Appellate Case No.: 11-55687, 11-55699

IN THE UNITED STATED COURT OF APPEALS
FOR THE NINTH CIRCUIT COURT

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

Plaintiffs-Appellants,

v.

BARRY MINKOW, an individual; FRAUD DISCOVERY INSTITUTE, INC., a California corporation; TRACY COENEN, an individual; SEQUENCE, INC., a Wisconsin service corporation; WILLIAM LOBDELL, an individual; IBUSINESS REPORTING, a California business organization of unknown form; THOMAS ZIEMANN, an individual, AKA Zeeyourself,

Defendants-Appellees,

ROBERT FITZPATRICK, an individual,

Defendant-Appellee-Cross-Appellant

On Appeal from the United States District Court
For the Southern District of California
Court Case No.: 3:10-CV-00382-JLS-BGS

ANSWERING BRIEF FOR APPELLEES TRACY COENEN AND SEQUENCE INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

CORPORATE DISCLOSURE STATEMENT

Defendant/Appellee Sequence Inc. is a Wisconsin corporation that does not have a parent corporation and no publicly held corporation owns ten percent or more of its stock.

I. INTRODUCTION

Plaintiffs/Appellants Medifast, Inc. and Bradley MacDonald[1] use this appeal as yet another attempt to oppose Defendants/Appellees Tracy Coenen and Sequence Inc.'s (collectively, "Coenen") Special Motion to Strike (also referred to as the anti-SLAPP motion). But Medifast already had a chance to do so and failed. Rather than demonstrate any errors on appeal, Medifast prefers to raise new arguments, only highlighting that it did not previously meet its burden of demonstrating a probability that it would prevail on the claims against Coenen. In this appeal, Medifast has abandoned the majority of the allegedly libelous statements it focused on below and now claims that the anti-SLAPP motion should have been denied based on entirely different statements. Medifast cannot use this appeal as an opportunity to do what it did not do previously: establish that Coenen made statements that constitute libel per se.

The problem with Medifast's opening brief boils down to the same problem that has existed throughout this action – Coenen has to guess which statements Medifast believes are libelous and try to defend against a constantly evolving set of attacks. Medifast now claims that Coenen publicly accused it of three crimes. Yet, if that were the case, it is unclear why such statements were not pled in the operative complaint or even identified in the opposition to the anti-SLAPP motion. Instead, Medifast resorted to paraphrasing entirely different statements until they barely resembled the remarks Coenen actually made. It seems that even after five months of

[1] Appellant Bradley MacDonald joined in Medifast's general claims and asserted claims against internet posters for making allegedly defamatory remarks about him. For ease of reference, this brief generally uses the name "Medifast" to refer to the claims by Medifast and MacDonald.

discovery, Medifast was unsure as to which statements it contended were libel per se. This contradicts the basic premise of libel per se – statements that are defamatory on their face.

This lawsuit was brought as an effort to intimidate and silence individuals who were critical of Medifast. Medifast complained that Coenen defamed it with false statements. However, by attributing statements to Coenen that she never made Medifast has now, in turn, spent several years making false accusations against Coenen. Because Medifast did not meet its burden, the district court correctly granted Coenen's anti-SLAPP motion.

Medifast has not demonstrated that the district court's decision to grant the motion was in error in any way. This court should therefore affirm the order granting Coenen's anti-SLAPP motion.

II. JURISDICTIONAL STATEMENT

Appellants have properly asserted jurisdiction below and in this Court. However, as explained below, Appellants have not preserved several of the arguments that they present on appeal.

III. STATEMENT OF THE FACTS

A. Tracy Coenen and Sequence Inc.

Tracy Coenen is a forensic accountant whose work includes investigating and preventing corporate fraud. [Coenen's Supplemental Excerpt of Record ("SER") 2, ¶ 2.] Coenen's company, Sequence Inc., provides comprehensive services to corporate clients, including in-house fraud detection and prevention training seminars, fraud investigation, and forensic examination. [SER 2, ¶ 3.]

Since 2005, Coenen has published a consumer protection blog, "Fraud Files," to inform consumers about corporate fraud investigations and litigation, and to provide her thoughts regarding potentially fraudulent

business opportunities. [SER 3, ¶¶ 6-7.] The statements about which Medifast complains appeared on the Fraud Files blog. [ER 36-37, ¶ 56; ER 38, ¶¶ 64, 66; ER 40, ¶ 72.]

"Fraud Files" is a "daily commentary on fraud, scams, scandals, and court cases." [SER 3, ¶ 6-7; SER 737.] It is a forum for opinion, commentary, and discussion; Coenen does not purport to break hard news on the site. Further, Coenen regularly employs feisty, hyperbolic language, and fiery rhetoric to make her case. [See SER 754-757 ("Amway Sucks! Quixtar Sucks! Alticor Sucks!").] To facilitate ongoing debate, most posts are open to comment from the general public. [SER 3, ¶ 7.] Readers perusing Fraud Files understand they are receiving Coenen's opinion and offer opinions of their own in the comments section. They know, or quickly learn, Coenen's slant: pro-consumer, anti-multilevel marketing.

Further, Fraud Files is not limited to work Coenen has done with Appellee Barry Minkow. Of the over 1,600 posts on the blog as of the filing of the anti-SLAPP motion, 21 reference Medifast (including thirteen posts relating to this lawsuit). Coenen has also posted over 1,000 times in another blog, "Pink Trust." [SER 838, ¶ 2.]

A frequent topic of discussion at Coenen's blogs is multilevel marketing programs and pyramid schemes. [SER 3, ¶ 6.] Multilevel marketing programs are a method to sell a product directly to consumers through a network of salespeople. [SER 3, ¶ 5; SER 27-33.] Participants are compensated for the amount of retail sales they make and for a portion of the sales or purchases made by salespeople they have recruited to join the program, which is often called a participant's downline. [SER 30-33.] Participants' compensation increases as their downline grows, or as the people they recruit attract additional participants, who in turn attract more

participants and so on. [SER 3, ¶ 6.] Such programs are often called pyramid schemes because of the tiered structure developed by the chain of downline recruits. Because the revenues that support the commissions are funded primarily by payments made for the right to participate and by sales within the program, a pyramid depends on the continual recruitment of new participants. [SER 35-37.] This revenue structure makes pyramid schemes inherently unstable, as the majority of participants will lose money when recruitment reaches an unsustainable level and the pyramid collapses. (*Id*.)

The Federal Trade Commission polices multilevel marketing programs and publishes a variety of information to educate consumers about multilevel marketing programs and thwart the growth of pyramid schemes. [SER 27-33, 46-63.] State and federal agencies encourage consumers to evaluate multilevel marketing programs with a critical eye by asking questions about the business model, products, and income opportunity. [SER 30-36.] That is what was done in this case.

B. Medifast and Take Shape for Life.

Medifast, Inc. is a publicly-traded weight loss company with more than 13 million outstanding shares of common stock. [SER 65-66.] In 2009, Medifast's revenue exceeded $165 million. [SER 68-72.] According to Medifast, its weight management program has been recommended by over 20,000 doctors and its products have been used by over one million people. [*Id*.] Its celebrity spokespersons have included Kristy Swanson and Emmy-award-winning soap opera star Genie Francis. [SER 74-75.]

Medifast sells its products through four distribution channels: (1) direct sales via the internet or phone orders; (2) at Medifast-operated weight loss clinics; (3) through partnerships with physicians; and (4) through the

program “Take Shape for Life,” where participants, known as “Health Coaches,” sell products directly to consumers. [SER 68-72.]

Around the time that Medifast brought this action, and in the immediately preceding years, Medifast experienced significant growth. Medifast’s revenue increased from $83.8 million in 2007 to $105.4 million in 2008, a 26% year-to-year increase. [SER 77-81.] In 2008, Fortune Small Business magazine identified Medifast as number 47 on its list of fastest-growing small public companies. [SER 83-84.] Forbes named Medifast number 85 on its 2008 list of “America’s 200 Best Small Companies.” [SER 86-87.] In 2009, Medifast’s revenue increased another 57%, to $165.6 million, and it climbed to number 26 on Fortune’s list and to 16 in the Forbes rankings. [SER 68-72, 83-87.] After Medifast filed this lawsuit, its growth continued. In the second quarter of 2010, year-over-year quarterly revenues increased 60% and Take Shape For Life (“TSFL”) revenue grew 71%. [SER 699-704.] The total number of health coaches reached 8,000. (*Id*.) And, in October 2010, Medifast was ranked number one in Forbes’ list of “America’s 100 Best Small Companies.” [SER 706-707.]

Medifast’s growth was tied to explosive growth in the TSFL program. TSFL’s revenue increased 79% in 2008, from $27.6 million in 2007 to $49.5 million. [SER 77-81.] In 2009, TSFL’s revenue more than doubled, accounting for more than 60% of Medifast’s total revenue. [SER 68-72.] And, the total number of participants in TSFL more than tripled from 2007 to 2009, increasing from 1,850 to 6,000 in that time period. (SER 68-72, 77-81, 89-92.]

TSFL provides an opportunity for clients to increase their income if they become a TSFL health coach. [ER 30, ¶ 21, ER 62.] TSFL clients/distributors purchase an “Application Pak or Career Builder Pak” for

$199 (formerly $299) and pay renewal fees of $30 every six months. [AOB, p. 13, n. 6; ER 31, ¶ 26; ER 1030-1014, ¶¶ 49-50, 53.] Once they are certified, health coaches can sell Medifast products to others and, if they choose, can recruit other health coaches to join their team. [ER 31, ¶¶ 26, 29.] Health coaches receive residual commissions on sales of products by the recruited coaches. [ER 32, ¶ 32.] New coaches got a $100 client acquisition bonus for recruiting five new clients within 30 days. [ER 62.]

C. The Fraud Discovery Institute Begins Investigating Medifast.

In the summer of 2008, the Fraud Discovery Institute ("FDI") began investigating Medifast. FDI hired Robert FitzPatrick to evaluate Medifast's growth and the TSFL business model. [ER 27, ¶ 2; ER 53.] FitzPatrick is an expert in multilevel marketing programs and pyramid schemes; has authored numerous books and articles on consumer fraud; has been featured in national and large market news media for his expertise; and has served as an expert witness or consultant in a number of cases. [SER 112-124.]

