11-55687, 11-55699

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MEDIFAST, INC., a Delaware corporation,

Plaintiff-Appellant-Cross-Appellee,

BRADLEY MACDONALD, an individual,

Plaintiff-Appellant,

—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 L. FITZPATRICK, an individual,

Defendant-Appellee-Cross-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
D.C. No. 3:10-cv-00382-JLS-BGS

REPLY AND RESPONSE BRIEF FOR PLAINTIFF-APPELLANT-CROSS-APPELLEE MEDIFAST, INC. AND PLAINTIFF-APPELLANT BRADLEY MACDONALD

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INTRODUCTION

Unable to respond to the legal arguments contained in Medifast and MacDonald's[1] opening brief[2] Minkow, Coenen and FitzPatrick[3] all apply the same tactics–attack the credibility of Medifast (and its attorneys) and apply fundamentally-false assertions of the law on defamation to obfuscate their liability for their direct statements of criminal conduct. Once the vitriol is stripped away, there is little left to Defendants' arguments. As the District Court correctly found, Medifast, Inc. met the burden of proof required to defeat Fitzpatrick's SLAPP motion.

On cross-appeal, Fitzpatrick's "Statement of Facts" is filled with irrelevant and/or inadmissible information that is subject to a contested Motion for Judicial Notice. Most of the "facts" are used to support his erroneous claim that Medifast is a limited purpose public figure.[4] The rest of his "facts" are really Fitzpatrick's arguments to bolster his own credibility and impeach the credibility of Medifast's affiant, Daniel Bell, ("Bell). FitzPatrick's attack on credibility is not admissible

[1] Unless otherwise noted, collectively "Medifast".
[2] "AOB"
[3] Collectively "Defendants". Hereinafter, Minkow and FitzPatrick's Response and Opening brief will be referred to as "MRB", their supplemental excerpts of record "MSER", Coenen's Response brief "CRB" and her supplemental excerpts "CSER". Medifast's supplemental excerpts are referred to as "SER".
[4] Medifast's Statement of Facts contained in its AOB supports its opposition to FitzPatrick's cross-appeal.

evidence that renders his accusations of criminal conduct by Medifast "true", and his attempt to raise the burden of proof must fail.

Minkow and Coenen, who use similar tactics, repeated the same accusations of criminal conduct made by FitzPatrick, and made other direct statements that libeled Medifast.

Their repeated accusations of criminal conduct–accusing Medifast of violating California's endless chain statute, of being a pyramid and Ponzi scheme–were not intended to be a "cautionary tale" about the company. Defendants made these statements for one purpose–to assist Minkow in driving down the price of Medifast stock. Minkow made money on the scheme by shorting Medifast stock and paid Fitzpatrick and Coenen well for their "expertise" in bolstering his false attacks. The First Amendment was not intended to shield individuals' participation in such fraudulent schemes.

COUNTER-STATEMENT OF ISSUES ON CROSS-APPEAL

1. Whether the District Court correctly determined the Declaration of Daniel Bell sufficiently established that FitzPatrick's statement "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 § 327" was a false statement of fact, or whether FitzPatrick's self-serving interpretation of the evidence and attacks on the credibility of Bell are sufficient to establish the truth of his statement as a matter of law.

2. Whether the District Court correctly determined that Medifast was not a limited-purpose public figure because it involuntarily responded in three press releases in order to defend itself against Defendants' attacks, which created the public controversy regarding Medifast's business practices.

3. Whether Medifast's showing that Defendants failed to conduct a proper investigation prior to publishing, relied on unreliable and biased experts, and ignored the warnings of experts that their statements were potentially false is sufficient to establish Defendants' statements were made with malice.

SUMMARY OF ARGUMENT

Contrary to Minkow and FitzPatrick's assertions, the Ninth Circuit *has* held that both Federal Rules of Civil Procedure 12(b)(6) and 56 preempt § 425.16 of California's Anti-SLAPP statute. The District Court erred by failing to analyze Minkow's motion to strike, which was based solely on the face of the complaint and not the evidence, under Rule 12(b)(6). On its face, Medifast's FAC was legally sufficient under Rule 12(b)(6) *and* the inapplicable California pleading requirements.

The District Court erred in failing to consider the exhibits properly attached and incorporated by reference in the FAC when considering the whether Medifast had properly alleged libel per se. The FAC, with those exhibits, make clear that Minkow and Coenen's statements accusing Medifast of committing crimes were libel *per se*.

Defendants' collective argument that Medifast's appeal consists of entirely new arguments, and should be denied on this basis, is erroneous. All of the arguments made by Medifast were contained within the FAC and its Opposition to Defendants' motions to strike. All of the statements Medifast has properly placed at issue before this Court were also properly before the District Court. Even so, in the Ninth Circuit, consistent, alternative arguments are not barred on appeal.

The affirmative defense of publisher's immunity under the Communications Decency Act, *47 U.S.C. § 230 et.seq.* ("CDA"), is not applicable to either Minkow or Coenen. Minkow waived any CDA immunity by failing to raise it as an affirmative defense in the District Court. Coenen is not entitled to CDA immunity because her post, which included FitzPatrick's January 2010 Update libeling Medifast, went well beyond mere republishing. Coenen's contributions to and analysis of FitzPatrick's post make her an "information content provider" and "responsible, in whole or in part, for the creation or development of information provided through the Internet..." *47 U.S.C. § 230(f)(3)*.

The District Court correctly held that Medifast had successfully met its burden in establishing that FitzPatrick's statement accusing Medifast of violating California Penal Code § 327 constituted libel per se. FitzPatrick's argument on cross-appeal rests upon a contest over credibility and weighing of the evidence between him and Bell. However, in resolving an anti-SLAPP motion, a court may not "weigh the comparative probative strength of competing evidence[.]" *Mindys Cosmetics, Inc. v. Dakar,* 611 F.3d 590, 599 (9th Cir. 2010). In evaluating Medifast's evidentiary showing, the Court "must credit all admissible evidence favorable to [Medifast] and indulge in every legitimate favorable inference that may be drawn from it." *Tuchscher Dev. Enters., Inc. v. San Diego Unified Port Dist.*, 106 Cal.App.4th 1219, 1238 (2003). FitzPatrick's interpretation of the facts,

which is contradicted by Bell's Declaration, does not prove, as a matter of law, that his statements are true.

As Medifast's entire libel per se claim against FitzPatrick survived his motion to strike, under the California Supreme Court's decision in *Oasis West Realty, LLC v. Goldman*, 51 Cal.4th 811, 820 (2011), the District Court did not need to analyze the remainder of FitzPatrick's libelous statements accusing Medifast of committing crimes–that Take Shape For Life ("TSFL") is a Ponzi scheme; that TSFL is a pyramid scheme; that Medifast has materially misled its shareholders and Wall Street for its own profit. Those statements are all still viable bases for upholding the District Court's decision denying FitzPatrick's motion to strike.

By contrast, Coenen and Minkow's statements are viable bases for reversing the District Court's decision granting their motions to strike. Under the totality of the circumstances test, Coenen's statements are libel per se by clear implication. Everything about Coenen's forensic accounting expert website where her statements accusing Medifast of committing crimes were posted would lead a reasonable reader to believe that Coenen was stating facts–not her opinion.

Relying on his erroneous argument that Medifast did not plead the exact words constituting libel per se, Minkow ignores the criminality of his statements accusing Medifast of running a "Madoff-like Ponzi scheme" and a pyramid

scheme. No amount of parsing his own words can remove their effect on the reader–his statements directly, or by implication accused Medifast of committing crimes.

The District Court was correct in determining that Medifast does not meet the definition of a limited purpose public figure. There was no public controversy into which Medifast injected itself until Defendants began their attacks in February 2009. Following the creation of that controversy, Medifast responded relevantly, proportionately, and narrowly in defense of its reputation. However, a "plaintiff does not become a public figure simply by responding to defamatory statements." *Mosesian v. McClatchy Newspapers*, 233 Cal. App. 1685, 1702 (5th Dist. 1991).

Even if it were a limited purpose public figure, Medifast presented more than sufficient evidence to establish that Defendants acted with the requisite malice when libeling Medifast to overcome their motions to strike–evidence of Defendants' "failure to investigate…reliance upon sources known to be unreliable, or known to be biased against the plaintiff", *Overstock.com, Inc. v. Gradient Analytics, Inc.*, 151 Cal.App.4th 688 701, 809-10 (1st Dist. 2007), is sufficient to establish Defendants' recklessness or their knowledge of falsity.

Finally, the District Court erred in determining that MacDonald lacked standing to sue. None of Defendants' arguments overcome the strong circumstantial evidence showing that MacDonald's reputation was indelibly linked

by Defendants to that of Medifast, and he was injured just as Medifast was by their accusations of criminal conduct.

ARGUMENT

I. Medifast's First Amended Complaint Sufficiently Pled Libel *Per Se* Under *Both* Federal and State Law:

Defendants argue the District Court ("Sammartino") applied the correct procedural law when she applied California pleading standards to Medifast's FAC and determined Medifast had not pled the "exact words" within the body of the complaint that it claimed were defamatory. In fact, relying on a single statement in *Condit v. Nat'l Enquirer, Inc.*, 248 F.Supp.2d 945, 952-53 (E.D. Cal. 2002) that "section 425.16 applies to state law claims advanced in a federal diversity action", Minkow and FitzPatrick claim the Federal Rules of Civil Procedure *never* apply to a motion to strike. Coenen argues that under either Federal or State law the pleading standard was not met.

What Defendants' specious argument, and their outright dismissal of the *actual* analysis in the *Condit* decision expose, is the *true extent* of Sammartino's error. Not only was the FAC and its exhibits sufficient under Federal law, but as *Condit* makes clear, Sammartino should have denied Minkow's motion to strike under a Rule 12(b)(6) analysis, as the FAC was legally sufficient *on its face*. *Id.*, at 983.

a. The Erie Doctrine Requires Application of the Federal Rules of Civil Procedure to a Motion to Strike

Minkow and FitzPatrick argue that under the Erie Doctrine, only California procedural law applies to a motion to strike–the Federal Rules of Civil Procedure do not. However, the authority they rely upon, *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963 (9th Cir. 1999), is no longer the law in the Ninth Circuit on this point. In *Rogers v. Home Shopping Network, Inc.*, 57 F. Supp. 2d 973, 976 (C.D. Cal. 1999), the Court held that a § 425.16 motion made in diversity cases must be treated as one either made under Rule 12(b)(6) or Rule 56, and analyzed under the applicable federal standards. In *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 845-47 (9th Cir. 2001) this Court held that the right to discovery under Rule 56 preempts the section of § 425.16 that limits a plaintiff's right to discovery.

