., 151 Cal.App.4th 688 (1st Dist.2007) (r'hg denied, rev. denied); Ampex Corp. v. Cargle, 128 Cal.App.4th 1569, 1576 (1st Dist.2005). Plaintiffs will concede that § 427.16(e)(3) of the Anti-SLAPP statute applies to the defamatory statements made by Defendants – they involved issues of public interest, made in a public forum.[54] The issue before this Court is then whether Plaintiffs have met their burden in establishing a probability of prevailing on their claims for 1) Defamation; 2) Conspiracy to Defame; 3) Market Manipulation; and 4) Unfair Business Practices. The answer to that question is a resounding yes.

[54] This is not a concession that Defendants' alleged "consumer protection" activity qualifies *any* defendant for immunity under Cal. Civ. Code § 47(b). That assertion, made solely by FitzPatrick, will be addressed separately in Section V.B., below. Nor does this concession have any connection with the issue of whether Plaintiffs are limited purpose public figures, requiring them to meet the actual malice standard under New York Times v. Sullivan. That issue, which Defendants addressed in summary fashion, will be argued in Section IV.A., below.

In evaluating Plaintiffs' evidentiary showing, the Court "must credit all admissible evidence favorable to [the plaintiff] and indulge in every legitimate favorable inference that may be drawn from it." Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist., 106 Cal.App.4th 1219, 1238 (4th Dist.2003); see e.g., Overstock, supra, 151 Cal.App.4th at pp. 699-700. The Court must "accept as true the evidence favorable to the plaintiff" and evaluate the defendant's evidence "only to determine if it has defeated that submitted by the plaintiff *as a matter of law*." Flatley v. Mauro, 39 Cal.4th 299, 326 (2006) (internal quotations omitted, emphasis added). Only a cause of action that lacks "even minimal merit" constitutes a SLAPP. Navellier v. Sletten, (2002) 29 Cal.4th 82, 89. Thus, the Court is to determine only whether Plaintiffs have made the requisite showing of minimal merit; it must not weigh the credibility or comparative probative strength of competing evidence. Wilson v. Parker, Covert & Chidester, 28 Cal.4th 811, 821 (2002) (superseded by statute on other grounds); Flatley, at p. 326.[55]

IV. ARGUMENT

Plaintiffs' First Amended Complaint alleges a cause of action for defamation per se, based upon the publishing of over twenty-eight different libelous internet postings by the Defendants. While each posting contains numerous defamatory statements (and total over 100 individual provably false statements of fact), all that Plaintiffs need to show to allow this case to continue to trial on *every* provably false statement is that they can prevail on *one statement per defendant*. Makaeff v. Trump Univ., LLC, 2010 U.S. Dist. LEXIS 87112, at *16-17 n.4 (S.D. Cal. Aug. 23, 2010) (following Mann v. Quality Old Time Serv., Inc., 120 Cal. App. 4th 90 (4th Dist. 2004)). As shown below, this burden is easily met in this case.

A. Neither Medifast Nor MacDonald are Limited-Purpose Public Figures:

If the plaintiff is a limited-purpose public figure, he must prove by clear and convincing evidence that the allegedly defamatory statements were made with knowledge of their falsity or with

[55] Plaintiffs briefly address FitzPatrick's unsupported assertion that this Court should consider Plaintiffs' opposition "with suspicion" because, as FitzPatrick's counsel alleges in his objectionable declaration (the Objections to which are filed herewith), and four and a half pages of his MPA, Plaintiffs are somehow lying to the Court about the history of Medifast. In fact, Counsel's rant against the company is in response to a single paragraph in the FAC (¶18), in which Plaintiffs provide a very brief overview of the company. As such, and because he cites to *no* authority for his assertion that this opposition should be viewed "with suspicion," we respectfully request that this Court ignore his request.

reckless disregard of their truth or falsity. New York Times Co. v. Sullivan, 376 U.S. 254, 279-280 (1964); Ampex, 128 Cal. App. 4th at 1577-1578. In the context of an anti-SLAPP motion, the limited-purpose public figure who sues for defamation must establish a probability that they can produce such clear and convincing evidence. Id., at 1578. If the plaintiff is *not* a limited purpose public figure, then negligence will suffice, which is often satisfied from the mere fact of publication. See, e.g. Makaeff.

Defendants all claim that Plaintiffs are limited-purpose public figures and are required to prove actual malice under New York Times v. Sullivan, 376 U.S. 254 (1964) and its progeny. However, in order for Plaintiffs to be deemed limited-purpose public figures, Defendants have the burden of establishing three elements: (1) there was a public controversy which was debated publicly and had foreseeable and substantial ramifications for nonparticipants; (2) Plaintiffs had undertaken some *voluntary* act through which they sought to influence resolution of that public controversy *prior to the defamatory statements sued upon*; and (3) the alleged defamation is germane to Plaintiffs' participation in that controversy. Makaeff, at *14.

Defendants have not (and cannot) meet this burden. It is axiomatic that a party cannot thrust himself into the center of a public controversy until a controversy actually exists. However, as shown below, all Defendants (except FitzPatrick) have *conceded* that the only controversy regarding Medifast was *of the Defendants' own making*, and this cannot qualify to impose limited-purpose public figure status on the Plaintiffs.[56] Recognizing this fatal defect, FitzPatrick resorts to widening the definition of what constitutes the "public controversy" far beyond any reality applicable to this case, and in complete contravention of the law. As no "public controversy" existed prior to Defendants admitted creation of one, the actual malice standard does not apply in this case and Plaintiffs need only establish the Defendants' negligence, i.e. the publication of false and defamatory statements, to overcome the anti-SLAPP motions.

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[56] Coenen MPA, 16:26, 17:1; Minkow MPA, fn.3, 13:25-28.

1. No Public Controversy Into Which Plaintiffs had Interjected Themselves Preexisted Defendants' Defamatory Attacks on Plaintiffs

Limited purpose public figures are those who "invite attention and comment" by "thrust[ing] themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974) (expressly rejecting the "public interest" test for the "public controversy" test). Corporations – even publicly traded companies – are not automatically considered limited purpose public figures – the elements of the test are the same for corporations and private citizens alike. See Vegod Corp. v. Am. Broadcasting Cos., Inc., 25 Cal. 3d 763, 770 (1979). Defamation decisions finding the complainants to be limited-purpose public figures have typically involved persons who claimed they were defamed *after* they interjected themselves into the middle of a public controversy. See, e.g., Gilbert v. Sykes, 147 Cal. App. 4th 13 (3d Dist. 2007) (citations omitted). As the U.S. Supreme Court stated, "those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." Hutchinson v. Proxmire, 443 U.S. 111, 135 (1979).

Indeed, a long line of California decisions following Gertz require the existence of a public controversy *prior to the defamatory statements at issue,* before limited-purpose public figure status can be found. See Annette F. v. Sharon S., 119 Cal. App. 4th 1146, 1164 (4th Dist. 2004) (finding that the validity of second-parent adoptions was a matter of public controversy in which plaintiff had clearly interjected herself at the time defendant made her allegedly defamatory statements); Ampex, 128 Cal. App. 4th at 1577-78 (relied upon by defendant Coenen) (finding defendant's allegedly defamatory Internet postings came only in response to already-existing public Internet outcry over sudden and unexplained discontinuance of previously-touted business division); Vegod, supra, (holding that plaintiff must 'become part of an *existing* public controversy' to be considered a limited purpose public figure).

In Moesian v. McClatchy Newspapers, 233 Cal. App. 1685 (5th Dist. 1991), the Court analyzed a lengthy list of California decisions where the plaintiffs had thrust themselves into a public controversy *prior* to the defamatory statements at issue, and then concluded that Moesian had "at every opportunity" thrust himself into a public debate in order to influence the outcome of a very

public dispute about his application (and subsequent denial) for a horse racing license prior to the alleged defamatory statements. The same analysis was applied in Reader's Digest Ass'n v. Superior Court, 37 Cal. 3d 244 (1984), a case relied upon by Fitzpatrick. There again, the defendant's allegedly defamatory statements concerning the plaintiff's drug treatment services came *after* another news entity (a non-party) was awarded the Pulitzer Prize for its scathing exposé on the same issue. In each of these cases, the timing of the public debate was a key factor in determining that the plaintiff was a limited-purpose public figure.[57]

As an initial matter, Defendants have not identified *any* public controversy that Plaintiffs thrust themselves to the forefront of *prior* to Defendants *creating* that public controversy. Injecting itself "into *the public arena*" as FitzPatrick claims Medifast has done, is wholly insufficient.[58] The test is whether there was a public *controversy* that pre-existed the defamatory remarks. The only "controversy" at issue – and the basis of Plaintiffs' defamation claim – involves Defendants' repeated allegations that Medifast (and the business model of TSFL) is a pyramid and Ponzi scheme and repeated comparisons between Medifast and Bernie Madoff's criminal enterprise (among others). Defendants have each admitted that *they* created the public controversy around Medifast and the business model of TSFL, *where none existed before*.[59]

Indeed, Minkow testified that prior to his investigation, he had never even heard of Medifast. Minkow was proud of being the first one to "break" the story, and he told that to anyone who would listen. Fitzpatrick testified that although he had *heard* of Medifast before Minkow retained him, it had not been a "company of [his] significant concern because most of its business was not in the area where [his] expertise was focused" – MLM's and pyramid schemes. Coenen stated unequivocally in an August 22, 2008 email, responding to Minkow's solicitation of her assistance in his investigation of Medifast, that she had "never heard of this company until now." Lobdell, who had been an investigative journalist for the LA Times, testified that he became aware of Medifast only from his

[57] See also Carver v. Bonds, 135 Cal. App. 4th 328, 354 (1st Dist. 2005) (distinguishing another list of cases as inapplicable to the defendant's argument that plaintiff was a limited-purpose public figure, *specifically* because they all involved an *existing* public controversy).
[58] FitzP. MPA, 21:23-27.
[59] Coenen MPA, 16:2617:1; Minkow MPA, fn.3, 13:25-28; Ex. 37.

review of Fitzpatrick's report, Coenen's website, and what Minkow told him – a year *after* Medifast came under public scrutiny by the postings of the other defendants.[60]

These clear admissions belie Defendants' collective conclusory arguments that there was *any* public controversy concerning either Medifast or the TSFL business model prior to Minkow's decision to create one. FDI's first attack on February 17, 2009 created this "public controversy" and, on this basis alone, the actual malice standard does not apply to this case.

2. Defending Itself Against Defendants' Attacks by Issuing Three Press Releases a Year Apart Does Not Satisfy the 'Voluntary Interjection Into the Controversy' Requirement

Assuming, *arguendo*, that a preexisting controversy did exist (and Defendants have not and cannot point to one), Defendants have failed to show how Medifast "*voluntarily* interjected" itself into any alleged controversy. As noted above, the limited-purpose public figure test requires the defamation plaintiff to actively and voluntarily interject himself into the controversy in a systematic and protracted manner. See Reader's Digest, supra, 37 Cal. 3d at 252-55 (1984) (finding that prior to defendants' comments, the defamation plaintiff had created a publicity machine to sway public opinion); Moesian, supra, at 1689-1694 (plaintiff systematically and continuously made public statements, voiced his opinions at numerous public meetings, commented to the press on several occasions, and called two press conferences, over the course of over a year).