On February 17, 2009, FDI published a report by FitzPatrick that stated his belief that TSFL operated as an endless chain. [ER 54.] FitzPatrick's conclusion was based on a number of observations, including:

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

- The true nature of the TSFL compensation structure was obscured by Medifast's failure to publish key financial data related to commission payments; and
- Though Medifast did not disclose financial data related to commission payments, there is evidence that Medifast paid out over 50% of all revenue as commissions to TSFL participants. [ER 52-81.]

Coenen did not republish this report. In conjunction with FDI's publication of the February 2009 report, FDI launched a website, www.medifraud.net. [ER 34, ¶ 46.] The website posted documents, including a press release that quotes Minkow, who co-founded FDI to expose investment schemes. [ER 34, ¶ 46; ER 83-102.]

In response to the February 2009 publications, Medifast issued a press release. [SER 95-96.] The press release identified Minkow as the author of the report and focused an attack on him, pointing out that Minkow was a "convicted felon" and claiming that he "is a liar [who] can't be trusted." [*Id*.] FDI and Minkow responded with a press release stating that Medifast failed to respond to the thrust of FitzPatrick's report – that the majority of TSFL revenue is transferred from recruits to participants higher up in the multi-level program. [ER 104-105.]

FDI continued its investigation into Medifast between February 2009 and January 2010, and FitzPatrick updated his report to analyze Medifast's quarterly financial reports. [ER 118-123.] FDI periodically issued press releases about the investigation, but Medifast never directly responded to, refuted, or negated FitzPatrick's allegations. Instead, Medifast would respond with a general denunciation of the allegations and personal attacks on Minkow. [SER 95-96, 104-105.]

Coenen periodically republished documents or posted blogs regarding this controversy. [SER 4, ¶¶ 12, 18.]

1. May 2009

On May 21, 2009, FDI published several documents regarding Medifast, including a press release about an updated report from FitzPatrick analyzing Medifast's first quarter financial disclosure and a document entitled, "5 Points of Similarity Between Medifast and YTB (YourTravelBiz.com)." [ER 36, ¶ 54; ER 107-108, ER 116.] On May 21, 2009, Coenen republished the press release and the "5 Points" as posts to Fraud Files. [ER 36, ¶ 56; ER 125-136.]

2. June 2009

On June 9, 2009, FDI published two documents regarding Medifast's auditor, Bagell Josephs Levine & Company ("BJL"). [ER 37, ¶ 60; ER 141-144.] The documents concerned the recommendation by a wealth management firm, which appeared to be connected to the auditor, of the purchase of Medifast stock to an FDI investigator. [ER 141-144.]

On June 24, 2009, Coenen published a post, "Conflict of Interest for Medifast auditors?" [ER 38, ¶ 64; ER 146-150.] Coenen discussed the duties of an auditor working in the capacity of an investment advisor and the independence issues that may arise out of working in that context. She outlined what would and would not constitute a conflict of interest under the scenario alleged by FDI. The facts Coenen discussed referred to claims made in the FDI report, and the post identified the report as its source. [ER 146-147.] Coenen linked to the FDI report that was the source of the claim [ER 141-142] and to a blog by Sam Antar, which restates FDI's claim that BJL recommended Medifast stock. [SER 779-790.] Coenen did not provide an opinion as to whether there actually was a conflict of interest; instead she concluded it was an open question based on the information presented in the FDI report. [ER 146-150; SER 4, ¶ 14.]

3. September 2009

By September 2009, almost eight months after FDI first published FitzPatrick's report, Medifast had still not refuted FitzPatrick's claims. FitzPatrick was not the only person questioning whether Medifast might be a pyramid scheme. On September 11, 2009, David Phillips published a two-part article on a popular financial news site: "Medifast: Weight-Loss Miracle or Pyramid Scheme?" [SER 98-102.]

Like FitzPatrick, Phillips questioned Medifast's growth, especially in light of "dour economic times," and evaluated the TSFL business model. [SER 98-102.] He concluded that there was "a troubling lack of conspiracy at Medifast" regarding the payment of program participants. He noted that Medifast "does not disclose actual incomes, costs incurred, attrition rates, or even a breakdown of the total number of sales representatives who are active or inactive." Phillips also observed that sales increased 96% year-on-year to $42.9 million in the first six months of 2009 but, in contrast, the direct marketing sales channel "witnessed an eight percent year-over-year decline in revenue, as compared to the first months of 2008." [*Id*.] Finally, Phillips commented that "one could infer from available data found in the compensation plan table that the only way a health coach can earn significant income is through recruiting to advance to higher payout levels – the classic recruitment con of a multilevel pyramid scheme." [*Id*.]

Three days after Phillips published his article, Coenen published a blog: "Medifast and Take Shape for Life: Weight loss pyramid scheme?" [ER 38, ¶ 66; ER 152-159.] The post uses the Medifast controversy as a case study to further the ongoing discussion of the potential dangers that multilevel marketing programs pose to consumers. [SER 5, ¶ 17.] Coenen referenced FitzPatrick's report and the Phillips article, and listed factors that

suggested that TSFL may be a pyramid scheme. For example, TSFL experienced rapid growth while similar weight loss companies were in decline due to the economy; TSFL's growth was inconsistent with Medifast's non-TSFL product sales; and TSFL's compensation plan was weighted to favor recruitment and sales within the program, rather than product sales outside of the program. [ER 152-159.] Coenen's opinions were based on a number of documents and her post references many of the sources upon which she based her opinion. [ER 152-153, SER 5, ¶ 17.]

4. January 2010

FDI released an updated report by FitzPatrick on January 8, 2010, as well as a press release announcing the report. [ER 38-39, ¶ 67; ER 161-178.] Days later, Medifast responded with a press release regarding the allegations of "convicted felon Barry Minkow." [SER 104-105.] The release stated that an "Independent Directors' Committee" concluded the allegations made in FitzPatrick's report were "false, misleading, and/or without merit." [*Id*.] The release did not directly refute any of the claims made in the reports.

FDI countered with a press release stating that Medifast was misleading its shareholders by failing to acknowledge that FitzPatrick, not Minkow, authored the report. [ER 180.] Minkow then sent a letter to Medifast's Board of Directors, offering to "immediately retract and formally apologize" if Medifast showed where FitzPatrick was factually incorrect. [ER 182-183.] Medifast did not respond, but over a month later filed the instant action. [ER 26-279.]

In two posts on January 12, 2010 and January 13, 2010, Coenen republished portions of the January 8, 2010 press release and FitzPatrick's updated report. [ER 185-196.] She also published a post on January 13, 2010, echoing the claim that Medifast was misleading its shareholders by

claiming that Minkow was the author of the report. [ER 199-203.] She accurately quoted a portion of a Form 10-Q filed by Medifast in November 2009, which implied that Minkow was the author of the critical reports. [SER 5, ¶ 19.] Coenen further noted that Medifast had not pointed out what might be false or misleading about FitzPatrick's report. [ER 199.]

D. The Proceedings Below.

On February 17, 2010, Medifast filed this lawsuit against FDI, Minkow, FitzPatrick, Coenen, Sequence Inc, iBusiness Reporting, William Lobdell, and Thomas Ziemann aka Zee Yourself.

On April 12, 2010, Coenen filed an anti-SLAPP motion pursuant to California Code of Civil Procedure section 425.16.[2] [SER 629-662.] Later that day, Medifast filed an amended complaint. [ER 26-279.] The First Amended Complaint ("FAC") includes causes of action for libel per se, civil conspiracy to defame, and violations of California Corporations Code section 24500 and California Business & Professions Code section 17200.[3] [ER 26-49.]

Medifast claims that the allegedly libelous statements were made to drive down the price of Medifast stock, allowing Minkow to profit by taking a short position in Medifast's stock before releasing negative information about Medifast.[4] [ER 33, ¶¶ 40-43.] On that basis, Medifast brought the derivative claims for market manipulation and unfair business practices. [ER

[2] Hereinafter, unless otherwise stated, all statutory references are to the California Code of Civil Procedure.

[3] Medifast's appeal only focuses on the district court's decision regarding libel per se.

[4] Coenen never took a short position in Medifast's stock. [SER 5-6, ¶¶ 20, 23.]

47, ¶¶ 115-116; ER 48, ¶ 120.] Medifast sought at least $270 million in damages. [ER 24, ¶ 1.]

On April 16, 2010, Coenen filed an anti-SLAPP motion with respect to the First Amended Complaint. [SER 634-697.] Thereafter, Medifast filed an ex parte motion seeking relief from the district court's scheduling order and requesting that the court allow it to conduct discovery.[5] On May 6, 2010, the court granted Medifast 90 days in which to conduct limited discovery. [ER 280-288.] The anti-SLAPP motions were dismissed without prejudice to refile after the close of discovery. [ER 288.]

By the fall of 2010, and after obtaining an extension, the limited discovery concluded. On November 9, 2010, Coenen refiled her anti-SLAPP motion. [ER 289-322.] Medifast filed its opposition on December 27, 2010. [ER 383-448.] On January 18, 2011, Coenen filed a reply in support of the anti-SLAPP motion. [SER 731-841.]

After reviewing the parties' arguments and briefing, and in a careful and lengthy opinion, the district court granted Coenen's anti-SLAPP motion. [ER 2-25.] In its opinion, the court noted that Medifast only brought a claim for libel per se, and did not have an additional claim for ordinary libel. [ER 6, line 1, fn. 4.] The court decided that Appellant Bradley MacDonald did not have standing. [ER 5, line 16 – ER 8, line 2.]

With respect to Coenen, the court ruled that her statements did not charge Medifast with commission of a crime and were not otherwise defamatory, without the necessity of explanatory matter. [ER 13, line 28 -

[5] Generally, when an anti-SLAPP motion is filed, discovery proceedings in the action are stayed until the motion is ruled upon and the discovery stay may only be lifted on noticed motion and for good cause. (Code Civ. Proc., § 425.16(g).)

ER 15, line 9.] The court also ruled that the comparisons to Madoff, allegations of auditor conflicts, and statements regarding the structure and function of TSFL's compensation system did not constitute libel per se. [ER 19, line 10 – ER 21, line 23.] Finally, the court found that Medifast had not demonstrated that it could prevail on its claims for civil conspiracy to defame, market manipulation, or unfair business practices. [ER 21, line 24 – ER 25, line 13.]