An argument challenging "the legal deficiencies [of the FAC is] addressable on a motion to dismiss under Fed. R. Civ. P. 12(b)(6), *not* for a failure to support a stated claim with evidence analogous to a motion for summary judgment…" *Condit*, at 953. In other words, when a district court decides a § 425.16 motion to strike, if the motion is made, as here, based upon the alleged legal deficiencies of the complaint itself, then a district court must apply the standards that govern a Rule 12(b)(6) motion to dismiss. *Id.*, at 983.

b. Medifast Met the Applicable Federal Pleading Standards

Because Rule 12(b)(6) requires the court to accept "as true all material allegations in the complaint and construes them in the light most favorable to the plaintiff," *Condit*, at 950, Sammartino should have analyzed whether Medifast had sufficiently pled a claim for libel *per se* against Minkow based on the sufficiency of the allegations made in the FAC under Federal law. Sammartino held that "[a] complaint for libel must plead the exact words constituting the alleged defamation," ER460, and because Medifast failed to do so in the body of its FAC, it had failed to overcome Minkow's motion to strike.[5] This was error.

All that Federal law requires is "more specific allegations" of libel–not the exact words. [6] *Newfarmer-Fletcher v. County of Sierra*, 2012, U.S. Dist. LEXIS 27311, *16. Coenen's authorities make this clear. As Coenen states, *Newfarmer-Fletcher* requires that "the defamatory statements must be specifically identified and the plaintiff must plead the *substance of the statement*." *Id.* (emphasis added). And *Toth v. Guardian Indus. Corp.*, 2012 U.S. Dist. LEXIS 44217, *7 (E.D. Cal.

[5] An argument that was made by Minkow for the first time in his reply on his motion to strike, and to which Coenen and FitzPatrick join for the first time on appeal.

[6] Moreover, Defendants did not, *and cannot* point to a Ninth Circuit case that has held the more liberal pleading standards of Rule 8 should not be followed when considering a § 425.16 motion made on the legal sufficiency of the pleadings in Federal court (or any other basis), as Minkow's motion was here. If Rule 12(b)(6) applies to a motion to strike, so too should the Federal rule setting the pleading standard under which such a motion should be tested.

2012), also relied on by Coenen, recognizes that in ruling upon a motion to dismiss for failure to state a claim, a court may consider the complaint, the exhibits thereto, and matters judicially noticed.

Coenen's other Federal cases are similarly instructive–pleading libel merely requires "more specific allegations"–it does not require the *exact* words. And, she admits as much when she asserts there is other Federal and state authority (besides *Christakis v. Mark Burnett Prods., 2009 WL 1248947 (C.D. Cal. 2009)*) "to support the proposition that libel must be pled *with detail*." CRB22(emphasis added). *See Toth*, at * 30 ("[p]leading the 'substance of the defamatory statement' is also adequate to state a claim for libel.") citing *Okun v. Superior Ct.*, 29 Cal.3d 442, 458 (1981). *See Silicon Knights v. Crystal Dynamics*, 983 F. Supp. 1303, 1314 (N.D. Cal. 1997) (regarding slander–"The complaint contains only general allegations of the defamatory statements and does not identify the substance of what was stated by the Defendants." Plaintiff therein *admitted* exhibits attached did not contain defamatory statements).

Sammartino should have considered the *entire* FAC, including the exhibits properly incorporated by reference. *Cooper v. Pickett*, 137 F.3d 616, 622 (9th Cir. 1998). And, when considering the FAC's allegations and exhibits thereto in the light most favorable to Medifast, *Condit*, at 950, it is clear Medifast pled libel *per se* with sufficient specificity. The FAC chronicles each round of attacks made by

Defendants, outlines in detail how their statements were defamatory, and for good measure, incorporates each of the actual posts by proper reference. ER34-44. These allegations make clear that what Medifast alleged as defamatory was *always* Defendants' unequivocal statements asserting that: "TSFL operates as an endless chain or pyramid scheme" and "violates California Penal Code Chapter 9 § 327" ER34lines22-23; "that Medifast is similar to Bernie Madoff's massive Ponzi scheme", ER35line12; that "Medifast is a Ponzi scheme and a pyramid scheme and is in violation of the laws of California…" ER36lines23-24; that Coenen continued the attacks with her blog entitled "Medifast and Take Shape For Life: Weight loss pyramid scheme?" and made false statements that "TSFL is a pyramid scheme", ER38lines18-22. Sammartino erred when she determined Medifast's FAC was insufficiently pled. ER15lines1-2.

As the FAC met Federal pleading standards, and taking Minkow's argument to its logical conclusion, Minkow's motion should have been *denied under Rule 12(b)(6)*. "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *See Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). *See Rogers*, 57 F. Supp. 2d at 976. Minkow did not even bother to challenge Medifast's evidence below–he merely argued that because Medifast did not plead the exact words, the FAC should have been dismissed. ER459-60.

Sammartino was then *required* to apply the standards for dismissal under Rule 12(b)(6). *Condit*, 248 F.Supp.2d at 954.

c. Even Under California Pleading Standards, Medifast Properly Pled Libel Per Se

Even if Sammartino was correct in applying California pleading standards, the FAC *did* meet those standards. In order to plead the exact words, a complaint for defamation "should set the matter out verbatim, either in the body *or as an attached exhibit*." *5 Witkin Cal. Proc. Plead* § 739 (5th ed. 2008) (emphasis added); *see also*, *5 Witkin Cal. Proc. Plead* §§ 427–431 (incorporation by reference in general). Moreover, it is well settled that a written instrument, which is the foundation of a cause of action "may be pleaded *in haec verba*, rather than according to its legal effect, either by setting forth a copy in the body of the complaint or by attaching a copy as an exhibit and incorporating it by proper reference." *Holly Sugar Corp. v. Johnson*, 18 Cal.2d 218 (1941). *See Hoffman v. Smithwoods RV Park, LLC*, 179 Cal.App.4th 390, 400 (2009). *See Okun*, 29 Cal.3d 442, 452-53 (1981) (letter attached to complaint as exhibit considered by Court in analysis of whether it constituted libel *per se*). Medifast properly attached each defamatory statement and properly incorporated it by reference within the FAC. ER27; ER34; ER36-43.[7]

[7] The cases relied upon by Defendants for the proposition that Medifast failed to meet the California pleading standard simply do not support their position. *See*

Defendants' alternative argument–that courts have no duty to ferret out the essential elements of a cause of action, MRB42−has no application to this case, as their own authorities make clear. In *California Trust v. Gustason*, 15 Cal.2d 268 (1940), the pleading at issue was an answer that attempted to aver an affirmative defense of fraud in the inducement. The Court refused to search the document to fill in the blanks left in the defendant's pleading, stating:

> the insufficiency of the pleading was obvious. The agreements were not pleaded at all, either *in haec verba* or according to their legal effect. No statement is made as to their terms or conditions, and it cannot be determined what right or title these agreements, or their alleged fraudulent procurement, conferred upon defendant, or how it was conferred. Nor are the necessary elements of fraud pleaded…

Id., at 272. The exhibit attached to the answer–a notice of rescission–contained the alleged misrepresentations, but they were neither explicitly, nor substantially alleged in the body of the answer.

Gilbert v. Sykes, 147 Cal. App. 4th 13, 31 (Cal. App. 3d Dist. 2007) ("The third major charge of the cross-complaint is that Gilbert's Web site 'misstates the content of communications between [Gilbert] and Dr. Sykes relating to the procedures performed by Dr. Sykes [with nothing more].' This allegation is far too vague and amorphous to support a cause of action for defamation."); *Vogel v. Felice*, 127 Cal. App. 4th 1006, 1017 (Cal. App. 6th Dist. 2005) (complaint legally insufficient on its face for failing to properly plead *actual malice* not the libelous statements).

Similarly, in *Burkett v. Griffin*, 90 Cal. 532, (1891) the documents had been attached solely to identify the lands referred to, not for the rights and covenants that were allegedly violated by the defendant. Those necessary facts were *in no way* averred within the body of the complaint. Again, the Court refused to fill in the blanks. *Id.*, at 541. *See also*, *Lincoln v. Fox*, 168 Cal.App.2d 31, 33 (1959) (in petition for writ seeking release from jail based on invalid contempt order, only specifications of invalidity were that "reporter's transcript of all the testimony . . . contains no more than gossip"–court would not search entire transcript to fill in missing facts).

Medifast's FAC did not leave any blanks to fill by reference to the exhibits–it substantially explained the defamatory statements within the body of the pleading, *and* incorporated the actual statements. No "ferreting" was required. Sammartino only had to turn to each exhibit as it was explained and incorporated by reference and see the statements at issue:

- "MEDIFAST=MADOFF?? Click here to view the Points of Similarity between Madoff and Medifast", ER34llines4-7andER83;
- "New FDI report reveals Madoff and Medifast have too many points of similarity", ER34llines4-7and ER83;
- "The site also unveils critical points of similarity between the Bernie Madoff massive Ponzi scheme and the recruitment-based multi-level

- "Both Madoff and Medifast are also closed systems," said Barry Minkow, Co-Founder of the Fraud Discovery Institute, Inc. "They both rely upon the transfer of money between investors within the scheme as opposed to money from retail sales generated outside the scheme." ER35lines8-28andER85;

In sum, under Federal or California pleading standards, Medifast met its burden. Sammartino erred as a matter of law, abusing her discretion by not dismissing Minkow's motion to strike under Rule 12(b)(6) and for failing to consider the exhibits attached to the complaint. *Casey v. Albertson's, Inc.*, 362 F.3d 1254 (9th Cir. 2004).

II. Medifast Made No New Arguments in its Opening Brief:

Upset that Medifast did not just recycle its brief used in the District Court, Defendants spend much time arguing that Medifast has made new arguments on appeal. This argument is a red herring, as all of Medifast's arguments were raised below. ER421:12-14; 422:20-425:28; 428:18-24; 429:3-5. The FAC "alleges almost thirty separate defamatory internet postings for which the defendants are liable, each containing numerous provably false statements that a reasonable fact finder would conclude declare or imply a provably false assertion of fact. The

most flagrant of these false assertions is that Medifast, like Bernie Madoff is running a Ponzi scheme…" ER422:20-24.

The thirty-seven statements Defendants continually refer to as the *only* statements Medifast put at issue below were merely *some* of the false statements Defendants used to support their claimed " opinions" that Medifast was running an endless chain, a pyramid scheme and a Ponzi scheme. Those claimed opinions–*their overarching direct allegations of criminal activity*–were always at the core of Medifast's FAC and its Opposition. ER421lines12-14; 422line20-425line28; 428lines18-24; 429lines3-5; ER26-46, *generally*. And, there can be no doubt when one looks at their posts that Defendants did call Medifast an endless chain, a pyramid scheme and a Ponzi scheme.[8]

Indeed, in her Memorandum of Points and Authorities ("MPA"), not only did Coenen analyze her potential liability as to each of her posts attached to the FAC, ER306line19-307line9; 312line22-313line9; 315line17-318line20, she responded to these arguments again in reply, and most notably to "Medifast's TSFL: weight loss pyramid scheme?", which she now claims was never at issue below. CSER5line23-743line4. Coenen ensured these statements were before Sammartino.

[8] Medifast has never argued Coenen directly accused Medifast of operating a Ponzi scheme, as she claims. CRB45-46. However, Coenen *did* republish FitzPatrick's January 2010 report wherein *he* claimed TSFL was a Ponzi Scheme. *See* Sections III.b. and IV.a.4, *infra*.