The New York Times protections apply only where the plaintiff "*voluntarily* expose[s] himself to an increased risk of injury" by treading deliberately into public waters. Reader's Digest, supra, at 256. In that situation *only*, where the defamation plaintiff actively seeks to use the media to his or her advantage, the law effectively levels the playing field. However, "the mere involvement of a person in a matter which the media deems to be of interest to the public does not, in and of itself, require that such a person become a public figure." Id. In other words, one who is "dragged unwillingly into the controversy" is not a limited purpose public figure. Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157, 166 (1979).

[60] **Ex. 115**; **Ex. 1**, 145:9-15; **Ex. 3**, 57:4-18; **Ex. 8**; **Ex. 4**, 34:8-17; 62:16-25; 123:9-124:3.

Here, Medifast and MacDonald were clearly dragged into an issue not of their own making. Until defendant FDI published its first attack on February 17, 2009, no one had voiced any concerns over TSFL's business model in the public domain and certainly, no one was questioning whether Medifast (or TSFL) was a pyramid scheme or Ponzi scheme like Madoff. Indeed, over the course of a year, Defendants posted approximately 28 different defamatory posts. Coenen continued with 12 more. Their attacks were relentless and widely publicized. Indeed, Minkow made *every effort to ensure* that as many media outlets as possible picked up his releases.[61]

Only *after* FDI's unsolicited public attack did Medifast seek to defend itself against Defendants' defamatory allegations, by releasing three short press releases over a year-long period. FitzPatrick, relying upon Readers' Digest, claims that because Medifast responded to his reports it voluntarily injected itself into the public controversy.[62] As an initial matter, a "plaintiff does not become a public figure simply by responding to defamatory statements." Mosesian, supra, at 1702 (citing Time, Inc. v. Firestone, 424 U.S. 448, 454-455 n.3 (1976)); cf. Foretich v. Capitol Cities/ABC, Inc., 37 F.3d 1541, 1559-1561 (4th Cir. 1994) (providing history of common law privilege to defend oneself against defamation per se – "the publication of a defamatory attack constitutes an 'occasion' triggering the conditional privilege of reply" and such a reply cannot confer limited public figure status"). FitzPatrick's reliance upon Reader's Digest is also misplaced. Medifast only responded to the 28 attacks by Defendants with three short press releases. In Reader's Digest, by contrast, there was a "media blitz" executed by the plaintiff, including 960 letters to media outlets nationwide, which specifically "argued [plaintiff's] case and intentionally attracting further attention to its cause." Id. at 256.

FitzPatrick then tries to frame the "controversy" as one involving Medifast and MacDonald's voluntary interjection "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." However, in Makaeff v. Trump Univ., LLC, (a case decided just four months ago in the Southern District of California) Chief Judge Gonzalez flatly rejected claims such

[61] **Ex. 4**, 136:9-137:17; **Ex. 1**, 97:24-98:23; **Ex. 9**, 139:3-9; 166:5-170:15; **Ex. 15**.
[62] FitzP. MPA, 21:24-27.

as FitzPatrick's, that pervasive business advertising is sufficient to subject a company to public-figure status. 2010 U.S. Dist. LEXIS 87112, at *12-15.

Dismissing the theory that pervasive advertising equated to affirmative commentary on the validity of a company's business practices, Judge Gonzalez held that: "aggressive advertising alone does not convert a company into a public figure." Id. (citing Vegod Corp., 25 Cal. 3d at 769). Indeed, relying on the California Supreme Court's decision in Vegod, the Makaeff Court reiterated that "[c]riticism of commercial conduct does not deserve the special protection of the actual malice test…a person in the business world advertising his wares does not necessarily become part of an existing public controversy." Makaeff, at *14-15 (quoting Vegod, at 770).

Defendants' attempt to drag all of Medifast and TSFL's public promotional commentary into the mix of voluntary interjections this Court must consider when determining if Plaintiffs are limited-purpose public figures must fail under the sound reasoning of Chief Judge Gonzales, and the California Supreme Court.[63] When weighed against Defendants' relentless public attacks, Plaintiff's three press releases simply cannot rise to the level of commentary required to impose the higher burden of proving actual malice on Plaintiffs.[64]

3. The Defamatory Statements Themselves Preclude a Finding of a Public Controversy into Which Plaintiffs Have Interjected Themselves

The third element in the "public figure" analysis is the requirement that the defamatory statements must be germane to the plaintiff's participation in the public controversy. The defamatory statements at issue – that Medifast is a pyramid scheme; Medifast is a criminal enterprise

[63] Nor should Plaintiffs' decision to bring this lawsuit be characterized as "voluntary," since a plaintiff's only recourse to stop the offending publications *is* to file suit. That is not the case here, however, as Coenen has been relentless in her vindictive and defamatory commentary on the very subject of this litigation. In the twelve posts she has published since this lawsuit was filed, she has attacked the professional reputations of Plaintiffs' attorneys, calling one counsel "inept," "clueless about the case and the happenings related to [Coenen's] involvement," and an outright liar. Neither Medifast, nor its counsel, have responded to Coenen's posts as they are not interested in litigating this case in the public blogosphere.

[64] Tellingly, Defendants do not even mention any public controversy to which plaintiff MacDonald has been a party. Nor do they point to any statement made by MacDonald personally that would qualify him as a limited-purpose public figure. All of their arguments are made with reference to Medifast, attempting to lump MacDonald in without any support for such a contention. However, other than the filing of this lawsuit in order to repair his tarnished reputation and a short comment in the press release announcing the filing of this lawsuit, MacDonald has remained silent throughout. As such, even if this Court determines that *Medifast* is a limited-purpose public figure, MacDonald clearly is not.

like that of Bernie Madoff's Ponzi scheme; that Medifast is materially misleading its shareholders and committing a fraud on its investors, for example – and Plaintiff's response to these statements – to deny them as false, only support the determination that Plaintiffs are not limited-purpose public figures. There was nothing to comment on until these statements were made. It is *Plaintiffs' participation* that is germane to the defamatory statements – not the other way around.

B. Contrary to Defendants' Assertions, Plaintiff Bradley MacDonald Has Standing to Sue for Defamation for Statements Directed at Medifast:

In their motions to strike, FitzPatrick and the Minkow defendants have alluded to the issue of standing in regards to Plaintiff MacDonald, asserting that because none of their defamatory statements mentioned him directly, he cannot state a claim for defamation against them.[65] But under established California and federal law, an individual is entitled to sue for defamation if the defamatory statements are "of and concerning" the plaintiff in some way. Blatty v. New York Times Co., 42 Cal. 3d 1033 (1986) citing Rosenblatt v. Baer, 383 U.S. 75, 83 (1966); Wallace v. Henderson, 2010 U.S. Dist. LEXIS 30519, at *9 (S.D. Cal. 2010) (finding that even if there is no express reference to the plaintiff in a defamatory statement, a claim will still lie if "the statement refers to the plaintiff by implication"); SDV/ACCI, Inc. v. AT&T Corp., 522 F.3d 955, 959 (9th Cir. 2008).

Additionally, when a company has been defamed, the individuals who run the company have a cause of action for defamation when the statements about the company can reasonably be understood to refer to the individual plaintiff. Id.; see also Bohan v. The Record Publ'g Co., 1 Cal. App. 429, 430-431 (1905); Schiavone Constr. Co. v. Time, Inc., 619 F. Supp. 684, 696-697 (D.N.J. 1985). Although in both of these cases, the individual plaintiff shared the same name as the corporate plaintiff, neither case *required* that a plaintiff share the name of the business in order to maintain suit. Rather, the focus of the inquiry is on whether the individual plaintiff can show that 1) the statement could reasonably be understood as referring to him, and 2) that some other third party

[65] See Fitzpatrick MPA, p. 19, fn.5. Coenen concedes that MacDonald has standing, as she does not address this issue at all. The Minkow defendants make this argument on p. 13-14 of their MPA in support of their Motion to Strike, and in their Motion to Dismiss filed concurrently with the Motion to Strike.

understood the statement in this way. SDV/ACCI, Inc., at 959; see also DeWitt v. Wright, 57 Cal. 576, 578 (1881); Smith v. Maldonado, 72 Cal. App. 4th 637, 645 (1999).

From the very start of the year-long campaign by Defendants, MacDonald was indelibly linked by readers to the allegations that Medifast, the company of which he is the Executive Chairman, is nothing but a Ponzi scheme and a pyramid scheme. Defendants' attacks on Medifast linked MacDonald, the company's Executive Chairman, with Bernie Madoff and Madoff's criminal Ponzi scheme with the TSFL business model. FitzPatrick specifically named MacDonald on page one and page six of his February 16, 2009 report, first maligning him by citing to an incident that had occurred several years earlier, when MacDonald posted on a Yahoo! Message board, and then maligning MacDonald for his belief that during tough economic times, people begin to care more about their health.[66]

Then the following year, FitzPatrick cited to MacDonald in his January 2010 update on page 5, in the section entitled "Pyramid Meets Pump and Dump," and again on page 9, when discussing Medifast's "history of deception." Minkow then posted an "Open Letter to Mr. Bradley MacDonald" on the FDI website, following *the company's* response to FitzPatrick's January 2010 update and FDI's correlating press release. Minkow deliberately chose to link MacDonald with the defamatory allegations he and his co-conspirators were making against the company. Moreover, by parroting the attacks made by FitzPatrick and Minkow, and linking them to her own website, Coenen's postings were also reasonably linked to MacDonald personally. She knew that FitzPatrick and Minkow specifically referenced MacDonald in their attacks – she reviewed each of FitzPatrick's reports and helped Minkow draft his press releases. She made sure her readers had quick and direct access to the original documents in which MacDonald's name appeared. Indeed, on January 13, 2010, she directly comments on, and provides a link to, Minkow's "Open Letter to Mr. Bradley MacDonald" in her post entitled "Medifast Continues to Mislead Shareholders."[67]

As for FDI employee, Lobdell, on February 3, 2010, in his first posting about Medifast, he attacked the trading activities of Medifast "insiders" – of which MacDonald was one. Even when he

[66] Ex. 40, pp. 1, 6.
[67] Ex. 67, pp. 5, 9; Ex. 70; Ex. 2, 152:4-153:16; Ex. 72.

attempted to "correct" his false statement on February 25, 2010, Lobdell specifically referenced trades made by "Chairman of the Board Bradley T. MacDonald's family," directly attacking MacDonald's spouse, and *implying* that there was something illegal about those trades.[68] Based on all of the foregoing evidence, it is more than reasonable for this Court to determine that Brad MacDonald's personal reputation was defamed by the attacks made by each defendant, even if their defamatory statements did not mention his name directly.