On April 26, 2011, Appellants filed a notice of appeal. [ER 1.]

E. Medifast's Allegations Against Coenen.

1. Allegations in the First Amended Complaint.

Throughout this action, Medifast has brought a revolving door of allegations against Coenen. Basically, Medifast has attempted to avoid the pleadings challenge of an anti-SLAPP motion by constantly amending its claims. That is impermissible. (*Salma v. Capon*, 161 Cal.App.4th 1275 (Cal.Ct.App. 2008) (a plaintiff may not avoid a pleadings challenge pursuant to section 425.16 by amending the challenged complaint after the anti-SLAPP motion has been filed).)[6]

Medifast's allegations in the FAC were based on two types of Fraud Files posts: (1) statements originally published by FDI and/or FitzPatrick and republished to Fraud Files, and (2) statements attributable to Coenen.

With respect to the first category, the FAC alleges that Coenen posted: (1) FDI's May 21, 2009 press release, which republished in its entirety the FDI press release [ER 36, ¶ 56; ER 125-130]; (2) "5 Points of Similarity Between Medifast and YTB" on May 21, 2009, which had been posted by

[6] Here, Medifast even had an opportunity to formally amend its claims because the district court allowed Medifast to file a First Amended Complaint.

FDI on May 21, 2009 [ER 36, ¶¶ 54, 56; ER 131-136]; (3) a January 12, 2010 post, which was entitled "Medifast multi-level marketing scheme called into question by expert" and which republished portions of FDI's January 8, 2010 press release [ER 40, ¶ 72; ER 185-190]; and (4) a January 13, 2010 post. [ER 40, ¶ 72; ER 192-196.]

Regarding the second category, the FAC focuses on three posts: (1) a June 24, 2009 blog entitled "Conflict of interest for Medifast auditors?" [ER 38, ¶ 64, ER 146-150]; (2) a September 14, 2009 post entitled "Medifast and Take Shape for Life: Weight loss pyramid scheme?" [ER 38, ¶ 66; ER 152-159]; and (3) a January 13, 2010 post entitled "Medifast continues to mislead shareholders." [ER 40, ¶ 72, ER 198-203.]

However, Medifast did not identify or describe in any kind of detail, or in anything other than overly broad conclusory statements, any of Coenen's allegedly libelous statements within any of the posts.

2. Allegations in the Opposition to the Anti-SLAPP Motion.

In Medifast's opposition to Coenen's anti-SLAPP motion, Medifast narrowed its focus to the following allegedly actionable statements by Coenen: (1) a comparison to YTB; "ten levels of commission payouts – nine others get paid more than the seller," (2) "BJL Wealth Management recommended the purchase of Medifast stock to an operative of FDI," (3) "the recommendation of Medifast stock by its outside auditor may be considered a conflict of interest," (4) Medifast requires minimum purchases to continue to qualify in the pyramid," (5) Medifast does not make proper disclosures," (6) "TSFL makes it clear that to make real money, you have to recruit new people into the plan," (7) "Almost no one makes a living wage in TSFL," and (8) "the bottom 50% of coaches are making all of the sales and not getting paid for their work." [ER 431.] Coenen did not make the

statements as described by Medifast (with the exception of indicating that Medifast stock was recommended). The statements are Medifast's words, not Coenen's. And, the seventh and eighth statements were not even remotely close to any comments made by Coenen. [SER 743.]

3. Allegations in Medifast's Opening Brief.

Once again, it is difficult to pick out those specific statements Medifast claims are libel per se on Coenen's part, as opposed to the general allegations that Medifast continues to make. With respect to this appeal, Medifast primarily focuses on new statements it contends Coenen made in her September 24, 2009 post. [Appellants' Opening Brief ("AOB"), pp. 21-22 and 49-53.] Medifast alleges that on September 14, 2009, Coenen commented on whether Medifast and TSFL were a weight loss pyramid scheme. Medifast noted that Coenen made the following statements, none of which it alleged in any kind of detail in the FAC or relied upon in the opposition to the anti-SLAPP motion: (1) Medifast's SEC filings reflected "no evidence that the products themselves were actually selling well," (2) "the product or service isn't the real focus [at TSFL]. It's simply the bait to get someone in and make the company look legitimate," and (3) "everything points to the real deal being endless chain recruitment." [AOB, pp. 21-22.] Medifast now also focuses on the title of Coenen's September 14, 2009 post. Then, Medifast makes the leap that Coenen "thereby pronounc[ed] Medifast guilty of two crimes – a pyramid scheme and a violation of Cal.Pen.Code § 327." [AOB, p. 22.]

Further, Medifast tries to hold Coenen liable for FitzPatrick's statements, by claiming that her statement about the real deal is similar to FitzPatrick's statement in his February 16, 2009 report "that TSFL's business model and reward system – by their design, operation[,] and

promotion – meet the definition of an 'endless chain' within the meaning of' Penal Code section 327." [AOB, p. 49, fn. 12.] Coenen did not write FitzPatrick's February 2009 report, did not republish it on her blog, and did not state that TSFL was an endless chain within the meaning of Penal Code section 327.

Additionally, Medifast did not discuss such statements, or any of the statements referenced above for that matter, in its FAC or the opposition to the SLAPP motion. Thus, Medifast's conclusion that the district court did not analyze Coenen's statements [AOB, p. 57] is simply not relevant for purposes of this appeal. (*Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999).) Medifast never brought these alleged specific statements to the court's attention, instead apparently expecting the court to dig through the roughly 225 pages of exhibits attached to the FAC and the approximately 2,000 pages of materials Medifast submitted in opposition to the anti-SLAPP motions and to guess which statements Medifast believed constituted libel per se on Coenen's part. Yet, in all of those pages, Medifast failed to directly quote any statement by Coenen, much less statements that allegedly constitute libel per se.

In addition, in its opening brief, Medifast references Coenen's January 12, 2010 and January 13, 2010 posts. [AOB, p. 23.] Medifast now argues that the title of the January 13, 2010 blog, which republishes FitzPatrick's January 2010 update, is a direct assertion that Medifast is committing a crime. [AOB p. 51.] Medifast claims that Coenen provided her own opinion, including that she was highlighting FitzPatrick's report because "they're the facts that many pushers of MLMs will never tell you." [AOB, p. 51.] Again, such allegations are absent from the FAC and the opposition to the anti-

SLAPP motion. Further, discussing pushers of MLMs is hardly an accusation that Medifast engaged in criminal conduct.

In short, although on appeal Medifast references multiple sentences of Coenen's September 14, 2009 blog and the title of the January 13, 2010 blog, none of those statements were in its opposition to the anti-SLAPP motion or pled in the FAC. Further, Medifast never previously argued that such statements were demeaning and thus punishable, as it now does. [AOB, pp. 51, 53.] Medifast cannot get a second bite at the apple with this appeal, and modify and expand its claims. Rather, an appellate court reviews the proceedings below for trial court error based on issues raised in the proceedings below and not on the arguments Medifast now wishes it had raised. The fact that the district court did not analyze statements to Medifast's liking – statements which were not identified and do not constitute libel per se – is not grounds for reversal.

IV. EXCERPTS OF RECORD

The record in this appeal is problematic. For excerpts of records that exceed 75 pages, documents "normally shall be arranged by file date in chronological order beginning with the document with the most recent file date." (Circuit Court Rule 30-1.6, subdivision (a).) Here, it is unclear how Medifast has organized the excerpts of record, except that the documents are not indexed and submitted chronologically, or in any manner similar to how documents were filed with the court below. The nonsequential ordering of documents and separate indexing of every article and deposition excerpt Medifast previously submitted as exhibits creates considerable difficulty in grasping the record before the district court and, specifically, the context in

which each document was submitted. Further, Medifast does not include the majority of Coenen's submissions. As such, Coenen has supplemented the excerpts of record to include her pleadings and evidence filed with the district court.

V. STANDARD OF REVIEW

Appellate courts do not consider an issue unless it was raised and considered by the trial court. This is to ensure that the parties have the opportunity to offer to the factfinder all the evidence they believe relevant to the issues. (*Exxon Shipping Co. v. Baker*, 554 US 471, 487 (2008).) The appellate court may affirm on any ground that has support in the record, whether or not the district court decision relied on the same grounds or reasoning adopted by the appellate court. (*Yonemoto v. Department of Veteran Affairs*, 648 F.3d 1049, 1059 (9th Cir. 2011).) The Ninth Circuit will also affirm, if there was error in the lower court proceedings, if such error was harmless; reversal only lies for prejudicial error. (28 USC § 2111; Federal Rules of Civil Procedure 61; *Obrey v. Johnson*, 400 F.3d 691, 699 (9th Cir. 2005).)

Finally, this Court reviews a district court's grant of a motion to strike under California's anti-SLAPP statute de novo. (*Roberts v. McAfee, Inc.*, 660 F.3d 1156, 1193 (9th Cir. 2011).)

VI. SUMMARY OF THE ARGUMENT

Under California's anti-SLAPP statute, section 340.6, once a defendant shows that he or she has been sued over an exercise of freedman of speech with respect to a public issue, or an issue of public interest, the plaintiff must show, through both legal argument and evidence that would be admissible at trial, that it has a valid legal claim against the defendant on

which it has a reasonable probability of succeeding. Here, Medifast does not dispute that section 340.6 applies to its complaint. [AOB, p. 32.]

On appeal, Medifast has abandoned most of its arguments in favor of raising new claims. But, neither the old claims nor the new claims constitute grounds to reverse the district court's Order. Medifast faults the court for not discussing its new allegedly egregious statements separately and seems to claim that those statements alone are enough to meet its burden of showing a probability of prevailing on its claims.

These arguments are faulty. Because Medifast never called most of the statements it is now focusing upon to the district's court's attention in opposing the SLAPP motion, and did not allege them in the FAC, Medifast can hardly fault the court for failing to discuss them separately. Moreover, Coenen's statements reflect her opinions, which she presented to her readers and invited them to comment upon through her blog. Finally, Medifast did not introduce admissible evidence that Coenen's statements were false.