Regardless, "[a]s the Supreme Court has made clear, it is claims that are deemed waived or forfeited, not arguments." *United States v. Pallares-Galan*, 359 F.3d 1088, 1095 (2004). An alternative argument made to support what has been a consistent claim made from the outset is not barred on appeal. *Id*. *See, e.g.*, *Correlleone v. Covina Police Dep't*, 2012 U.S. App. LEXIS 409 (9th Cir. 2012) (appellant changed claim from one challenging his conviction to one seeking return of property–not considered); *Sims v. Rios*, 457 Fed. Appx. 626 (9th Cir. 2011) (appellant added claim for relief under 8th Amendment–not considered); *Odell v. F.B.I.*, 456 Fed. Appx. 705 (9th Cir. 2011) (added constitutional claims–not considered); *Stansbury v. U.S. Gov't*, 444 Fed. Appx. 940 (9th Cir. 2011) (added retaliation claim–not considered); *Smith v. Marsh*, 194 F.3d 1045 (1999) (appellants ignored entire element necessary for granting of application for intervention before the district court and "cryptically" claimed in opening brief on appeal that it had been addressed below). There is nothing argued in the opening brief that is inconsistent with Medifast's arguments made before the District Court.[9]

[9] Coenen's claim−that Medifast's argument that her statements were demeaning and brought Medifast into disrepute−is new, CRB43, is similarly flawed. She is simply arguing semantics.

III. The Affirmative Defense of CDA Immunity is Unavailable in this Case:

Under the Communications Decency Act of 1996 ("CDA"), 47 U.S.C. § 230(c), one who merely republishes the content of another without altering it in any manner is considered an "interactive computer service provider" under the CDA, and is entitled to immunity for their actions. *Fair Housing Council of San Fernando Valley v. Roommate.com*, 521 F.3d 1157, 1162-63 (9th Cir. 2008). Both Minkow and Coenen assert CDA immunity as a defense to Medifast's appeal. But the CDA applies to neither.

a. Minkow Waived Any Potential CDA Immunity

Minkow asserts he is entitled to CDA immunity for republishing FitzPatrick's statement that the TSFL business model and reward system "are an endless chain in violation of Penal Code § 327." MRB50-52. Immunity under the CDA is an affirmative defense. *Perfect 10, Inc. v. Google, Inc.*, 2008 U.S. Dist. LEXIS 79200, *23 (C.D. Cal. 2008). Minkow *never* raised this affirmative defense before Sammartino, ER359-382;449-465, and an appellee may not raise an affirmative defense for the first time on appeal. *Santos v. Alaska Bar Assoc.*, 618 F.2d 575, 576-577 (9th Cir. 1980). Minkow's motion to strike should have been denied on the same ground that Sammartino properly denied FitzPatrick's motion.

b. Coenen Was an Information Content Provider Not Entitled to CDA Immunity

Responding to Medifast's argument that Coenen libeled Medifast when she posted excerpts of FitzPatrick's January 8, 2010 Report with her commentary and affirmation of FitzPatrick's allegations, ER192-93, Coenen asserts she is an "interactive computer service provider", protected by §230(c)(1) of the CDA. But CDA immunity "applies only if the 'interactive computer service provider' is not also an 'information content provider.'" *Roommate.com*, 521 F.3d at 1162.

An "information content provider" means "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." *47 U.S.C. § 230(f)(3)*. If a website operator "passively displays content that is created entirely by third parties, then it is only a service provider with respect to that content. But as to content that a website operator creates, or 'is responsible, in whole or in part' for creating or developing," as Coenen did here, "the website is also a content provider" and immunity is unavailable. *Roommate.com*, at 1163.

Significantly, all of the cases determining that CDA immunity applies deal with the republishing by an interactive computer service provider of a *user's* content. Immunity applies when the provider either makes the determination to post or remove content submitted to the provider by *a user of the site*. *See, e.g.*, *Id.*, (users provided personal information to roommate search website); *Carafano*

v. Metrospash.com, Inc., 207 F. Supp. 2d 1055 (C.D. Cal. 2002) (users created personal ads on dating website); *Fraley v. Facebook*, 2011 U.S. Dist. LEXIS 145195 (N.D. Cal. 2011) (users clicked "like" on other users' posts).

Here, FitzPatrick was not a *user* of Coenen's site. There is no evidence in the record that FitzPatrick submitted his report for Coenen to post on her website. Coenen affirmatively sought out FitzPatrick's report, and then created an entirely new post that incorporated excerpts from his report, and which contained her own analysis and commentary–her own stamp of approval as forensic accountant and fraud investigator. Coenen added her own title–"More on the endless chain recruitment scheme of Take Shape For Life", *ensuring* that her readers understood that FitzPatrick was right when he called TSFL an endless chain pyramid scheme. ER192-93. Coenen's decision to select FitzPatrick's report for publication, analysis and comment on her own blog effectively altered the report's meaning by adding to the report the message that Coenen deemed the report worthy of her readers' attention, *and they should believe it*.

The CDA was not intended to shield the type of affirmative action Coenen took here. *See*, *Roommate.com*, at *1170-1171 (clarifying Court's holding in *Batzel*–if tipster tendered material for posting online "editor's job was, essentially, to determine whether or not to prevent its posting…but if the editor publishes material he does not believe was tendered to him for posting online, then he is the

one making the affirmative decision to publish, and so he contributes materially to its alleged unlawful dissemination"); *Carafano*, 339 F.3d at 1124 ("Under § 230(c), therefore, so long as a third party willingly provides the essential published content, the interactive service provider receives full immunity regardless of the specific editing or selection process.").

Indeed, the actions Coenen took here are analogous to those taken by the defendants in *MCW Inc. v. Badbusinessbureau.com, L.L.C.*, 2004 U.S. Dist. LEXIS 6678 (N.D. Texas 2004). In *MCW*, the Court found CDA immunity inapplicable where the defendants created disparaging titles, headings and editorial messages for the reports posted on their website. These contributions to the posts were "clearly part of the webpage content" and the defendants were deemed information content providers *not* entitled to immunity. *Id.*, at *33.

As in *MCW*, Coenen did not merely distribute "information provided by another" and she is not entitled to CDA immunity. *Id.*, at *33. *Phan v. Pham*, 182 Cal.App.4th 323 (4th Dist. 2010) is distinguishable. In *Phan*, the defendant forwarded an email after adding an "introductory line" of his own. That line essentially told readers, "[t]he truth will come out in the end. What will be will be. Whatever." *Id.*, at 328. The court determined that this sole introductory message did not materially contribute to the defamatory email–it merely provided the

contents, undisturbed, for the reader's consideration. It did not convert the defendant into an information content provider, and CDA immunity applied.

Coenen's argument that her contributions to the post are not libel *per se* by themselves is irrelevant. Because Coenen is an information content provider, she is liable for *FitzPatrick's* libelous statements. *Flowers v. Carville*, 310 F.3d 1118, 1128 (9th Cir. 2002). And, because Medifast prevailed against FitzPatrick on its libel claim *in toto*, ER19fn.15, Coenen's republishing of FitzPatrick's statements that are *still at issue* makes her responsible for those same libelous statements.

Finally, whether Coenen is liable for her own content, *excluding* FitzPatrick's statements, was argued fully in Medifast's AOB, 51-53. Coenen attempts to avoid liability for *these* statements by claiming they are libel *per quod*. But the post entitled "More on the endless chain recruitment scheme of Medifast and Take Shape for Life" is an "opinion" that Coenen supports by express facts. Those facts include FitzPatrick's express statements that TSFL relies on "endless chain recruiting…not on retail sales" and does so "to obscure the recruitment pyramid;" that he questions "the plan's legality" under California law and that "the greatest share of all commissions is transferred to those in the top positions of the pyramid." ER192-93. Coenen's readers do not need any explanation to understand that what she is telling them−TSFL is a pyramid scheme designed to separate those naïve enough to join from their money. This is libel *per se*, not libel

per quod. *See Wong v. Jing*, 189 Cal.App.4th 1354, 1372 (2010) (libel *per se* may be accomplished by implication).

Coenen also argues that Medifast did not argue she was not entitled to CDA immunity below, thus waiving it. Coenen is mistaken–Medifast argued that "active involvement in the creation of a defamatory Internet posting would expose a defendant to liability as an original source." *Barrett v. Rosenthal*, 40 Cal. 4th 33, 60 n.19 (2006). ER446lines11-13;447lines24-26. And indeed, Medifast argued Coenen was not entitled to immunity for *this specific post*, ER445line26-446line1;447line18-448line11. Sammartino never reached Coenen's CDA argument. Even so, parties are free to make new, consistent arguments on appeal. *Pallares-Galan*, 359 F.3d at 1095.

IV. Defendants All Made Provably-False Statements of Fact Constituting Libel Per Se:

Defendants seek to heighten the burden Medifast is required to meet in order to overcome their motions to strike. But the standard is clear–"[p]robability" as used in §425.16(b) means "reasonable probability." *Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 971 (9th Cir. 1999); *Wilcox*, 27 Cal.App.4th at 824-25. And, "'[r]easonable probability' in the anti-SLAPP statute has a specialized meaning: it requires only a 'minimal level of sufficiency and triability.'" *Mindys*, 611 F.3d at 598 (*quoting Linder v. Thrifty Oil Co.*, 23 Cal.4th 429, 438 n.5 (2000)). "A plaintiff is not required to *prove* the specified claim to

the…court; rather, the issue is whether plaintiff has stated and substantiated a legally sufficient claim." *Mann v. Quality Old Time Serv., Inc.*, 120 Cal.App.4th 90, 105 (2004), (quotation omitted). Only a cause of action that lacks "even minimal merit" constitutes a SLAPP. *Hilton v. Hallmark Cards,* 599 F.3d 894, 908 (9th Cir. 2010)(*citing Navellier v. Sletten*, 29 Cal.4th 82, 89 (2002)).

Medifast has more than met this low burden against all three defendants.

a. FitzPatrick's Argument Does Not Establish the Truth of His Defamatory Statements as a Matter of Law:

In resolving an anti-SLAPP motion, a court may not "weigh the comparative probative strength of competing evidence[.]" *Mindys,* 611 F.3d at 599. In evaluating Medifast's evidentiary showing, the Court "must credit all admissible evidence favorable to [Medifast] and indulge in every legitimate favorable inference that may be drawn from it." *Tuchscher*, 106 Cal.App.4th at 1238. This Court must "accept as true the evidence favorable to [Medifast]" and evaluate [Defendants'] evidence only to determine if it has defeated that submitted by [Medifast] *as a matter of law*." *Flatley v. Mauro*, 39 Cal.4th 299, 326.

FitzPatrick admits he accused Medifast of violating a criminal statute. MRB60. He makes no argument that his accusation was *protected* opinion. FitzPatrick's *entire* argument on appeal is his assertion that Daniel Bell's ("Bell") declaration proves *as a matter of law* that TSFL violates § 327. But FitzPatrick's argument relies on a credibility contest between himself and Bell, and a weighing

of the evidence, both of which are impermissible on motion to strike. *Mindys*, at 599. Sammartino correctly determined that Bell's declaration is sufficient to establish falsity, and properly denied FitzPatrick's motion to strike.