There is also no question that third parties clearly understood the attacks on Medifast as attacks on MacDonald personally. Exhibits 28 and 29 to Plaintiffs' First Amended Complaint (attached as Ex. 26 and 27 to Coenen's Motion to Strike) provide ample evidence of this:

a) Posted on the Yahoo! MED message board on January 24, 2010 by 'medisdead' – "Pimp-Daddy-Brad" receives Pimp of the Year Award, likening the alleged recruitment of health coaches to prostitution.

b) Posted on the Yahoo! MED message board on January 29, 2010 by 'medisdead' – "Pimp-Daddy-Brad MacDonald is a disgrace to our Armed Forces for running a Madoff Ponzi Scheme and ripping off good people."

c) Posted on the Yahoo! MED message board by 'medisdead' on January 30, 2010 – "Nell claims he is Trolling for Tots on the Internet!!! I predict Pimp-Daddy-Brad will do more time in Prison then [sic] Madoff!"

d) Posted on the Yahoo! MED message board by 'zeeyourself' on October 27, 2009 – "Medifast Insider Selling PUMPS UP BIG…Brad MacDonald – Hiding from an Insider Short Position. Good luck TSFL newbie investors!"

e) Posted on the Yahoo! MED message board by 'zeeyourself' on November 3, 2009 – "the word on the street is its[sic] a short position created by an Insider, it matches the Brad MacDonald long position listed in his name…What's the exit?????? Rooming with Madoff????"

These postings, made on an internationally available, public message board, read by countless investors on a minute-to-minute basis, are not only proof that Defendants' defamatory postings are *reasonably capable* of being understood as referring to Brad MacDonald – they were, in fact, so understood by third parties. SDV/ACCI, Inc., supra, at 960. As such, Defendants' claim that MacDonald cannot maintain an action for his personal defamation must be denied.[69]

[68] Ex. 74; Ex. 76.

[69] Now that MacDonald's connection to Defendants' defamatory statements has been established, from this point forward, both Plaintiffs will be referred to as 'Medifast' to avoid confusion.

C. Publications Made by Defendants Contain Provably False Statements of Fact:

Libel, a form of defamation "is a false and unprivileged publication by writing[70]... 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) and § 45. A statement that is defamatory without the need for explanatory matter such as an inducement, innuendo or other extrinsic fact, constitutes "a libel on its face" or libel per se. Id. § 45a. Wrongful accusations of criminal conduct are among the most clear and egregious types of defamatory statements one can make, and are always considered libel per se. Weinberg v. Feisel, 110 Cal. App. 4th 1122, 1127; Cal. Civ. Code § 45a; 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 482, p. 566. In the case of libel per se, damages are presumed. Burdette v. Carrier Corp., 158 Cal. App. 4th 1668, 1693 (3rd Dist.2008) quoting Clark v. McClurg, 215 Cal. 279, 284 (1932).

Defendants' allegations against Medifast clearly meet the definition of libel per se – they, literally and in substance, have accused Medifast of running a Madoff-sized Ponzi scheme, violating federal securities laws and defrauding its investors, running an illegal pyramid scheme in violation of a California criminal statute, poisoning its health coaches for profit, and using the services of a Madoff-like auditing firm to cover up their illegal activities.

1. Defendants' Statements Are *Not* Non-Actionable Opinion:

Each of Defendants' arguments seeking to avoid liability lack merit. First, Defendants assert that none of their statements are actionable because they are merely "opinion," not provably false "statements of fact." They flatly claim that every statement made by them, in all 28 of their posts, are based on truth, are supported by fully disclosed sources, and are thus protected as their non-actionable opinions.

Of course, merely calling a statement an "opinion" does not make it so – nor does it shield a defendant from liability. In Milkovich v. Lorain Journal Co., 497 U.S. 1, 17, (1990), the United States Supreme Court moved away from the notion that defamatory statements categorized as opinion as opposed to fact enjoy wholesale protection under the First Amendment. Significantly, the

[70] As the issue of publication is clearly established (and conceded) in this case, Plaintiffs will address only the remaining elements of the cause of action. (Coenen MPA, 7:1-8:28; Minkow MPA, 1:15-17; FitzP. 12:11-14.)

Court recognized that "expressions of 'opinion' may often *imply* an assertion of objective fact." Id. at 18 (emphasis added). Because simply couching a statement in terms of opinion does not dispel its implications, Overstock.com, supra, 151 Cal. App. 4th, at 701, a false statement of fact, *whether expressly stated or implied* from an expression of opinion, is actionable. Id.; Milkovich, supra, 497 U.S. at 19. The key is not parsing whether a published statement is fact or opinion, but "whether a reasonable fact finder could conclude the published statement declares or implies a provably false assertion of fact." Franklin v. Dynamic Details, Inc., 116 Cal. App. 4th 375, 385 (2004), (citing Milkovich, supra, 497 U.S. at 19, among other authority.)

In determining whether a statement communicates or implies a provably false assertion of fact, the Court must use a totality of the circumstances test. Id. This entails examining the language of the statement. "'For words to be defamatory, they must be understood in a defamatory sense…Next, the context in which the statement was made must be considered.'" Id., at 385-386, quoting Baker v. Los Angeles Herald Examiner, 42 Cal.3d 254, 260-261 (1986). The contextual analysis requires that the Court examine the nature and *full content* of the particular communication, as well as the knowledge and understanding of the audience targeted by the publication. Baker, supra, at 261. Even if the author discloses facts upon which he bases his opinion, "if those facts are either incorrect, incomplete, *or if his assessment of them is erroneous*, the statement may still *imply* a false assertion of fact." Overstock.com, at 701 (quoting Milkovich, supra, at 18-19) (emphasis added).

The First Amended Complaint alleges almost thirty separate defamatory internet postings for which the defendants are liable, each containing numerous provably false statements of fact – or, certainly statements that a reasonable fact finder would conclude declare or imply a provably false assertion of fact. The most flagrant of these false assertions is that Medifast, like Bernie Madoff is running a Ponzi scheme – an illegal criminal enterprise called Take Shape For Life, designed to transfer money from the last investors in, to those at the top, with no chance of ever recovering their investment. Both state and federal courts in California have determined that such accusations are more than sufficient to meet the standard of a provably false statement of fact.

On point is Chief Judge Gonzales' opinion in Makaeff, supra, 2010 U.S. Dist. LEXIS 87112 (S.D. Cal. 2010), at *16. There, the Court considered 21 defamatory statements alleged to have been made by the defendant. Although determining that some of those statements were non-actionable opinion or rhetorical hyperbole, the statements made by defendant that Trump University engaged in (1) a "clear practice of personal financial information fraud," (2) "grand larceny," (3) "identity theft," (4) "unsolicited taking of personal credit and trickery into [sic] opening credit cards without approval," and (5) "blatant lies" when it represented that it provided "mentoring and coaching sessions" were at least reasonably susceptible of an interpretation which implies a statement of fact. The Court stated – "It cannot be said as a matter of law that no reasonable person could construe them as provably false." Id. at 16-17.

Also on point is Overstock.com, a case strikingly similar to this case on its facts. There, as here, a public company plaintiff sued for defamation arising from certain negative "reports" that were generated so that defendants could profit from short-selling the plaintiff's stock. After analyzing the published reports, the Court determined that "without question" they

> reasonably could be understood as implying that Overstock changed its accounting methodology in order to boost revenue figures artificially; the change was a substantive violation of GAAP that led to continuing material overstatements of revenue; the company knowingly inflated its cash flow; and the president and CFO resigned as a result of these transgressions. In other words, Overstock was 'cooking the books' and manipulating accounting procedures to boost the price of its stock.

Id. at 704.

Here, all of the Defendants published reports that (i) contained allegations of the criminality of Medifast's "MLM" arm, TSFL; (ii) claims that Medifast is purposely failing to make material disclosures to its investors – disclosures that Coenen testified over and over again, are not actually required to be made; (iii) direct comparisons to Bernie Madoff, Enron, the "housing bubble" and the "sub-prime mortgage crisis;" and to YTB, a company the AG prosecuted under a criminal statute; and (iv) referred to the company as a "gigantic pyramid scheme." As in Makaeff and Overstock, all of these statements could reasonably be understood as implying a statement of fact. And just as in Overstock.com, "these implications are strengthened by the sheer flurry of negative reports" (26 in all, *prior* to the filing of this lawsuit) "as well as the stylistic emphasis placed on key phrases." Id.

2. Defendants' Statements Are *Not* Rhetorical Hyperbole:

FitzPatrick and Coenen attempt to avoid liability by claiming that their statements -- including comparing Medifast to Madoff and an illegal Ponzi Scheme and calling TSFL a gigantic pyramid scheme -- are rhetorical hyperbole in this day and age, and are therefore not *really* defamatory.[71] Among other inflammatory accusations of criminal activity, they base this argument on cases dealing with statements made "by participants in an adversarial setting," such as a public political debate and heated union election.[72] But Coenen and FitzPatrick fail to point to any "adversarial setting" in which Defendants' defamatory statements were debated with Medifast – this was not a public debate during a heated election (or any public forum) – this was a Minkow-financed, carefully orchestrated one-way attack, made by seven co-conspirators, over the Internet for one purpose – to cause the stock of Medifast to collapse so that Minkow (and others in his network) could reap a profit.

It may well be that calling someone a "thief" or a "liar" in a heated public debate in 2001 (and under the particular circumstances involved in those cases) may have been "constitutionally-protected rhetorical hyperbole," but likening Medifast and the TSFL business model to the largest Ponzi scheme in history, a mere *two months* after its' mastermind, Bernie Madoff, was sentenced to prison for one hundred and fifty years for stealing a record $50 billion from his investors, is a far cry from rhetorical hyperbole.[73] And it is the very definition of malicious. At the very least, it is the paradigm of recklessness. Both FitzPatrick and Minkow knew that by comparing Medifast to Madoff, the reader would be drawn in, eager to read about all the juicy details of yet another giant criminal enterprise, just like Madoff's Ponzi scheme, Enron, Arthur Andersen and WorldCom.

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[71] FitzP. MPA, 20:24-28; Coenen MPA, 18:3-9.

[72] Citing Ferlatudo v. Hamsher, 74 Cal.App.4th 1394, 1401 (1999); Gregory v. McDonnell Douglas Corp., 17 Cal. 3d 596, 601 (1976), and Rosenaur v. Scherer 88 Cal.App.4th 260, 280 (2001).