VII. ARGUMENT

Medifast's appeal concerns the district court's analysis of whether Appellees' statements were libelous per se. **[**See ER-6, fn. 4.] Medifast asserted that Appellees' statements were libelous per se because they "claim Plaintiffs engaged in criminal conduct and other violations of the law." **[**ER 45, ¶ 103.] Yet, Medifast never identified any statements by Coenen in which she claimed Medifast engaged in criminal conduct or otherwise violated the law, much less demonstrated that her statements constitute libel per se.

Medifast is a large, public company and, with success, comes public attention. Medifast cannot have it both ways: experiencing great growth and earnings, but preventing the public from commenting on and analyzing its

business model. If such commentaries were not protected by the First Amendment,

> "…there would be no room for expressions of opinion by commentators, experts in a field, figures closely involved in a public controversy, or others whose perspectives might be of interest to the public. Instead, authors of every sort would be forced to provide only dry, colorless, descriptions of facts, bereft of analysis or insight. There would be little difference between the editorial page and the front page, between commentary and reporting, and the robust debate among people with different viewpoints that is a vital part of our democracy would surely be hampered.

(*Partington v. Bugliosi*, 56 F.3d 1147, 1154 (9th Cir. 1995).)

A. The District Court Applied the Correct Law to Medifast's Pleadings.

Medifast first argues that the district court erred in applying a state pleading requirement to the allegations in its state claims. Medifast focuses on the court's statement that "problematically, though, Medifast does not plead the exact words constituting the alleged defamation." [ER 15, lines 1-2.] As demonstrated by Medifast's constant evolving allegations against Coenen, Medifast's decision not to plead the specific libelous statements was a problem. Even on appeal, Medifast complains about, yet again, different statements that it contends constitute libel per se. The court was correct that Medifast should have pled its claims for libel per se with greater specificity.

In support of its comment that Medifast did not plead the exact words constituting the libel, the court cited *Christakis v. Mark Burnett Prods.*, 2009 WL 1248947 (C.D. Cal. Apr. 27, 2009). There, the court stated that "a complaint for libel or slander must plead the exact words constituting the alleged defamation." (*Id*. at p. *4, citing *Des Granges v. Crall*, 27 Cal.App. 313, 314, 315 (Cal.Ct.App. 1915); *Franchise Realty Interstate Corp. v. San*

Francisco Local Jt. Executive Bd. of Culinary Workers, 542 F.2d 1076, 1082-1083 (9th Cir. 1976) (where a plaintiff seeks damages for conduct that is protected by the First Amendment, "the danger that the mere pendency of the action will chill the exercise of the First Amendment rights requires more specific allegations than would otherwise be required.").)

While *Christakis* can be relied upon in this appeal,[7] there is also other federal and state authority to support the proposition that libel must be pled with detail. (See e.g., *Gilbert v. Sykes*, 147 Cal.App.4th 13, 31 (Cal.Ct.App. 2007); *Okun v. Superior Court*, 29 Cal.3d 442 (Cal. 1981), 458; *Silicon Knights, Inc. v. Crystal Dynamics, Inc*., 983 F. Supp. 1303, 1314 (N.D.Cal. 1997); *Jacobson v. Schwarzenegger*, 357 F. Supp.2d 1198, 1216 (C.D.Cal. 2004), superseded by statute on other grounds as stated in *Williams v. Finn*, 2010 WL 2179905 (E.D.Cal. May 25, 2010).)

Actions in federal court are subject to the requirement of specificity in pleading claims for libel: *Newfarmer-Fletcher v. County of Sierra*, 2012 U.S. Dist. LEXIS 27311, *16 (E.D.Cal. March 1, 2012) (the defamatory statement must be specifically identified and the plaintiff must plead the substance of the statement; also noting that "even under the liberal federal pleading standards, 'general allegations of the defamatory statements' that do not identify the substance of what was said are insufficient"); *Silicon Knights, Inc*., 983 F. Supp. at p. 1314 (holding that "the words constituting a libel or slander must be specifically identified, if not pleaded verbatim.");

[7] Circuit Rule 32.1 provides that a court may not prohibit or restrict the citation of federal judicial opinions that have been designated as unpublished or the like, which were issued after January 2, 2007.

Toth v. Guardian Indus. Corp., 2012 WL 1076213,*11 (E.D. Cal. Mar. 29, 2012) (stating that under California law, "the general rule is that the words constituting an alleged libel must be specifically identified, if not pleaded verbatim in the complaint"; pleading the substance of the defamatory statement is inadequate to state a claim for libel; and that "'general allegations of the defamatory statements' which do not identify the substance of what was said are insufficient," citing *Gilbert v. Sykes*, 147 Cal.App.4th 13, 31 (2007)); *Jacobson*, 357 F. Supp.2d at p. 1216. Thus, both state and federal cases require defamation claims to be pled with particularity by alleging the specific instances of defamatory conduct.

Despite the above, Medifast argues that it should not have had to identify the exact words of the defamation. However, in addition to the requirements for pleading a claim of libel per se, Medifast cannot overlook that it was responding to an anti-SLAPP motion. Medifast had the burden to demonstrate the "probability that [it] will prevail on the claim." (Code Civ. Proc., § 425.16, subd. (b)(1).) In responding to an anti-SLAPP motion, a plaintiff must demonstrate that the complaint is legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited. (*Vargas v. City of Salinas*, 46 Cal.4th 1, 20 (Cal.2009).)

It is unclear how a plaintiff can meet its burden if the specific statements that allegedly constitute libel per se are not identified. As the district court noted, "If Defendants' statements were as explicit as Medifast makes them out to be, the court's job would be easy." [ER 13, lines 2-27.] However, that was not the case in Medifast's FAC or its opposition to the anti-SLAPP motion.

B. Medifast's Appeal is Based on Specific Statements that were not Asserted Below and, Thus, were not Preserved for Appeal.

To the extent that Medifast is arguing that the district court's decision regarding the statements raised in its opposition to the SLAPP motion was in error, most of such statements have not been addressed on appeal. The judgment striking those claims should therefore be affirmed.

In Medifast's very lengthy opposition to the anti-SLAPP motion, it focused upon eight statements it attributed to Coenen. [ER 383-448.] Notably, none of those statements referred to a Ponzi scheme, accusations of criminal conduct, comparisons to Madoff, or other violations of laws. While these statements were not identified in the FAC, and Medifast did not plead the exact words constituting the alleged defamation, the district court did analyze the statements brought to its attention in the opposition. [ER 15-21.] Those are the statements, if any, that should be at issue in this appeal.

Instead, Medifast primarily confines its appeal to new statements – statements which were not raised below and which, therefore, are not preserved for appeal. (*Smith*, 194 F.3d at p. 1052 (arguments and allegations raised for the first time on appeal are not considered); *Howard v. AOL*, 208 F.3d 741, 747 (9th Cir. 2000); see also *Navellier v. Sletten*, 29 Cal.4th 82, 88 (Cal. 2002) (in opposing an anti-SLAPP motion, a party is limited to the complaint as pled and cannot add allegations after the filing of the SLAPP motion); *Church of Scientology v. Wollersheim*, 42 Cal.App.4th 628, 655 (Cal. Ct. App. 1996), disapproved on another point in *Equilon Enterprises v. Consumer Cause*, 29 Cal.4th 53, 68, fn. 5 (Cal. 2002) (in a SLAPP motion, as in a motion for summary judgment, the "pleadings frame the issues to be decided.").)

Regarding the new statements, Medifast relies on exhibits to its FAC to try to avoid the absence of specific pleading. Courts have no duty to pick out the essential elements of a claim by referring to exhibits attached to a pleading. (*Lincoln v. Fox*, 168 Cal.App.2d 31, 33 (Cal.Ct.App. 1959), citing *California Trust Co. v. Gustason*, 15 Cal.2d 268, 272-273 (1940).)

Nowhere in the FAC did Medifast allege that the statements referenced on pages 21-22 of its opening brief constituted libel per se on Coenen's part and nowhere in the opposition to the SLAPP motion did Medifast identify and discuss such statements. Thus, Medifast cannot argue that Coenen's anti-SLAPP motion should have been denied based upon statements it did not discuss below. And now it is too late to complain about such statements.

C. <u>Medifast has not Shown that it had a Probability of Prevailing on the Merits</u>.

Medifast had the burden to show that it has a probability of success on the merits regarding the libel per se claims against Coenen. (Code Civ. Proc., § 425.16, subd. (b)(1).) Medifast did not show it had a probability of success with respect to the statements raised below and, even if its failure to preserve its arguments for appeal and to address issues that were raised and in the record below could be overlooked, Medifast has still fallen short of meeting its burden.

A libel per se, or libel on its face, is libel that is defamatory of the plaintiff without the necessity of any explanatory matter such as an inducement, an innuendo, or any other extrinsic facts. (Civ. Code § 45a; *Barnes-Hind, Inc. v. Superior Court*, 181 Cal.App.3d 377, 381 (Cal.Ct.App. 1986).) To establish defamation, a plaintiff must prove a publication that is false, defamatory, and unprivileged, and that has a natural tendency to injure

or that causes special damage. (*Taus v. Loftus*, 151 P.3d 1185, 1209 (Cal. 2009).) Here, Coenen's statements are true, require explanatory matter, and are not capable of defamatory meaning.

1. Coenen is not Liable for Republications on her Internet Blog.

Medifast claims that Coenen published false information, but it is Medifast that continues to make false accusations against Coenen. In its opening brief, Medifast questions whether the district court erred in granting Coenen's SLAPP motions because she republished FitzPatrick's report, which contained libel per se. [AOB, p. 3.] The court found that a statement in FitzPatrick's February 16, 2009 report constituted libel per se. However, Coenen never republished that report and Medifast has not demonstrated otherwise (nor did Medifast plead that Coenen published that report). It is not libel per se when Coenen never published the relevant report and, even if she had republished the report on her blog, it would not constitute libel per se. (*Barrett v. Rosenthal*, 40 Cal.4th 33, 39 (Cal. 2006).)

While Medifast identified several other statements that it alleged Coenen republished in the opposition to the SLAPP motion, Medifast has abandoned the majority of those arguments on appeal, with the exception of Coenen's January 13, 2010 blog republishing portions of FitzPatrick's January 2010 update.[8] Coenen's republication of portions of FitzPatrick's

[8] Coenen's publications of the May 21, 2009 post, "Fraud Discovery Institute blasts Medifast," republished in its entirety the FDI press release of the same date and title. The January 12, 2010 post, "Medifast multi-level marketing scheme called into question by expert," republished portions of FDI's January 8, 2009 press release. Thus, Coenen was not liable for such posts pursuant to the CDA. (47 U.S.C. section 230, subd. (c)(1); *Barrett*, 40 Cal.4th at pp. 40-41.)

updated report is not libel per se and is protected by the Communications Decency Act of 1996, 47 U.S.C. section 230(c)(1).