1. FitzPatrick's Attempt to Circumvent the Rule that Credibility is Not Considered Must Fail

As Sammartino stated, "FitzPatrick does not present any evidence to rebut the [sic] Bell's declaration, other than declarations restating the allegations in his report." ER16lines21-22. Instead, he attempts to use Bell's own words to prove that TSFL violates § 327. But FitzPatrick's "analysis" of Bell's declaration is in fact an *argument* that *his* interpretation carries more weight than Bell's.

FitzPatrick accuses Bell of manipulating data and misleading Sammartino to prove his point. MRB21-22,26-28,66. He goes to great lengths to establish his own credibility as an expert, MRB15-16, while discrediting Bell, accusing him of bias, and attempting to link him to a completely different company prosecuted by the Federal Trade Commission ("FTC") through inadmissible documents that do not support his baseless allegations.[10] MRB21-23.

According to FitzPatrick, *his* interpretation of the data is more reliable and more accurate–the Court should believe him over Bell. *None* of this is permissible, *Mindys,* 611 F.3d at 599. In evaluating Medifast's evidentiary showing, the Court

[10] The documents relied upon are the subject of Minkow and FitzPatrick's Request for Judicial Notice, to which Medifast objects. *See* Docket Entry 52-1.

"must credit all admissible evidence favorable to [Medifast] and indulge in every legitimate favorable inference that may be drawn from it." *Tuchscher*, 106 Cal.App.4th at 1238. As below, this Court should deny FitzPatrick's motion to strike.

2. FitzPatrick's Arguments are Controverted by the Evidence

FitzPatrick's appeal must also fail because his statement that TSFL violated § 327 remains provably-false–the "facts" he claims establish the truth of his allegation "as a matter of law" do no such thing. The several statements he relies on as the essence of his argument are refuted by the admissible evidence before the Court, and FitzPatrick failed to provide any admissible evidence to the contrary. ER16lines21-22.

FitzPatrick argues "the salient fact in Bell's declaration is that Medifast distributes its products through a scheme whereby the Health Coaches pay consideration for the chance to obtain commissions by *introducing* more Health Coaches." MRB24. He states it again–"By definition, the issue [under § 327] is whether the participant gets any compensation for *introducing* additional participants." MRB61. He says it another way–"the scheme becomes an endless chain when the participant receives compensation for *introducing* additional participants." MRB62(emphasis added).

These statements are a complete manipulation by FitzPatrick, and leave out one key fact–there is *no evidence* in the record to prove that a single health coach has ever received any compensation merely for *introducing* a health coach to TSFL. And FitzPatrick points to none.

FitzPatrick argues: "The Income Disclosure Statements also verified FitzPatrick's determination that the lowest levels of TSFL's Health Coaches generated most of the revenue and growth, but received the least compensation." MRB20. This statement is contradicted by Bell's testimony–from July to December 2009, the top ten percent of health coaches generated 43 percent of TSFL's revenue. ER1021¶78. In April 2010, the top 47 percent of health coaches were generating 86.72 percent of TSFL's revenue. ER1023¶83.

FitzPatrick asserts that "TSFL's bonus structure also satisfies the definition of an endless chain" by claiming the bonuses aggregate to benefit the highest levels of Health Coaches. MRB68. This erroneous interpretation of TSFL's bonus plan was refuted at length by Bell. ER1016-25. In evaluating Medifast's evidentiary showing, the Court "must credit all admissible evidence favorable to [Medifast] and indulge in every legitimate favorable inference that may be drawn from it." *Tuchscher*, 106 Cal.App.4th at 1238.

Finally, FitzPatrick claims he has rebutted Bell's declaration with his own evidence–TSFL's attrition rate. But he admits that this "fact", as he interprets the

numbers, is not a factor "considered by California law." To *him*, it reflects "a business structure dependent on an endless chain." MRB69. This is just argument−not proof "as a matter of law" that TSFL violates § 327.

3. Medifast Did Not Mislead this Court

FitzPatrick claims that Medifast is confusing the Court by applying the FTC's pyramid scheme definition to the analysis of § 327. But Medifast does no such thing. In its AOB, Medifast showed that both Minkow and Coenen accused TSFL of being a "pyramid scheme" and argued that such statements are libelous per se. For this reason, Medifast correctly cited to caselaw interpreting the FTC's definition of what constitutes a "pyramid scheme". AOB45-46.

In regards to § 327, no analysis was necessary as Sammartino already determined such a statement was provably-false. Moreover, when determining that FitzPatrick had indeed libeled Medifast by stating it violated § 327, Sammartino did so after analyzing *People v. Bestline Prods., Inc*., 61 Cal.App.3d 879, 914 (1976)–the case FitzPatrick relies on. MRB62-63. Sammartino soundly determined that FitzPatrick's statement that Medifast violated § 327 was provably-false and not protected opinion. The Court should uphold that decision.

4. Even if FitzPatrick's Appeal is Granted on his § 327 Statement, FitzPatrick Drafted Minkow's Madoff Comparison and his Reports were Riddled with Statements Directly or by Implication Accusing Medifast of Crimes

FitzPatrick claims that Sammartino ruled his § 327 statement was "the only one a reasonable fact finder could conclude was a provably false statement of fact." MRB61. From this false premise FitzPatrick argues that if he is able to succeed on this one issue on appeal, the entire case against him must be dismissed. In *Oasis West Realty*, 51 Cal.4th at 820, the California Supreme Court adopted *Mann's* holding that "once a plaintiff shows a probability of prevailing on any part of its claim, the plaintiff *has established* that its cause of action has some merit and the entire cause of action stands." *Id.* Relying on *Mann*, 120 Cal.App.4th at 106, Sammartino correctly held that "because Medifast has shown a probability of prevailing on its libel per se claim regarding the statement that TSFL is an endless chain…the entire libel per se claim against FitzPatrick stands." ER19fn.15(citations omitted). Once Sammartino found that just this one statement constituted libel *per se*, she *did not need* to analyze any of FitzPatrick's other libelous statements. And, there were multiple other libelous statements.

For example, although never disclosed to readers, FitzPatrick was the author of the defamatory post "Points of Similarity Between Madoff and Medifast". ER932-34. FitzPatrick and Minkow decided to update FitzPatrick's original report

following Madoff's arrest in December 2008, and include comparisons to Madoff's Ponzi scheme before releasing it on February 17, 2009. ER929-31; ER1100line24-1103line15; Compare 1032-38(update)&1039(original). FitzPatrick continued his comparison in his January 2010 report. ER166-67.

FitzPatrick also falsely accused Medifast of running a pyramid scheme. In fact, FitzPatrick was the original source for Minkow and Coenen's libelous statements on this topic. ER83-86,107,125-26,152-53,177-78185-193. FitzPatrick wrote:

- "My view is that Take Shape For Life does operate as an endless chain or pyramid scheme." ER1039;
- "Medifast's Pyramid Pay Plan", ER1052;
- "in my view, TSFL's income opportunity fits this definition [of a pyramid scheme]. Its products, inducements, promises, claims, and rewards are inextricably tied, though sometimes disguised, to the endless chain recruitment-and-reward model described by Dr. Vandernat." ER1040;
- "In structure and pay plan, TSFL is similar to the multi-level marketing scheme, Your Travel Biz.com…The California Attorney General is currently prosecuting YTB under [] § 327 and has publicly called it a 'gigantic pyramid scheme.'" ER1040-41;

- "Medifast's business model manifestly meets the pyramid definition", ER1299.

FitzPatrick also made statements asserting Medifast was misleading shareholders and Wall Street by convincing them "the endless chain income scheme of its [TSFL] division is truly 'limitless.'" ER1300. In his 2010 report, FitzPatrick states: "This updated report moves the analyses forward from Medifast's endless chain "business opportunity" to the inflation of Medifast's stock. Effectively, the pyramid selling scheme…is being leveraged into the securities market." ER1296. Not only is TSFL a pyramid, but also a pump-and-dump scheme–ER 1300("Pyramid Meets Pump-and-Dump"). *See* ER1305("Here is where the reality metastasizes into a fateful delusion. A belief arises that the money transfer system can continue indefinitely, without regard to the limits of available investors. This is the delusion that Medifast has cultivated on Wall Street.").

None of these provably-false statements of fact needed to be addressed by Sammartino–she left them for a jury to analyze. These statements either directly, or at the very least impliedly, accuse Medifast of a crime, and "[false] [s]tatements that could reasonably be understood as imputing specific criminal…acts are not entitled to constitutional protection[.]" *Standing Comm. v. Yagman,* 55 F.3d 1430, 1440 (9th Cir. 1995). Even if the Court reverses on FitzPatrick's § 327 statement,

his statements (i) accusing Medifast of being a Ponzi and/or pyramid scheme, (ii) claiming that Medifast is a pump-and-dump scheme, and (iii) asserting that Medifast is deceiving its stockholders and Wall Street, are individually (or collectively) ample bases for denying his motion to strike. ER34-36&39;ER52-81;ER118-126;ER161-175.

b. Under the Totality of Circumstances Coenen's Statements are Still Libel *Per Se*:

Medifast showed in its AOB that Coenen's statements were *direct* libel. To this argument, Coenen provides little response, other than to downplay her attacks, claiming she simply "touches upon 'the allegations of being a pyramid scheme'" using "the Medifast controversy as a case study to further the discussions of the potential dangers that multilevel marketing programs pose to consumers." CRB31. This is not what Coenen did.

There was no controversy for her to use as a case study–her post *helped create* the "controversy" by attacking Medifast and stating unequivocally that "everything points to the real deal [about TSFL] being endless chain recruitment into a pyramid scheme." This is far from a discussion of potential dangers to consumers. Without more, Medifast met its burden.

Coenen now argues her statements must be analyzed under the Ninth Circuit's totality of circumstances test. This test is utilized to determine whether "a statement *implies* an assertion of fact." *Nicosia v. De Rooy*, 72 F.Supp.2d 1093,

1101 (N.D. Cal. 1999)(emphasis added). In making this determination, the Court uses a three-part test: (1) whether the general tenor of the entire work negates the impression that the defendant is asserting an objective fact, (2) whether the defendant used figurative or hyperbolic language that negates that impression, and (3) whether the statement in question is susceptible of being proved true or false. *Partington v. Bugliosi*, 56 F.3d 1147, 1153-60 (9th Cir.1995).

Even if the author discloses facts upon which he bases his opinion, "if those facts are either incorrect, incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact." *Overstock.com,* 151 Cal.App.4th at 701. In other words, "[a] defendant is liable for what is insinuated, as well as for what is stated explicitly." *Wong v. Jing,* 189 Cal.App.4th at 1372. The First Amendment only protects "statements that cannot 'reasonably [be] interpreted as stating actual facts' about an individual." *Art of Living Found. v. Does 1-10,* 2011 WL 2441898, *5, *7 (N.D. Cal. 2011). "[I]f [the statement] contains a charge *by implication* from the language employed by the speaker and a listener could understand the defamatory meaning without the necessity of knowing extrinsic explanatory matter", it is libel *per se*. *Wong,* at 1369(emphasis added).