[73] Madoff was arrested on December 11, 2008, just two months before Minkow requested an update of FitzPatrick's September 2008 report, and posted it on the medifraud website. (Ex. 56, p.3) Since then, courts have commented on just how heinous Madoff's crimes were and how they have changed the world's financial landscape. See In re Madoff Investment Secs., 2010 Bankr. LEXIS 3875, at *3 (S.D.N.Y. Bankr. Nov. 17, 2010), characterizing scope of Madoff's criminal activity as "a fraud of unparalleled magnitude." See e.g., Backus v. Connecticut Community Bank, N.A., 2009 U.S. Dist. LEXIS 119955 (D. Conn. Dec. 23, 2009) (referring repeatedly to "infamous" nature of Madoff scheme); MLSMK Invs. Co. v. JP Morgan Chase & Co., 2010 U.S. Dist. LEXIS 85466, at *1 (S.D.N.Y. July 14, 2010) (referring to Madoff's "now-notorious Ponzi scheme"); United States v. Treadwell, 593 F.3d 990, 993 n2 (9th Cir. 2010) (highlighting Madoff Ponzi scheme as recent *exemplum par excellence* in the public eye).

FitzPatrick uses these same comparisons on the very first page of his report to enflame the reader at the outset, and pre-condition him to believe everything that follows as gospel: "[i]n the post Madoff era, which includes Enron/Arthur Andersen scandals, extraordinary and singular growth by a company must now be viewed as a cause for scrutiny rather than an automatic assumption of market success." FitzPatrick himself recognizes the power of these words. It is precisely why he chose to use them. Overstock, supra, at 704.

Indeed, FitzPatrick closes out the report's preamble on page 7, by stating: "[l]ike Enron's special business model and Madoff's secret trading system, Medifast dazzles its prospects with the classic and indecipherable MLM pay plan, showing the potential of an income with "no cap." The remainder of the report is merely his "reasons" why Medifast is "not legitimate." Thus, the reader has been set up to see Medifast and the TSFL business model as a criminal enterprise from the very beginning – one that should be shut down, and those at the company responsible, like its Executive Chairman Brad MacDonald, should go to jail – just like Kenneth Lay and Jeff Skilling; just like Bernie Madoff. These statements are not rhetorical hyperbole, but dangerous and malicious allegations – allegations that are provably false statements of fact.

The statements of Plaintiff's illegal activity did not stop with the Madoff comparison, and calling Medifast a Ponzi scheme, however. Defendants also stated, with impunity, that TSFL violates Cal. Penal Code § 327 – again claiming Medifast is a criminal enterprise. Defendants – FitzPatrick, Minkow *and* Coenen – compared TSFL to YTB, a multi-level marketing company that was prosecuted by the AG for being "a gigantic pyramid scheme."[74] Defendants inferred through their statements against Medifast's auditing firm that, just like Madoff, Medifast had been committing securities fraud, and using their one-office auditing firm to cover up the fraud – their one-office auditing firm that was illegally pumping MED stock to their clients.

Plainly, the statements by FitzPatrick, Minkow and Coenen, accusing Medifast of illegal conduct, at a very minimum *imply* provably false statements of fact, and not hyperbole or opinion.

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[74] Ex. 40, p. 10; Ex. 49, 50.

3. The Totality of the Circumstances Requires a Finding of Actionable Opinion:

Under the totality of the circumstances test, which this Court is required to apply to determine whether the statements at issue are provably false statements of fact or merely non-actionable opinion or hyperbole, the Court must look at all of the statements in their broad context. Overstock.com, supra, at 705. Here again, as in the Overstock case, many of the defamatory posts are "reports," touted by Minkow as written by "experts" in their fields. By characterizing these reports and commentaries as those made by "experts," Defendants are creating a serious tone and content; one that a typical reader would take seriously. Moreover, each of the defendants holds themselves out as having specialized knowledge in some area; e.g., multi-level marketing, pyramid schemes, forensic accounting and fraud. All of their businesses were built around developing reader confidence to rely on their opinions as reflecting the truth about the companies they investigate. See Id. at 705-706. Indeed, Minkow is oft-quoted as saying "one and done." He attempts to give legitimacy to whatever he posts simply by claiming that because he is an ex-con, he has to be right all the time. The message to the reader is clear – everything he posts *must be true*.[75]

Within this context, where each defamer touts him/herself as an expert in the areas upon which they write, the audience does not merely take their work as "opinion" but as a statement of fact – if the expert says it's true, it must be so. In this way, the opinion implies to the reader that it is based upon, or is, *standing on its own*, a true statement of fact. See Overstock.com, supra, distinguishing Morningstar, Inc. v. Superior Court, 23 Cal. App. 4th 676 (1994). Indeed, while "[a]n accusation that, if made by a layperson, might constitute opinion may be understood as being based on fact if made by someone with specialized knowledge of the industry." Wilbanks v. Wolk, 121 Cal. App. 4th 883, 904 (1st Dist. 2004) (citing Slaughter v. Friedman 32 Cal. 3d 149, 154 (1982). Here, as in Wilbanks, Defendants have held themselves out "to have special knowledge resulting from extensive research" and have claimed to be experts "that could recognize and identify [illegal] practices that the average person might not recognize. Because Defendants repeatedly assert that

[75] See, e.g., Barrett, Beth, Barry Minkow 2.0, L.A. Weekly, Oct. 14, 2010, http://www.laweekly.com/2010-10-14/news/barry-minkow-2-0.

they are "crusader[s] and watchdog[s]" for the protection of unwitting consumers,[76] Defendants "clearly expected readers to rely on their opinions as reflecting truth," without questioning their validity. Id. This renders hollow any argument that they were merely stating the facts and drawing their own opinions from them.

4. Defendants Failed to Provide All of their Sources:

Defendants claim that because they have provided their readers with all of their sources, the reader may make up his or her own mind, and their opinion is thus protected on this basis. However, the Defendants did not provide all of their sources. In fact, in discovery, FitzPatrick admitted that he did not provide any reference to the YTB compensation plan, which he admitted he used and compared to the TSFL compensation plan in his initial report. He further testified that he not only reviewed the YTB compensation plan, but he had conducted an extensive investigation into YTB, which he utilized in his comparison with TSFL. None of this information was revealed to readers of his report. Nor did Coenen or Minkow provide a link to the YTB compensation plan, or *any* indication whatsoever what the source of that YTB post was.

When FitzPatrick did provide sources for his statements in his reports on Medifast, they were so vague, i.e., "SEC filings," without further clarification, that the average reader either would not be able to find the source or would be so confused that they would simply take FitzPatrick's statements at face value. This is precisely why FitzPatrick's "opinions" should not be afforded protection from liability – he so misleads his reader into believing that he has a source for every one of his "opinions," that the reader is duped into accepting all of his statements as truth.

Minkow Coenen and Lobdell simply state that they rely upon FitzPatrick as the source for most of their "opinions." Because FitzPatrick says something, it must be true. Interestingly, in her sworn declaration, Coenen admits that she provided "some" of her sources to her readers, but not *all of them*, as is required to obtain protection for her statements as verifiable opinion.[77] Based on all of the foregoing, the Court should dismiss Defendants' collective arguments that their statements are non-actionable opinion and cannot form the basis for a claim of defamation.

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[76] Minkow MPA, 1:2-8; 3:4-27; Coenen MPA, 3:2-12; 14:10-17; FitzP. MPA, 2:1-6; and Declarations cited therein.
[77] Coenen Decl. ¶ 17.

Finally, the Court need not parse out which of the numerous statements made by Defendants are actionable. "[O]nce a plaintiff shows a probability of prevailing on any part of its claim, the plaintiff has established that its cause of action has some merit and the entire cause of action stands." Mann v. Quality Old Time Serv., Inc., 120 Cal. App. 4th 90, 106 (4th Dist. 2004); Makaeff, supra, at *16-17 n.4 (following Mann). "Thus, a court need not engage in the time-consuming task of determining whether the plaintiff can substantiate all theories presented within a single cause of action and need not parse the cause of action so as to leave only those portions it has determined have merit." Id. Stated differently, a motion to strike "is not a substitute for a motion for a demurrer or summary judgment. In resisting such a motion, the plaintiff need not produce evidence that he or she can recover on *every possible point urged*. It is enough that the plaintiff demonstrates that the suit is viable, so that the court should deny the motion and allow the case to go forward." Wilbanks, supra, at 905 (emphasis added).

Here, even beyond the overarching themes of criminality, which, as will be shown below, are absolutely false, Defendants make *very clear* provably false statements of fact within their various posts, which cannot be characterized as opinion. For all of these reasons, Defendants' anti-SLAPP motions must be denied.

D. Defendants' Statements of Fact Are Provably False:

The Declaration of Dan Bell, filed herewith, shows that Defendants' provably false statements of fact are indeed false and Plaintiffs respectfully and specifically refer the Court's attention to paragraphs 20-23, 25-31, 33-38, 44-45, 47-48 and 59-91. These paragraphs refute Defendants' reckless and malicious allegations that Medifast is (i) involved in criminal conduct; (iii) a gigantic pyramid scheme like YTB (or otherwise); and (iii) a Madoff-like Ponzi scheme. Bell's statistics also put the lie to Defendants' repeated allegations that TSFL is nothing more than an endless chain recruitment scheme.

Indeed, and as Bell notes, in February 2009, a total of 28,385 orders were placed with 12.3% from health coaches and 87.7% from clients or patients of physician/health coaches. The same statistic applies to all of 2009 -- approximately 87% of all sales of Medifast products went to end user clients/patients *who were not health coaches*. From May 2009 to April 2010, TSFL added

6,356 new health coaches and 102,505 new ordering clients/patients. These facts prove that the company is growing and profiting from *product sales* – not the recruitment of health coaches. [78]

Defendants are expected to argue that many of Bell's statistics were unknown to them, and as such, cannot support a finding of malice, *even if* they prove that TSFL is clearly *not* the pyramid, Ponzi or endless chain recruitment scheme that Defendants have claimed. This argument has no merit and will be addressed infra, in Section IV. E. Suffice it to say here, even without these heretofore non-public statistics (which under Overstock.com, supra, 151 Cal. App. 4th, at 705, n.15, are admissible to prove the falsity of defendants' statements), Bell's detailed explanation of how the TSFL compensation plan *actually* functions refutes the majority of all of the defendants' false statements. This is clearly demonstrated below, wherein each of the more egregious statements made by each Defendant is reproduced, followed by the citation from Dan Bell's declaration and other sources to prove its falsity:[79]

As to FitzPatrick:

i) coaches "are the engines of the company revenue through their own recruitment work, while also serving as major sources for revenue through their own purchases and payments of fees"; **TRUTH:** Bell Decl. ¶ 33-35.

ii) TSFL has ten levels of management in its distribution/payment channels; **TRUTH:** Bell Decl. ¶¶ 46, 59-65; 84-91.

iii) while the pay plan theoretically allows for reaching upper levels through sales only, this is a realistic impossibility; "[i]n practice, the only feasible means to reach the upper level is to build structure, i.e.,, recruit coaches who recruit other coaches." **TRUTH:** Bell Decl. ¶¶ 47, 61-65; 68-80.

iv) a coach at the bottom only earns 14.7% and the remaining 36.3% is paid to those above him; **TRUTH:** Bell Decl. ¶¶ 50-58.

v) coaches are required to purchase $300 worth of product per month; **TRUTH:** Bell Decl. ¶ 55, 56.

vi) coaches expend large amounts of money each month to earn anything (41% of their gross profits, based on Medifast's direct selling sector expenses), thus true earnings are grossly exaggerated by the company. **TRUTH:** Bell Decl. ¶¶ 51-58.