The Communications Decency Act ("CDA") confers broad immunity against defamation liability for republishing on the internet information that originated from another source. (*Barrett*, 40 Cal.4th at p. 39.) The immunity extends to individuals who republish allegedly defamatory content unless the individual "materially contributes" to the illegality of the statement. (*Id*. at pp. 58-63; *Fair Housing Council of San Fernando Valley v. Roommates.com*, 521 F.3d 1157 (9th Cir. 2008) (an example of material involvement in unlawfulness is when a website "remove[s] the word 'not' from a user's message reading '[Name] did not steal the artwork' in order to transform an innocent message into a libelous one.").) Materially contributing to unlawful content requires more than augmenting the content generally and requires that one materially contribute to its alleged unlawfulness. (*Id*. at pp. 1167-1168.)

Thus, the "material contribution" inquiry focuses on whether the republisher took action to create the alleged illegality of the statement. Exercising editorial functions of a publisher does not deprive a defendant of CDA immunity. (*Id*. at p. 60, fn. 19; *Batzel v. Smith,* 33 F.3d 1015, 1031, fn. 18 (9th Cir. 2003).)

In *Barrett*, the California Supreme Court held that the CDA immunized a defendant who reposted an allegedly defamatory article to a news group, and stated that "Congress has comprehensively immunized republication by individual internet users." (*Barrett*, 40 Cal.4th at pp. 40-41.) Because the defendant was not actively involved in the creation of the defamatory posting, but only republished the posting to a website, the CDA immunity precluded liability. (*Id*. at pp. 40-51, 60, n. 19; *Pham v. Pham*, 182

Cal.App.4th 323, 328 (Cal.Ct.App. 2010) (CDA immunity applied to the sender of an email who added an introductory statement when forwarding an allegedly defamatory email).)

Here, Coenen republished portions of FitzPatrick's latest January 2010 report. She did not contribute to the creation of the report. In addition, the post in which Coenen republished the report did not constitute a material contribution to the illegality of any statements (nor did Medifast make such an argument in the record below). Instead, the majority of the blog republishes excerpts from FitzPatrick's report. Coenen provided a link to FitzPatrick's updated report and, thus, her statements are clearly based on a document that she provides for her readers. [ER 185-186, 192-193.] Any reader may look at the same document and determine what he or she thinks of the information. By supplying the document upon which she is commenting, Coenen has set forth an opinion, not fact.

Coenen's statement preceding the republishing of FitzPatrick's report is also not libel per se; Coenen states that she wants "to highlight these things because they're the facts that many pushers of MLMs will never tell you." [AOB, p. 62; ER 994.] Libel per se is "a libel which is defamatory of the plaintiff without the necessity of explanatory matter." (Civ. Code § 45a.) The above statement requires explanatory matter and, moreover, does not state anything defamatory. It is unclear what is libelous about that statement; the statement is completely innocuous on its face.

Similarly, Coenen's concluding statements – "That's right…recruiting pays more than selling. The upline is making way more money off the sale of products than those actually doing the selling" – are nothing more than a repetition of quotes from FitzPatrick's report: "The pay plan pays far more – per sale – to those who recruit other coaches than to those who actually sell

product to consumers…" [AOB, pp. 52-53, ER 995.] Such repetitions, or commentary as Medifast calls it, do not come close to a material contribution to the unlawfulness of a statement or to libel per se. Coenen's own statements cannot be understood without explanatory material, are words that open and close her republication of FitzPatrick's report, and are not defamatory on their face or otherwise. Coenen's statements do not "directly assert that Medifast is committing a crime." [AOB, p. 51.] In fact, nowhere did Coenen ever state that Medifast is committing a crime. Rather, Coenen is merely republishing portions of FitzPatrick's report.

Medifast also concludes that Coenen's statements in this blog were expressly stated facts to back her opinion that Medifast is running an endless chain recruitment scheme. Again, her republishing a report is not expressly stated facts supporting her opinion. Further, the "facts" Medifast points to, which are nothing more than a conclusory statement summing up FitzPatrick's statements, are hardly libel per se. [ER 995.] A review of the post reveals that Coenen provided a quote from FitzPatrick's report and then summarized that quote. Once more, even if her summary did constitute "facts," the facts are not libel per se as they require explanatory matter. (Civ. Code § 45a.)

Finally, and most importantly, Medifast did not identify even one of the sentences discussed above in its FAC or opposition to the SLAPP motion. Medifast cannot claim for the first time in this appeal that the district court's ruling was incorrect because such statements are libel per se. And, because Medifast's pleadings framed the issues to be decided, claims that did not appear in the pleading could not constitute grounds upon which to deny the anti-SLAPP motion. (*Navellier*, 29 Cal.4th at p. 88; *Church of Scientology*, 42 Cal.App.4th at p. 655.)

2. Coenen did not Make Direct Statements that Constitute Libel Per Se.

In Medifast's Opposition to the SLAPP motion, it focused upon the following statements by Coenen: (1) a comparison to YTB; "ten levels of commission payouts – nine others get paid more than the seller," (2) "BJL Wealth Management recommended the purchase of Medifast stock to an operative of FDI," (3) "the recommendation of Medifast stock by its outside auditor may be considered a conflict of interest," (4) Medifast requires minimum purchases to continue to qualify in the pyramid," (5) Medifast does not make proper disclosures," (6) "TSFL makes it clear that to make real money, you have to recruit new people into the plan," (7) "Almost no one makes a living wage in TSFL," and (8) "the bottom 50% of coaches are making all of the sales and not getting paid for their work." [ER 431.] The statements were all in Medifast's words, not Coenen's. Also, the seventh and eighth statements were not remotely close to statements made by Coenen and, as demonstrated in her reply to the opposition to the anti-SLAPP motion, none of the above-identified statements constitute libel per se. [SER 743.] Medifast has not addressed any of these statements in its opening brief and, therefore, the issue of whether these statements are libel per se has not been preserved for appeal.

Now, Medifast claims that "Coenen directly accused Medifast's TSFL division of operating as a criminal enterprise." [AOB, p. 49.] Medifast relies on Coenen's September 14, 2009 blog post, "Medifast and Take Shape for Life: Weight loss pyramid scheme?" for this assertion. The post discusses multilevel marketing in general and why it is financially lucrative, as well as FDI, Minkow, FitzPatrick, and financial expert David Phillips's critiques of Medifast. [ER 967-968.] After discussing Minkow and FitzPatrick's work;

that Phillips "is criticizing Medifast for promoting their alleged pyramid scheme"; and questioning Medifast's success in a difficult economic climate, Coenen touches upon "the allegations of being a pyramid scheme." [ER 968.] Coenen concludes with her own opinion, "everything points to the real deal being endless chain recruitment into a pyramid scheme." [ER 968.]

The September 24, 2009 post used the Medifast controversy as a case study to further the discussions of the potential dangers that multilevel marketing programs pose to consumers. [SER 5, ¶ 17.] This post, like all of Coenen's posts, was to provide consumer protection information to the general public. [SER 5-6, ¶ 20.] It also, at best, served as a cautionary tale to her readers. [ER 20, lines 1-6; Makaeff v. Trump Univ., LLC, 2010 WL 3341638, at *3 (S.D. Cal. August 23, 2010.)]

a. Medifast's Attempt to Piggyback Coenen's Statements to FitzPatrick's Statement does not Constitute Libel Per Se

Medifast makes a far stretch when it tries to link Coenen's statements to FitzPatrick's in order to hold Coenen liable. In footnote 12 of its Opening Brief, Medifast states that Coenen's statement that "everything points to the real deal being endless chain recruitment into a pyramid scheme" is similar to FitzPatrick's accusation in his Expert Report of February 16, 2009, "that TSFL's business model and reward system – by their design, operation[,] and promotion – meet the definition of an 'endless chain' within the meaning of' Penal Code section 327." This is no different than the approach Medifast used in its opposition to the SLAPP motion, such as stating that all "defendants also stated, with impunity, that TSFL violates Cal. Penal Code § 327 – again claiming Medifast is a criminal enterprise." [ER 425, lines 17-18.] Medifast's continuous attempt to hold Coenen liable for a statement FitzPatrick made only highlights that Medifast did not and cannot

demonstrate a reasonable probability of prevailing against Coenen. In addition, the attempt to shoehorn Coenen's actual statement, made in a completely different context than that in FitzPatrick's report, ignores Coenen's actual words and merely underscores that Medifast continues to use exaggerations to try to make Coenen's statements into something they are not.

Further, the use of an explanation or extrinsic facts demonstrates that a statement is not libel per se. (Civ. Code § 45a.) Medifast relies on extrinsic facts to conclude that Coenen's statement regarding the real deal was libel. Coenen never republished FitzPatrick's February 2009 report, either in her May 2009 blog or previously, and her readers would not have known of FitzPatrick's statement to attribute a defamatory meaning to Coenen's statement. If a reader recognizes a defamatory meaning only because of his or her knowledge of specific facts and circumstances, extrinsic to the publication, which are not matters of common knowledge attributable to all reasonable persons, it is not libel per se, but is libel per quod.[9] (*Barnes-Hind*, 181 Cal.App.3d at pp. 386-387 ("also stating that "if there is a libel per se, it should be unnecessary to plead extrinsic facts; the defamation should be as apparent to the court as to the reader.").) In short, there would be no reason to set forth such additional facts unless they were needed to help a reader understand the purported defamatory nature of Coenen's statement. A court must refrain from scrutinizing what was not said to find a defamatory meaning that was not conveyed to a reader.