1. The General Tenor of Coenen's Entire Work Weighs In Favor of Denying First Amendment Protection

"An accusation that, if made by a layperson, might constitute opinion may be understood as being based on fact if made by someone with specialized knowledge of the industry." *Wilbanks*, 121 Cal.App.4th at 904. *See Overstock.com*, at 705-706 (defendants' businesses built around developing reader confidence to rely on their opinions as reflecting truth about companies investigated). Coenen asserts her statements should not be analyzed like FitzPatrick's, CRB36, downplaying her role as an expert. But Coenen *markets herself as a forensic accounting expert-for-hire.* CRB3-4; CSER2-3&737; ER642line1-643line21. It is within this context that her statements must be analyzed.

Coenen relies heavily on her website's content to support this element.[11] Her site promotes her services with the following heading: "Forensic Accounting, Investigations, and Expert Services." Next to that heading, it reads: "Read the Fraud Files Blog…daily commentary on fraud, scandals, scams, court cases." By clicking, a reader is directed to the blog, but the heading remains. Additionally, this statement always appears:

> Tracy Coenen is a forensic accountant and fraud examiner in Chicago and Milwaukee who investigates white collar crimes, including cases of financial

[11] www.sequenceinc.com(last visited August 24, 2012).

> statement fraud, embezzlement, tax fraud, and insurance fraud.

Coenen also provides links so visitors can purchase her books on fraud investigation.

There is no indication that what Coenen is writing on her blog should not be taken seriously–the average reader would assume they were reading the statements of an expert providing objective facts, not subjective opinion or "observations". CRB36. Coenen presents herself as someone with authority. Readers will give deference to her claimed expertise, and assume she speaks the truth. *See Wilbanks*, 121 Cal.App.4th at 904.

2. The Fact that Coenen Used Colloquial Language When Accusing Medifast of Criminality is Irrelevant

Recognizing the fallacy of denying her expertise, Coenen argues that because the posts were on her blog, which is generally filled with "hyperbole, invective, short-hand phrases and language not generally found in fact-based documents such as corporate press releases, SEC findings, or expert reports" her posts about Medifast could not be seen as anything but opinion. CRB38. However, Coenen's false statements do not gain First Amendment protection simply by placing them on a blog. Her accusations of criminal activity *are* provably false assertions of fact. There is nothing "loose, figurative or hyperbolic" about language accusing an individual of committing a crime, and the fact that they

appeared on a blog does not "'negate the impression that the writer was seriously maintaining that [the individual] committed the crime[.]'" *Gardner v. Martino,* 563 F.3d 981, 990 (9th Cir. 2009)(*quoting Milkovich,* 497 U.S. at 21). *Compare*, *Baker v. Los Angeles Herald Examiner,* 42 Cal.3d 254 (1986)(op-ed piece by television reviewer was opinion–"the point of any review is to convey the reviewer's opinion and professional evaluation of the thing being reviewed."); *Cochran v. NPY Holdings, Inc.* 58 F.Supp.2d 1113 (1998) *aff'd*, 210 F.3d 1036 (2000)(article found in Opinion section of newspaper, written by well-known, opinionated, regular columnist, about highly controversial topic–protected opinion).

Contrary to her assertions, Coenen's statements were not made in the context of a "heated debate", *Nicosia v. De Rooy*, 72 F.Supp.2d 1093, 1103 (N.D. Cal. 1999), and do not involve "emphatic language on both sides." *Underwager v. Channel 9 Australia*, 69 F.3d 361, 366 (9th Cir. 1995). This was a one-way attack precipitated by an individual who brags about her expertise at every turn, and attempts to hide behind her use of common colloquial language.

3. In Order to Avoid Bell's Substantial Evidence of Falsity, Coenen Attempts to Alter the Burden of Proof

The third element of the test is whether the statement in question is susceptible of being proven true or false. *Cochran*, at 1125. The allegation that TSFL is a pyramid scheme is either true or false–it is an objective, provable fact.

Gardner, 563 F.3d at 990. Coenen ignores this simple premise and instead takes a kitchen-sink approach to avoid the significance of Medifast's evidence.

First, Coenen argues Medifast has not established that her statements were false. CRB39. By doing so, she places a higher burden on Medifast than is required. "A plaintiff is not required to *prove* the specified claim", *Mann*, 120 Cal.App.4th at 105 (quotation omitted), all that is required is "a minimal level of sufficiency and triability" to defeat a motion to strike. *Mindys*, 611 F.3d at 598. Bell's declaration more than satisfies this low burden.

Coenen next argues, for the first time on appeal, that because the *gist* of her statements was "substantially true", Medifast cannot establish that her "opinion, that TSFL is a pyramid scheme" is false. CRB41.[12] Coenen cherry-picks facts to support her claim that Medifast substantially meets Black's Dictionary's definition of a "pyramid scheme". Coenen further claims that by "pyramid scheme" she actually meant "to describe multilevel marketing programs", and Medifast meets *this* definition, based again, on her cherry-picked facts. Thus, her statements were "substantially true." CRB41-42. Coenen cites to *Masson v. New Yorker Magazine*, 501 U.S. 496. *Masson* answered the question of "whether publication of a quotation with knowledge that it does not contain the words the public figure used demonstrates actual malice." *Id.*, at 514. The Court determined that where a

[12] FitzPatrick unsuccessfully throws in this same argument. MRB64-65.

journalist attributes statements from an interview to the article's subject without quoting him *verbatim*, if they are substantially true, they were not made with malice "unless the alteration results in a material change in the meaning conveyed by the statement." *Id.*, at 517.

Coenen's new argument (like FitzPatrick) seeks to change the burden of proof. Coenen is in effect claiming that because *her* interpretation of the facts substantially supports her statements, that she has overcome Medifast's evidence to the contrary. But in order to overcome Medifast's evidence–Dan Bell's declaration–Coenen must do so with her own evidence that would defeat it "as a matter of law." *Flatley v. Mauro*, 39 Cal.4th 299, 326 (2000)(quotation omitted). As with FitzPatrick, her biased interpretation of those facts is insufficient. *Mindys,* 611 F.3d at 599 (court must not weigh credibility or comparative probative strength of competing evidence).[13] Moreover, the *Overstock.com* court rejected this very type of argument. *See Overstock.com*, 151 Cal.App.4th at 709 (voluminous allegations against company did not "constitute a single straying from the main story line, nor are they minor factual errors" but were "part and parcel of Gradient's ongoing negative coverage and assessment of the company.").

[13] Coenen also claims her statements were "substantially true" because Medifast relied upon proprietary data. CRB40-41. Not only does this argument make little sense, it lacks merit. *See Overstock.com*, 151 Cal. App. 4th, at 705, n.15 (non-public information admissible to prove falsity of defendants' statements).

Unable to refute Bell, Coenen claims that Bell's declaration only addressed *FitzPatrick's* statements and so it cannot establish the falsity of *her* statements; and it is inadmissible anyway. CRB40. This is just absurd. Coenen called TSFL a pyramid scheme. Bell's declaration goes into great detail as to how TSFL is *not* a pyramid scheme. And, Bell's declaration *is* admissible, just as Bell's live testimony will be at trial. *See Overstock.com*, 151 Cal.App.4th at 707-708 (declaration of company representative with personal knowledge sufficient to meet burden opposing motion to strike); *Makaeff v. Trump Univ., LLC*, 2010 U.S. Dist. LEXIS 87112, *20 (S.D. Cal 2010)(same); Fed. R. Evid. 602, 603. Bell's declaration refutes Coenen's allegations, and sufficiently establishes under the *applicable* standard that TSFL is not a pyramid scheme.

Even giving Coenen the benefit of the "totality of circumstances" test, her rhetorical question asking whether TSFL is a pyramid scheme, and then providing her 'evidence' as to why the answer can only be "yes," shows that Coenen clearly implied a provably-false statement of fact.

4. Coenen's Use of the Term "Endless Chain" was Intended to Form Her Readers' Beliefs that Medifast Violated a Criminal Statute

Coenen repeatedly claims Medifast "makes a far stretch when it tries to link Coenen's statements to FitzPatrick's in order to hold Coenen liable." CRB31. More specifically, she claims that she "never accused Medifast of violating Penal

Code § 327 and has never stated that Medifast operates as a criminal enterprise." CRB33. Both of these statements are demonstrably-false.

To support her statement that she never accused Medifast of violating § 327, she claims that her post, which contained the statement "everything points to the real deal being endless chain recruitment into a pyramid scheme" ER967-968, could only be interpreted as libel per quod, since, in order to understand this statement as one accusing Medifast of violating § 327, the reader must have read FitzPatrick's report. Coenen then asserts that she never republished Fitzpatrick's report "and her readers would not have known of FitzPatrick's statement to attribute a defamatory meaning to Coenen's statement." CRB32.

However, just three pages later, CRB35, Coenen admits that in this same post, she included a link to FitzPatrick's report, which as shown above, accused Medifast of violating § 327. Coenen pointed her readers to FitzPatrick's report so they would understand precisely what criminal conduct she claimed Medifast was carrying on, but now she would like this Court to believe her readers would never have understood her use of the term "endless chain" to refer to any such criminal behavior.

Moreover, by supporting her "opinion" with FitzPatrick's statement, which has already been determined to be sufficiently provably-false, ER16, Coenen loses any protection of her claim being non-actionable opinion. *See Condit v. Dunne*,

317 F.Supp.2d 344, 364-66 (S.D.N.Y. 2004) (defendant based opinion on fully-disclosed, false allegations–not protected opinion under settled California law). Indeed, her assertion that she cannot be held responsible for libeling Medifast because she has fully-disclosed the facts upon which she relied must fail for this reason–Coenen's source for each of the statements at issue was *FitzPatrick*, and FitzPatrick's motion to strike was denied.

Coenen's statement that she never accused Medifast of operating as a criminal enterprise is also easily disproven. *Coenen* wrote Medifast is "an endless chain pyramid scheme." *She* entitled her post "Medifast's Take Shape For Life: weight loss pyramid scheme?" ER967-68. A pyramid scheme is an *illegal* business structure, *Webster*, 79 F.3d at 782, *ergo*, according to Coenen, TSFL operates like a criminal enterprise.

c. Minkow's Failure to Acknowledge His Accusations of Criminal Activity is Fatal to His Argument Against Reversal:

Almost the entirety of Minkow's argument against reversal is based on his assertion that Medifast is improperly attempting to use exhibits to provide missing elements of its claim. However, as established in Section I above, this argument fails. Minkow thus attempts to divert the Court's attention from this failed argument by falsely claiming Medifast never alleged he called TSFL a pyramid scheme or endless chain, MRB54; falsely claiming Medifast continues to

mischaracterize his words, MRB55; and ignoring his actual statements directly comparing Medifast to "the Bernie Madoff massive Ponzi scheme", ER85. MRB55-56. Rather than address Medifast's arguments on appeal, Minkow simply parrots Sammartino's decision.