[78] Bell Decl. ¶¶33-35.

[79] This is a compilation of provably false statements of fact found in the 28 posts attached as exhibits to Medifast's FAC, and downloaded from the Internet – this does not represent all of those statements contained in each posting, as many are duplicative statements made in several posts. *In no way*, should this attempt to avoid duplication be construed as any sort of concession that these same statements are not defamatory when made in other posts.

vii) the "scheme immediately offers the new coach a $100 'client acquisition bonus' for recruiting 5 new participants (participants are other coaches or retail customers, called 'clients') within 30 days; **TRUTH:** Bell Decl. ¶¶ 59-60.

viii) the "escalating bonuses" are only paid to those that recruit – "all of these special bonuses and overrides are reserved to those in the upper levels of the sales chain, but ultimately most of the revenue on which they are based comes from the work of the lowest level coaches"; **TRUTH:** Bell Decl. ¶¶ 59-67; 84-91.

ix) an "Executive level earning 30% of CV - $44 per $300 sold by a coach - that is exactly the same amount made by the coach who actually made the sale"; **TRUTH:** Bell Decl. ¶¶ 57-58; 61-65

x) "[p]residential gets 3% CV [Commissionable Volume] cut, about 10% of what the coach made, 10 levels up, and incurred no costs at all on the sale!"; **TRUTH:** Bell Decl. ¶¶84-91.

xi) "upline recruiters are paid more than twice as much as the actual sales people per sale"; **TRUTH:** Bell Decl. ¶¶ 45; 68-91.

xii) roll-up and compression exacerbates the concentration of rewards to the top levels. And although the "extraordinary significance of this system would not likely be grasped by a consumer that has just signed up as a coach, it is [sic] key driver for recruitment and an amazing reward for those in the upper levels." **TRUTH:** Bell Decl. ¶¶92-98.

xiii) "Bonuses are nakedly paid up-front for recruiting new coaches." (Ex. 117, p. 4) **TRUTH:** Bell Decl. ¶¶ 38;48; 59-60.

As to Minkow:

i) Because Medifast relies on a closed system whereby little actual retailing to those outside the scheme is going on, and taking into consideration the daily recommended serving and all other products taken per day, Medifast's coaches are compelled to consume even higher than normal amounts of their lead-infested products, leading to even greater risk to their health – in sum, Medifast is poisoning its health coaches for profit; **TRUTH:** Bell Decl. ¶¶ 35;

ii) Approximately 50% of TSFL's revenue from product purchases is transferred from recruits to Medifast's recruiters. The great majority of this sum is transferred to those in the upper levels of the recruitment pyramid; **TRUTH:** Bell Decl. ¶¶ 45; 68-91.

iii) Medifast's TSFL compensation plan has ten levels; **TRUTH:** Bell Decl. ¶¶ 46, 59-65; 84-91.

iv) Medifast's upper levels get an increasingly larger piece of each share of the profits – more than the one who actually makes the sale; **TRUTH:** Bell Decl. ¶¶ 45; 68-91.

v) "Coming soon" – YouTube videos from disgruntled coaches who have been defrauded by Medifast; **TRUTH:** Not a single video has ever been posted by Minkow.

vi) Medifast's outside auditor recommended Medifast stock to an FDI operative; **TRUTH:** Affidavits of Faith Hollander; Matthew Bagell and exhibits thereto; and Charles Holmes.

vii) The recommendation of Medifast stock by its outside auditor is a 'potential' conflict of interest; **TRUTH:** Affidavits of Faith Hollander; Matthew Bagell and exhibits thereto; and Charles Holmes; Ex. 2, 208:3-11; Ex. 100-103.

viii) 67% of all commissions paid out go to 10% of the organization (implying they do so without making the correlative sales to earn those commissions); **TRUTH:** Bell Decl. ¶¶ 75-82.

ix) The bottom 80% of coaches earn $52 a week (implying, as before, that these 80% make all of the sales); **TRUTH:** Bell Decl. ¶¶ 75-82.

As to FitzPatrick and Minkow Collectively:

i) Medifast/Avon Comparison: Medifast has recruiters overseeing recruiters – no one represents the company or the customer; Medifast forces payments in advance for orders by sales representatives; every health coach is automatically authorized to recruit; Medifast has ten levels of downline recruiters; up levels get increasingly larger piece of each sale; bottom level coaches earn only14.7% of the sale; recruiting is treated as sales; **TRUTH:** Bell Decl. ¶¶ 6, 7, 20-23; 25-30; 46, 59-65; 84-91; 50-58.

ii) Letter to FTC and AG: Medifast is a gigantic pyramid scheme just like YTB; **TRUTH:** Bell Decl. ¶¶ 20-23; 25-31; 33-38; 44-45; 47-48; 59-91

As to Minkow and Coenen Collectively:

i) YTB Comparison: ten levels of commission payouts – nine others get paid more than the seller; **TRUTH**: Bell Decl. ¶¶ 46, 59-65; 68-91.

As to Coenen:

i) "BJL Wealth Management recommended the purchase of Medifast stock to an operative of FDI"; **TRUTH:** Affidavits of Faith Hollander; Matthew Bagell and exhibits thereto; and Charles Holmes.

ii) The recommendation of Medifast stock by its outside auditor may be considered a conflict of interest; **TRUTH:** Ex. 2, 208:3-11; Ex. 100-103.

iii) Medifast requires minimum purchases to continue to qualify in the pyramid; **TRUTH:** Bell Decl. ¶¶ 54-58.

iv) Medifast does not make proper disclosures; **TRUTH:** Ex. 2 145:6-146:6; 166:8-13; 176:5:177:18.

v) TSFL makes it clear that to make real money, you have to recruit new people into the plan; **TRUTH:** Bell Decl. ¶¶ 47, 61-65; 68-80.

vi) Almost no one makes a living wage in TSFL; **TRUTH:** Bell Decl. ¶¶49-80; 83

vii) The bottom 50% of coaches are making all of the sales and not getting paid for their work; **TRUTH:** Bell Decl. ¶¶75-80.

As to Lobdell:

i) Bottom 80% of the sales force makes $52 a week (implying that they do most of the work and do not get paid for it); **TRUTH:** Bell Decl. ¶¶75-80.

ii) Most of TSFL's revenue comes from recruiting, not sales; ¶¶ 47, 61-65; 68-80; 83..

iii) Only 1% of the sales force earns between $8,000 and $20,000 – the rest do not earn enough to cover the costs of membership, marketing and shipping costs; ¶¶ 47, 49-58; 61-65; 68-80; 83.

iv) Medifast's quarterly revenue has increased 100% because the company is generating much of its money from recruiting new sales associates, not meal replacement products; **TRUTH:** Bell Decl. 33-35; 83.

v) As of February 3, 2010, the date Lobdell's first post was published, "Medifast insiders have dumped more than $6 million in stock in the past two months." Ex. 130.

E. Even if the Court Determines Plaintiffs Are Required to Show Actual Malice, Ample Evidence Exists to Meet This Burden:

In response to an anti-SLAPP motion to strike, the limited-purpose public figure plaintiff (which neither Medifast nor MacDonald are) must put forth sufficient admissible evidence to support a finding (by clear and convincing evidence) that the allegedly defamatory statements were made with knowledge of their falsity or with reckless disregard of their truth or falsity. Actual malice may be proved by circumstantial *or* direct evidence. "However, we will not infer actual malice solely from evidence of ill will, personal spite or bad motive." Ampex Corp. v. Cargle, supra, 128 Cal.App.4th at pp. 1578-1579 (citations omitted). But

> evidence of negligence, of motive and of intent may be adduced for the purpose of establishing, by cumulation and by appropriate inferences, the fact of a defendant's recklessness or of his knowledge of falsity.' *A failure to investigate*, anger and hostility toward the plaintiff, *reliance upon sources known to be unreliable*, or *known to be biased against the plaintiff* – such factors may, in an appropriate case, indicate that the publisher himself had serious doubts regarding the truth of his publication.

Overstock.com, supra, at. 700-701, citing Reader's Digest Assn. v. Superior Court, (1984) 37 Cal.3d 244, 257-258. As shown below, Plaintiffs have easily met their burden.

1. FitzPatrick:

FitzPatrick thinks that he is beyond reproach because he is the expert on MLMs and, according to him, all MLMs are the same, their compensations plans are the same and all have evil intentions. FitzPatrick was biased from the outset – it was the very reason Minkow has repeatedly used him in his short-selling scheme.[80] See, Readers' Digest, at 257-258. But it is FitzPatrick's

[80] See Fn. 9, 10.

arrogance that exemplifies his malicious intent. Indeed, he did not have to conduct an actual investigation to conclude that TSFL is an endless chain recruiting scheme and a pyramid scheme and a Ponzi scheme (which to him are interchangeable) – it was a foregone conclusion.

At his deposition, however, FitzPatrick's complete lack of understanding of the TSFL compensation plan – the one document he should have thoroughly understood – became apparent. FitzPatrick had to admit that (i) a health coach could move up the "chain" (his terminology) by either structure *or* volume, a concept he relegated to a footnote of his report (ii) all forms of compensation paid under the compensation plan, whether commissions or bonuses, were paid based upon the sale of actual products, a concept he denied over and over in his reports; (iii) not a penny was ever paid purely for recruiting a health coach into the organization, again a statement that appears regularly in his reports.[81]

FitzPatrick's main theme is that it is impossible for any health coach to make money and reach the upper levels without recruiting, and making money by sales is only a "theory" under the plan.[82] As Dan Bell's Declaration makes clear, FitzPatrick is wrong. If FitzPatrick had any actual understanding of how the TSFL compensation plan worked – or the data cited by Dan Bell – he could not have characterized TSFL as an "endless chain" recruiting MLM. But rather than admit he did not understand, or even that certain data to reach his conclusion was missing, he created his own truth (the truth that Minkow wanted), and he gave it validity by touting his "expertise." That is malice.

Indeed, FitzPatrick's recklessness is evident in everything he *didn't* do when investigating Medifast. He didn't speak to anyone at the company. Out of thousands of health coaches, he looked at *one* health coach website and concluded that *all* health coach websites were the same. He spoke to *one* health coach, and the only question he asked her (not even her name) was how much it cost her to advertise to generate sales. He did not ask how much she earned with TSFL, or even if she had any complaints. But based on that one short pretext phone call, FitzPatrick came to the conclusion that the costs associated with working as a health coach were so enormous, no one could

[81] See, Fn. 20, 21.
[82] See, Fn. 20.

be profitable with TSFL unless they recruited more health coaches. His arrogance stopped him from conducting a proper, objective and unbiased investigation of TSFL (like he testified he did in Amway, PPL, and even YTB, where he actually spoke to numerous people actually working the program) and skewed his conclusions before he even put pen to paper.[83] Id.