[9] Medifast's First Amended Complaint did not include a cause of action for libel per quod. [ER 26-279, ER 6, fn. 4.]

b. Coenen did not Accuse Medifast of Violating Penal Code § 327

Unlike the statement in FitzPatrick's expert report, Coenen has never accused Medifast of violating Penal Code section 327 and has never stated that Medifast operates as a criminal enterprise. And, again, Coenen did not even republish the FitzPatrick report Medifast cites in footnote 12.

c. Coenen's Statements in her September 2009 Blog are Nonactionable Opinions

Medifast's arguments regarding Coenen's September 2009 blog do not constitute grounds to reverse the district court's decision both because Medifast did not address the particular statements below and because such statements reflect Coenen's opinions. Coenen provides her opinions throughout her posts, including in the September 2009 blog, and her statements of opinion are not actionable. (*Tommy Bahama Group, Inc. v. Sexton*, 2009 WL 4673863, *14 (N.D.Cal. December 3, 2009).)

To determine whether a statement is an opinion or fact, a court must look at the totality of the circumstances, including an examination of the statement in its "broad context, which includes the general tenor of the entire work, the subject of the statement, the setting, and the format of the work." (*Nicosia v. De Rooy*, 72 F.Supp.2d 1093, 1103 (N.D.Cal. 1999), citing *Underwager v. Channel 9 Australia*, 69 F.3d 361, 366 (9th Cir. 1995)).) Then, the specific context and content of the statement is examined, "analyzing the extent of figurative or hyperbolic language used and the reasonable expectations of the audience in that particular situation." Finally, the court determines whether the statement is "sufficiently factual to be susceptible of being proved true or false." (*Id*.)

In applying the test, "editorial context is regarded by the courts as a powerful element in construing as opinion what might otherwise be deemed fact." (*Morningstar, Inc. v. Superior Court*, 23 Cal.App.4th 676, 693 (Cal.Ct.App. 1994).) In addition, a court must consider whether the statements were made by participants in an adversarial setting. (*Ferlauto v. Hamsher*, 74 Cal.App.4th 1394, 1401 (Cal.Ct.App. 1999).) "Where potentially defamatory statements are published in a public debate…or in another setting in which the audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole, language which generally might be considered as statements of fact may well assume the character of statements of opinion." (*Gregory v. McDonnell Douglas Corp.*, 17 Cal.3d 596, 601 (Cal. 1976).)

Here, the average readers are readers of a consumer advocate's blog – a "daily commentary on fraud, scams, scandals, and court cases." As in *Morningstar, Inc*., where the average readers were subscribers to a financial newsletter, the "the imaginative title and its hint of upcoming criticism of statistics was not likely lost on the readers of petitioners' commentary – the relatively sophisticated subscribers to the financial newsletter." (*Morningstar, Inc*., *supra*, at p. 688.) Also, the title of Coenen's blog conveyed the sense that her postings were expressions of opinion and commentary.

Finally, when the facts underlying an opinion are disclosed, as Medifast argues they are [AOB p. 50], readers understand they are getting the publisher's interpretation of the facts presented, and "are free to accept or reject the author's opinion based on their own independent evaluation of the facts." (*Standing Comm. on Discipline of the United States District Court v. Yagman*, 55 F.3d 1430, 1440 (9th Cir. 1995) Such statements of

opinion are entitled to full constitutional protection. (*Id*.) Similarly, when the context of a statement signals to readers they are receiving the author's opinion, courts construe statements as opinion that may otherwise be deemed fact. (*Baker v. Los Angeles Herald Examiner*, 42 Cal.3d 254, 260, 267-268 (Cal. 1986) (reader expects opinion from Op-Ed pages and critical reviews).)

i. Coenen provided her readers with the facts she relied upon.

Turning more specifically to Coenen's September 2009 blog, her opinion that TSFL is or may be a pyramid scheme is a nonactionable statement of opinion based on disclosed facts. (*Standing Comm.*, 55 F.3d at p. 1440.) Coenen titled her post, "Medifast and Take Shape for Life: Weight loss pyramid scheme?" Her use of the question mark indicates she does not have definitive knowledge about the subject and that she is inquiring into the set up of the entities. Then, Coenen identifies the facts she relies on in forming her opinion, including referencing outside source material, such as FitzPatrick's report (which Medifast never refuted) and Phillips' article, as well as documents released by Medifast. She also posts links to the materials directly. [ER 967-968; ¶ 16-17.]

Readers of Coenen's blog understand they are getting her interpretations of the facts provided. By identifying the facts forming the basis of her opinion and linking to the materials, readers are given the opportunity to draw their own conclusions. Further, Coenen could only rely on the facts available to her and could not base her opinions on facts that were not available at the time, such as the assertions Medifast made publicly in the opposition to the SLAPP motions. (*Partington v. Bugliosi*, 56 F.3d 1147, 1156-1157 (9th Cir. 1995).) When Coenen published her blog, she did

not believe any of her statements were false and still does not believe the statements were false. Medifast never asked that Coenen retract her blog and never provided her, or anyone else, with information to contradict the information contained in her post. [SER 6, ¶¶ 21-22.]

ii. The context of Coenen's statements confirm they are her opinions.

The setting and format of Coenen's statements further indicate that her postings provide her opinions. Although Medifast repeatedly tries to tie Coenen's statements to FitzPatrick's because the district court found one of his statements constituted libel per se, the context the statements were made in were different (as were the statements themselves). (*Knievel v. ESPN*, 393 F.3d 1068, 1075 (9th Cir. 2005) (the statement must be analyzed in the context in which it was made and appears).) The context of Coenen's statements, among other things, only reinforce that they are not libel.

The district court explained that FitzPatrick's statement, unlike Coenen's, was made in the context of his "Expert Report," citing *Overstock.com, Inc. v. Gradient Analytics, Inc*., 151 Cal.App.4th 688 (Cal.Ct.App. 2007) (holding that the research reports at issue contained actionable statements of fact and noting that the reports were not written in the form of loose, figurative, or hyperbolic language, but were serious in tone and content).) Regarding Coenen, the general tenor and content of her blogs make it clear that her observations about multilevel marketing programs represent her point of view, not assertions of fact; the statements were made by Coenen in an informal format – her own blog, which provides her commentary on and exposes the dangers of multilevel marketing programs. Coenen's September 14, 2009 blog was not lengthy and did not purport to be an expert report.

The statements in the September 2009 blog were also part of an ongoing debate regarding multilevel marketing programs in general, and TSFL's operations in particular. [See e.g., SER 26-72, 95-105, 109-110, 148-177, 181-182, 200-204, 214-219, 258-272.] Her comments, such as, "like all other MLMs that I've looked at the service isn't really the focus. It's simply the bait to get someone in and make the company look legitimate," reflect her thoughts on multilevel marketing programs; are marked by the type of loose and figurative language signaling that they are her opinions; and use phrases that are too vague and subjective to be capable of being proven true or false."[10] The paragraph in which the statement is made makes a larger point: multilevel marketing programs appear to be about product sales, while in reality the structure incentivizes recruiting.

Reference to the post as a whole further confirms that it is Coenen's opinion. The post uses TSFL to provide context for commentary on the economic realities of multilevel marketing programs. Coenen discusses the financial lure of the business opportunity and how such programs rely on recruitment for continued success. She emphasizes the dichotomy between what is possible, on the one hand, and what is practical and probable, on the

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[10] Medifast also references Coenen's statement that "SEC filings reflected 'no evidence that the products themselves were actually selling well.'" [AOB, p. 21.] As an initial matter, Medifast continues to piece together statements, rather than quoting them accurately. Coenen's actual statement was that "the MLM portion of the company is booming, even though there's no evidence that the products themselves are actually selling well." While it is unclear if Medifast is now trying to argue that statement was libel per se, again, that is Coenen's opinion based on the documents she reviewed and those available at the time, and there was no evidence to dispute her opinion. Also, the statement is not defamatory without the necessity of explanatory matter. Once again, it also is not a statement that was previously discussed by Medifast. (Civ. Code § 45a.)

other: an observation that is central to her critique of multilevel marketing programs. She also highlights the difference between what is advertised and theoretically possible versus the reality of most multilevel marketing: most people make little money and to make real money, recruitment is typically needed. In context, this reflects Coenen's opinion that in TSFL, like other multilevel marketing programs, it may be possible to make money through product sales alone, but the only practical way to make significant money is by recruiting participants.

In addition, Coenen's September 2009 post, like most of her posts, is full of hyperbole, invective, short-hand phrases and language not generally found in fact-based documents, such as corporate press releases, SEC findings, or expert reports. For instance, Coenen uses phrases such as "cash cow," "MLM junk," "gobs of money," and "the real deal."

Readers presumably peruse Coenen's blog not to read a dry description of facts, but to learn of Coenen's personal perspective about issues such as multilevel marketing programs. (See e.g. *Partington v. Bugliosi*, 56 F.3d 1147, 1154 (9th Cir. 1995), citing *Phantom Touring, Inc. v. Affiliated Publications*, 953 F.2d 724, 729 (1st Cir. 1992) (statements are protected in part because they are found "in the type of article generally known to contain more opinionated writing than the typical news report.").) Readers often view comments made in the context of a debate as "spirited critique" and "would expect emphatic language on both sides." (*Underwager v. Channel 9 Australia*, 69 F.3d 361, 366 (9th Cir. 1995); *Nicosia v. De Rooy*, 72 F.Supp.2d 1093, 1103 (N.D.Cal. 1999) ("In the context of heated debate on the internet, readers are more likely to understand accusations of lying as figurative, hyperbolic expressions.").)

Coenen's blog is a forum in which readers are likely to recognize that her critiques represent her subjective opinions.

Finally, although Coenen did not accuse Medifast of criminal activity, even if she had, accusations of criminal activity, like other statements, are not actionable if the underlying facts are disclosed. (*Nicosia*, 72 F.Supp.2d at p. 1103.) Coenen disclosed the underlying facts and allows readers to draw their own conclusions about Medifast. [ER 967-968.] A speaker who outlines the factual basis for his or her conclusion is protected by the First Amendment. (*Gardner v. Martino*, 563 F.3d 981, 987 (9th Cir. 2009).)

In short, Coenen's September 2009 blog provides a summary of the opinions of FDI, FitzPatrick, Minkow, and Phillips, and closes with her own opinion. Coenen's concluding thoughts hardly sound like a statement of fact. Coenen's blog is to enlighten potential consumers of allegedly questionable practices. Within that context, the opinions she provides are not actionable.

d. Medifast has not Established that the Statements were False.