1. Contrary to Minkow's Assertion, Medifast Did Put His Pyramid Scheme and Endless Chain Allegations at Issue Below

Minkow repeatedly used the terms "endless chain" and "pyramid scheme" in referring to Medifast in multiple postings over his 18-month long attack. ER83, ER107, ER178&ER182. These are direct statements accusing Medifast of a crime and do not require any explanation for the reader to understand them as such. And Medifast's claims against Minkow have always included his false statements calling TSFL a pyramid scheme, ER36, ER45, ER398, ER408, ER421, ER423, ER425, ER428-29. Unable to proffer any substantive argument as to why these statements are not libel per se, Minkow is left to draw meaningless distinctions. MRB56-58.

Minkow argues that the FTC definition of a pyramid scheme found in *Webster* does not apply to this case because Medifast somehow only complained about his "defamation concerning the existence of an endless chain under California law." MRB57. Minkow claims Medifast is attempting to avoid the definition of an "endless chain" because a pyramid scheme is defined more

broadly, and according to his interpretation of the facts, TSFL meets the definition of an endless chain under California law.

This argument ignores three points: first, although unnecessary to its arguments, Medifast provided the Court with the definition of an endless chain, AOB22; second, Medifast has sufficiently established that TSFL does not violate § 327, *see* Sec. III.a. *supra*; and third, accusing Medifast of violating § 327 is a *different* false statement than accusing Medifast of running a pyramid scheme, and *both* are equally actionable as false allegations of criminal conduct. *See Webster*, 79 F.3d at 782.

2. Minkow Ignores the Plain Meaning of His Ponzi Scheme Statements

Minkow's assertion that his "Points of Similarity Between Madoff and Medifast" post, ER1110(or88)[14], "simply does not accuse Medifast of a crime" completely ignores the contents of that post. He claims the document does not say that Medifast "transferred money to new investors to pay earlier ones". MRB55. However, the *full* statement referring to Madoff was: "So money was transferred from new financial investors to pay off older ones within a closed system." When comparing this to Medifast, Minkow writes: "investments are gained from 'coaches', who must then recruit other coaches into the closed system to recoup

[14] Minkow claims Medifast is not referring to the same document attached to the FAC. But ER1110 *is* the same document as ER88.

their investments." Minkow also compares the "insufficient trading profits" of Madoff to the "insufficient retail sales" of Medifast, which both occur within a "closed system". ER88.

Minkow attempts to divert the Court from the obvious–that each time he states how Madoff stole from his investors, he matches that conduct with false allegations that Medifast is guilty of the same conduct with its health coaches. That Minkow may have used slightly different words when comparing Medifast's business to Madoff's are distinctions without difference–his "points of similarity" between Medifast and Madoff's criminal activity are the key.

Minkow appears to believe that if he parses out his statements until they lose all meaning, the Court will not be able to see that the entire post, taken as a whole, directly and expressly accuses Medifast of running what he himself referred to as a "Bernie Madoff massive Ponzi scheme." ER85. [15]

[15] The exact quote, taken from Minkow's February 17, 2009 press release is: "The site also unveils critical points of similarity between the Bernie Madoff massive Ponzi scheme and the recruitment-based multi-level marketing compensation plan of Medifast, Inc." ER85. Minkow claims that once again, Medifast is "mischaracterizing an exhibit for maximum impact", MAB55, but this statement *was specifically made by Minkow*.

3. Under the Totality of Circumstances Test, Minkow's Statements are Implied Libel *Per Se*

Like Coenen, Minkow makes mention of the totality of circumstances test, but he does not bother to undertake the analysis. MRB53. Even under this test, Minkow's statements are *not* protected opinion.

Minkow's attack on Medifast was mounted through FDI's website. The general tenor of the website–as a source for truth amidst a sea of corporate fraud, and Minkow's claimed unique expertise in unearthing the culprits, MRB13-14–was such that the average reader would believe Minkow was asserting objective facts, and not his subjective opinion. The FDI website was not a venue for editorializing or speculation–it was touted as a source for conclusions based on fully-investigated facts. MRB13-15; ER960.

Everything about the FDI website and Minkow's own assertions would lead an average reader to take Minkow at his word–that Minkow, the expert fraud-buster with nothing to gain and everything to lose if proven wrong. With respect to Medifast, the FDI site heralded that the report was the objective result of a six-month investigation, and not merely Minkow's uneducated, subjective opinion. ER. *See Overstock.com,* at 705-706 (tone and content of publications was serious; typical reader would take materials seriously, thus implying statements of fact).

Nor was any of the language chosen by Minkow the type of language a reasonable reader would interpret as rhetorical hyperbole, or some type of vigorous

epithet. Minkow's statements were not made in the midst of a heated debate between rivals, *Nicosia*, 72 F.Supp.2d at 1103. Minkow used deliberate language and outlined exactly how it was that Medifast was committing a crime–this is not just innocent name-calling or mud-slinging during a heated debate, *Underwager*, 69 F.3d at 366.

Finally, claiming that TSFL is a Ponzi or pyramid scheme, or that it violates § 327 are statements that *are* objectively, provably false. *Cochran*, 58 F.Supp.2d at 1125. These are not nebulous statements such as "things at Medifast are not what they seem." ER20.

4. Minkow's Arguments Must Fail Because His Opinion was Based on FitzPatrick's Statements

Minkow argues that because he was stating his opinion and identified the underlying facts, he cannot be held liable. But Minkow's identified underlying facts were those found in FitzPatrick's Reports. ER83; ER85; ER107-8; SER3line10-4line10. FitzPatrick's motion to strike was denied as to Medifast's entire libel claim. By relying entirely on FitzPatrick's statements as his source for his "opinion" that TSFL violates § 327, Minkow relied on a statement *already established* as a provably-false statement of fact. At a minimum, Minkow's endless chain allegations cannot be deemed protected opinion for this reason, s*ee Condit*, 317 F.Supp.2d at 364-66, and Medifast's entire claim should survive his motion to strike. *Oasis West Realty*, 51 Cal.4th at 820.

V. The District Court Correctly Held that Medifast Is Not a Limited-Purpose Public Figure:

Limited-purpose public figures are those who "invite attention and comment" by "thrust[ing] themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974) (rejecting "public interest" test for "public controversy" test). If a plaintiff is a limited-purpose public figure, they must establish a probability that they can prove the allegedly defamatory statements were made with actual malice under *New York Times, Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). If a plaintiff is not a limited purpose public figure, then negligence will suffice. *Isuzu Motors Ltd. v. Consumers Union of United States, Inc.*, 66 F.Supp.2d 1117, 1122 (C.D. Cal. 1999).

Publicly traded companies are not automatically considered limited-purpose public figures. *Vegod Corp. v. Am. Broadcasting Cos., Inc.*, 25 Cal. 3d 763, 770 (1979). In order to characterize Medifast as a limited-purpose public figure, Defendants must establish: (1) there was a public controversy which was debated publicly and had foreseeable and substantial ramifications for nonparticipants; (2) Medifast had undertaken some *voluntary* act through which it sought to influence resolution of that controversy; and (3) the defamation is germane to Medifast's participation. *Ampex, Corp. v. Cargle*, 128 Cal. App. 4th 1569 1577 (1st Dist. 2005).

Defendants argue Sammartino erred when she determined that Medifast was *not* a limited-purpose public figure. As they did below, Defendants have the burden of proof on this issue. *Dawe v. Corr. United States*, 2010 U.S. Dist. LEXIS 16454, *34 (E.D. Cal. 2010). They still fail to meet that burden.

a. Any Public Controversy was Created by Defendants on February 17, 2009

Minkow and FitzPatrick cite to a quote from *Waldbaum v. Fairchild Publ'ns, Inc.*, 627 F.2d 1278, 1296 (D.C. Cir. 1980) for the definition of a "public controversy." But they quote only half the definition, leaving out a critical element: "A public controversy is not simply a matter of interest to the public; it must be a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way." *Id.* As Sammartino correctly stated, "a controversy clearly requires, at least, the presence of two sides holding conflicting views on a particular issue or set of issues." ER9lines13-14.

1. Under California Law, A Public Controversy Must Pre-Exist the Defamatory Statements

As a threshold issue, it is axiomatic that a party cannot thrust himself into the center of a public controversy until a controversy exists. Indeed, there is a long line of California decisions following *Gertz* that require the existence of a public controversy *prior to the defamatory statements at issue,* before limited-purpose public figure status can be found. *See Annette F. v. Sharon S.*, 119 Cal. App. 4th

1146, 1164 (4th Dist. 2004)(validity of second-parent adoptions was matter of public controversy in which plaintiff had already injected herself at time defendant made allegedly defamatory statements); *Ampex*, at 1577-78 (defendant's defamatory Internet postings came only in response to already-existing public outcry over sudden and unexplained discontinuance of previously-touted business division); *Vegod,* 25 Cal.3d at 770 (plaintiff must "become part of an existing public controversy" to be considered limited purpose public figure).

In *Moesian*, 233 Cal. App. 1685, the Court analyzed a list of California decisions where the plaintiffs had thrust themselves into a public controversy *prior* to the defamatory statements. It then concluded that Moesian had "at every opportunity" thrust himself into the debate in order to influence the outcome of a public dispute about his application for a horse racing license prior to the alleged defamatory statements. The same analysis was applied in *Reader's Digest Ass'n v. Superior Court*, 37 Cal. 3d 244 (1984). There again, the defendant's allegedly defamatory statements concerning the plaintiff's drug treatment services came *after* another news entity was awarded the Pulitzer Prize for its exposé on the same issue that created the controversy. In each of these cases, the timing of the public debate was a key factor in determining that the plaintiff was a limited-purpose public figure.

See also, Carver v. Bonds, 135 Cal. App. 4th 328, 354 (1st Dist. 2005) (distinguishing another list of cases, *specifically* because they all involved an *existing* public controversy); *Gilbert v. Sikes*, 147 Cal.App.4th 13, 25-26 (3d Dist. 2007) (determining plaintiff's private conduct need not *generate* public controversy and recognizing that "defamation decisions finding the complainants to be [limited-purpose] public figures have typically involved persons who claimed they were defamed for private conduct *after* they injected themselves into matters of general public discussion or controversy."); *Foretich v. Capital Cities/ABC*, 37 F.3d 1541, 1553 (4th Cir. 1994) ("In the course of deciding *Gertz*, *Firestone*, *Hutchinson*, and *Wolston*, the Court developed a two-part inquiry for determining whether a defamation plaintiff is a limited-purpose public figure. First, was there a particular 'public controversy' *that gave rise to* the alleged defamation?")(emphasis added).

Without a pre-existing controversy into which Medifast voluntarily injected itself, Defendants cannot establish that Medifast was a limited-purpose public figure. Recognizing this, Defendants attempt to broaden the definition of the public controversy beyond anything remotely related to the defamation at issue.

2. The Public Controversy Created by Defendants Was Their Assertions About the Legitimacy of the TSFL Business Model–Nothing More

Before Sammartino, Coenen and FitzPatrick defined the alleged controversy as "the country's obesity epidemic and the personal finances crisis", ER9lines5-8,[16] and Minkow defined it as "the safety of [Medifast's] products and the viability of its business practices", ER10lines15-16. Sammartino flatly rejected any claim that the obesity epidemic, personal finance crisis or safety of Medifast's products are public controversies. ER10lines7-13; ER11lines6-7.