Saying anything positive about Medifast was not an option for FitzPatrick. Not only would this have been unacceptable to the person that was paying him (Minkow), but it would have also hurt his "credibility" in the eyes of his other clients, such as attorneys, government agencies – those that pay him fees as an expert in the evils of MLM's. Indeed, when Minkow wanted to promote Avon in a comparison with Medifast, FitzPatrick voiced his reservation about putting his name on a document which said anything positive about Avon (which he believes is on its way to becoming just another MLM). Despite his reservations, FitzPatrick wrote the comparison anyway, because Minkow was paying him to write it.[84]

FitzPatrick believes that he knows more about what constitutes an illegal pyramid scheme than the government. He believes this so strongly that he is willing to ignore the facts in order to make his case. Over and over, in post after post, FitzPatrick likened Medifast to Bernie Madoff, a huge criminal enterprise, stealing money from innocent investors, misleading its shareholders and perpetrating a massive Madoff-like fraud on its participants and Wall Street. But at deposition, when asked whether he, in fact, believed that Medifast was a criminal enterprise, his response was "No." Obviously, FitzPatrick knew what he was publishing was false, but published it anyway.[85]

2. Minkow Defendants:

In the Lennar lawsuit, where Minkow is also being sued for defamation for publishing lies about another publicly traded company, after a full day evidentiary hearing on Lennar's motion for sanctions, the Honorable Gill Freeman remarked that Minkow "seems to have absolutely no sense of responsibility for telling the truth. The truth is whatever he decides is important to the moment…" Case No. 08-55741 CA 40, 11th Dist. Fla., Aug. 26, 2010.

[83] See, Fn. 20, 21, 22; Ex. 3, 130:23-131:5;
[84] See Fn. 30.
[85] See Fn. 23.

Minkow does not care about the truth. In search of a profit, Minkow will find a public company to attack – MLMs are "low hanging fruit" – gather his team of experts and look for ways to drive the stock price down, even if it means publishing lies. Herbalife, USANA, PrePaid Legal, Lennar and now Medifast. Most recently, Minkow has acknowledged the evil of his ways and says he is giving up his shorting and attacking public companies. Whether this acknowledgement is real, or merely a recognition that his business model is not paying off, the manner in which he went about attacking Medifast evidences his absolute recklessness – and even actual malice. [86]

Minkow chose FitzPatrick to write the "expert" report on Medifast because he knew from prior cases that FitzPatrick would only prepare a negative report (a fact admitted by Lobdell in his deposition). Minkow then relied completely on whatever FitzPatrick told him was the truth about Medifast. Minkow had no truly independent information about Medifast and, at deposition, his inability to comprehend how the TSFL compensation plan worked was obvious. Whenever he was asked a question about how the compensation plan functioned, he turned to FitzPatrick's rigged report for the answers.[87]

Minkow published a letter from his purported "food expert," Attorney Chris Grell. The evidence reveals that Minkow essentially wrote the letter for Grell – and proves Minkow's malice. Indeed, while Grell's original draft was limited to whether certain Medifast products violated Prop. 65, Minkow recast the letter into a scathing and malicious attack that accused the company of poisoning its health coaches by running a "closed system" that forces them to consume mass quantities of food products that contain lead, all for Medifast's profit.[88]

Minkow hired an ex-con, Mike Lair, as his undercover "operative." Ironically, Lair went to prison for lying about the very thing that Minkow hired him for, i.e. to dig up dirt on target companies. At deposition, Minkow admitted that he knew Lair was an ex-con, but did not know the details of his crime. Minkow then admitted that, in hiring Lair, he takes "risks." Thus, he hired Lair, and then used information of which he had absolutely no corroboration to smear Medifast by

[86] See Fn. 19, 52.
[87] See Fn. 9, 10, 26.
[88] See Fn. 16, 25.

claiming that its outside auditor, BJL, had a conflict of interest.[89] Whether Minkow knew an ignored Lair's crimes, or he (a private investigator) didn't bother to find out, his reliance on Lair constituted malice.

Minkow's attack of Medifast by using completely fabricated allegations of impropriety by BJL also involved his other expert, forensic accountant Coenen. Significantly, however, and as further proof of Minkow's actual malice, Coenen told Minkow that there was *no* conflict of interest. Again, the truth did not matter and Minkow published the BJL story to turn a profit. And indeed, that one attack drove the price of Medifast's stock down 4.5 percent.[90]

As for Lobdell, his complete failure to do any independent research or attempt to corroborate a single thing before he joined forces with FDI, and before he posted it on his website is the paradigm of recklessness. Moreover, at his deposition, Lobdell admitted to the numerous errors in his postings.[91]

3. Coenen:

Like FitzPatrick, Coenen was hired by Minkow because of her bias – she believes every MLM is a pyramid scheme. Most notably, although adamant that Medifast is a pyramid scheme, she never reviewed the one document central to such an analysis – the compensation plan. At her deposition, Coenen first claimed that she spent no more than an hour studying the TSFL compensation plan. She then admitted that she had never even seen the TSFL compensation plan until it was put in front of her. Later in the deposition, she claimed to have spent some amount of time comparing the TSFL compensation plan to YTB's compensation plan before she prepared the YTB post for Minkow (which was also published on her own website). Putting aside the blatant discrepancies in her sworn testimony, Coenen made *very clear*, proven-false statements of fact about a compensation plan that she either *never* read or read very superficially.[92] Either way, this proves that Coenen acted with malice.

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[89] See Fn. 34-41.
[90] See Fn. 37-41; Ex. 65
[91] See Fn. 18, 50.
[92] See Fn. 11.

Coenen's penchant for playing fast and loose with the truth is also evident in her assertion that she is not responsible for the YTB post because she just made "suggestions" to Minkow. The e-mails, which Coenen believed would never be discovered, prove that she was the *author* of the YTB post and this too evinces her malicious intent. Her malicious intent is evident in the lengthy back-and-forth regarding whether BJL's alleged recommendation of Medifast stock was a conflict of interest. In emails written at the time, she clearly stated her belief that there was no conflict and wanted no part of that post (and recently confirmed her belief on this topic at her deposition). Nonetheless, just two weeks later, Coenen blogged on this very topic, misleading the public into thinking there might possibly be just such a conflict. Her post also made a definitive statement for which she had no basis – that BJL recommended Medifast stock to an FDI operative. At deposition, Coenen admitted she did not know, did not care and did not ask about the identity of the "operative."[93]

Coenen maintains that she never posts anything on her blog at Minkow's direction. In January, 2010, however, Coenen posted three times in two days, contemporaneous with Minkow and FitzPatrick's four attacks on Medifast. Whether or not at Minkow's direction, this collaborative effort contributed to driving the stock price of Medifast down over 45 percent. Besides what Minkow paid her, each post gives Coenen more publicity for her company, for her books, and her services as an "expert." Truth is a relative term to her – Coenen craves celebrity, and attacking Medifast, which continue to this day, is her way of getting attention.

We anticipate that Defendants will argue that because they did not have access to the previously non-public information, they could not possibly have known that Medifast is not an endless chain pyramid scheme, and as such could not have acted with the requisite malice. But based on their own testimony, this argument is flawed. Defendants intentionally avoided obtaining any information that would prove their already-determined conclusion wrong. All of them admitted

[93] Still another example is her refusal to join in the comparison of Avon and Medifast because it put Avon in a positive light; she then turned around and posted the piece on her own website the same day. Then there is her continual posting of Medifast's failure to make certain disclosures, without informing her readers that in her mind, these disclosures are not required by law. By leaving this crucial fact out, she misled her readers into believing that Medifast was breaking the law. See Fn. 11-13, 30-32, 38, 41, 43.

they did not bother attempting to speak with anyone within the company. They did not bother seeking Medifast's comment before publishing their findings. It wasn't until January 12, 2010 that Minkow asked the company for a response, and by that time, it was too late – the stock had plummeted – the damage had been done.[94]

But most notably is Minkow's own testimony that it's always better if a company doesn't respond to one of their attacks. It brings more attention to the issue and leads to more bad press. Minkow never expected a response from Medifast. Indeed, if Minkow had been provided with the truth, Defendants' entire plan would have failed. And there was a client ordering an attack on Medifast.[95] Defendants acted with malice at every turn. Their motions should be denied.

F. The Remaining Claims Rise or Fall, In This Case Rise, on the Defamation Claim:

1. Conspiracy to Defame:

Contrary to Defendants' assertions, California recognizes a related cause of action for civil conspiracy, extending liability against *all* parties who have agreed to defame the plaintiff in order to further *their own* purposes. See, 1-9 Cal. Torts § 9.03, Civil Conspiracy, Matthew Bender & Co., Inc.; See, DeVries v. Brumback, 53 Cal.2d 643, 648(1960); Farr v. Bramblett, 132 Cal. App. 2d 47 (1st Dist.1955). All that Plaintiffs need establish is (1) the formulation of the conspiracy, (2) wrongful conduct done in furtherance of the conspiracy, and (3) damages. Duncan v. Stuetzle, 76 F.3d 1480, 1490 (9th Cir. 1996); see also, Saunders v. Superior Court, 27 Cal. App. 4th 832, 845-56 (2nd Dist.1994). Once a conspiracy is shown, each party is liable for all acts done in pursuance of the conspiracy, and lack of knowledge of details or absence of personal commission of overt acts is immaterial. Peskin v. Squires, 156 Cal. App. 2d 240, 245-246 (2nd Dist.1957). Each co-conspirator becomes liable as "a joint-tortfeasor for all damages ensuing from the wrong, irrespective of whether or not he was a direct actor[,] regardless of the degree of his activity," Unruh v. Truck Ins. Exchange, 7 Cal. 3d 616, 631 (1972), or even when he joined in. DeVries, at 648.

As the evidence makes clear, the attacks by Defendants on Medifast were a well-orchestrated conspiracy. In each attack (up to Lobdell's joining in the conspiracy in February 2010), Minkow

[94] Ex. 3, 89:11-24; 106:5-107:21; Ex. 2, 139:7-140:9.
[95] Ex. 1, 132:11-1325.

utilized both Coenen and FitzPatrick to carry out his scheme. Minkow was the coordinator, with FitzPatrick, the MLM expert, and Coenen, the forensic accountant. Each of them collaborated on FitzPatrick's reports, and Minkow recruited Coenen and FitzPatrick to help draft other defamatory publications, including the Medifast/Madoff comparison (drafted by FitzPatrick and posted by Minkow); the Avon comparison (drafted by FitzPatrick and posted by Minkow after he sought Coenen's input); the YTB post (drafted by Coenen at Minkow's direction and published on both FDI and Coenen's sites); and the BJL attack (produced by Minkow with the input of Coenen and Antar.) Lobdell joining the conspiracy is evident in the fact that, even though iBusiness Reporting was supposed to be an "independent" site, he continually sought the input of Minkow, FitzPatrick, Coenen and Antar and didn't post anything without first checking with the group.[96]

It is also irrelevant whether Coenen or FitzPatrick profited from any short selling in order to be liable for the conspiracy. They each joined "to further their own purposes" – which, besides getting paid, is to bring attention to themselves, their business, their books, and their services as an expert in other matters.[97]

As to damages – the Plaintiffs have clearly been defamed – their reputations sullied. There is more than enough evidence unearthed at this juncture in the litigation to meet Plaintiffs' burden. And the Defendants are all jointly liable for all damage caused. DeVries, 53 Cal.2d 643, at 648.