Medifast did not present evidence establishing that Coenen's statements were actually false. A statement is not false for defamation purposes if it is substantially true; it must be provably false. (*Masson v. New Yorker Magazine*, 501 U.S. 496, 516-517 (1991).) A statement that is too vague or subjective to be proven true or false is also not actionable. (*Seelig v. Infinity Broadcasting Corp*., 97 Cal.App.4th 798, 810 (Cal.Ct.App. 2002).) In addition, a statement viewed in its full context must convey a statement of fact, not opinion. (*Monetary Plaza Hotel v. Hotel employees & Restaurant Employees*, 69 Cal.App.4th 1057, 1065 (Cal.Ct.App. 1999).) What constitutes a statement of fact in one context may be treated as a statement of opinion in another, in light of the nature and content of the

communication taken as a whole. (*Baker v. Los Angeles Herald Examiner*, 42 Cal.3d 254, 260 (Cal. 1986).)

In the opposition to the SLAPP motion, as here, Medifast relies on proprietary data – that health coaches make money through sales, not recruiting – to try to prove that the Appellees' statements were false. [ER 1003-1004, ¶ 16.] However, Medifast did not publish such information until it filed the opposition. And, the only so-called evidence Medifast cites in support of the falsity of the allegedly libelous statements is an unsupported and unqualified hearsay declaration of Daniel Bell. [ER 999-1027.] The declaration neither establishes that Bell is an expert nor submits any documents to support Bell's statements and opinions. The declaration also solely disputes FitzPatrick's reports, not the statements Coenen made. [ER 999-1027.]

Regardless, Bell's declaration does not change the fact that Coenen's statements are not libel; Coenen's opinion on TSFL's structure and business model was based on an analysis of those documents publicly available at the time. [SER 5-6, ¶¶ 17, 21-22.] To the extent Medifast now contends that it has information that demonstrates the falsity of Coenen's statements, the majority of the information Medifast (and, specifically, Bell) relies upon – private corporate information – would never have been known and was not made available to Coenen until late December 2010, almost one year after this lawsuit was filed.[11] [ER 1003-1004, ¶ 16.] In fact, even in Medifast's press releases responding to FDI's reports, Medifast did not offer any facts to demonstrate that the statements being made were false. [SER 95-96, 104-105.] It is difficult to comprehend how Coenen could be held liable for not

[11] The information was in Bell's declaration; however, again, the declaration provides no documentary support for the assertions stated therein.

knowing information Medifast was withholding or not disclosing. She could not have relied on or analyzed materials and statements that were not publicly available.

Thus, Medifast has not established that the gist of Coenen's opinion, that TSFL is a pyramid scheme, is false. And Medifast cannot do so. Black's Law Dictionary defines a pyramid scheme as "a property distribution scheme in which a participant pays for the chance to receive compensation for introducing new persons to the scheme, as well as for when those new persons themselves introduce participants." (Black's Law Dictionary, p. 1272 (8th ed. 2004); see also Cal. Penal Code § 327 (in an endless chain a participant pays valuable consideration for the chance to receive compensation for introducing additional persons into participation into the scheme or for the chance to receive compensation when a person introduced by the participant introduces a new participant).) TSFL's business model involves recruits paying a registration fee to become participants in TSFL, as well as renewal fees and a bonus structure. The program is organized into a ten-level tiered compensation structure where participants receive commission on sales made by their downline. [ER 1005, ¶ 22; ER 1012, ¶¶ 46, 50-51, 1013-1014, ¶¶ 49-50, 53, ER 1016-1017, ¶¶ 59-63.]

Coenen's use of the phrase "pyramid scheme," as well as similar phrases in her post, as demonstrated within the post itself, was to describe multilevel marketing programs that attract participants to sell products as a money making opportunity, when the only practical way to make significant money in the program is to recruit downline salespeople. [SER 35-37.]

Medifast's attempt to establish that TSFL is not an endless chain – that 49% of its revenue is generated within the program, rather than 51% - misses the point. That distinction is irrelevant to the context in which the

statement was offered. Such showings remove Coenen's statement from the context and ignore the thrust of the criticism. They similarly are not sufficient to show that commissions are not paid without the retail sale of a product and that participants do not pay for the chance to receive compensation for bringing others in. The issue is whether a participant gets any compensation for introducing new participants; they do.

Coenen's statements were substantially true. Participants have to move up the pyramid to make significant income. Coenen linked to TSFL's graphical compensation plan, which shows how the commission percentages increase as a participant moves up level-by-level. Medifast's income disclosure statement illustrated how that worked in practice: the bottom 80% earn a median monthly income of $78.97-$388.24, the top 0.63% earn $16,751-$41,563.37.[12] [SER 803-804.]

However, whether or not Medifast and TSFL qualify as pyramid schemes depends not just on what percentage of the proceeds they receive or the services they provide, but on whether and how much participants pay to become health coaches, how those proceeds are spent, and whether new recruits are required to recruit additional individuals into the company. Medifast presented no evidence on those issues. Further, in its opposition, Medifast claimed that its focus is on client acquisition, not recruiting other health coaches. However, that is contrary to Medifast's own statement that from May 2009 through April 2010, Medifast enrolled 6,346 new health coaches. [ER 409, line 5.]

[12] That excludes all health coaches earning $24 or less in monthly income, which would presumably lower the average figures for participants at the bottom of the pyramid. [SER 803-804.]

Ultimately, Coenen's post did exactly what the Federal Trade Commission encouraged customers to do when evaluating a multilevel marketing program: ask questions about the business model, products, and income opportunity. [SER 30-36.] Coenen asked such questions and offered her opinion. Even if the statements Medifast now raises were deemed statements of fact and not opinion, and even if they had been raised by Medifast in the underlying proceedings, the district court properly granted Coenen's anti-SLAPP motion because Medifast did not present admissible evidence that Coenen's statements were false.

e. Medifast's Argument that the Statements are Demeaning was not Made Below.

In addition to not identifying the statements discussed herein in the proceedings below, Medifast also adds entirely new arguments in its opening brief. It is becoming increasingly clear that this is Medifast's second attempt to oppose the anti-SLAPP motion, with Medifast raising new facts and claims. In one of those new arguments, Medifast asserts that Coenen's statements are libel per se because they "reflect on Medifast's integrity so as to bring it into disrepute" and are demeaning. [AOB, pp. 51, 53.]

The fact that Medifast now contends that Coenen's statements were demeaning or reflected on its integrity does not provide a basis for reversing the district court's decision. (*Smith*, 194 F.3d at p. 1052 (new arguments cannot be raised on appeal).) Further, as discussed above, Coenen's statements were her opinions, not false and demeaning facts. (*Standing Comm.*, 55 F.3d at p. 1439 ("A statement of opinion based on full disclosed facts can be punished only if the stated facts are themselves false and demeaning.").) In *Standing Committee on Discipline of the United States District Court v. Yagman*, the court further explains that, "a simple

expression of opinion based on disclosed… nondefamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is." (*Id.*, citing *Lewis v. Time, Inc.*, 710 F.2d 549, 555 (9th Cir. 1983); Restatement (Second) of Torts § 566, cmt. c).)

This is the first time Medifast has argued that Coenen's statements brought it into disrepute and were demeaning and, thus were, libelous. Even here Medifast simply concludes that Coenen's statements were demeaning, without providing any other detail. [AOB, p. 53.] This new claim has no merit and, regardless, cannot be asserted on appeal.

D. <u>The District Court did not Improperly Weigh Evidence.</u>

Medifast also claims that the district court engaged in the impermissible weighing of evidence and made the wrong finding regarding Coenen's opinions. Medifast is wrong. Medifast simply disagrees with the court's interpretation of law and evidence in holding that Medifast could not show a reasonable probability of prevailing against Coenen: that disagreement is not enough to warrant a reversal of the court's decision.

The district court's consideration of Coenen's evidence was not an improper weighing of evidence or a misapplication of evidentiary standards. In fact, rather than demonstrating any sort of weighing of the evidence, the court's order actually shows that the court followed the law and carefully considered the evidence presented by Medifast. The court concluded that the 37 allegedly false statements identified in the opposition did not charge Medifast with commission of a crime and were not otherwise defamatory without the necessity of explanatory matter. [ER 15, lines 4-9.]

In addition, Coenen's evidence demonstrated that Medifast did not have a reasonable probability of prevailing against her, and Medifast's

inability to identify any specific statements by Coenen that constitute libel per se further demonstrated that it could not state and substantiate a legally sufficient claim. Medifast's attempt to identify different statements in the course of this appeal than those identified in the opposition to the SLAPP motion does not overcome its failure to meet its burden. It is too late and, as discussed above, the statements discussed in the answering brief do not constitute libel per se.

Next, Medifast makes the sweeping assertion that the district court did not analyze any of Coenen's statements. That is also incorrect. The court analyzed those statements that Medifast discussed. [ER 15, lines 4-7.] However, the court was not obligated to make Medifast's arguments for it; sift through the hundreds of pages attached to the FAC to guess which specific statements Medifast contends constitute libel per se, but failed to identify; or analyze statements that were neither pled in the FAC nor discussed in the opposition to the SLAPP motion. Similarly, regarding the finding that Coenen's statements were not defamatory, again, the court did indeed analyze the statements that Medifast claims were libelous but could not examine those statements that were not brought to its attention, were not pled, and were not raised in the opposition to the SLAPP motion.

Medifast further argues that the district court's finding that Coenen did not accuse Medifast of running a Ponzi scheme is erroneous. But, Medifast does not point to any statement that Coenen made accusing Medifast of running a Ponzi scheme. In its Order, the court noted that Appellees' statements were not as explicit as stating that Medifast runs its business like Bernie Madoff. [ER 19, lines 18-23.] Medifast claims it has demonstrated that "Minkow and Coenen's statements were precisely that explicit." [AOB, p. 57, fn. 14.] Yet, again, Medifast does not cite any

statement by Coenen in which she states that Medifast runs its business like Madoff or even compares Medifast to Madoff. In fact, the section of the opening brief discussing comparisons to Madoff and Ponzi schemes does not even mention Coenen. [AOB, pp. 43-45.] Thus, the district court's decision regarding Coenen's alleged comparisons to Madoff was not erroneous.