Sammartino similarly rejected the argument that the viability of Medifast's business practices was a public controversy "extant when Defendants published their first statements". ER11lines18-20. Sammartino correctly determined that "[i]f any public controversy existed in February 2009," it had to do with TSFL's business model and Medifast's allegedly deceptive business practices, and Defendants initiated it." ER11line27-12line9.

Feeding off dicta in Sammartino's decision that "perhaps how to solve [the obesity problem] is an issue of legitimate dispute", Defendants all seek to enlarge their definition of the controversy–*now* the alleged controversy encompasses not only the viability of the TSFL business model, but also Medifast's attempt "to

[16] Regarding FitzPatrick, Sammartino noted that he attempted to hold Medifast to a lower standard, by voluntarily injecting itself into the "*public arena*"–not the requisite public controversy. ER9fn.8. Minkow and FitzPatrick try again here. MRB30.

influence public opinion regarding the legitimacy of weight-loss products" through "implementing mass nation-wide advertising", MRB 48, and "promoting TSFL as a solution [to the obesity epidemic]." CRB46.

As an initial matter, Defendants' attempts to import the obesity epidemic into their attacks do nothing to establish any pre-existing controversy. As Sammartino correctly determined, the obesity epidemic in America is hardly controversial ER10line7-13 (a Google search of "obesity in America" retrieves over sixty million hits). One would be hard-pressed to find a responsible individual in the U.S. who disagreed with the proposition that America is overweight. This is not a two-sided debate. *See e.g.*, *Wolston v. Reader's Digest Ass'n, Inc*., 443 U.S. 157, 167, fn. 8 (1979)("there was no public controversy or debate in 1958 about the desirability of permitting Soviet espionage in the United States; all responsible United States citizens understandably were and are opposed to it.").

More importantly, Defendants' defamatory attacks had nothing to do with the obesity epidemic in America, or finding a cure for it. Their attacks were focused on TSFL's alleged illegal business structure. *See generally*, ER52-88&104-203. Medifast could have been marketing *anything* under the TSFL business model and Defendants would have attacked it. They admitted as much–it was the business model that got their attention–the "low-hanging fruit" of multi-

level marketing that turned their collective spotlight on TSFL and Medifast, an uncontroversial company neither Minkow nor Coenen had even heard of before Minkow was hired to attack it. ER519line1-520line20;537lines9-12; ER790lines4-18; ER1028. There was nothing controversial about TSFL until Defendants *created* the controversy.

In sum, the only actual controversy involved in this litigation, and which was the subject of Defendants' public attacks on Medifast was over TSFL, which *they* admittedly created on February 17, 2009, with the launch of medifraud.net. ER313line23-314line4; ER376fn.4; ER1028. Coenen concedes as much– "Medifast's growth and business model, including TSFL's, were investigated by a number of people, including [Minkow], FitzPatrick, and Phillips. That *begun*[sic] not only a controversy regarding the obesity epidemic, but one about Medifast's model as well." CRB47(emphasis added).

b. Medifast Did Not *Voluntarily* Enter the Controversy

The limited-purpose public figure test also requires the defamation plaintiff to actively and voluntarily inject himself into the controversy in a systematic and protracted manner. *See e.g. Reader's Digest,* 37 Cal.3d at 252-55 (prior to defendants' comments, plaintiff created publicity machine to sway public opinion); *Moesian,* 233 Cal.App. at 1689-1694 (plaintiff made public statements, voiced opinions at numerous public meetings, commented to press on several occasions,

and called two press conferences). The *New York Times* protections apply only where the plaintiff "*voluntarily* expose[s] himself to an increased risk of injury" by treading deliberately into public waters. *Reader's Digest*, at 256. One who is "dragged unwillingly into the controversy" is not a limited-purpose public figure. *Wolston,* 443 U.S. at 166-67.

To determine if Medifast *voluntarily* injected itself into the controversy, the Court must focus on the "nature and extent of [its] participation in the particular controversy giving rise to the defamation." *Id.,* at 167, citing *Gertz*, 418 U.S. at 352. During defendants' eighteen-month attack, Medifast published three short press releases responding to Defendants, MSER620, 629&634; CSER95-96, 104-105&109-110; and filed this lawsuit. A lawsuit filed to defend a company's business and protect its shareholders cannot be considered voluntary. "Those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." *Khawar v. Globe Internat.*, 19 Cal. 4th 254, 266 (1998) citing *Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979). *Compare*, *Isuzu Motors Ltd.*, 66 F. Supp. 2d at 1123 (Isuzu had already injected itself into public controversy concerning rollover standards and vigorously participated in public debate about Trooper's safety and efficacy of CU's testing procedures for almost a year before suing.)

Similarly, Medifast's three press releases *defending* the company cannot be considered *voluntary* action. A "plaintiff does not become a public figure simply by responding to defamatory statements." *Mosesian*, 233 Cal.App at 1702 (citing *Time, Inc. v. Firestone*, 424 U.S. 448, 454-455 n.3 (1976)). "Under the common law, the publication of a defamatory attack constitutes an 'occasion' triggering the conditional privilege of reply". *Foretich,* 37 F.3d at 1559-1561. This privilege is only lost if it is "abused." *Id*.[17]

In all, Defendants published twenty-eight attacks on Medifast. Coenen continued her attacks, publishing at least fifteen more after Medifast filed suit, to which Medifast has *never* responded.[18] Medifast did not abuse the privilege–it responded relevantly, proportionately, and narrowly. *See Foretich,* 37 F.3d at

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[17] This leaves the three press releases announcing the company's earnings, none of which reference the controversy. MSER593-597;602-606;614-615; CSER68-70;77-81;699-704. They do not join in the fray; they do not respond to any of Defendants' attacks–they merely report the company's financial results. But even if these press releases *can* be considered voluntary injection, there were only three of them, over a year and a half.

Minkow and FitzPatrick also rely upon Medifast's Amended 10-K/A for 2009 filed in January 2011. MSER992-1103. This was not only filed a year after the litigation commenced, but was a document filed pursuant to government regulations–it was not *voluntarily* published in response to Defendants' allegations. Coenen cites two press releases regarding Medifast's participation in conferences in July 2010 and January 2011, CSER811-812, but provides no explanation how these could be relevant.

[18] www.sequenceinc.com/fraudfiles(last visited August 24, 2012).

1560. *Compare Reader's Digest*, 37 Cal.3d at 256 ("media blitz" included 960 letters to national media, which "argued [plaintiffs'] case and intentionally attracting further attention to its cause.").

Desperate to broaden the controversy, Defendants point to Medifast's advertising, claiming that "Medifast went beyond advertising its merchandise. It instigated public debate about the obesity crisis through its resort to a controversial business model", CRB47. Defendants argue that the Court should consider all of this advertising when analyzing the nature and extent of Medifast's participation in the controversy. [19]

However, the California Supreme Court rejected this precise argument in *Vegod*. In determining that a business was not a limited-purpose public figure because the defamatory statements at issue were directed at the company's advertising, the Court stated:

> Criticism of commercial conduct does not deserve the special protection of the actual malice test. Balancing one individual's limited First Amendment interest against another's reputation interest, we conclude that a person in

[19] MSER701-727 includes print-outs from the Medifast website, as well as non-dated material without any source. MSER1017 is a page from Medifast's 2009 10-K/A describing its marketing strategy. The link medifastdiet.com/pressreleases cited on MRB30, fn.15 is not an existing webpage. However, Medifast does provide its press releases online. They include product announcements such as "Medifast Introduces New 5-Calorie Pre-Measured Sugar-Free Syrup". http://ir.medifastdiet.com/releases.cfm(last visited August 2, 2012). CSER 74-75 is a July 2007 press release announcing Medifast's new ad campaign.

> the business world advertising his wares does not necessarily become part of an existing public controversy. It follows those assuming the role of business practice critic do not acquire the First Amendment privilege to denigrate such entrepreneur.

Vegod, 25 Cal. 3d at 770 (citations omitted). Because the obesity epidemic is not a public controversy, Medifast cannot be held to have voluntarily injected itself into any controversy merely by advertising its weight-loss products. Indeed, none of Medifast's advertising is directed at refuting the allegations made by Defendants. And, following *Vegod's* reasoning, Sammartino rejected Defendants' argument. "A corporation is not voluntarily injected into a public controversy when others publicly refute claims made by the corporation's advertising." ER13lines9-13.[20]

Tellingly, Coenen does not mention *Vegod*, or cite *any* caselaw when she argues Medifast's advertising "went beyond advertising its merchandise." CRB47. And, although Minkow and FitzPatrick recognize *Vegod's* existence, they fail to distinguish it, merely making the similarly conclusory statement that "Medifast went far beyond advertising its wares", MRB48. Once again, Defendants fail to meet their burden. *Dawe*, 2010 U.S. Dist. LEXIS 16454, *34.

[20] In contrast, in *Isuzu Motors*, 66 F. Supp. 2d at 1124, Isuzu was declared a limited-purpose public figure based on factors which *included* its use of advertising to make claims about the safety and performance of the Trooper, and refuting its tendency to roll over–the public controversy. Isuzu used its advertising to directly participate in the controversy surrounding the safety of its vehicle.

c. Defendants' Attacks are Not Germane to Medifast's Participation in the Controversy

As Medifast did not voluntarily participate in the controversy Defendants created, Defendants defamatory statements cannot be germane to any participation. This third element has no application to this case.

In sum, there was no error on this issue. Sammartino was correct in determining Medifast was not a limited-purpose public figure.

d. Medifast Presented More Than Sufficient Evidence to Establish Malice

Assuming, *arguendo,* the Court determines Medifast *is* a limited-purpose public figure, Medifast presented more than sufficient evidence of malice to Sammartino to overcome its burden. Actual malice may be proven by circumstantial *or* direct evidence. *Annette F.,* 119 Cal.App.4th at 1167. Citing to *Readers' Digest*, 37 Cal.3d at 257-258, the *Overstock.com* Court explained:

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

Overstock.com, 151 Cal.App.4th at 709-710(emphasis added). Medifast presented evidence that established at a minimum, Defendants' bias, their failure to

undertake any real investigation, and their reliance on sources known to be unreliable. Each one of them turned a blind eye to the truth and instead published their attacks for their own pecuniary gain.

1. FitzPatrick:

FitzPatrick's bias, his failure to properly investigate prior to publishing, shutting his eyes to a contradictory legal opinion, and his ultimate admission that he does not believe Medifast is committing any crime more than sufficiently evidence his "reckless disregard of whether [his statements were] false or not." *N.Y. Times*, 376 U.S. at 279-80.

FitzPatrick is biased. He claims to be a multi-level marketing expert and testified that all such companies are pyramid schemes. ER787line15-788line13. Because FitzPatrick was biased, Minkow repeatedly used him in his short-selling schemes attacking other public companies. ER532line21-534line23;538line7-540line13; ER879line2-25; ER622. Because he was biased, FitzPatrick failed to properly investigate Medifast before writing his damning report. FitzPatrick testified that he never spoke to anyone at Medifast. ER800line11-24. He looked at *one* health coach website and concluded that *all* health coach websites were the same. He recalled *one* short, pretext call to *one* health coach, asking her how much it cost to advertise to generate sales. He did not ask how much she earned with

TSFL, if she had any complaints about TSFL, or even her name. ER800line7-805line:25;825line5-835line5.