2. Market Manipulation & Unfair Competition Law

Defendants' Corporations Code and Unfair Competition Law ("UCL") arguments rehash identical arguments raised in the FDI Defendants' 12(b)(6) motion, which is also pending before this Court. (Doc. No. 43-1.) So as not to waste this Court's time, Plaintiffs respectfully refer this Court to its 12(b)(6) Opposition, to be filed January 3, 2010, for more detailed argument of these points. But, as outlined briefly below, Defendants' claims are specious and should be denied.

First, Minkow's claim that Plaintiffs lacks standing to enforce a §25400 market manipulation claim is false. The Overstock.com case, supra, which Defendants wholly ignore, sustained a market

[96] Antar was good for whatever Minkow asked him to do – he needed the money; and Grell was the lead guy. See Ex. 7, Fn. 14-16, 25, 30, 31, 35-52.
[97] See Fn. 10, 12, 13.

manipulation claim based on the exact conduct alleged here. Id. at 717. As to the enforcement provision: §25500, requires only that a shareholder suffer injury in connection with the purchase or sale of manipulated stock; which is adequately pled here. See FAC, ¶7, 22. Second, Minkow's co-conspirators cannot avoid ¶25400 liability merely because they themselves did not short Medifast stock. Their arguments ignore §25400(e), which extends liability to any person who is compensated by a stock manipulator for the dissemination of false statements; also pled here, and proven. See Cal. Corp. Code § 25400(e); see also Cohen Decl, Ex 7. Third, application of the Overstock.com, supra, decision squarely addresses and renders meritless their remaining claim that the UCL (Cal. Bus. & Profs. Code § 17200) does not reach defamation claims and injuries related to securities. Id. at *714-17.[98]

V. DEFENSES

Defendants FitzPatrick and Coenen have also raised separate affirmative defenses to Plaintiffs' FAC. FitzPatrick asserts that: 1) Plaintiffs' claims asserting liability for his February 16, 2009 Report, are barred by the applicable one-year statute of limitations; and 2) all of his publications are protected by the litigation privilege granted under Cal. Civ. Code § 47(b). Coenen asserts that she is entitled to immunity for several of her publications under the Communications Decency Act of 1996, § 509, 47 U.S.C. § 230 ("CDA"). Each of these affirmative defenses fails as a matter of law.

A. FitzPatrick Re-Published His February 16, 2009 Report on May 11, 2009 – Well Within the One-Year Statute of Limitations Period:

FitzPatrick's statute of limitations argument is that he "published" the report to *Minkow only*, by an email dated February 16, 2009, one year and one day before Plaintiffs filed their Complaint. FitzPatrick asserts that he cannot be held liable for Minkow's publication of his report *the following day* (February 17, 2009) on FDI's "medifraud" website. FitzPatrick's statute of limitations argument fails on any of three separate grounds.

[98] Finally, any easily curable defect in the pleadings is not a ground for dismissal. See Hayley v. Parker, No. SA CV 01-69 DOC (EEx), 2001 U.S. Dist. LEXIS 23255, at *25 (C.D. Cal. Aug. 31, 2001).

First, what FitzPatrick omits from his moving papers is the crucial fact that on May 11, 2009, when he drafted his Q-1 2009 update, he included in that update, a link to his initial February 16, 2009 report, which he then *personally published on his own Pyramid Scheme Alert website*.[99] Under Oja v. United States Army Corps of Eng'rs, 440 F.3d 1122, 1133-34 (9th Cir. 2006), the republication, even of unaltered material, is independently actionable where the material is reposted on a *different* website than the one upon which it was initially published. Clearly, the one year statute of limitations began to run anew from May 11, 2009.

Second, under well-settled California law, "each time [a] defamatory statement is communicated to a third person who understands its defamatory meaning…the statement is said to have been 'published'…Each publication gives rise to a new cause of action for defamation." Shively v. Bozanich, 31 Cal. 4th 1230, 1242 (2003). And with each repetition, the *original author* will be held accountable. Id. at 1243; Schneider v. United Airlines, Inc., 208 Cal. App. 3d 71, 75-77 (1st Dist. 1989); Mitchell v. Superior Court, 37 Cal. 3d 268, 281 (1984); McKinney v. County of Santa Clara, 110 Cal. App. 3d 787, 797 (1st Dist.1980). "It is the foreseeable subsequent repetition of the remark that constitutes publication and an actionable wrong in this situation, even though it is the original author of the remark who is being held accountable." Schively, supra, at 1242. The relevant inquiry is whether "the repetition was 'foreseeable' and [whether] there was a 'strong causal link between the actions of the originator and the damage caused by the republication.'" Schneider, at 75-76.

When Minkow published FitzPatrick's report to the world on February 17, 2009, on the FDI website, a new cause of action arose – one for which FitzPatrick, as the original author remains liable. Not only did FitzPatrick authorize and intend the republishing by Minkow, the publication by Minkow was reasonably expected by him. Indeed, FitzPatrick was well aware of Minkow's intentions of publishing his report to the world after receiving it – Minkow hired and paid him to write the report (as Minkow had done with reports that FitzPatrick had authored for other companies). Here, moreover, FitzPatrick even helped FDI employee Shannon Boelter draft the press

[99] Ex. 72; See FitzPatrick's MPA, 8:18-19 citing FitzPatrick Aff. ¶ 4 in which he declares under penalty of perjury that he "did not publicize any of his reports after they were published and sent to FDI."

release and the Medifast/Madoff comparison piece that were to be published contemporaneously with his report on February 16, 2009 – the night before the medifraud website went live. The publication of FitzPatrick's defamatory report on the medifraud website exposed Plaintiffs to ridicule; other media outlets picked up the story; and Minkow did, in fact, drive the price of Medifast's stock down.[100] Schneider, supra. For all these reasons, FitzPatrick's assertion that he cannot be held liable for FDI's publishing of his report on February 17, 2009 is wholly without merit.[101]

B. FitzPatrick Is Not Entitled to the Protection of California Civil Code § 47(b):

FitzPatrick asserts entitlement to the litigation privilege found in Cal. Civ. Code § 47(b)(2) for each and every one of his defamatory postings. But the litigation privilege, even if it did apply, does not extend that far. FitzPatrick cites to three cases to establish that *all* of his reports, and *all other* defamatory statements attributable to him, are barred by the litigation privilege. The first, Ramalimgam v. Thompson 151 Cal. App. 4th 491 (2007), wherein the litigation privilege was held to bar a malpractice suit filed by one spouse, against the accountant retained as joint expert by both spouses in their dissolution action, is hardly applicable here. While FitzPatrick is correct that the litigation privilege applies to communications made in matters beyond the courtroom, such as quasi-

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[100] See Fn. 5, Ex. 65.

[101] Finally, in this case, the applicable one-year limitations period would be subject to equitable tolling under the Discovery Rule and thus timely. Specifically, whenever defamatory communications are published in a confidential, non-public manner, and where the plaintiff's contemporaneous awareness of that publication is plainly unreasonable, courts have applied the Discovery Rule to toll the statute of limitations. Schively, at 1249-1252; Schneider, supra, 208 Cal. App. 3d at 77. See e.g., Magnuso v. Oceanside Unified School Dist., 88 Cal. App. 3d 725 (4th Dist.1979) (libelous material in teacher's personnel file to which she had no access – Discovery Rule applied); McGuiness v. Motor Trend Magazine, 129 Cal.App.3d 59, 62-63 (2nd Dist.1982).

Here, when FitzPatrick emailed his February 16, 2009 Report (which included the original September 2008 report *in its entirety*) to FDI, and FDI alone, Plaintiffs had no way of knowing that they had been defamed. *No one knew* – other than those within Minkow's circle of conspirators – until FDI went live with the medifraud website and published the report on the Internet on February 17, 2009. Indeed, this secrecy was key to Minkow's intention to profit from shorting Medifast's stock prior to the report's dissemination to the public. (Ex.

It must also be noted that FitzPatrick's statute of limitations defense was not raised in his original Motion to Strike. As such, Plaintiffs were not aware of the need to take discovery on the issue, and were in fact, not permitted to take discovery on the issue under the Court's May 4, 2010 Order. As such, if the Court determines that the statute of limitations remains an issue, it should be reserved for trial, so that Plaintiffs will have had a full and fair opportunity to seek discovery.

judicial proceedings, merely stating that all of his defamatory statements are privileged does not make it so.

FitzPatrick next cites Silberg v. Anderson, 50 Cal. 3d 205 (1990), but completely ignores the four factors that Silberg determined he *must establish* for the privilege to apply, viz. the communication must 1) have been made in a judicial or quasi-judicial proceeding; 2) by litigants or other participants authorized by law; 3) to achieve the objects of the litigation; and 4) have some connection or logical relation to the action. Id. at 212. His failure to provide the Court with any *factual analysis* of how he satisfies any of these four factors in regards to each of his defamatory communications is not surprising, since FitzPatrick cannot meet the first factor for any of his statements – that they were made in a judicial or quasi-judicial proceeding.

The third case cited by Fitzpatrick, Kashian v. Harriman, 98 Cal. App. 4th 892 (5th Dist. 2002), actually works *against* him in establishing this first factor. Kashian extends the litigation privilege only to communications that are *actually transmitted* in the anticipation that an investigation will be opened into the subject of the communication. Here, there is *only* one communication that may have any potential of being covered by the litigation privilege – the May 22, 2009, letter FitzPatrick and Minkow 'addressed' to the FTC and the AG, comparing Medifast to YTB (Ex. 80). But to come under the privilege it must be clear that the letter was to *actually be sent to the AG's office*, in the anticipation that the letter will prompt the AG to open an investigation of the subject of the communication. Id., at 927; Wise v. Thrifty Payless, Inc., 83 Cal. App. 4th 1296 (3d Dist. 2000) (report actually made to the DMV regarding ex-wife's drug use privileged); Edwards v. Centex Real Estate Corp., 53 Cal. App. 4th 15, 34-36 (1st Dist. 1997), reh'g denied, rev. denied).

Moreover, under Edwards, a communication is not afforded protection of the quasi-litigation privilege unless it was made *preliminary to* a proposed quasi-judicial proceeding. "That is, a proceeding must actually be suggested or proposed, orally or in writing." Id.