E. The District Court Erred by not Identifying Medifast as a Limited Purpose Public Figure.

Medifast is a limited purpose public figure because it voluntarily injected itself or was drawn into a public controversy, becoming a public figure for a limited range of issues. (*Gertz v. Robert Welch, Inc*., 418 U.S. 323 (1974).) To classify one as a limited purpose public figure, there must be a public controversy; the plaintiff must have undertaken a voluntary act through which he or she sought to influence resolution of the issue; and the alleged defamation must be germane to the plaintiff's participation in the controversy. (*Ampex Corp. v. Cargle*, 128 Cal.App.4th 1569, 1577 (Cal.Ct.App. 2005).) A public controversy is a dispute that has received public attention because its ramifications will be felt by those who are not direct participants. (*Copp v. Paxton*, 45 Cal.App.4th 829, 845 (1996).) A limited public figure must prove malice by clear and convincing evidence that the statements were made with knowledge of their falsity or with reckless disregard of their truth of falsity. (*Ampex Corp.*, 128 Cal.App.4th at pp. 157-1578.)

A public controversy existed here. Medifast spends millions of dollars annually publically promoting itself. It injected itself into the public controversy about the country's obesity epidemic and solutions to the problem, promoting TSFL as a solution. [SER 744.] (*Gilbert v. Sykes*, 147 Cal.App.4th 13, 24-26 (2007) (once a plastic surgeon placed himself into the

public debate, by touting the virtue of plastic surgery through television appearances, articles, and magazine pieces, he became a public figure relating to that topic).) Medifast chose to voluntarily place itself at the core of debates about the obesity epidemic and the personal finance crisis. [ER 30, ¶¶ 21-22, ER 32, ¶¶ 37-39; SER 68-92, 699-707.] It has made public claims about the quality of its weight loss products, and about TSFL – promoting TSFL as a way to achieve a healthy body, mind, and finances. [ER 30, ¶ 22.] Medifast also uses celebrities to promote its treatment for the obesity epidemic. [SER 74-75.]

Thus, Medifast went beyond advertising its merchandise. It instigated public debate about the obesity crisis through its resort to a controversial business model for TSFL. [SER 68-92, 95-96, 699-704, 811-812.]

Also, Medifast's growth and business model, including TSFL's, were investigated by a number of people, including FDI, FitzPatrick, and Phillips. That begun not only a controversy regarding the obesity epidemic, but one about Medifast's model as well. Again, Medifast injected itself into the controversy. It issued press releases regarding its growth and the success of the TSFL program, and responded to FDI's allegations through press releases and other media. [SER 68-72, 95-96, 104-105, 109-110.] In press releases announcing its financial results, Medifast touted TSFL's success and relied on its rapid growth to project a positive financial outlook for the company as a whole. [SER 68-72, 77-81, 89-92, 699-704, 811-812.] Those claims predate FitzPatricks' first report. Instead, the reports and blogs in part dissected, responded to, and were related to those public claims.

Appellees' allegedly defamatory statements were also germane to Medifast's participation in the controversy. The comments were based on information in Medifast's financial and marketing material, and they

pertained to the public debate over Medifast's weight loss products and business practices. [SER 5, ¶ 17, 6, ¶ 21; ER 52-59.]

As a limited purpose public figure, Medifast must establish that Coenen acted with malice. Medifast did not do so. Evidence of ill will, personal spite, or bad motive is insufficient to establish malice. (*Harte-Hanks Communications, Inc. v Connaughton*, 491 U.S. 1146, 1167 (Cal.Ct.App. 2004).) Coenen's statements were based on FitzPatrick's reports, material FDI published, Medifast's public documents, and articles about the company. [SER 4, ¶ 16; SER 5, ¶ 20.] Coenen believed the statements were true when they were published, and Medifast did not publish any information to suggest otherwise. [SER 5-6, ¶¶ 20-22.] She reviewed the TSFL plan, as well as many other documents in connection with her posts. [SER 5, ¶ 17; SER 6, ¶ 21; SER 814-819.] Even if she had not, failure to conduct a thorough and objective investigation alone does not prove malice. (*Reader's Digest Ass'n*, 37 Cal.3d 244, 258 (Cal. 1984).)

Coenen's focus was on the truth and, when she disagreed with a point, she challenged FDI's work. For example, she challenged FDI's investigation into Medifast's auditor. She told Minkow she disagreed with a draft report comparing the auditor to Medifast's auditor. [SER 709-720.] She was outspoken on the issue of auditor independence and made her opinion clear – it was an open question based on the facts.

Medifast failed to produce sufficient evidence to show that Coenen published any of the statements with actual malice. Instead, she did not believe her opinions were false – to the extent opinions can even be false.

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F. Appellant Bradley MacDonald did not have Standing to Allege Claims against Coenen.

The majority of the claims against Coenen have been brought by both Appellants Medifast and Bradley MacDonald.[13] However, MacDonald never pointed to any defamatory statements Coenen made about him. To be defamatory, the statement on which a claim is based "must specifically refer to, or be 'of and concerning' the plaintiff in some way." (*Blatty v. N.Y. Times Co*., 728 P.2d 1177, 1182 (Cal. 1986).) MacDonald needed to demonstrate that (1) the statements could reasonably be understood as referring to him as an individual, and (2) some third party understood the statements in this way. (*SDV/ACCI, Inc. v. AT&T Corp*., 522 F.3d 955, 959 (9th Cir. 2008).) MacDonald did not do so and cannot do so because Coenen did not make any statements about him.

MacDonald never identified, either in the opposition to the SLAPP motion or in the opening brief, defamatory statements by Coenen that are of or concerning MacDonald. And, not surprisingly, MacDonald has not pointed to anything from the record below wherein he identified such statements. [AOB, pp. 59-67.] All he can come up with is that Coenen "parrot[ed] FitzPatrick and Minkow's attacks, linking them to her website, and commenting directly on them." [AOB, p. 64.] Republishing reports and documents on her blog is not enough to constitute libel per se by Coenen and against MacDonald. (*Barrett*, 40 Cal.4th at p. 39.)

MacDonald also references Coenen's statement that she wanted to highlight things in FitzPatrick's January 2010 report because "they're the

[13] MacDonald recently passed away. At this point it is unclear if his personal representative plans on substituting in for MacDonald and pursuing his claims on appeal.

facts that many pushers of MLMs will never tell you." That statement can in no way be reasonably understood as referring to MacDonald as an individual, or even Medifast, and MacDonald would be hard pressed to demonstrate that a third party understood the statement that way.

Then, MacDonald notes that Coenen provided a link to Minkow's "Open Letter to Mr. Bradley MacDonald, Chairman, Medifast, Inc. and the 'Independent Committee of distinguished members of the Board of Directors of Medifast, Inc.'" in one of her posts (which, notably, does not make a single statement of or concerning MacDonald). Yet, nowhere in her post does Coenen even mention MacDonald and the language following her link to the letter does not do so either. Rather, Coenen states that Minkow invited "Medifast executives" to point out what was false or misleading about FitzPatrick's report and to provide the documentation that proves their points. [ER 989.]

It is a complete leap to state that "Coenen makes clear that she believes MacDonald is a key player in Medifast's criminal schemes." [AOB, p. 65.] Coenen is not discussing criminal schemes in her post, MacDonald, or individuals who might be key players in the purported schemes. The reality is that most third parties reading Coenen's blog would not have known who MacDonald was or the identity of other Medifast officers or directors.

The only statements in the FAC that appear to be directed specifically at MacDonald are several postings on a Yahoo! Message board written by anonymous bloggers. [ER 41, ¶ 78.] Those few comments that MacDonald does mention are not defamatory, were not made by Coenen, and do not demonstrate that any statements by Coenen were understood by third parties to be of or referring to MacDonald.

Again, MacDonald cannot point to any libelous statements Coenen made about him because none exist. A posting that "the Medifast Fraud File expands w/Med Stock Bubble" does not have anything to do with MacDonald and was not written by Coenen. The fact that the bloggers may have referenced a post by Coenen does not mean that they understood that any of Coenen's posts referred to MacDonald as an individual. The bloggers do not link to or reference any of Coenen's statements and the rampant speculation MacDonald relies on in claiming that the bloggers read Coenen's statements and understood them to refer to MacDonald is not permissible. (*Hall v. Tim Warner, Inc.*, 153 Cal.App.4th 1337, 1346 (Cal.Ct.App. 2007) (plaintiff must oppose a SLAPP motion with evidence that would be admissible at trial).)

In closing, MacDonald did not identify any statements in the FAC by Coenen about MacDonald. Because a SLAPP motion is framed by the pleadings, MacDonald cannot try to change his allegations against Coenen. (*Navellier*, 29 Cal.4th at p. 88).

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VIII. CONCLUSION

In its opposition to the anti-SLAPP motion, Medifast did not demonstrate that it had a reasonable probability of prevailing on its claims against Coenen. The district court's ruling in favor of Coenen on her anti-SLAPP motion was therefore correct.

The fact that Medifast now wishes it had focused on different statements to establish libel per se is of no moment and, like the statements it relied on previously, the new statements addressed in this appeal are not libel per se. The order granting Coenen's anti-SLAPP motion should be affirmed.

Dated: May 14, 2012

Respectfully submitted,

KLINEDINST PC
Heather L. Rosing
Leah A. Plaskin

By: /s/ Leah A. Plaskin

Attorneys for Appellees: Tracy Coenen and Sequence, Inc.

STATEMENT OF RELATED CASES

Pursuant to the Ninth Circuit Rule 28-2.6, Appellees Tracy Coenen and Sequence, Inc. state that they are not aware of any other pending related cases.

Dated: May 14, 2012

Respectfully submitted,

KLINEDINST PC
Heather L. Rosing
Leah A. Plaskin

By: /s/ Leah A. Plaskin

Attorneys for Appellees: Tracy Coenen and Sequence, Inc.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that this Appellees' Second Brief on Cross-Appeal is proportionately spaced, has a typeface of 14 points or more, and contains 13901 words excluding those parts of the brief exempted by Fed.R.App.P.32(a)(7)(B)(iii).

Dated: May 14, 2012

Respectfully submitted,

KLINEDINST PC
Heather L. Rosing
Leah A. Plaskin

By: /s/ Leah A. Plaskin

Attorneys for Appellees: Tracy Coenen and Sequence, Inc.

9th Circuit Case Number(s)	11-55687, 11-55699

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