But based on that one short, pretext call, FitzPatrick concluded that the costs associated with being a health coach were so enormous, no one could be profitable with TSFL by just selling products. ER800line7-805line:25;825line5-835line5. His preordained (and libelous) conclusion−that the only way to make money was by recruiting other health coaches−was proven false by Bell's Declaration. ER999-1027. FitzPatrick's bias stopped him from conducting an objective investigation of TSFL (as he testified he did in other investigations, where he actually spoke to numerous people working the programs). ER821line23-822line5.

Additionally, FitzPatrick's testimony establishes that he has no understanding of how the TSFL Compensation Plan–the very basis for his accusations–even works. At deposition, FitzPatrick had to admit that (i) a health coach could move up the "chain" by either structure *or* volume, a concept he relegated to a footnote; (ii) all forms of compensation paid under the compensation plan, whether commissions or bonuses, were paid based upon the sale of actual products; and (iii) not a penny was ever paid purely for recruiting a health coach into the organization. ER839line21-840line1;843line24-844line23;846line2-873line7. If FitzPatrick had any actual understanding of how the TSFL compensation plan worked, he could not have characterized TSFL as an "endless

chain" recruiting scheme. But rather than admit he did not understand, or even that certain data to reach his conclusion was missing, ER890line2-892line264, he created his own truth, and he gave it validity by touting his "expertise."

FitzPatrick's recklessness is underscored by the fact that he published his report on Medifast even after soliciting (and receiving) the opinion of a lawyer–one who specialized in prosecuting companies for violating § 327–indicating that his conclusions about Medifast were unsupported and possibly wrong. ER1061-68; ER883lines2-10;889lines3-20. FitzPatrick even *admitted* he did not believe his own accusations. Numerous times, FitzPatrick compared Medifast to Bernie Madoff's criminal enterprise, accusing Medifast of stealing money from coaches, misleading its shareholders and perpetrating a massive Madoff-like fraud. At deposition, when asked whether he, in fact, believed that Medifast was a criminal enterprise, his response was "No." ER902line6-904line8.

2. Coenen:

Like FitzPatrick, Coenen was hired by Minkow because of her bias–she believes every multi-level marketing company is a pyramid scheme, and she blogs vehemently on the topic on two separate websites. She does television interviews about her views on multi-level marketing. ER535line14-536line6; ER642line1-643line21; ER654line18-655line18. Any "expert opinion" Coenen gives regarding Medifast is skewed by this bias.

Here, although adamant that Medifast is a pyramid scheme, Coenen *never* reviewed the one document central to such an analysis–the TSFL compensation plan. ER658line24-659line6;687line3-688line23. Coenen made *clear*, provably-false statements of fact about a compensation plan she knew nothing about. She relied solely on FitzPatrick's analysis, and as shown, FitzPatrick had no understanding of how it worked.

Similarly, Coenen re-posted allegations made by Minkow without fact-checking. When writing her post on Medifast's outside auditor and stating definitively that a person who worked at the wealth management division of the auditor recommended Medifast stock to an "FDI operative", Coenen did not bother to find out either who the operative was, or if the statement was true–she relied solely on Minkow, the "ex-fraudster." ER699line18-700line11. Minkow's operative was a known felon on probation for conning people into paying for false information. ER1247. At deposition, Coenen testified she did not care who the operative was. ER711line11-713line13. Coenen's statements were made recklessly and with utter disregard for whether they were true.

Minkow also asked Coenen for her opinion on this same subject, i.e., whether a conflict of interest existed for Medifast's outside auditing firm if a person connected with the firm *had* recommended Medifast stock. In response, Coenen was adamant that no such conflict existed, and told Minkow she wanted no

part in his post. ER1284-1290. Nonetheless, two weeks later, Coenen blogged on this very topic, misleading the public into thinking there might be just such a conflict of interest for Medifast's auditors. ER146-47.

Additionally, Coenen's posts about Medifast continually included references to what she claimed was key information Medifast didn't disclose, leading her audience to believe that there was something nefarious or potentially illegal in Medifast's failure to make such disclosures. She even went so far as to compare Medifast's failure to disclose to that of YourTravelBiz.com, a company under investigation by the California Attorney General at the time. ER126;ER132-33; ER153;ER199. But at deposition, Coenen admitted that Medifast is not legally required to make *any* of those disclosures. ER685line6-686line6;705lines2-13;709line5-710line18.

In sum, Coenen's disdain for the truth comes across loud and clear in her email correspondences with Minkow, in her failure to corroborate a single fact before posting statements she took from others, and her bias against Medifast. *See Overstock.com*, 151 Cal.App.4th at 709. Indeed, Coenen appears to take great pleasure in continuing to attack Medifast. And the company is not the only subject of her attacks–nothing is off limits for Coenen if it will bring her publicity.[21]

[21] E.g., http://www.sequenceinc.com/fraudfiles/2010/09/the-fun-continues-in-the-medifast-litigation(last visited August 24, 2012).

3. Minkow:

Minkow's actions in this case are the very epitome of malice. He selected experts he knew from prior use were biased and would be amenable to reach the conclusions he suggested they reach. ER489line22;529line18;534line23; 535line23-536line6;538line7-540line13. He personally conducted virtually no investigation, while publicly announcing he was releasing the results of "a six-month undercover investigation". ER528lines16-21;537lines19-25;540line14-542line24. He paid a known felon who was convicted *for selling false information to people* to find him negative information on Medifast's auditing firm, which he published without verification, against Medifast. ER1247; SER5line10-13line16; SER32lines8-21;34lines6-18. He had absolutely no understanding of how TSFL operated–every statement Minkow ever posted on Medifast was based on what FitzPatrick told him. ER556line2-589line3; SER3line10-4line10. And twice, when faced with disagreement with his proposed allegations by his retained experts, Minkow ignored them both and recklessly published anyway. ER546line6-547line15; ER1061-71&1284-1290; SER20line17-22line14;25lines7-12;26lines25-27line21.

To two-time felon Minkow, it was always about money–neither truth nor controversy played a part in the equation. In search of profit, Minkow would find a public company to attack–multi-level marketing companies are "low hanging

fruit"–re-gather his team of experts and look for ways to drive the stock price down after shorting its stock. ER507line14-509lilne1;519line1-520line20. Nothing about Minkow's statements was meant for the good of the consumer–to "educat[e] the public about corporate and consumer fraud." MRB13.

Minkow saw an opportunity to make money by publishing false reports while shorting Medifast's stock. It had worked for him before, so he took it. Herbalife, USANA, PrePaid Legal, Lennar and Medifast. And now, Minkow is in prison for another five years for his shorting schemes.[22] At every turn, Minkow acted with either knowledge of the falsity of his statements, or with a reckless disregard for whether they were false or not. *See Overstock.com*, 151 Cal.App.4th at 709-711 (evidence showed defendants colluded to publish reports that met negative expectations of Rocker in order to please Rocker and drive down the value of Overstock's stock).

[22] Los Angeles Times, *Barry Minkow gets 5 years in prison in Lennar fraud,* http://latimesblogs.latimes.com/money_co/2011/07/barry-minkow-sentenced-to-five-years-in-prison-in-lennar-fraud-case.html(last visited August 24, 2012).

VI. Every Statement Made About Medifast Reflected on MacDonald and Constitutes Libel Per Se for the Same Reasons–There is No Need for Remand

Defendants' arguments in opposition to Medifast's appeal on this issue require little rebuttal.[23] Coenen invokes *Barret*, 40 Cal.4th for the proposition that republishing is not sufficient to constitute libel *per se* by her against MacDonald. However, her citation, at p.39, is to the list of counsel representing the parties to the action. We are unaware of a statement in Barrett that would support her proposition–*Barrett* is not a standing case.

In any event, Coenen's argument on standing is that her readers don't actually read the source material she links to in her posts, and so according to her, they would have no idea the "executives" she referred to, ER989, included the only one referred to by name, MacDonald.[24] CRB50. In fact, 'zeeyourself'–who questioned whether MacDonald would soon be "Rooming with Madoff???"

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[23] Mr. MacDonald passed away on April 4, 2012 http://www.bizjournals.com/baltimore/news/2012/04/05/brad-macdonald-former-medifast.html(last visited August 24, 2012). Under Fed.R.App.Proc. 43, there is no set timeframe for moving for substitution of a deceased party. *See e.g., Nelson v. United States OPM*, 148 Fed. Appx. 617, 618-619 (9th Cir. 2005)(substitution post filing of Court's decision, and when death occurred five months prior, acceptable). The probate estate has recently been opened, and the estate representative appointed. Substitution will be made in the near future.

[24] If Coenen doesn't believe her audience read *that* source document, one can assume she doesn't expect her readers to read *any* of her source documents–they simply take her "expert" word for it. This contradicts her assertion that her readers would understand they are merely getting "her interpretation of the facts provided", and that they then draw their own conclusions, making her statements protected opinion. CRB35. *See* Sec. IV.b. *supra*.

ER245–posted a link to Coenen's attack on TSFL in his yahoo finance post. ER259-60. Coenen argues that it would be "rampant speculation" based on inadmissible evidence to determine this proves 'zeeyourself' knew she was referring to MacDonald. Her argument ignores the law. Through this circumstantial evidence, a reasonable person *could* conclude 'zeeyourself' understood her posts were "of and concerning" MacDonald. That is all that is required. *SDV/ACCI, Inc. v. AT&T Corp.*, 522 F.3d 955, 959-60 (9th Cir. 2008).

While Minkow and FitzPatrick argue that none of their attacks had anything to do with MacDonald, their Statement of Facts includes an entire section devoted to how "MacDonald Perpetuated Medifast's Murkiness". MRB9-11. Consistent with their public stance, they intended their statements to reflect on MacDonald and they did just that. TSFL is the Ponzi scheme. MacDonald was Madoff. What is unreasonable is to believe the yahoo finance bloggers came up with that analogy *all on their own*. ER213, ER217, ER219-21&245.

MacDonald has established that Defendants' statements about Medifast either impliedly accused MacDonald of involvement in Medifast's criminal conduct, or they were "of and concerning him." Their attacks on Medifast were attacks on MacDonald's reputation as well. Sammartino erred as a matter of law.

CONCLUSION

Medifast and MacDonald respectfully request that this Court affirm that portion of the District Court's Order determining that Medifast is not a Limited-Purpose Public Figure; affirm the District Court's decision denying FitzPatrick's anti-SLAPP motion; reverse the District Court's decision granting Minkow and Coenen's anti-SLAPP motions; and reverse the District Court's decision that MacDonald lacked standing to sue for Defendants' defamation.

Dated: September 11, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that this Appellants' Response/Reply Brief is proportionately spaced, has a typeface of 14 points or more, and contains 13,997 words excluding those parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: September 11, 2012

Respectfully submitted,

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

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