> Without some actual verbalization of the danger that a given controversy may turn into a [quasi-judicial proceeding], there is no *unmistakably objective way* to detect at what point on the continuum between the onset of a dispute and the filing of a [quasi-judicial proceeding] the threat of litigation has advanced from mere possibility or *subjective anticipation* to contemplated reality.

Id. at 34-35 (italics added) (citing the Rest. (Second) Torts, § 586-588 & com. e, pp.247-251). The critical point in the analysis is that "the mere potential or 'bare possibility' that judicial proceedings 'might be instituted' in the future is insufficient to invoke the litigation privilege." Id. at 36. It must be *imminent*. See also Rothman v. Jackson, 49 Cal. App. 4th 1134, (2d Dist. 1996) (privilege does not apply to "public mudslinging" and the mere airing of disputes outside the courts). Thus, there must be *objective* evidence that an *imminent* quasi-judicial proceeding was actually proposed.

At his deposition, FitzPatrick's testified that it was his *general practice* to send all of his reports on all companies he investigated to the AG or to the FTC in hopes that they would act on his allegations. This is clearly insufficient, as it merely evidences his subjective anticipation. Moreover, under Edwards, FitzPatrick's affidavit testimony (prepared *after* his deposition was taken), that he always had the expectation that the authorities would see his work on the Internet and take action is also insufficient to assert the privilege for the same reason.[102] This is simply not objective proof that there was an imminent quasi-judicial proceeding contemplated by FitzPatrick.

FitzPatrick's assertion that because he and Minkow addressed one letter to the AG and the FTC, which they posted on the Internet, is also insufficient to prove that FitzPatrick solicited the AG and FTC to look into *all* of the allegations he made in *all* of his reports.[103] The only allegations made in that letter to the AG and FTC was the comparison of Medifast to YTB, originally drafted by *Coenen*. FitzPatrick cannot attempt to claim the litigation privilege to all of *his* defamatory communications, none of which had anything to do with Coenen's YTB comparison, through this one letter.

Significantly, there is no proof the letter was ever actually mailed. The letter itself does not even contain actual addresses for the recipients, and it is unsigned by its authors. Minkow did not recall whether it was mailed and when questioned on the issue, admitted that if he had sent it, it would have been signed, and if there was a signed copy of the letter, it would have been produced in discovery – but no such copy *was* produced. FitzPatrick assumed it was mailed, but had no personal knowledge. FitzPatrick's deposition testimony also contradicts his Affidavit testimony (again

[102] FitzP. 2d Aff. ¶ 20; Ex. 3, 274:2-11; 275:1- 276:5; Ex. 9, 56:8 – 58:19.
[103] FitzP. MPA, 6:10-11.

prepared after his deposition was taken), that he "followed his usual approach and notified the authorities" about Medifast. FitzPatrick never sent any of his reports on Medifast to either the AG or the FTC.[104] The privilege cannot apply to reports never sent to the authorities. Kashian, supra, at 927.

Even more compelling is a May 21, 2009, email from Minkow to FitzPatrick, which indicates that *until that day*, the two had not even contemplated approaching the AG or FTC in order to prompt them to start an investigation into Medifast. This email also makes clear that the subject of that proposed investigation was to be how TSFL compared to YTB, a company already being prosecuted by the AG – nothing more.[105] Any communication regarding Medifast made prior to the *contemplation* of a quasi-judicial proceeding – May 21, 2009 – is not protected by the privilege. Edwards, at 34-35. This email makes clear that the privilege cannot attach to any of the defamatory posts made prior to that date.

Finally, to provide unqualified immunity from suit, each time a person claims to be a consumer advocate and posts something on the Internet, *in anticipation* that the authorities will see it and take action, would undermine the very purpose of 47(b). Anyone could post defamatory statements on the Internet and then hide behind the litigation privilege, as FitzPatrick attempts to do here, by claiming he was *anticipating* the government would see all of his posts and take action. The assertion of the litigation privilege should be denied.

C. Coenen Cannot Hide Behind the Communications Decency Act As She Did Far More Than Merely "Republish" Others' Defamatory Statements:

Coenen argues that she cannot be held liable for the contents of four of her seven blog posts on her Fraud Files blog because all she did was merely re-publish another defendant's work. Those postings are as follows: 1) May 21, 2009 post entitled '5 Points of Similarity Between Medifast and YTB' (the "YTB post"); 2) May 21, 2009 post entitled 'Fraud Discovery Institute Blasts Medifast'; 3) January 12, 2010 post entitled 'Medifast multi-level marketing scheme called into question by expert'; and 4) January 13, 2010 post entitled 'More on the endless chain recruitment scheme of

[104] **Ex. 3**, 274:2-11; 275:1- 276:5; **Ex. 9**, 56:8 – 58:19; FitzP. 2d Aff. ¶18, 20.
[105] **Ex. 79**.

Medifast and Take Shape For Life.' Coenen further attempts to claim CDA immunity for *a single sentence* contained in her June 24, 2009 post, that *she* drafted, based on *information* she obtained from Minkow, thus attempting to avoid liability for what is clearly a false statement of fact.[106] Coenen's arguments fail for several reasons.

1. Coenen Was the Original Source for the YTB Post and the Single Sentence Regarding BJL:

Under the CDA, 47 U.S.C. § 230(c)(1), "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." The CDA has been interpreted to confer broad immunity against defamation liability for those who use the Internet to publish information that originated from another source. Barrett v. Rosenthal, 40 Cal. 4th 33, 39 (2006). However, active involvement in the creation of a defamatory Internet posting *will* expose a defendant to liability as an original source. Id. at 60 n.19. And when a defendant is the *original drafter* of the defamatory content, that defendant cannot hide behind the CDA, as Coenen concedes by not claiming CDA immunity for *three other* of her posts. (Coenen MPA, 9:19-21; 18:19 – 21:17).

As to the first of the four posts she does seek immunity for – the YTB post (item no. 1 above) – she is not entitled to it. Indeed, in the Affidavit Coenen submitted upon the filing of her *original* Motion to Strike, dated April 16, 2010, she declared, under penalty of perjury, that she *did not* draft any of the four posts listed above, and thus claimed that she was entitled to full immunity under the CDA.[107] However, discovery in this case (which Coenen never expected to come to light before her Motion to Strike was heard)[108] revealed that she drafted the YTB post *in its entirety*. During her deposition, Coenen attempted to explain away the discrepancy between her conflicting sworn statements by claiming that she was merely editing Minkow's work, or providing suggestions to him. Coenen further testified that she did not even know if what she provided to Minkow in the email was what eventually ended up on the FDI (and Fraud Files) website. In fact, however, and

[106] Ex. 50, 52, 64, 69, 71.
[107] Coenen Original Decl. ¶¶ 12, 17. Compare with current Declaration ¶ 12 – assertion has not changed.
[108] See http://www.sequenceinc.com/fraudfiles/2010/07/20/medifast-is-abusing-the-legal-system-to-punish-critics-of-take-shape-for-life/

despite Coenen's feeble explanations, a comparison of the email she sent to Minkow, and the post that ended up on both FDI's and Coenen's website on May 21, 2009, shows that her email – the one that she drafted – was posted *verbatim.*[109] Clearly, CDA immunity does not apply to the original source of the defamatory statement – Coenen – and she is thus not entitled to immunity for the YTB post. Barrett, supra, at 40.

Just as Coenen cannot claim immunity for the YTB post, she is also not entitled to avoid her clearly-established liability for her own statement: "This gets interesting when you consider that BJL Wealth Management recommended the purchase of Medifast stock to an operative of FDI."[110] Coenen brazenly asserts that because she obtained the information contained in this *one sentence* from another source, that she was merely a re-publisher of this *one sentence*, not its originator, and is entitled to immunity for this *one sentence* – not the entire post (which she freely admits she wrote). But that sentence does not exist anywhere but in Coenen's June 24, 2009 post. It was Coenen who took "facts" that were provided to her by Minkow through email communications, and wrote her own post on the subject. To allow Coenen to claim immunity for this one sentence would turn the CDA on its head. Coenen drafted that sentence. She alone posted it on the Internet and she is personally responsible for maliciously disseminating that false statement of fact.

2. The CDA Was Not Intended to Immunize a Co-Conspirator:

As to the remaining three posts (items 2, 3 and 4 above), CDA immunity should not apply to publishers that conspire with the original content providers to defame. Barrett, Concurring Opinion of Moreno, J., at 63-65. Although Justice Moreno's opinion is not binding on this Court, its reasoning for why the CDA did not intend to confer publisher immunity on a co-conspirator is sound reasoning. "Unlike the Internet service provider, or even the typical user of an interactive computer service, one engaged in a tortious conspiracy with the original information content provider is hardly one of the neutral 'intermediaries' that Congress intended to absolve of liability." Id. at 64. And, as the majority stated in footnote 19, cited above, "active involvement in the creation of a defamatory Internet posting would expose a defendant to liability as an original source." Id. at 60.

[109] See Fn. 31; Ex. 2, 151:20-153:7; Ex. 2, 201:21-203:7; Compare Ex. 75 – 76.
[110] Ex. 111.

As detailed above (in Section IV.F.1), Coenen and the other co-conspirators were actively involved in every aspect of the attacks on Medifast. Coenen in particular has provided input from when she was retained by Minkow in August 2008 through the last attack on May 19, 2010. In fact, when Minkow was unable to post on his own website because of a claimed conflict, Coenen was there to fill in and keep up the attacks.[111] Coenen also reviewed and provided suggested changes to FitzPatrick in regards to his January 2010 update, and now seeks immunity for her two January 2010 posts regarding that updated report.[112]

Put simply, Coenen she should not be allowed to hide behind publisher immunity for the harm she directly caused to Plaintiffs through her zealous participation in the repeated attacks. The Court should therefore deny Coenen's assertion of CDA immunity, and hold her responsible for all seven of her defamatory posts.

VI. CONCLUSION

Plaintiffs were defamed by Defendants on thirteen separate occasions, in twenty-eight public posts on their respective websites. And these were almost all before Plaintiffs had to resort to filing this lawsuit. Since then, there have been approximately fourteen more by the defendants and another dozen or so by Sam Antar. None of this was about the First Amendment, or consumer protection. With or without the need to prove actual malice, Plaintiffs have sufficiently established that the attacks on Plaintiffs were exactly that – malicious, callous, and intended solely for pecuniary gain and fame. Based on all of the foregoing, Plaintiffs respectfully request that the Court DENY each of the defendants' Motions to Strike the First Amended Complaint and allow this case to proceed.

Dated: December 27, 2010

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[111] See Fn. 42-44.

[112] Coenen's recent decision to distance herself from Minkow and FDI does not change the fact that she was a willing and active participant in the conspiracy to defame Plaintiffs. **Ex. 2**, 70:22-72:10; 74:9-75:3.